THE

FEDERAL REPORTER.

VOLUME 61.

CASES ARGUED AND DETERMINED

IN THE

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

PERMANENT EDITION.

JUNE—AUGUST, 1894.

A TABLE OF STATUTES CONSTRUED IS GIVEN IN THE INDEX.

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AMENDMENTS TO RULES

OF THE

UNITED STATES CIRCUIT COURT OF APPEALS.

Fourth Circuit.

35.

Ordered, that hereafter the clerk in making his docket shall not set down for argument any cause for any Saturday of the term for which such docket is intended, and that this court will meet on said days for consultation only.

Passed May 29, 1894.

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[1] Commissioned Circuit Judge, Dec. 19, 1893.
[2] Commissioned Feb. 12, 1894.
[3] Commissioned Jan. 15, 1894.

FEDERAL REPORTER, VOLUME 61.

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[1] Commissioned Circuit Judge, March 23, 1893.

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CASES

ARGUED AND DETERMINED

IN THE

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

HURST v. COBB et al.

COOKE v. SAME.

(Circuit Court, N. D. Texas. April 5, 1894.)

Nos. 1,808, 1,809.

REMOVAL OF CAUSES—CASES ARISING UNDER FEDERAL LAWS.

An action against private parties to recover damages for wrongfully causing a United States marshal to levy an execution on plaintiff's chattels is a case arising under the laws of the United States, and is therefore removable under section 2 of the act of August 13, 1888. Bock v. Perkins, 11 Sup. Ct. 677, 139 U. S. 629, applied.

This is an action at law, brought in a court of Texas by J. D. Hurst against Cobb & Avery, to recover damages for wrongfully causing a United States marshal to levy an execution of plaintiff's chattels. Defendants removed the case to this court, and it is now heard on a motion to remand.

McCormick & Spence, for plaintiff.
Cobb & Avery, in pro. per.

RECTOR, District Judge. In this case the plaintiff sued the defendant in the district court of Hunt county, Tex., for $4,977, the alleged value of 170 head of cattle belonging to plaintiff, upon which defendants caused an execution, in the hands of P. B. Hunt, United States marshal for the northern district of Texas, to be levied, and said cattle sold under said execution. That said execution issued out of cause No. 1,036, wherein W. W. Avery, as plaintiff, recovered a judgment in the United States circuit court in and for the northern district of Texas, against J. H. Cooke, O. F. Hail, William Hodges, and J. M. Johnston, for $2,638. That said Hunt, United States marshal, acted by and through his deputy, T. B. McMurray, in levying said execution on said cattle, and also in selling them. That said defendants caused said execution to be issued and levied on said

property of plaintiff, and caused the same to be sold thereunder. Defendants filed their application for removal, averring that the property levied on and sold under the execution by the marshal was the property of the defendant in the execution, J. H. Cooke, and that the damages claimed against the defendants in the case at bar arose entirely out of the acts of the United States marshal and his deputies. Defendants say that their defense arises under the constitution and laws of the United States.

2. The case was removed to this court on said application of defendants, and now the plaintiff appears, and moves that the case be remanded to the state court, "because the record discloses no removable federal question."

3. Section 2 of the removal act of March 3, 1875, provides:

"That any suit of a civil nature at law or in equity now pending or hereafter brought in any state court, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and arising under the constitution or laws of the United States, either party may remove said suit," etc.

The said section was afterwards amended by act of August 13, 1888, so as to read as follows:

"Sec. 2. That any suit of a civil nature at law or in equity arising under the constitution or laws of the United States, of which the circuit courts of the United States are given original jurisdiction by the preceding section, which may now be pending or which may hereafter be brought in any state court, may be removed by the defendant or defendants therein to the circuit court of the United States for the proper district." 1 Supp. Rev. St. (2d Ed.) p. 612.

When we turn to the first section of the same act, we find:

"That the circuit courts of the United States shall have original cognizance concurrent with the courts of the several states of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of $2,000.00, and arising under the constitution or laws of the United States." See page 611.

4. The contention here is whether this case arises under the constitution or laws of the United States. In Carson v. Dunham, 121 U. S. 427, 7 Sup. Ct. 1030, the court draws the distinction between the second section of the act of 1875 and section 709, Rev. St., which provides for review by the supreme court of the decisions of the highest courts of the states, and says:

"That under the act of 1875, for the purpose of removal, the suit must be one arising under the constitution or laws of the United States, or treaties made or which shall be made under their authority; that is to say, the suit must be one in which some title, right, privilege, or immunity on which the recovery depends will be defeated by one construction of the constitution or law or treaty of the United States, or sustained by a contrary construction."

The case of Bock v. Perkins, 139 U. S. 629, 11 Sup. Ct. 677, was an action against the United States marshal and his deputies for levying an attachment on goods in the possession of Bock, the plaintiff in error. The attachment was sued out against Lane, who had assigned the goods to Bock. The case was removed to the United States court, and there was a motion to remand, which was overruled. The supreme court sustained the removal to the United States circuit court, and in so doing say:

"A case, therefore, depending upon the inquiry whether the marshal or his deputy has rightfully executed a lawful precept directed to the former from a court of the United States is one arising under the laws of the United States, for, as this court has said, cases arising under the laws of the United States are such as grow out of the legislation of congress, whether they constitute the right or privilege or claim or protection or defense of the party, in whole or in part, by whom they are asserted. This case was one arising under the laws of the United States, and therefore removable."

To the same effect is Ellis v. Norton, 16 Fed. 4; Houser v. Clayton, 3 Woods, 273, Fed. Cas. No. 6,739.

In the case of Howard v. Stewart (Neb.) 52 N. W. 714, the plaintiff in execution had given bond to the marshal, and, when the latter was sued, plaintiff intervened, set up the facts, and asked to remove case to the United States court. Held he might remove, as the marshal had that right. It seems to us in the case at bar that, inasmuch as the United States marshal, if sued in the state court, might remove the case to this court, that the defendants can also do so.

Motion to remand overruled. Let the same order be entered in No. 1,809, of John H. and M. E. Cooke v. Cobb & Avery.

SWEENEY v. GRAND ISLAND & W. C. R. CO. et al.

(Circuit Court, D. South Dakota, W. D. April 14, 1894.)

REMOVAL OF CAUSES—SEPARABLE CONTROVERSY—SUIT TO ENFORCE MECHANICS' LIENS.

A suit to enforce a mechanic's lien against a railroad, under a statute which requires all lien holders to be made parties, and their claims and priorities adjudicated (Laws S. D. 1893, c. 116, § 4), is not removable on the ground that there is a controversy between plaintiff and the railroad company which is separable from the matters affecting other lien holders who are defendants, and citizens of the same state with plaintiff. Supp. Rev. St. p. 612.

This was an action by Thomas Sweeney against the Grand Island & Wyoming Central Railroad Company; John and David Fitzgerald, copartners as John Fitzgerald & Bro.; John Carroll, Samuel E. Donoghue, and Frank P. Phillips, late copartners as Carroll, Donoghue & Co.; and the Congdon & Henry Hardware Company. The action was brought in a state court to enforce a mechanic's lien, and was removed to this court by the railroad company. Plaintiff moved to remand.

Charles W. Brown and Martin & Mason, for plaintiff.
N. K. Griggs, for defendant Grand Island & W. C. R. Co.

SANBORN, Circuit Judge. The plaintiff, Thomas Sweeney, makes a motion to remand this case to the circuit court of Pennington county, S. D. He brought this action in that court to enforce a mechanic's lien against certain real property of the railroad company situated in South Dakota, upon which the Congdon & Henry Hardware Company also claims to have a similar lien. The rail-

road company and John Fitzgerald and David Fitzgerald are citizens of Nebraska, and the company removed this action to this court on the ground that there was a controversy in it wholly between the plaintiff on one side and the railroad company and the two Fitzgeralds on the other, which could be fully determined as between them; but Thomas Sweeney and the Congdon & Henry Hardware Company are citizens of South Dakota, and it is claimed that this fact is fatal to the jurisdiction of this court.

Since the act of congress of August 13, 1888 (Supp. Rev. St. p. 613), the order of the circuit court refusing to remand a case to a state court is reviewable, but the order granting a motion to remand is final, and is not subject to review by any higher court. The right or removal is a cherished and valuable right, and an order that cannot be reviewed, and that determines that this right does not exist in any case, ought not to be granted without careful consideration, nor without due regard to the fact that, if erroneous, it leaves the petitioner remediless. In this view I have examined this case, and have become satisfied that this court has no jurisdiction of it, and that it would be futile to let it proceed to trial. That clause of section 2 of the act of March 3, 1887, as amended by the act of August 13, 1888, under which this action was removed, reads as follows:

"When in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the circuit court of the United States for the proper district." Supp. Rev. St. p. 612.

The statutes of South Dakota under which this action was brought provide that:

"Any person having a lien by virtue of this article may bring an action to enforce the same in the circuit court of the county or judicial subdivision where the property charged with such lien is situated, and any number of persons claiming liens against the same property may join in the same action, and whenever an action is brought by any one or more of them the court before proceeding in such action shall require that all persons claiming liens against the same property be brought in and made defendants or join with the plaintiff as shall seem to the court to be just and proper, and the court shall direct the time and manner of service, and may order service to be made by publication as in other cases and with like effect. The court may render judgment for or against one or more of the plaintiffs and for or against one or more of the several defendants and shall determine the ultimate legal and equitable rights of all the parties, and shall determine what liens are established, and the several amounts thereof, and may direct the sale of the property charged with said liens and direct the application of the proceeds of such sale to the satisfaction of all liens which have been established in said action ratably in proportion to the amounts thereof and without regard to the order of filing said liens, and the court may also allow as part of the costs the money paid for filing each lien and the sum of five dollars for drawing the same." Sess. Laws S. D. 1893, c. 116, § 4.

A suit against the owner of real property, and the holders of coeval and junior incumbrances upon it, to foreclose a lien and to subject the property to sale, to satisfy the lien, rests on a single and indivisible cause of action. The relief which the plaintiff seeks in such a suit is not the bare adjudication of the amount owing

by his debtor, nor is it the sale of the interest of the owner of the fee in the property, but, in addition to these, it includes the determination of the amounts and priorities of the liens upon it, the sale of the entire property discharged from those liens, and the distribution of the proceeds among the parties to the suit, according to their respective rights. It matters not that the plaintiff in such a suit might have maintained an action against the owner of the fee alone, and that the controversy between them might have been fully and completely determined without the presence of the incumbrancers. The only relief that could be obtained in such an action would be to determine the amount of the plaintiff's lien as against the owner, and to subject the interest of the owner of the fee in the property to a sale, subject to the rights of the incumbrancers. This falls far short of that complete relief usually sought in such suits, and far short of the relief prayed for in this action. The plaintiff has the right to this complete relief in a single suit in equity. To a suit in which the plaintiff seeks such relief every lienor of equal rank, and every junior incumbrancer, is an indispensable party, since his rights cannot be adjudicated nor foreclosed until he has had his day in court. The statute of South Dakota to which we have referred made the hardware company, and every other lienor, an indispensable party to this suit by its very terms.

In his complaint the plaintiff avers that the hardware company claims some interest in or lien upon the property in question which is inferior to his lien, and prays that the property be sold and the proceeds applied to pay his own claim. The railroad company insists that the controversy here is over the amount of the plaintiff's claim and the existence of his lien, that it is wholly between the plaintiff on one side and the railroad company and the two Fitzgeralds on the other, and that it can be fully determined between them alone. But the hardware company has the same right as the railroad company to contest the amount and the existence of the plaintiff's lien, and, if it can establish its own, it has every interest to defeat the plaintiff's. If it can entirely defeat it, the proceeds of the sale will inure to its sole benefit to the full amount of its lien, and, if it succeeds but in part, its proportion of the proceeds will increase as the claim of the plaintiff is diminished. A plaintiff in a suit to foreclose a lien cannot be compelled, at the option of any of the defendants, to divide his cause of action into as many separate controversies as there are separate defendants entitled to contest his claim. The option is with the plaintiff, and not with the defendants, to determine whether or not he will have the complete relief to which the rules and practice in equity entitle him, in a single suit or in several suits. Yet every lienor is entitled to contest the plaintiff's claim. How, then, can it be successfully maintained that the controversy over it can be fully determined between the plaintiff and the owner of the property without the presence of the incumbrancers? Every subsequent incumbrancer is a necessary party to its complete determination, and every such incumbrancer is interested to defeat or to diminish the amount of the lien of the plaintiff, and naturally ranges himself on the same

side of the controversy as does the owner of the property. It matters not that controversies may arise in the case over the priorities of liens, or over other minor issues, in which only a part of the parties may be interested, nor that different defendants in the suit may have separate and different defenses. These contests are mere incidents to the main suit. They do not constitute separable controversies, within the meaning of the act of congress, and separate defenses do not make separable controversies.

In my opinion, congress has not given this court jurisdiction of this suit, because the cause of action stated in the complaint is single and indivisible, the respective interests of the plaintiff and the hardware company range them on opposite sides of the controversy involved in it, that controversy cannot be fully determined without the presence of both of them, and they are citizens of the same state. Hax v. Caspar, 31 Fed. 499; Ayers v. Chicago, 101 U. S. 184; Safe Deposit Co. v. Huntington, 117 U. S. 280, 6 Sup. Ct. 733; Graves v. Corbin, 132 U. S. 571, 588, 10 Sup. Ct. 196; Brown v. Trousdale, 138 U. S. 389, 396, 11 Sup. Ct. 308; Torrence v. Shedd, 144 U. S. 527, 531, 12 Sup. Ct. 726; Bellaire v. Railroad Co., 146 U. S. 117, 13 Sup. Ct. 16.

The motion to remand must be granted.

For similar reasons, like motions must be granted in Nos. 84, 85, 86, 87, 88, 90, 91.

OWEN v. PRESIDIO MINING CO. et al.

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

No. 58.

1. MEXICAN LAND GRANTS—PROOF OF EXECUTION.
   A grant which would include over 2,000 square miles of land was alleged to have been made January 25, 1832, by the alcalde of Presidio del Norte, state of Chihuahua. The sole documentary proof thereof was a certified copy of an alleged testimonio record in Bexar county, Tex., in 1851, showing the original grant, a subsequent act of transfer, and various certificates. These papers were of different dates, not in chronological order, but all apparently constituting one document. For the purpose of procuring the record to be made, two persons had made affidavit of the genuineness of the signatures, but the terms of one affidavit were unsatisfactory, and the authors of both were shown to have been dependents of the persons then claiming under the grant. It further appeared that in the interest of those claimants, a forged paper, purporting to be a decree confirming the grant by the congress of Chihuahua, was surreptitiously introduced into the public archives of Juarez, Mexico. The parol testimony as to whether such a grant had ever been heard of prior to 1848 was conflicting, and gave rise to no inferences favorable to the claimants. *Held*, that the evidence was insufficient to establish the execution of the grant.

2. SAME—POWERS OF ALCALDE.
   The fact of the making of a grant of land by an official of the state of Chihuahua raises no presumption that he had power to do so, if the grant was executed after the adoption of the colonization law of May 25, 1825; and under that law the alcalde of a village had no power, in 1832, to make grants of the public lands.

3. SAME—DECREE OF CONFIRMATION—EVIDENCE TO ESTABLISH.
   A claimant of lands under an alleged grant by a village alcalde who had no authority to make it sought to support the same by showing a decree

of confirmation by the congress of Chihuahua in 1834, and for this purpose introduced a paper purporting to be such a decree, but which was entirely in print, without written signature, seals, rubrics, or other marks of attestation. This paper was found in 1890, in the archives of Santa Barbara, a mining town, 150 miles from the capital of Chihuahua, under circumstances not calculated to strengthen any presumptions of genuineness. Further, it bore an irregular or fraudulent number, and there was no entry on the proper registry that such a decree had ever been received and filed. The weight of evidence was that no such decree had ever been heard of in connection with the alleged grant prior to 1887. It appeared further that a forged decree of confirmation had at some time been introduced into the archives of Juarez, Mexico. *Held*, that the genuineness of the document was not established.

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

This is a suit in equity, brought by the complainant, Ernest Dale Owen, as trustee, a citizen of the state of Illinois, against the Presidio Mining Company, a corporation of the state of California, and against William Noyes, the superintendent of said mining company, a citizen of Texas, and John L. Bullis, a citizen of the territory of Arizona, to recover section 8 in block 8 of the survey of the Houston & Texas Central Railway Company in Presidio county, Tex., to quiet the title thereof, and to recover the value of silver ore extracted by the Presidio Mining Company from the mines situated thereon, and praying for a receiver and an injunction.

The original bill of the complaint, said to have been filed on the 29th day of January, 1890, does not appear in the transcript. By the amended supplemental bill of the 13th of July, 1891, complainant claims title to the land in controversy by means of certain conveyances from the heirs of Lieut. Col. Jose Ygnacio Ronquillo under a grant of land alleged to have been made to him by the alcalde (conciliador) of Presidio del Norte, state of Chihuahua, Mexico, on the 25th day of January, 1832, for 15 leagues square of land, or 2,345½ square miles, situated on the east bank of the Rio Grande river, and now in the counties of Jeff Davis, Brewster, and Presidio, in the state of Texas.

The bill alleges that in November of the year 1832, Ronquillo petitioned the governor of the state of Chihuahua to be excused from the performance of the condition of the grant by reason of being ordered away from the frontier on an excursion against the Indians, and that the same was allowed on the 12th of November, 1832; that on the 27th of November, 1832, a certificate was made by the alcalde of Presidio del Norte in pursuance of an order made by the governor excusing him from the performance of the conditions of the grant; that the grant was confirmed by the congress of Chihuahua on the 24th day of September, 1834; that in 1849 the testimonio of the grant was offered for record in the office of the county clerk in Bexar county, Tex., that being the proper place and the proper office for such registration at that time; that the testimonio was accompanied by the affidavit of one witness, Cesario Ureta, dated the 17th day of August, 1849, and afterwards an additional affidavit for proof by one Edward Hall was filed, dated July 10, 1851; and that on July 11, 1851, the testimonio was recorded in Bexar county; that in 1850 the grant was surveyed by Richard A. Howard, the official deputy district surveyor for the district of Bexar; that his survey was certified as correct by the official surveyor of Bexar district, and this survey was recorded in the regular surveyor's office of that district, at San Antonio, February 27, 1851; that in 1854, when El Paso county, Tex., was organized, the grant was recorded in the proper records of that county; that the field notes of the Howard survey were also recorded in El Paso county in 1854, both in the record of deeds and the surveyor's records, and again recorded in the surveyor's office of Presidio county in October, 1873; that in 1855 the outline

of this grant was marked on the county map filed in the general land office of Texas, and there designated as the "Ben Leaton Claim."

The defendants, in their answer, deny the claim of title set up by the complainant in his bill and amended bill, and say it is not true in fact that any grant or any portion thereof, was ever made by the alcalde of Presidio del Norte, or by the state of Chihuahua, or by any legal authority of the said state, to Jose Ygnacio Ronquillo on the 25th day of January, 1832, or by any other title; and they deny that the said alleged grant of the 24th of September, 1834, was ever ratified or confirmed by the congress of the state of Chihuahua, or by any other legal authority. Defendants also plead that they are innocent purchasers in good faith, and the statutes of limitations of three and five years.

A stipulation in the record admits that the complainant has acquired, by mesne conveyances, whatever title Lieut. Col. Ronquillo had, unless the same has been lost by something occurring since the grant; but it is not admitted that Ronquillo had any title.

The only documentary evidence offered by the complainant in support of said grant is the copy of the alleged testimonio from the records of Bexar county, state of Texas, and the duplicate printed copy of the alleged decree of confirmation certified from the archives of Santa Barbara, a small mining town in the state of Chihuahua, Mexico. The genuineness of the alleged testimonio recorded in Bexar county, Tex., and of the purported printed decree from the archives of Santa Barbara, is denied in the defendants' answer, and both are impeached as forgeries in the affidavit on file in the cause.

On a hearing in the circuit court upon all the evidence the court reached the conclusion that the alcalde who executed the grant had no power to execute the same, and that the same was void; and, further, that the same was never confirmed by the congress of Chihuahua, and thereupon entered a decree dismissing complainant's bill.

Seth F. Crews, John Ireland, A. G. Foster, Wm. H. Burges, and Earnest Dale Owen, for appellant.

Thos. J. Beall, for appellees.

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

PARDEE, Circuit Judge (after stating the facts). The first question presented in the consideration of this case is, did Cesario Herrera, alcalde of Presidio del Norte, make and execute the alleged grant to Jose Ygnacio Ronquillo on the 25th day of January, 1832? The burden is on the complainant to establish such a grant. He offers for the purpose no original documentary evidence of any kind or description, no record from the alcalde's office, no record, memorandum of, or reference to, any such grant, from any of the public archives or other places where such evidence, if the grant was actually made, should be found, either in the state of Chihuahua or in the republic of Mexico, save and except the printed copy of the alleged decree of confirmation of the congress of Chihuahua, found in Santa Barbara, hereafter referred to. The following admission appears from a stipulation in the record:

"That complainant has made diligent search among the archives and records in the cities of Austin, San Antonio, and El Paso, in the state of Texas, and in Presidio del Norte (or Ojinaga), Juarez, and in the city of Mexico, in the republic of Mexico, for the original expediente, protocol, and testimonio of the grant which complainant claims to have been made to Jose Ygnacio Ronquillo on the 25th day of January, 1832, by Cesario Herrera, alcalde of Presidio del Norte, and that these are all the places where the same might have been reasonably expected to be found, and the said town of Presidio del Norte (or Ojinaga) being the place where by law the original expediente

and protocol of said title was originally required to be filed and archived, and that the same are not among the records and archives; and that complainant has also inquired of and made diligent search with all persons where the same might reasonably be found, and has been unable to find the same; and that the same, if they ever existed, are either lost, destroyed, or cannot be found. It is not admitted, but denied, by defendants that the same ever existed."

The parol evidence offered giving the recollection of witnesses (many of them interested witnesses) as to whether any such grant was known or heard of prior to 1848 is so fully met by contradictory evidence of the same nature, offered on the other side, that, after reading and considering the same, no impression favorable to the complainant is derived from it. The sole documentary evidence offered to establish that such a grant was made is the copy of the record produced from the office of the clerk of the county court of Bexar county, state of Texas, which shows that on the 16th day of August, 1849, a paper purporting to be a testimonio of the title for lands granted in favor of Don Jose Ygnacio Ronquillo on the 25th day of January, 1832; also a public act passed on the 27th day of November, 1832, bargaining the said grant of lands by Jose Ygnacio Ronquillo to one Hypolito Acosta; also a certificate on the 10th day of May, 1833, signed by Hypolito Acosta and Juana Pedrasa, that the said Juana Pedrasa is interested in the lands in question; and also a certificate by said Cesario Herrera, alcalde, on the 27th day of November, 1832, to the effect that Don Jose Ygnacio Ronquillo has complied with all the conditions of law on the subject, and therefore has the right to sell at his will (all, testimonio, transfer, and certificate, though of different dates, apparently forming one document),—was offered for record; and on the same day one Cesario Ureta made affidavit that he was well acquainted with the signatures of Cesario Herrera, Rafael Hernandez, Hypolito Acosta, and Juana Pedrasa to the annexed instrument of writing, and knows the same to be genuine and good; and, further, that the said persons above named resided out of the limits of the state of Texas; and afterwards, on July 10, 1851, one Edward Hall made affidavit that he had transacted business with Cesario Herrera, Rafael Hernandez, and Hypolito Acosta, and that he had often seen them sign their names, and that the signatures of Cesario Herrera, Rafael Hernandez, and Hypolito Acosta, as they appear at the foot of the annexed instrument of writing, he knew to be genuine and good; and, further, that the said Herrera, Hernandez, and Acosta were either dead, or out of the limits of the state of Texas; and thereupon the said document was recorded.

Considering the make-up of the document, and that it purports to be a record of several transactions, not in chronological order, and each purporting to be attested by a different set of witnesses, it is very doubtful whether the affidavits of Ureta and Hall furnished sufficient proof to warrant the county clerk of Bexar county to record the same. The presumption is very strong that the alleged testimonio is, at best, only a copy of a testimonio. As to the propriety of the record as made, see Pasture Co. v. Preston, 65 Tex.

454; and as to effect if recorded without sufficient proof, see Holliday v. Cromwell, 26 Tex. 189; Lambert v. Weir, 27 Tex. 359.

The original of this document, although presumably in the custody of the parties claiming title under it, is neither produced nor accounted for. As made and proved, this record unquestionably shows that the complicated document claimed by complainant to be a testimonio of his title was in existence on the 16th day of August, 1849,—17 years after the date of the alleged grant; but as to the persons who made and executed it we are left to the evidence of Hall and Ureta, and as to when it was made we are remitted to the document itself. The affidavit of Ureta is to the effect that he was well acquainted with the signatures, among others, of Cesario Herrera and Rafael Hernandez, two of the persons whose names purported to be signed to three of the separate acts contained in the document; and he swore that he knew the same to be genuine and good, without giving in any manner his means for so knowing, and without specifying which particular signatures of Herrera and Hernandez were genuine and good. If any credit is to be given to his affidavit, it is to be taken that he meant that all of the signatures of Cesario Herrera and Rafael Hernandez were genuine and good. The affidavit of Ureta, however, does not appear to have been sufficient in terms to satisfy the clerk of the county court of Bexar county of the genuineness of the document.

The affidavit of Hall is more full as to his knowledge, and he says that he "has transacted business with Cesario Herrera, Rafael Hernandez, and Hypolito Acosta; that he has often seen them sign their names; and that the signatures of Cesario Herrera, Rafael Hernandez, and Hypolito Acosta, as they appear at the foot of the annexed instrument in writing, he knows to be genuine and good." The names of Cesario Herrera, Hypolito Acosta, and Rafael Hernandez appear, among others, at the end of the alleged grant, and at the end of the alleged transfer or act of sale from Jose Ygnacio Ronquillo to Hypolito Acosta. Which signatures of said Herrera, Hernandez, and Acosta affiant Hall knew to be genuine and good does not appear.

In the case of Luco v. U. S., 23 How. 515, it was held that no Mexican grant in the state of California should be considered genuine unless documentary evidence thereof should be found in the archives; and in Peralta v. U. S., 3 Wall. 434, it is held that record evidence of a grant must be shown and be produced or accounted for, and mere parol evidence will not suffice to establish it. The document recorded in Bexar county came from the possession of, and was undoubtedly recorded in the interest of, Ben Leaton and Juana Pedrasa, with whom said Leaton is shown to have been living at the time the same was presented for record. Both Ureta and Hall were employes and dependents of Leaton; and Hall, after Leaton's death, married Juana Pedrasa. It also appears that the only trace of the grant in the general land office of the state of Texas is an old map found there, marked "Ben Leaton's Claim." The evidence also shows that Ben Leaton and Cesario Herrera were acquainted, if

not intimate; that Leaton borrowed $500 to buy land, and that Herrera was arrested by the Mexican authorities for issuing false titles to land; and there is some evidence which, if believed, shows that Herrera was contemplating the forging of this very document. It is admitted that in the Leaton interest,—that is, the Juana Pedrasa interest,—under which, so far as it is good, complainant claims (and it would seem to cover the entire title, if the document under consideration is taken as genuine), a forged and false decree, purporting to be a confirmation of the grant and transfer by the congress of Chihuahua, was surreptitiously introduced and placed in the public archives of Juarez, in the state of Mexico, which forged and false decree of confirmation was the basis of the title claimed by complainant in his original bill in this case.

The supreme court of the United States, in passing on a grant alleged to have been made by the Mexican governor of California, said:

"The signatures of M. G. Vallejo to the permit of occupation, and of Micheltorena and F. C. Arce, the governor and acting secretary, are genuine, if three witnesses are to be believed,—Castenada, W. D. M. Howard, and Salvador Vallejo, one of the original grantees. * * * We have said that the signatures of the officers to the documentary evidence of the title are genuine if we can believe the witnesses Castenada, Howard, and Vallejo; but, as all of these officials were living after the United States had taken possession of the country during the war, and even after the cession by Mexico, and, with the exception of the governor, resided in California, these signatures may be genuine, and still the title invalid. It was practicable to have made the grant in form genuine, but antedated." U. S. v. Teschmaker, 22 How. 402–404. See, also, Fuentes v. U. S., Id. 454.

Enough has been said to show that we have been unable to find affirmatively from the evidence in this case that on the 25th day of January, 1832, Cesario Herrera, alcalde of Presidio del Norte, executed the alleged grant to Jose Ygnacio Ronquillo. As to the execution of such a grant, the complainant has failed to establish his case, unless he has established that the congress of Chihuahua, in 1834, by decree for the purpose, ratified and confirmed the said grant, which matter will be considered in its order.

If we assume for the purposes of the case that Cesario Herrera, alcalde of Presidio del Norte, on the 25th day of January, 1832, actually made and executed to Jose Ygnacio Ronquillo the grant in question, the next inquiry is whether said Cesario Herrera, alcalde, had the power to make such a grant. An alcalde is "a justice of the peace or judge who administers justice in a town, the presiding officer of a town council." 1 Sayles' Early Laws of Texas, p. 13. At first impression a person at this day is struck with astonishment at a claim of power on the part of an alcalde of a provincial town to make an absolute grant of the public lands to the extent of 15 leagues square, 20 times the area that could be included in a grant under the national and state colonization laws in force at the time, a tract comprising as much territory as is included in the states of Rhode Island and Delaware; in fact, a tract of land equal in area to a strip one mile wide, reaching from the city of New Orleans to the city of San Francisco. Land at that time may have been plenty, and next to

worthless, and people may have been very scarce, but then why the national and state colonization laws limiting grants?

The complainant contends, with regard to this power on the part of the alcalde, that it is to be presumed from the fact that he exercised it; that the burden of proof to show that he had no such power is on the defendants; and that, in fact, the alcalde had such power under the positive provisions of the laws of Chihuahua, referring particularly to a decree (No. 65) alleged to have been passed by the congress of Chihuahua on August 5, 1825, quoted in complainant's brief as follows:

"Decree No. 65.

"Relating to the Abolishment of Sub-Delegates.

"The Honorable Constitutional Congress, etc., etc. First. The judges with the appointment of sub-delegates are hereby abolished, as in the system that governs us such appointments are unknown. Second. Their faculties shall be resumed by the constitutional alcaldes ('alcaldes de primera denominacion'), and in those towns where there is only one alcalde, they will also have judicial jurisdiction, as prescribed in former depositions, until the constitution establishes a fixed rule regarding the office.

"Be it understood by the Governor of the State," etc.

Complainant also cites Hall's Mexican Law, p. 7, as follows:

"Alcaldes, mayores and corregidores had, prior to the date of the Ordinance of Intendencias, December 4, 1786, and for nearly three centuries exercised the functions of magistrates of their respective partidos (districts), with political powers also. They acted as governors. In the matter of the sale and composition of land and water they were usually made sub-delegates."

In support of the presumption arising from the fact of an officer's making the grant that he has authority of law to do so, complainant cites authorities from the reports of the supreme court of the United States and of the supreme court of Texas, which, in the main, sustain his contention. U. S. v. Peralta, 19 How. 343; Gonzales v. Ross, 120 U. S. 605, 7 Sup. Ct. 705; Bryan v. Shirley, 53 Tex. 440; Blythe v. Houston, 46 Tex. 76; Jenkins v. Chambers, 9 Tex. 167; Jones v. Garza, 11 Tex. 186; Hancock v. McKinney, 7 Tex. 384. Probably the correct rule with regard to the presumption of authority in favor of an officer making a grant is that such authority is presumed where the documentary evidence of the grant comes from the proper archives, or where the genuineness is not in question. See U. S. v. Peralta, supra.

The defendants, in reply, admit that under the royal decrees of Spain, where persons in authority issued grants, the power was presumed from the existence of the grant itself, but with regard to Mexican grants a different rule obtained after the passage of the national colonization laws of August, 1824, and the regulations of 1828, and in the state of Chihuahua, of the colonization law of the 25th day of May, 1825, which was in strict conformity with the general laws of colonization of the republic of Mexico. That in the early cases in the supreme court of the United States (referring to U. S. v. Clarke, 8 Pet. 436) it is held that the power is to be presumed from the existence of the grant itself, but in all the later cases since the passage of the laws above mentioned it has been uniformly decided that no presumption can be indulged as to the existence of the power to make

the grant, but it must be conferred by the law, and be exercised in conformity with its terms. Referring to U. S. v. Cambuston, 20 How. 59; U. S. v. Vallejo, 1 Black, 541.

There can be no doubt that the rule claimed by defendants is recognized by the supreme court in all cases of grants claimed in California. U. S. v. Sutter, 21 How. 170; U. S. v. Hartnell, 22 How. 286; U. S. v. Vallejo, 1 Black, 541; U. S. v. Cambuston, 20 How. 59; U. S. v. Workman, 1 Wall. 745; Fuentes v. U. S., 22 How. 443.

It is said, however, that while California was a territory, and subject to the national colonization laws, the state of Chihuahua was a free and independent state, and owned and controlled its own public lands; the national laws not being applicable. It is to be noticed, however, that in 1825 the state of Chihuahua itself passed a law in strict conformity with the national colonization law. We therefore are unable to see why, subsequent to the 26th day of May, 1825, a different rule should prevail in the state of Chihuahua from that conceded to prevail in the territory of California with regard to the method and manner of disposing of public lands. On this question the learned judge of the circuit court said:

"In my judgment, if I follow the decisions of the supreme court of the United States, and if those decisions mean what they say, the alcalde had no power to make such concession at that date. In 1824, when Mexico threw off the Spanish yoke, and erected her own government, an entirely different system of distributing public lands was inaugurated, and under that system, and under the colonization law of 1825 of the state of Chihuahua, the alcalde had absolutely no authority to execute such a grant; not only a grant of 1,500,000 acres, but he was without authority to execute an 11-league grant. Therefore, upon its face, the grant is a nullity."

We agree with the circuit judge in this conclusion.

The next and main question in the case is whether the Ronquillo grant, alleged to have been made by Cesario Herrera January 25, 1832, was ratified and confirmed by the congress of the state of Chihuahua, September 24, 1834. Such a decree of ratification and confirmation would tend to show that Cesario Herrera, alcalde, made and executed the grant at the time alleged, and would elimi nate from the case all question as to his power as alcalde to make and execute such a grant. It appears that in the complainant's original bill he set up and asserted a decree of confirmation to the Ronquillo grant, passed by the congress of Chihuahua on the 24th day of September, 1834, in substance as follows:

"The constitutional congress of the state of Chihuahua has deemed it proper to ratify and confirm the action of Sr. Cesario Herrera, alcalde of Presidio del Norte, on the 27th day of November, 1832, granting to Sr. Don Jose Ygnacio Ronquillo, lieutenant colonel of the active army, for distinguished military services, certain lands, pastures, and minerals situated on the left bank of the Rio Bravo del Norte, in front of Presidio del Norte."

This decree was assailed by the defendants as a forgery, and is now by both parties so admitted. In relation to this forged decree, the complainant, in his amended bill, after asserting that the grant was in all things duly ratified and confirmed by the congress of Chihuahua, says:

"Your orator further says that in their answer to the bill heretofore filed in this cause the defendants aver, on information and belief, that there was

no confirmation of the grant by the congress of Chihuahua, as herein heretofore alleged, but that a pretended circular letter, pretending to be a decree of such congress, confirming and ratifying the action of the senor alcalde at Presidio del Norte on the 27th day of November, 1832, in this bill heretofore described, as in the archives at Juarez, Mexico, and that the same is a forgery, and has been surreptitiously inserted and placed among said archives at Juarez. Your orator says that he has seen and inspected the paper so referred to by defendants in their said answer, and that he is convinced and says the same is a forgery, and not a true archive at said Juarez. Your orator further says that long before the purchase or negotiation for any interest in said property by this complainant or his immediate grantors, and long before your orator or his immediate original grantors knew anything of this property or its title, some one interested as by or through the heirs at law of one Ben Leaton and Juana Pedrasa y Leaton, his wife, surreptitiously abstracted from the archives of Juarez, Mexico, the true and genuine confirmation, previously one of the archives at that place, and, for the purpose of adding a supposed strength to the title at that time claimed by such heirs, forged a pretended decree somewhat differing from the real and genuine decree aforesaid in its wording, and surreptitiously put such forged and pretended decree into the stead and place of the former and genuine decree among such archives. That such paper is not now one of the archives at Juarez, but has been taken therefrom, and referred to one of the judges under the Mexican system of laws, to inquire into its genuineness, and your orator is not informed as to the result of such judicial inquiry; but that your orator makes no pretense that such pretended decree is genuine, and claims no manner of benefit or advantage of the same, but declares it is his opinion that it is a forgery, but that the confirmation referred to in your orator's bill is not a confirmation of the action of the alcalde done on the 27th day of November, 1832, but of the grant itself, made on the 25th day of January, 1832, and is not, therefore, the forged paper referred to in the defendants' said answer."

To this matter defendants answer:

"These defendants aver that they are not advised as to the person or persons who forged the circular letter pretending to be a decree of the congress of Chihuahua, confirming and ratifying the action of the senor alcalde at Presidio del Norte on the 27th day of November, 1832, in this answer heretofore described, and thereafter deposited in the archives at Juarez, Mexico; and therefore neither admit nor deny that the same was done by some person interested as by or through the heirs at law of one Ben Leaton and Juana Pedrasa y Leaton, his wife; but these defendants deny that any true and genuine confirmation, previously one of such archives at that place, was taken therefrom, and said pretended circular letter deposited in its place, as complainant in his said amended supplemental bill has alleged. And these defendants deny that any such paper confirming or ratifying said grant, purporting to have been made on the 25th day of January, 1832, or at any other time, was ever deposited or archived at Juarez, Mexico, or, if any such circular letter or decree confirming or ratifying said grant was ever archived at said place or elsewhere, then these defendants are informed and believe and so charge the same to be a forgery; and these defendants, for a greater certainty, crave leave to refer to said pretended executive decree confirming said grant, as alleged in said complainant's amended supplemental bill, when the same shall be produced. And these defendants further aver that the said pretended circular letter, or executive decree, ratifying or confirming said grant to Jose Ygnacio Ronquillo, was never authenticated, or proved for record, and was never duly recorded in any county in Texas, wherein said land is or was situated."

To prove the decree of confirmation by the congress of Chihuahua, alleged in the amended bill, the complainant produces the printed document, without written signature or marks, without seal or rubrics, or any other marks of attestation, found in duplicate in the archives of Santa Barbara, a mining town, about 250 miles from

the capital of the state of Chihuahua, and, so far as the evidence goes, found nowhere else in the archives of the state of Chihuahua, nor elsewhere in the republic of Mexico. The stipulation as to search for documents does not cover a search for evidence of a decree of confirmation, but it is a fair inference that, if complainant made search for in every proper place, and made inquiry of every person likely to know about the protocol, expediente, and testimonio of the grant, no existing evidence of a genuine decree of confirmation would have been overlooked. No proof is offered in the case tending to show that in the archives or records of the congress of Chihuahua there is any mention of the Ronquillo grant by way of memorandum, petition, letter, expediente, protocol, resolution, or decree. There is no evidence showing or tending to show that Don Jose Ygnacio Ronquillo himself ever had any knowledge or notice of any decree of confirmation. It does not appear that his widow, who survived him many years, ever heard of any such decree of confirmation. There is no proof tending to show that prior to the year 1887 the heirs of any Ronquillo, or any person or persons claiming title to the grant in question, ever made any claim, or pretense even, of a decree of confirmation. If the document recorded in Bexar county in 1851 is taken to be a genuine document, then it is clear that Ronquillo, in November, 1832, transferred the grant to Hypolito Acosta, who in turn transferred it to Juana Pedrasa. The decree of ratification was not annexed to the document so recorded.

In short, the weight of evidence in this case practically shows that a decree of confirmation was never heard of in connection with the Ronquillo grant prior to 1887, 53 years after the time in which it is now alleged that such decree was passed.

There is some evidence on the part of the complainant found in the testimony of Mr. Provencio, Mr. Siejas, and T. T. Teel to the effect that a genuine decree ratifying the grant of January 25, 1832, was on the files at Juarez some time during and after the year 1887. The evidence is offered in support of the theory of the complainant that a genuine decree was in the archives at Juarez, but in the interest of the Ben Leaton heirs it was surreptitiously removed, and a forged decree inserted in its place. The circuit judge analyzed this evidence, and reached the conclusion that what these witnesses then saw was the forged, and not any genuine, decree; and we agree with the reasoning and conclusion. That a forged decree was placed in the archives at Juarez is undoubtedly true, but it is hardly credible that any person claiming an interest under a doubtful Mexican grant, and having a genuine decree from the congress of the state of Chihuahua confirming the grant, would remove the genuine decree, and insert a forged one. That such a genuine decree was so removed is further negatived, almost conclusively, by the fact established by the defendants, that the genuine decree, corresponding to the number and date of the alleged decree of confirmation, which was on the files in its proper order, was a decree relating to public affairs of minor importance, not at all likely to be inquired or looked for after a period of 50 years.

The finding of the Santa Barbara decree in the nick of time is

seemingly so fortuitous as to be also suspicious. It appears that about the spring of 1887, one T. T. Teel, an attorney at law of San Antonio, Tex., learned of the record of the alleged testimonio, and, soon thereafter finding Isabella Shirley, surviving heir of Ben Leaton, and securing an agreement to divide recovery, in October, 1889, brought suit for the land. Thereupon one E. N. Ronquillo appeared and set up title to the property as heir at law of Jose Ygnacio Ronquillo, to whom the land was granted. The record shows that he was the son of another Jose Ygnacio Ronquillo, who died in 1860, but in no wise connected with the Jose Ygnacio Ronquillo to whom the grant is alleged to have been made, and who died in 1834. The record also shows that Teel had E. N. Ronquillo arrested for asserting a fraudulent claim, and such it seems to be from the evidence of both complainant and defendants in this case. As said by counsel for defendants: "He must have started out to acquire the land as heir at law of Ronquillo on the principle of idem sonans." The arrest of Ronquillo appears to have amounted to nothing more than to bring about a compromise or adjustment between the contending claimants by which the interest of Teel and of E. N. Ronquillo seem to be fully protected for all they are worth, each retaining an interest in the recovery in this case. Thereafter E. N. Ronquillo appears to have been employed by the complainant, who, it seems, had acquired the interests of all the claimants, to assist in finding evidence, and he testifies, as taken from the complainant's abstract of evidence:

"I have spent considerable time and money traveling to different points in Chihuahua to search archives and records, but not much for witnesses. Went as interpreter to Presidio del Norte with Mr. Owen. Went to Chihuahua and Santa Barbara to search records. Went to Santa Barbara with Mr. Foster in October, 1890. De la Garza, at Chihuahua, told us there were important records at El Valle. Foster telegraphed Owen to that effect, and received answer to go at once there. At El Valle we found nothing, but the priest and Jefe Politico there told us the most complete set of records in that neighborhood were at Santa Barbara, it being out of the way of revolutions, and its records not being burned. At Santa Barbara we applied to search records, and, after considerable discussion, permission was given by ayuntamiento for the secretary to search for us. He did so in our presence and found Confirmation No. 16, dated September 24, 1834, in duplicate. We obtained a certified copy, and also one of the duplicates, which we brought to complainant. Santa Barbara is a small mining town, about 250 miles from the city of Chihuahua. It is not the capital of any state at present, but was formerly capital of the state that is now Chihuahua."

Inez Franco, secretary of the municipality of Santa Barbara, testifies:

"That E. N. Ronquillo and Mr. Foster, from El Paso, Texas, came to Santa Barbara twice in search for a decree of confirmation of the Ronquillo grant; the first time in October, 1890, and the second time in November, 1890. The first search was made in October, 1890, at which were present Juan Pablo Baca, then president of the ayuntamiento, Jose Mesa, third regidor, E. N. Ronquillo, Foster, and myself. The second search was made in November, 1890, at which were present Leandro de Dios, who was then president of the ayuntamiento, E. N. Ronquillo, Foster, and myself. The second search was made principally by myself, but I was assisted to a greater or less extent by probably all who were present. The search was made at the instance of E. N. Ronquillo. Two copies, exactly alike, were found by me among

the regular files of the archives of the ayuntamiento of Santa Barbara, in a package containing all other archives for the year 1834, and E. N. Ronquillo took one of said duplicates away with him."

Leandro de Dios testifies:

"I am president of the ayuntamiento of Santa Barbara. From January to October, 1890, inclusive, I was a simple member of the ayuntamiento, and from November, 1890, to the present time I have been president. In the month of October, 1890, E. N. Ronquillo and Mr. Foster were here for the first time, and then came again in November, 1890, who requested me to look among our archives here for an act of the congress of Chihuahua concerning a concession or grant of land to Jose Ygnacio Ronquillo, and we made the search as requested. Inez Franco was the secretary of the ayuntamiento at the time. E. N. Ronquillo and Mr. Foster made the search. They found the concession made by the congress of Chihuahua of the land to Jose Ygnacio Ronquillo, dated September 24, 1834, in the package in which were packed for preservation the archives for the year 1834. It was the first time I had ever seen the act. Inez Franco, the secretary of the ayuntamiento, assisted in the search for the decree, with Messrs. Ronquillo and Foster, and it was Mr. Franco who found the act."

By stipulation of counsel it was agreed as follows:

"That the act or decree of confirmation referred to in the depositions of Inez Franco and Leandro de Dios was found as in said depositions related, on the first search made for the same, referred to in said depositions as made in the month of October. And that it shall be taken as if said witness had so testified, and the fact herein stipulated is to be taken and admitted as part of the evidence of this cause, as fully as if the witness Inez Franco and Leandro de Dios had so testified."

With regard to this stipulation, defendants' counsel claims that it amounts to no more than an admission that said witnesses Franco and De Dios would have testified that the document in question was found at the first search, and not by any means an admission that it was found at the first search. In this connection, however, we note that by the testimony of Franco and De Dios, Mr. Foster, who is known to be an intelligent lawyer in good standing at the bar in El Paso, assisted at both searches, and was present when the Santa Barbara decree was found, and yet he was not called as a witness to relate the circumstances attendant upon the finding of said decree. The absence of his testimony cannot be explained by the fact that he appears as one of the solicitors of record for the complainant in this case, because solicitors on neither side have been backward in testifying wherever their evidence was considered at all important. Our conclusion with regard to this point is that, while the evidence establishes that the Santa Barbara document was found at the time and place asserted by complainant, yet the circumstances attending upon the finding are not calculated to raise or strengthen any presumptions in favor of the genuineness of the document itself, but rather the reverse.

The complainant filed in the circuit court, and by assignments of error has renewed in this court, numerous motions to suppress evidence. The record is not made up in such a way that these motions to suppress can be intelligently reviewed, and reasons given for sustaining or denying the same, without great labor. The motions, however, may be summarized in three classes, as follows:

First. To suppress the depositions of Juan de Dios Vasquez and

some 10 others, because of irregularity in the commission issued by the clerk of the circuit court, who is said in the motion to have issued the commission in the name and by the authority of the state of Texas. The commissions appear to have been issued under a stipulation of counsel which, as it appears in the record, the clerk of the circuit court is not to be blamed for misunderstanding. We consider the objection to be to a great extent technical, and doubt very much whether, if good, it would render the commissions wholly void. We are precluded, however, from ruling upon this class of motions to suppress, because the parties have not seen fit to bring up in the record a single one of the commissions objected to for our examination.

Second. Motions to suppress, based on alleged illegality and irrelevancy of interrogatories propounded by counsel for defendants; and, irrelevant, incompetent, and illegal answers made by witnesses respectively. This class of objections is not pressed in the complainant's brief, nor discussed for the defendants, and may be treated as abandoned.

Third. Motions to suppress depositions, wholly or in part, of defendants' alleged expert witnesses. Of this class of motions we are disposed to think that they should be partly sustained and partly overruled, but we make no ruling on the matter, not considering the same necessary. We remark, however, that the question in hand is not a question of handwriting. There is neither signature, rubric, sign, nor mark of any ink (other than print) upon the document found in the archives of Santa Barbara, and offered in this case as a muniment of title. It is a printed paper throughout, claimed to be an archive in the records in Santa Barbara, and from that fact alone to be presumed to have been issued by the governor, or rather to be a true and genuine copy of a decree issued by the governor.

The question in the case is one of connecting the governor and other state officials with the printed document. As is well said by the counsel for the defendants: "It is a question of whether the archives of Mexico can be invoked to connect a public official with a printed document purporting to be his official act; and, if so, whether similar archives of Mexico can be invoked to repel this presumption." In suits for the establishment of Mexican grants, the supreme court holds that the Mexican archives are public documents which the court has a right to consult, even if not made formal proof in the case. See U. S. v. Teschmaker, 22 How. 392; and see Luco v. U. S., 23 How. 515; Romero v. U. S., 1 Wall. 721. In cases of this kind, if the court has the right to consult the public archives, it follows from the fact that the court cannot go to the archives, nor in many cases the archives be brought to the court, that the only way the archives can be examined by the court is through intelligent witnesses, who make such examination, and thereafter give their evidence; and, if such evidence is permissible, we can see no reason why it cannot be corroborated and illustrated and sustained by officially certified copies, and, a fortiori, by duly-proved photographic copies. And further, we add that the burning question for expert evidence in the case is as to the age of the printed paper pro-

duced, and on that question experts in paper, printing, printer's ink, and type would best meet the demands of the case.

To establish the genuineness of the printed copy of decree of confirmation found at Santa Barbara, the complainant filed with such copy a certificate of one J. Melchor de la Garza to the effect that the decree was printed by him in the official printing office of the state, of which printing office he was a director, and at the time expressed therein. The depositions of J. Melchor de la Garza were afterwards obtained, first by the complainant, and then by the defendants; and the pertinent part of said depositions is as follows:

"(3) What was your occupation in the years 1834 and 1835? Ans. The management of the printing office of the state government for the printing done there for the same." "(5) How were the acts of congress in Chihuahua published and made official in 1833, 1834, and 1835? Ans. The decrees and resolutions of the congress in these years, as well as those of the previous and subsequent years, were and are sent to the government, who sent them to all the authorities of the state for compliance and observance with the same, either printed or in manuscript. (6) State whether a printed paper was shown you lately, purporting to be an act of congress of Chihuahua, made in 1834, with reference to a grant to Jose Ygnacio Ronquillo, purporting to confirm the same to him. Ans. It was shown to me by Mr. E. N. Ronquillo. (7) If you saw such a paper, where and when did you see it? Ans. I saw it at my house, and it was shown to me by Mr. Ronquillo several months ago." "(9) If you know, you may state where it came from,—what archives. Ans. I cannot say where it came from, but Mr. Ronquillo told me that he had obtained it in the town of Santa Barbara. (10) State who printed the paper or had it printed. Ans. I have already said that it belongs to a class of documents which were then, and are still, printed by order of the government; and the one to which we now refer, judging by its date, must have been printed by me, as manager of the printing office at that time." "(12) State what, if anything, you know of the type it was printed with and the paper used. Ans. I cannot say anything in respect to this." "(14) From your examination of the paper, when do you say it was printed? Ans. The date of that paper itself states it precisely. (15) From your examination of that paper, and any fact you may know concerning it, do you say it is an original and genuine and official act of the congress of Chihuahua, or a spurious or false or forged copy? Ans. I cannot say or affirm anything in this respect." "Cross Interrogatory 3. If you say that said printed paper came from the archives of Santa Barbara, state how you know that it came from said archives. Did you see it among the archives? If so, when did you first see it there? And when, and by whom, was it put there? Were you present when a search was made for it at Santa Barbara? And did you see it delivered to the person who afterward showed it to you? Ans. I have never said that such documents belong to the archives of Santa Barbara, a place which I do not know; and I could not very well affirm that it existed among those archives, nor when it was extracted therefrom, or for whom, nor to whom it was delivered, or with what object. Mr. E. N. Ronquillo showed it to me, stating that he had obtained it at that point, but without telling me who had given it to him. Cross Int. 4. If you say that you compared said printed paper with another printed paper, please attach to your answers the printed paper with which you compared the paper that was shown to you, so that we may see the resemblance; also please attach the paper that was shown to you, or, if you cannot attach it, state why you cannot. Ans. I have already stated in answer to interrogatory 18 that I cannot attach the original copy asked for, because I have the same forming a book with other documents of which I do not wish to deprive myself. I returned to Mr. Ronquillo the document which he showed me, and I certified at the foot thereof that the said document had been printed by me on account of my having acted as manager of the printing office at the time in which it was published and circulated by the government to the authorities of the state, and for this reason I cannot attach a document which is neither in my possession nor belongs

to me, but to Mr. Ronquillo, who is the person who should have it. But I attach hereto a photograph of the said document, which will be found marked 'Exhibit A.'"

Second deposition:

"(2) If you are the same person whose depositions were taken in said cause, please state whether or not you have in your possession a certain book containing official documents, a decree printed by you in the year 1834. If yea, is there now, or was there at the time you gave your former deposition, any executive decree No. 16, promulgating an act of congress of Chihuahua, confirming a grant of land to Jose Ygnacio Ronquillo, or any document whatever, relating to said grant in said book? Ans. Yes. He has the collection of decrees referred to in the first part of the second question, but there is no decree No. 16 in the same that refers to the concession of land made to Col. Jose Ygnacio Ronquillo." "Now, please state if you intended to testify in said answer that you had at that time any printed paper or document in said book confirming the grant of Jose Ygnacio Ronquillo, or having any relation thereto. If not, explain fully what you intended to say in answer to said interrogatory. Ans. I said, when answering the interrogatory 18, to which reference is here made, I did not intend to signify that I had any decree in my collection relative to the concession made to Col. Ronquillo, but only that the decree which was presented to me by Lawyer Ronquillo seemed to be the same type and of the same time that I was in charge of the government printing office." "Cross Int. 5. When this paper was shown you at the city of Chihuahua, some time previously to the taking of your testimony, did you not at that time then and there say to E. N. Ronquillo that upon comparison of this paper with another like it that you thought it was genuine, and that it had been printed by you in 1834, and that you were willing to certify to the same, and did you not then and there take this paper, and write in your handwriting upon it the words included in cross interrogatory No. 4? Ans. I only certified that the decree presented by Mr. Ronquillo was like the type and bore the same date as the ones I have in my collection of the same time."

This evidence falls far short of establishing the fact that De la Garza, as official printer, printed in the government printing office, state of Chihuahua, in the year 1834, the copy of the alleged decree of the congress of Chihuahua confirming the Ronquillo grant. The evidence is worth, at most, that of a more or less qualified expert who gives an opinion that the copy presented by the complainant is genuine.

The testimony of expert witnesses offered by the complainant to sustain the genuineness of the document found in Santa Barbara, taken with that of the expert witnesses offered by the defendants and not attacked by the complainant in his motion to suppress, as a whole, is of such a character, and so conflicting, that the non-expert, after reading and considering it, cannot intelligently say on which side the truth lies. Certain it is, the preponderance is not in favor of the complainant.

On September 24, 1834, the date on which it is alleged the decree of confirmation of the Ronquillo grant was passed by the congress of Chihuahua, the state of Chihuahua was divided into 11 partidos, of which the partido of Parral included the mining district of Santa Barbara. The president of the ayuntamiento of the chief town in the district was the political chief, and, with the ayuntamiento, administered the government of each pueblo or municipality in the district; and it was alone through them that all communications were

made, and all orders and decrees sent by the governor to the president of each municipality in the district. The ayuntamientos were required to keep a register of all deeds of land, either public or private, in their districts, and were required to make and keep an exact inventory of all the public archives in their respective places or towns. The laws and decrees of congress, when printed and signed by the governor and secretary of state, were sent to the political chief of the district, who was required to distribute them to his own ayuntamiento, and to the several towns and municipalities in his district, and to take receipts for all decrees distributed by him. See Laws of Congress, State of Chihuahua, January 5, 1826. All decrees, therefore, that were sent to Santa Barbara in 1834 should have been, and probably were, sent through the political chief of the partido of Parral, and the same decrees should be also found in the archives of Parral when found anywhere in the district, and the receipts for such decrees should also be found at Parral, and the inventory and registry of both Parral and Santa Barbara should show that any decree properly found in the archives at either place had been duly filed, and the date thereof. Evidence of this character in relation to the decree in question is entirely wanting in this record.

Complainant's case, then, as to the genuineness of the printed copy of the decree of confirmation of the Ronquillo grant found in Santa Barbara in 1890, depends entirely upon the document itself, and the place where found. It is not aided by the circumstances attendant upon the finding; nor by the testimony and certificate of Melchor de la Garza, the alleged printer; nor by the weight of opinion on the part of competent experts; nor by evidence that the existence of such a document was, or ever had been, of record elsewhere, or was known by interested parties, or had ever been the basis of transactions between parties in relation to the Ronquillo grant; nor by evidence tending to show that the congress of Chihuahua ever passed, or considered even, any decree relative to said grant; nor by evidence showing that any genuine decree of confirmation was ever in any of the public archives in Mexico. Suspicion and doubt attach to the case, because a duly-authenticated copy is nowhere found, and seems never to have been heard of. No similar copies of such decree of confirmation are found in the public archives or elsewhere. No such decree of confirmation was claimed or asserted by anybody prior to the institution of this suit. It is a conceded fact that the public archives in Juarez, Mexico, were invaded in the interest of the claim now asserted, and a false and forged decree placed in the archives in such a manner as to obtain full credit, so far as forming a part of the public archives is concerned. The document is irregularly, if not falsely, numbered, the alleged number 16 belonging to a genuine decree of the same day, month and year; and the confirmation of the Ronquillo grant by the congress of Chihuahua involved a violation of the state and national policy in regard to the disposing of public lands as declared in the colonization laws of 1824, 1825, and 1828. In view of all of which the learned judge of the court a quo, in his opinion dismissing the complainant's bill, said:

"Considering the circumstances of this case, and the conflict of opinion between experts, and my own examination of these papers, I am thoroughly satisfied that the Santa Barbara decree is a forgery. I can draw no other conclusion consistent with the facts and circumstances of this case."

If the genuineness of the document in question is admitted so far as fabrication, date, and place of deposit are concerned, still it is only secondary and circumstantial evidence, and, in the absence of other proof tending to show that the congress of Chihuahua in the year 1834 took some action in regard to the Ronquillo grant, is of not sufficient value and authenticity to establish the alleged decree of confirmation, when taken in connection with the established fact that for more than 50 years no claim of title by and under such decree was asserted by any of the persons under whom the complainant claims title. See U. S. v. Castro, 24 How. 346; Romero v. U. S., 1 Wall. 721; Pico v. U. S., 2 Wall. 279. The printed paper produced, although it may be a genuine circular letter distributed for information, is not authentic, does not import verity, does not prove itself, and never was intended, unauthenticated, to make proof. A congressional decree confirming a doubtful grant is a law as well as a grant, and should be promulgated and proved as other laws. The constitution of the state of Chihuahua of 1825, tit. 7, art. 45 (translated), is as follows:

"The governor shall publish the law under this formula: 'N. of the governor of the state of Chihuahua to all of its inhabitants. Know ye, that the congress of said state has decreed the following: [Here a literal copy of the law], to the end that he command it to be printed, published, promulgated and executed in all of its parts. [The date, the name and signature of the governor and secretary of state].' "

Article 46 (translated) is as follows:

"Article 46. The governor will circulate the laws authenticated by the secretary of state, without which requisite they shall not be obeyed."

And article 74, tit. 13, of the same constitution, is as follows:

"The decrees, resolutions and ordinances of the governor shall be issued, signed by the secretary of state, without which requisite they shall not be obeyed."

The act of the congress of Chihuahua of the 18th of February, 1826, (arts. 35, 36, and 37), prescribing the duties "Del Secretario del Despatcho," provides as follows:

"Art. 35. The secretary shall be the first chief of his office. Art. 36. He shall authenticate with his full signature all those proceedings that are signed by the governor, and shall use his signature when the governor shall do the same. Art. 37. He shall authenticate all copies which emanate from the office of secretary in his charge."

From these specific provisions as to promulgation of laws and decrees it would seem that proof of congressional decrees, as well as of decrees, resolutions, and ordinances of the governor, could and should be taken as proved only when properly signed and attested with name and signature (evidently by hand) of the governor and secretary of state.

Our impression of the complainant's case, after patient and careful investigation of some 1,900 printed pages of record and abstracts, with the aid of 566 pages of printed brief and three days of oral argu-

ment by very able and experienced solicitors, is substantially as follows:

In 1832–33, Don Jose Ygnacio Ronquillo, lieutenant colonel, was an active and enterprising officer in command of the frontier of the upper Rio Grande, at which time, probably, and on the ground of military services, he applied for a land grant. It is probable that several, and perhaps all, of the preliminary steps were taken to secure to him such a grant, and it is more than probable that Cesario Herrera, about that time alcalde of the town of Presidio del Norte, had knowledge of Ronquillo's application, and perhaps, as alcalde, was called on to aid in some of the preliminary steps; but the troubled condition of the border, with the departure and subsequent death of Col. Ronquillo, in 1834, resulted in the abandonment of the proceedings, and in the abandonment of the grant. Matters remained in this shape some 16 years,—until after the close of the war between the United States and Mexico, resulting in the acknowledgment of the title of the state of Texas to all that part of the state of Chihuahua lying north of the Rio Grande,—when the enterprising Ben Leaton appeared upon the scene, became acquainted with Cesario Herrera, former alcalde, and between them the Ronquillo grant was resurrected, and located on an immense territory in western Texas. A testimonio was concocted, with such transfers as would permit Leaton to assert title, and a persistent effort was made by Leaton to secure and record a recognition of the Ronquillo grant. It was then that the record in San Antonio was obtained, the survey by Howard was made, and the map, hereinbefore referred to, marked "Ben Leaton's Claim," deposited in the land office of the state of Texas. The efforts of Leaton and his agents were kept up until 1854–55, notwithstanding the arrest of Cesario Herrera, formerly alcalde, on the charge of manufacturing false titles, about which time Ben Leaton died. Again there was an abandonment and a period of quiet with regard to claimants under the Ronquillo grant until about 1887–88, when, western Texas land becoming more valuable,—important silver and other mines being discovered and developed,—the Ronquillo grant was again resurrected, and put forward as a genuine claim for the immense tract involved. The value of the property in question with the chances presented to speculative lawyers and other parties naturally inspired the most pertinacious and industrious efforts to prove up the claim. One great value of the property being in its silver mines, and, silver mines not passing by ordinary land grants under the government of Mexico, it was necessary to show title direct from the sovereign, which would convey the minerals. Such title could only be secured by a decree of the congress of the state,—a matter that it seems Cesario Herrera and Ben Leaton had overlooked in preparing the testimonio and transfers,—and therefore was concocted the admitted forged decree placed in the archives of Juarez, forming the original basis of complainant's suit, but purporting to be signed in writing, with rubrics attached, by the governor and secretary of state, and afterwards (again profiting by experience) was found the Santa Barbara copy, wholly in

print, with no tale-telling signatures or rubrics; both of which alleged decrees convey full title to all the minerals found in the tract.

It is proper to say that, in so far as this record goes, the present complainant, Mr. Owen, is to be acquitted of all knowledge of or complicity in the matter of all doubtful efforts and transactions entered into to establish the validity of the Ronquillo grant. His good faith is apparent, and it is to be regretted that his persistent efforts to maintain his case, with his very able, candid, and industrious exposition of the same, cannot be rewarded.

In our opinion, the decree of the circuit court dismissing the complainant's bill was correct, and should be affirmed, with costs; and it is so ordered.

COE et al. v. AIKEN et al.

(Circuit Court, D. New Hampshire. August 26, 1893.)

No. 228.

1. EMINENT DOMAIN—CONTRACT—ESTOPPEL.
A party asking relief against a railway company upon a contract which necessarily assumes a right of eminent domain in the latter cannot, in the same suit, complain of an additional taking of lands, on the ground that the company is not of a kind to be invested with such right.

2. SAME—FRAUDULENT LOCATION—SETTING ASIDE.
A court of equity cannot set aside an adjudication of a proper tribunal determining and locating the quantity of lands required for a public use merely because the parties who brought about the adjudication had a fraudulent or illegal intent; but it must appear that the tribunal itself proceeded fraudulently, or in excess of its powers, or that it committed a gross mistake, or was imposed upon by fraudulent methods.

3. SAME—EXTENT OF LOCATION—EQUITY JURISDICTION.
A court of equity has power to determine whether the amount of land taken is needed for public use, but in this respect the courts are liberal towards the party exercising the right, as the owner is protected by the requirement for compensation; and every reasonable intendment will be made in favor of the adjudication of the tribunal awarding the lands.

4. SAME—UNCERTAINTY OF LOCATION.
A location of lands taken for public use cannot stand if it is uncertain in law; but that it is uncertain in fact, so as to require a resort to the courts for settlement of its boundaries, does not render it uncertain in law, for in law that is certain which can be made certain.

5. CONTRACT—CONSTRUCTION—LEASE.
The owners of a mountain summit leased a portion thereof to a tourists' railroad company for five years, with the privilege of erecting an hotel and other buildings thereon. At the termination of the lease, the lessors were to have the right to purchase whatever buildings were on the premises, whether within or without the limits of the railroad right of way, "excepting such parts of said buildings and improvements within said limits as may be required by said second party for the proper and convenient use of its road, and for its engines, cars, and repairs." A hotel and other buildings were accordingly erected, partly within and partly without the railroad location. The lease was twice renewed, and after the expiration of the last term, and before any adjustment was reached, the railroad company made an additional location, which was claimed to include the hotel and most of the other buildings. *Held*, that the question whether or not the buildings were required for railroad purposes was to be determined by the condition of things at the termination of the lease; that, reading the contract as a whole, the lessors were not to take any buildings re-

quired for strictly railroad uses, whether situated within or without the original location; that the word "required" should be read as "fairly required;" and that the hotel was not thus required for railroad purposes, as was conclusively proved by the fact that the railroad people had rented it to be run substantially as the lessors must run it, if they took it.

This is a bill in equity brought by Ebenezer S. Coe and David Pingree, trustees, against Walter Aiken, the Boston, Concord & Montreal Railroad Company, the Mt. Washington Railway Company, and the Concord & Montreal Railroad Company for specific performance of a contract, and the setting aside of a railroad location, and for an injunction to restrain the defendants from maintaining an hotel on Mt. Washington. See 50 Fed. 637, 640.

The complainants allege that they were owners of the land covering the summit of Mt. Washington; that on the 1st day of July, 1872, the Jackson Iron Manufacturing Company, then the owners of the summit, executed a lease to the Mt. Washington Railway Company of the land included within a circle of the radius of 100 rods in length, extending from the central point of the end of the Mt. Washington railway on the summit; that the lease was given with the view that the railway company should erect an hotel upon the summit, or permit some person to erect one, reserving to the lessors the right at the expiration of the term of the lease to purchase whatever buildings and improvements then should be on the premises, including that portion of said buildings that should be within the limits of the railroad as located, except such parts of said buildings and improvements as might be required by said railroad company "for the proper and convenient use of its road, and for its engines, cars, and repairs," at their original cost, and, relying upon the performance of said agreement, the iron manufacturing company permitted the hotel to be erected upon the premises thus leased; that the hotel was in fact built by Walter Aiken and the Boston, Concord & Montreal Railroad, and mainly located upon the location of the Mt. Washington Railway Company upon the summit of the mountain, but some portion of it being outside of that location, and upon the leased premises. Before the expiration of the said first lease, the title to the summit was transferred from the Jackson Iron Manufacturing Company to the complainants, as trustees of the estate of David Pingree, deceased, who, applying for statement of the cost of hotel, received from Aiken and the Boston, Concord & Montreal Railroad a statement of cost amounting to $70,000, which complainants believe much larger than the actual cost, and made fraudulently and purposely to prevent complainants taking the hotel, and to enable the owners to retain it for another five years. On the 26th day of October, 1877, the complainants executed a second lease to the Mt. Washington Railway Company, with substantially the same provisions as to the conveyance of the buildings to the lessors as were contained in the first lease, except that they were to be conveyed to them at an appraisal. The bill alleges that under this second lease an attempted appraisal was made, but defendant Aiken objected to the appraisal being made, on the ground that he and the Boston, Concord & Montreal Railroad were the owners of the hotel and furniture, and were not bound by the contracts contained in the lease; that on the 9th day of May, 1883, the complainants executed a third lease to the Mt. Washington Railway Company for the term of five years from the 1st day of November, 1882, of the same premises as were described in the other leases, and with the same provision as to the conveyance of the buildings, furniture, fixtures, and improvements at the termination of the lease, the value of said property to be determined by the parties, and, if they could not agree, then to be determined by an appraisal by three disinterested parties to be agreed upon, or, in case they could not agree, the appraisers were to be appointed by the chief justice of the supreme court of New Hampshire upon the application of either party, and in this last lease it was agreed that no new or additional buildings should be erected by the lessees upon the premises without the consent of the lessor. The defendants Aiken and the Boston, Concord & Montreal Railroad were parties to this lease, and by the

lease it was provided that, in case the plaintiffs should desire to purchase the property referred to at the expiration of the lease, the Mt. Washington Railway Company should have the right to include in the sale all rights, titles, and interest of said Aiken and the Boston, Concord & Montreal Railroad, or either of them, as owners, and make proper and sufficient conveyance thereof to the plaintiffs, with the understanding that the Mt. Washington Railway Company should account to Aiken and the Boston, Concord & Montreal Railroad, respectively, for the value of their rights in the property so sold and conveyed, and that each party should execute such further instruments as might be necessary and proper to carry into full effect the intent and meaning of said indenture. In the lease, the Mt. Washington Railway Company agreed with the plaintiffs that they might use the buildings and improvements, wherever they were located and built, for the same purposes and uses as they had been used and occupied, for the term of five years after the expiration of the lease, and that, at the expiration of said five years, the plaintiffs might remove the improvements and buildings from said railroad location for their own use and control, and manage the business therein in a proper manner so as to furnish good accommodation therein to the public, or that they would cause the same to be done. Under the provisions of the last lease, Mr. Aiken, by permission of the plaintiffs, built an addition to the hotel outside of the railroad location, and on the leased premises. On the date of the expiration of the last lease, the complainants applied to the railway, Mr. Aiken, and the Boston, Concord & Montreal Railroad for an appraisal of the property; thereupon they were served with notice in the name of the railway company that the company needed the buildings for railroad purposes. The original location of the Mt. Washington Railway Company was made in 1869, and in 1889 the railroad commissioners of New Hampshire made an additional location which covered the whole site of the Summit House and addition which the complainants claimed to have conveyed to them under the terms of the last lease, and of such form and extent as to render the remaining land on the summit of no value for the erection of an hotel thereon; and the present hotel is maintained by the railway company without right or authority, and it has forfeited all right to the land so devoted by them. Said additional location was defective on the ground that the return made by the commissioners did not correspond with the monuments fixed upon the ground, or with the monuments described in the commissioners' return; and the additional location was made for the purpose of avoiding the performance of the contract, and was not for the legitimate and proper use of the railway company, but was intended for the use and purposes of Mr. Aiken and the Concord & Montreal Railroad, who were then the owners of the interest of the Boston, Concord & Montreal Railroad in the hotel, to enable them to maintain the hotel for their own use, the original railroad location upon the summit being sufficient for all the legitimate uses of the railroad. After the expiration of the last lease, November 1, 1887, the Mt. Washington Railway Company paid the rental to the plaintiffs for two years, and, immediately after the filing of the additional location, Mr. Aiken notified the plaintiffs that he should not continue to pay rent. Since that date Aiken and the Concord & Montreal Railroad have leased the hotel at an annual rental of $9,000 a year.

The bill further alleges, in substance, that the railroad was a unique thing, built with a cog rail for the purpose of carrying sightseers from the base to the summit of the mountain, and was not such a railroad as would entitle the railroad company to take property of an individual, under the right of eminent domain, for the public use. The bill prays for the specific performance of the contract to assign and convey the hotel to the plaintiffs, and that there should be a portion or all of said additional location set aside and assigned to them as would give them a convenient and proper site upon the summit for the hotel when assigned to them, and also that said additional location should be set aside on account of its not being authorized, and on account of its having been used and appropriated to improper use as alleged in the bill; and the bill further prays that Aiken and the Concord & Montreal Railroad should account for the rental of the hotel after the time they refused to pay the ground rent, and that the defendants be perpetually enjoined from using any part of the land on the summit for hotel purposes.

The answer admits the original location of the Mt. Washington Railway Company under an act of the legislature of the state of New Hampshire in the year 1869, but denies that said location included any land upon the summit for side tracks, wood sheds, repair shops, engine, car, and freight houses, turntables, and depot purposes, or that said original location was ever sufficient for the proper uses of the railway company. It admits the execution of the several leases set out in the bill, but denies that they were executed for the purposes claimed in the bill. It alleges that, immediately upon the first location of the road, it became manifest that, for the security of travelers to the summit, it was necessary that a suitable building should be erected for a railroad station, and to afford shelter to passengers upon the summit of the mountain, and that the railway company negotiated with Mr. Aiken and Mr. Lyon, president of the Boston, Concord & Montreal Railroad, to erect a railroad station, which station should contain facilities for lodging and caring for travelers, and that it was within the legal powers of the railway company to cause said building to be erected for those purposes; that Aiken and the Boston, Concord & Montreal Railroad procured the lease from the Jackson Iron Manufacturing Company, and made the addition to the original building upon the land so leased, and that Aiken and the Boston, Concord & Montreal Railroad ever since furnished to the Mt. Washington Railway Company adequate station facilities in the building, and accommodations for lodging and board of travelers and employes; that all the indentures between the plaintiffs and defendants were subject to the rights and interest of the railway company in the land included within the original location, and that all buildings upon the summit required for the proper and convenient use of the railway were, by the terms of the indenture, exempted from sale or transfer to, or ownership or occupation by, the complainants, and by force of these provisions the complainants are not entitled to any decree for the sale and transfer of said buildings to them so long as the same are required by the railway for its station, or a place to lodge and board its employes, and for a refuge for its passengers; that, on account of the increased business of the railroad, the railroad company made an additional location, which was filed in the office of the secretary of state, and afterwards the complainants applied to the railroad commissioners for a change of the location and, upon hearing before the commissioners, they did cut off, restrict, and diminish the additional location that was made by the railway company, and set out a less quantity of land by metes and bounds to the railway company for its location for side tracks, wood sheds, repair shops, etc.; that, upon further proceeding, the railroad commissioners appraised the damages to the complainants for the land thus taken. They allege that the railroad commissioners are a judicial tribunal established by the laws of the state, and have final jurisdiction for the purpose of annulling or varying a location made by the railroad company, and that the railway company has paid the damages assessed by the commissioners, and claim that the railroad commissioners' location of said additional land was final and conclusive; that said location was not detrimental to complainants' other land beyond the ordinary results of such taking; that the railway company has done nothing by which they have forfeited any rights to the land occupied by them for railroad purposes, or that the additional location is defective or illegal, and they claim that a railroad of the construction of this one is for a railroad of public utility and use, and is entitled to hold land under the power of eminent domain.

Henry Heywood, Oliver E. Branch, Harry Sargent, and Everett Fletcher, for complainants.

On the question of specific performance, the complainants claim that the last lease contained a complete contract in writing signed by all the parties, and in every respect sufficient to comply with the requirements of the statute of frauds; that the provisions of the lease, taken in connection with the evidence, which is always admitted in determining the subject-matter of a contract and in giving an interpretation of a written instrument, shows a full and complete contract on the part of the Mt. Washington Railway Company and Aiken and the Boston, Concord & Montreal Railroad, to whose interest the Concord & Montreal Railroad has succeeded, for the conveyance of the

house and furniture and the laundry and fixtures, as they are all included in the last lease. The exception made in the contract of "such parts of the buildings and improvements within said limits as may be required by said second party (the railway company) for the proper and convenient use of its road, and for its engines, cars, and repairs," has reference to the rights given by the statutes of New Hampshire to the railway company to take land of an individual for railroad purposes; those rights being specified by statute to take land for the roadbed, with necessary additions for excavations and embankments, and such lands as may be necessary for yards, side tracks, wood sheds, repair shops, turntables, gravel pits, engine, car, and freight houses and depots, and for making provisions to supply their buildings and engines with water; that the provisions of the lease in relation to the rights of the complainants to keep the buildings upon the railroad location for such purposes as they had heretofore been used and occupied show that the contract applied to the hotel, and not to railroad buildings; and, also, the provisions in relation to making additions with the assent of the owners, and that Mr. Aiken did make an addition under that provision to the hotel, show that the hotel was the subject-matter of the contract. That the additional location was irregular and void, the complainants rely upon Green's Brice, Ultra Vires, p. 395, note a; State v. Jersey City, 25 N. J. Law, 309; Cassidy v. Railroad Co., 45 Me. 263; Railroad Co. v. Smith, 78 Ill. 96; Platt v. Bright, 29 N. J. Eq. 129; Hazen v. Railroad Co., 2 Gray, 574; Vail v. Railroad Co., 21 N. J. Law, 189; Strang v. Railroad Co., 16 Wis. 666; Railroad Co. v. Munson, 57 Mich. 42, 23 N. W. 455; Railroad Co. v. Wallace, 14 Pa. St. 245; Railroad Co. v. Bruner, 55 Pa. St. 318; Railroad Co. v. Porter, 29 Pa. St. 165; In re New York C. & H. R. R. Co., 90 N. Y. 342. That a railroad of this description was not such a public use as would authorize the acquiring of land by the power of eminent domain, the complainants rely largely upon the case of In re Niagara Falls & W. Ry. Co., 108 N. Y. 375, 15 N. E. 429; St. Joseph Terminal R. Co. v. Hannibal & St. J. R. Co., 94 Mo. 535, 6 S. W. 691; Aldridge v. Spears, 101 Mo. 400, 14 S. W. 118; In re Eureka Basin Warehouse & Manuf'g Co., 96 N. Y. 42. That the court might decree for restitution of unnecessary land taken by the railroad commissioners, the plaintiffs rely upon Dodd v. Railroad Co., 33 Law T. 311; People v. Pittsburgh R. Co., 53 Cal. 694; Edgewood Ry. Co.'s Appeal, 79 Pa. St. 257; Central R. Co. v. Pennsylvania R. Co., 31 N. J. Eq. 475. And that the court had power to set aside and make restitution of such lands as the railroad company did not use, they refer to Neimeyer v. Railroad Co., 43 Ark. 111; Central R. Co. v. Pennsylvania R. Co., 31 N. J. Eq. 475; Webb v. Railway Co., 4 Mylne & C. 119; Eversfield v. Railway Co., 3 De Gex & J. 285.

E. B. S. Sanborn and Frank S. Streeter, for defendants.

1. The plaintiffs, by contract or otherwise, have no right to purchase the Summit House and fixtures.

2. The present site of the Summit House, being the railway company's original location, cannot be taken by the plaintiffs or assigned to them by the court.

3. The additional location was legally made, and cannot be annulled, in whole or in part, by any just order of court.

4. The plaintiffs are not entitled to an accounting.

5. The maintenance of the Summit House by the railway company has been and is within the lawful powers of the company, and its further maintenance cannot properly be enjoined.

6. The plaintiffs are estopped from claiming that the railway company may not maintain the Summit House as heretofore.

We deny that the Summit House of Mt. Washington is in Sargent's purchase, but, from the testimony of plaintiffs' counsel, and the deeds put into the case, we are obliged to admit that the plaintiffs have a paper title to the summit, which they bought in 1867 of one Aurin N. Chase, whom the plaintiffs hired to procure the passage of a resolution through the New Hampshire legislature for the sale of state's land, whereby they intended to procure, and did procure, for the sum aforesaid this paper title. Whether this title was obtained by the plaintiffs under such circumstances as to divest the state of

New Hampshire of its title to the summit of Mt. Washington and preclude the state from now asserting its right thereto is not properly before this court. That question is for the state authorities. The respondents cannot controvert in this proceeding the plaintiffs' paper title.

I. The plaintiffs, by contract or otherwise, have no right to purchase the Summit House and fixtures. Plaintiffs' right of purchase, if it exists, must be found from the following language in the lease of May 9, 1883: "And if, at the termination of this lease, said first party shall desire to purchase whatever buildings, together with the fixtures and furniture therein, and improvements which may have been made and shall then be on said premises, including also those portions thereof which may be within the limits of the aforesaid road of the second party, excepting such parts of said buildings and improvements within said limits as may be required by said second party for the proper and convenient use of its road, and for its engines, cars, and repairs, * * * the second party shall sell the same to said first party at the value thereof," etc. The plaintiffs' leases did not cover the land on the summit included within the railway location. At the time the last lease was made, the Summit House was the only building inside of the location. By the terms of the lease, the plaintiffs reserved the unqualified right to purchase whatever buildings and improvements may have been made and shall then be on said premises. By the "premises" they meant the leased premises outside of the railway location, and they reserved the unconditional right to buy at their cost whatever buildings lessees might erect during the term outside the original location. Having thus settled the question of the plaintiffs' right of purchase of buildings on the leased lands (outside the railway location), they then dealt with the question of reserving a right of purchasing buildings which the railway company might erect on its own land (within the location), and as to these buildings the railway company did not give, nor did the plaintiffs take, an unconditional right of purchase, but they took the right subject to a very important exception, viz. "excepting such parts of said buildings and improvements as may be required by said second party for the proper and convenient use of its road, and for its engines, cars, and repairs." This exception was general in its terms, and could not be confined to any particular building or class of buildings which the railway company might erect during the term of the lease, provided the company, at the termination of the lease, required the building so erected for the "proper and convenient use of its road." At the expiration of the lease, there were buildings on the leased premises outside the railway location. By the terms of the contract the plaintiffs, if they desired, might purchase these buildings. As to these buildings, there were no conditions attached to the plaintiffs' right of purchase. The Summit House was within the location, and by the terms of the contract, if the plaintiffs so desired, they might buy the Summit House, provided "the railway company did not then require it for the proper and convenient use of its road." The right to determine what buildings were required for such use was not left to the discretion of the plaintiffs or that of the court; it was left solely to the railway company. The parties might have made a different contract, and provided that referees or the court, or some other tribunal, should determine whether the Summit House was or was not required for the proper and convenient use of the road. They did not make such a contract. They agreed that the railway company should exercise its sole discretion upon that subject, and determine for itself what it required. In accordance with the right reserved to it by the contract, the railway company has exercised its discretion, and determined that question. November 1, 1887, the plaintiffs notified the railway company that they desired to purchase all the buildings. December 27, 1887, the railway company served notice upon the plaintiffs that it required said buildings (meaning the Summit House) for the proper and convenient use of its road within the terms of the contract. In giving said notice, the defendants exercised the legal right plainly reserved to them by the contract. By that notice the plaintiffs' conditional right of purchasing buildings within the location on the summit, viz. the Summit House, was terminated.

III. The additional location was legally made, and cannot be annulled, in whole or in part, by any just order of the court. January 3, 1888, the railway

company filed its location "of additional land on said summit of Mt. Washington for side tracks, wood sheds, repair shops, engine, car, and freight houses, turntables, and depot purposes, and all other purposes that are incidental thereto, or may be necessary to carry into effect the object for which the Mt. Washington Railway Company was established." This location covered about five and a half acres of land, and the location, with the plan and survey, was filed in the office of the secretary of state. Proceedings were had under the authority of Gen. Laws N. H. c. 160, § 29. Plaintiffs, being dissatisfied with the additional location made by the railway company, applied to the railroad commissioners for a change, alleging that the railway company "have already sufficient land for all necessary uses, and all that is needed for the management of their railway, but they desire to take the said land for other purposes." It was upon this issue that the hearing before the railroad commissioners was had. After a full hearing, the commissioners made their decision, reducing the boundaries of an additional location as made by the railway company, established new boundaries, found as a fact that the location as fixed by them was necessary to the railway company for side tracks and the other purposes indicated by the statute, and made their return to the office of the secretary of state. Upon the return of the additional location, the plaintiffs were bound to apply to the court to annul the judgment, or to acquiesce in the judgment. Instead of attacking the judgment, they acquiesced in and assented to it. They do not charge the railroad commissioners with fraud or corruption, but admit the contrary. On the day the return was filed by the commissioners, the railway company applied to them to appraise the damages to the plaintiffs for the taking of the land. Hearing was had, at which all parties were present. The damages were awarded, and the plaintiffs took their appeal, not from the judgment determining the boundaries of the location, but from the award of damages for the land taken.

The necessity or propriety of appropriating private property for the use of the public or of the government is not a judicial question. The power of determining such necessity or propriety resides exclusively in the legislature. There is no restraint upon the legislative power except that requiring compensation to be made. The legislature may conclusively prescribe the methods by which the power shall be exercised, may appoint proper tribunals to determine (1) the necessity for the taking for any particular public use; (2) the amount or quantity to be taken; (3) the compensation to the owner for the property so taken. The legislature may provide an appeal from the judgment of said tribunals upon any one or more, or all or none, of the three questions; it may provide that the judgment of said tribunals shall be final and conclusive upon either or all of the three questions. The statute (Gen. Laws, c. 160, § 29) provided that railroad corporations may take and hold such land as may be necessary for side tracks, etc., and that, if the owner is dissatisfied with such location, either party may apply to the railroad commissioners, who may change the same as justice may require. From the decision of the railroad commissioners determining the necessity for the taking and the amount of land to be taken, and changing the location, as justice may require, no appeal has been provided by the legislature. Upon this question, the judgment of the railroad commissioners is final and conclusive; that judgment has the same validity and is as binding upon all the parties interested as any judgment of this court in a case where it has final jurisdiction of the subject-matter and the parties. The legislature might have provided for an appeal by either or both the parties interested, but it has not done so. If the judgment of the railroad commissioners in determining the amount of land to be taken, and the boundaries thereof, is unsatisfactory to the railway company they have no remedy; they are bound by the judgment, and cannot take any land outside of the boundaries prescribed by the commissioners. If the judgment of the railroad commissioners is unsatisfactory to the landowner, he has no remedy; he must submit to that judgment, but may recover full compensation for all land taken. It will be observed that the rights of the landowner are fully protected. He cannot appeal from the determination of the commissioners as to the amount of his land necessary to be taken; but upon the question of proper compensation for the land taken he may appeal, and have that compensation de-

termined by a jury. The judgment is final. Railroad Co. v. Speer, 56 Pa. St. 325; Struthers v. Railroad Co., 87 Pa. St. 282; Farnham v. Canal Co., 61 Pa. St. 265; Chambers v. St. Louis, 29 Mo. 543; Land v. Coffman, 50 Mo. 243; Hill v. Railroad Co., 32 Vt. 68; Swan v. Williams, 2 Mich. 437; Chicago, R. I. & P. R. Co. v. Town of Lake, 71 Ill. 333; People v. Smith, 21 N. Y. 595. I therefore submit that both parties are concluded by the judgment of the commissioners of September 11, 1883, which fixed the limits of said additional location, and determined the fact that the land within said limits was necessary for the legitimate use of the railway company. Plaintiffs, pursuing their statutory remedy, applied to the railroad commissioners to change the location, claiming that the railway company had already sufficient land for all necessary uses, and that they desired to take the land for other purposes. These issues were tried, and finally adjudicated. The plaintiffs had their day in court. That adjudication was final; it cannot be reopened here.

V. The maintenance of the Summit House by the railway company for station purposes, and as a place of entertainment for its patrons, and for furnishing them food, lodging, and shelter while at the summit, is within the lawful powers of the railway company, and its further maintenance cannot be properly enjoined.

The Court: That is a question for the attorney general of New Hampshire, not for this court.

PUTNAM, Circuit Judge. This is a very important case, and involves a large mass of facts; but the principles which govern it are to my mind simple, and, therefore, I think I had better dispose of it now. I am satisfied that, if I should delay the decision for the purpose of investigating, pending the investigation, which would necessarily be delayed somewhat, I should lose from my mind more than I should acquire.

Something has been said touching the title of the complainants, but it does not seem to be seriously contested. So far as the record goes, the complainants have been in possession since 1862, and are now in possession, subject to the interests of the Mt. Washington Railway Company and the other respondents, and no one disputes their title, so far as I can discover. For all the purposes of this case, and for the carrying out of the contract here under consideration, the title is certainly sufficient; and if not, yet, so far as this case is concerned, the respondents are estopped by the contract from disputing it.

The objections of complainants to the last location made by the railway corporation are threefold: (1) That the purposes for which this railway was constructed are not such as to make a public use within the meaning of the constitution; (2) that the location, as modified by the railroad commissioners, should be set aside, in whole or in part, for reasons which I will refer to later on; (3) that the location is defective on account of a confusion or error touching the point from which the first call in its description starts.

As to the first objection, the amended bill prays the court to set aside the location on the ground that the railway corporation has no power under the constitution to take lands by eminent domain. If I should grant that request, the decree which would be rendered would necessarily pull up the contract by the roots, as its whole scheme is based on the reverse idea. There is an inconsistency in asking relief on the contract, and at the same time deny-

ing that this corporation can avail itself of the right of eminent domain. So long as the complainants stand upon the contract, they are estopped, at any rate in any litigation in which they set it up, from obtaining relief on the other ground. I need not go further, although I have very positive views in harmony with the general position of the respondents, if I found it necessary to express them.

With reference to the second objection, there is no doubt in my mind that a court of equity may set aside the action of a tribunal of this character, either in whole or in part, if it is fraudulent in its nature or essence, or was fraudulently obtained. It may even go further, and, for the same reasons, set aside the judgment of a judicial tribunal. This is a fundamental principle of equity law. But it is not enough for that purpose that the parties who brought about the adjudication had a fraudulent or illegal intent. It must be shown that the tribunal itself proceeded fraudulently or in excess of its powers, or that it committed a gross mistake, or that the adjudication was obtained by fraudulent methods practiced upon or before the tribunal, as by false testimony. It is a well-settled principle that a just result, otherwise lawful, is not ordinarily affected by the fact that the parties who secured it entertained in their own breasts an illegal, fraudulent, or unauthorized intent or purpose. The law ordinarily judges of what was done by what was done, and not by the purposes of those who secured the result. Courts proceed very grudgingly in setting aside adjudications of other tribunals, and within very narrow lines, and only in a clear case. The reason is evident. If the proceedings of the first tribunal may be attacked for loose or general reasons, the proceedings of the second tribunal may be attacked for the same reasons, and there would be no end to litigation. The proofs in this case fail to meet these requirements. But the proposition is also made that the railroad commissioners have gone beyond their powers, and laid out more land than was required for any legitimate railroad uses. I have no doubt that, aside from the usual questions of fraud, excess of power, or gross mistake, and from the other usual grounds of interference by courts of equity with the action of judicial or quasi judicial tribunals, nothing but the final decision of the ultimate judicial tribunal can absolutely prevent a landowner from raising the question whether or not property taken was needed for public uses. But upon that question every reasonable intendment is made in favor of the party exercising the right of eminent domain. The various constitutions provide that this taking for public uses shall be compensated for. But the requirement that property taken for public uses shall be compensated for gives the owner his substantial protection, without going further and establishing nice rules as to the quantity to be taken. The nature of the use for which land is to be taken necessarily appears on the face of the proceeding; and, if it is not a public one, the condemnation cannot be sustained, no matter what the legislature may have declared. The constitution of New Hampshire makes no express limitation touching the amount of property which shall

be taken for public uses, all other conditions being complied with; and, as I have already said, the courts on this point have been very liberal towards the party exercising the right of eminent domain, and have given him the benefit of every reasonable intendment. For example, the statute right of way for railroads in this state is 99 feet in width. Now, if a railway corporation in any particular case took that amount of land, and the question was raised whether or not it was more than it actually needed, the objection would receive from the courts no consideration except of the most grudging character. That is, the declaration of the legislature that a railroad corporation may take a right of way of 99 feet in width has been practically construed as giving the right to take that entire width, so far as the corporation desire it, without any question whether or not it could at any particular point construct its road, and maintain it with less. The general proposition is strengthened in this case by the fact that an adjudication—whether a strictly judicial one or not it is not necessary for me to say—has been made by the railroad commissioners, who have viewed the premises, and who, under all the circumstances, are more capable of determining what is required by the railway corporation, not only for the present, but in the reasonable future, than a court of law. A judge, sitting as I am sitting here, ought not to review the action of a tribunal of that character on such a matter, except the evidence is clear that the commissioners made a gross mistake. The case here, moreover, shows distinctly that the corporation did need land outside of its first location. Its engine house, turntable, and storage tracks were and are necessarily outside of it; and evidently, if the present hotel was removed, the railway corporation could not be accommodated within its original limits and yet build such a station as it would require for its ordinary passenger service. There was therefore, on the face of this case, an evident necessity for the corporation to take advantage of the statutory provisions under which it proceeded to make this additional location. And there are circumstances enough in this case, giving the evidence for the complainants full force, and wholly disregarding the evidence for the respondents, to show that the railroad commissioners made no such gross mistake as to authorize the court to annul their action in whole or in part. The complainants recite in the bill that the railroad commissioners proceeded on the hypothesis that the railway corporation was entitled to take land for hotel purposes. I do not find anything in the proceedings of the commissioners which justifies that suggestion. In the face of the fact that they report that the land was taken for the purposes the statutes authorize it to be taken for, and without evidence that they in any way expressed themselves otherwise, I do not perceive that this proposition can be sustained. To go back to a principle already stated, the fact that the railway corporation desired a part of this land for hotel purposes, if it did so desire it, or that it desired for special reasons to exclude the complainants, if it did so desire, will not invalidate the action of the commissioners unless it is also shown

that the desire received form and practical effect in the action of the commissioners themselves; because, as I have already stated, the fact that a party who has the legal right to proceed in a certain direction, and reach a certain result, also desired to reach that result for reasons not within the scope of the law, does not ordinarily affect it, if it is otherwise valid. For the reasons stated, I cannot annul the action of the commissioners, in whole or in part, on the ground of the second objection.

Coming to the proposition that the report of the commissioners is erroneous with reference to the beginning of the first course, all I need say about it is that, if the location made by them was uncertain in law,—not merely in fact, but in law,—it could not stand; but that it is uncertain in fact, that individuals may differ in regard to its construction, and that it must go to the courts to ultimately settle its boundaries, do not make it uncertain in law, as the law says that what can be made certain is certain. The report cannot be set aside on that ground. There is some question, no doubt, as to the proper construction of the report, but that I think I will be able to dispose of so far as this case is concerned without difficulty. I do not propose to leave this matter in such form that the proceedings in this court shall go forward on a theory favorable to the complainants, and yet the damages be assessed by the state courts on another theory unfavorable to them.

I see nothing in the new location which prevents carrying out the essence of the contract, because the contract expressly provided that it should be executed on the old location; and the fact that the new location does not any more interfere with its practical execution than did the existence of the original right of way. The parties have submitted many propositions based on the apparent theory that we are to determine the ultimate rights of railway corporations, and of abutters and landowners, with reference to land taken for railroad uses. There may be cases where contracts are of such a nature, that the court sees that their enforcement according to their terms would prevent a railway corporation from performing its duty to the public; and then the court might hesitate, and, perhaps, refuse to proceed, although ordinarily, as has been stated during the hearing, equity courts do not take the place of the attorney general, for the purpose of seeing to it that corporations perform their duties to the public. We may suppose an instance where a railway corporation has, upon its admitted right of way, erected structures which the landowner claims it has no right to erect and maintain; and, a controversy arising on that point, the parties in interest might well adjust and compromise the question, and agree, under such circumstances, that the corporation shall for a certain length of time retain the use of the buildings, and that afterwards the landowner shall take possession of them, leaving them where they are for another certain length of time, and then removing them on certain conditions stipulated. An agreement of that nature should be enforced by the courts, unless they see that it necessarily interferes with the performance by the cor-

poration of its duties to the public. Whether or not the parties in this case were in that position, it is not necessary to say; but the pith of the contract in question is to that effect, and as though it had reconciled and compromised many of the questions argued before me, in a way which, in my judgment, does not affect the public necessities, and does not prevent the railway corporation from performing its duties to the public. I see no difficulty whatever, therefore, in carrying out the contract substantially as the parties to it have agreed.

The question next arises, to what does the contract appertain? The court finds here two propositions of importance. The first is whether the exception of the buildings needed for railroad uses, is limited to those that are or were within the original location, and the other is based upon the claim of the respondents that the corporation is to determine what buildings are thus required. In the latter connection the respondents say that whether or not the buildings were required for railroad purposes, was to be determined according to the condition of things at the termination of the lease. I agree to this; and I also hold that whether or not an excepted building is within or without the limits referred to in the contract, relates to the same period of time. As all buildings which, in my judgment, are needed for railroad uses are within the limits of the location as it now exists, I do not consider that the railway corporation is required to turn over to the complainants, or that the complainants are required to receive, any of the buildings intended for strictly railroad uses, whether within or without the original right of way. I refer here to the phraseology, "excepting such parts of said buildings and improvements within said limits, as may be required by said second party for the proper and convenient use of its road, and for its engines, cars, and repair shops." Even if this clause is restricted to the time when the lease was made, so that the "limits" are those of the original location or right of way, yet, taken in connection with what follows in the lease,—that the buildings and improvements to be taken by the complainant shall be used for hotel purposes,—it is very clear, reading the whole contract together, that it was not the intention that the complainants should take, or that the respondent railway corporation should deliver, any building intended strictly for railroad purposes, wherever situate. The respondents say that the word "required" is equivalent to the word "demanded" or "desired," and that the railway corporation is the ultimate judge of what buildings were to be reserved for railroad uses. Taking the whole contract together, my view of it is that, whatever particular word or particular expression may be found in it, it appears plainly that the complainants were to have the hotel, and that, whatever else was to be retained by the railway corporation, this certainly was not. But I do not rest the case there. I will follow to some extent further the view taken by the respondents and the interpretation put by them on the word "required." According to well-settled principles of construction, the word, whatever its meaning, is to be limited by the word "fairly," —"fairly required." And the fact that, since this controversy arose,

the respondents have leased the hotel property to be run substantially as the complainants must run it, if they take it, shows conclusively it was not thus "fairly required." So far as the record shows, it can be and will be used in the future for hotel purposes, railroad purposes, and other purposes, by the complainants, precisely as it has been used in the past under the arrangements which the respondents themselves have made; and the carrying out of the contract will not alter its status with reference to railroad uses and public necessities and convenience. In this position I am especially strengthened by the fact that, on the construction I put on the new location, the hotel buildings are not taken by it, and have been allowed to continue the property of private individuals (respondents in this case). I therefore see no difficulty whatever, arising either from the changed condition of affairs through the new location or from any present public necessity, which stands in the way of the carrying out of this contract according to its spirit and its letter, and I shall order a decree to that effect. I shall, however, provide in the decree that the railway corporation shall be allowed such uses of the platform, and of any portions of the general public rooms of the hotel, for the sale of tickets, or as a resort for its employes and passengers, as has been customary in the past, and in that way follow both the spirit of the contract and its letter, as it provides that the railway corporation shall retain such buildings or "parts" of buildings as are required, and so on. There will be no difficulty in framing a decree upon this point, having full regard, as it must have, to what has been the custom in the past.

I shall decree that the complainants have the use of both locations for the purposes which the contract describes, for five years from November 1, 1889, which I understand to be practically the termination of the old lease. It expired in 1887, but was continued by verbal arrangement and sufferance until 1889; and everything will run from that date.

I can conceive of no way in which equity can be done between these parties, without acceding to the prayer for an accounting; and I shall decree that the respondents account for the profits on the lease from November 1, 1889, to the time when the master makes up his report, and that the complainants be charged with interest from November 1, 1889, on the amount of the value of the hotel, fixtures, and furniture. The equities, as between the several respondents, touching the items of profit on the lease and interest, will be reserved for consideration after the coming in of the master's report; but that the master will ascertain and report in relation thereto such facts as any of the respondents request. I cannot direct the respondents to set aside any land to which the hotel may be moved; but I shall direct the master, in making his appraisal, to take into account the changed condition on the summit of the mountain, and if he finds that, on account of the new location, it will be impossible for the complainants to move this hotel upon any practical lot on the summit, he must take that into consideration in determining the value at which the complainants shall take the property. I shall also direct him to inquire whether the com-

plainants, before the new location was made, had practically a monopoly of the summit of the mountain for hotel purposes, except this precise location where the hotel now is, and are now deprived of that monopoly, and to give the facts found in reference thereto such weight as they should have in determining the value of this hotel, fixtures, and furniture. I am somewhat embarrassed as to the parties who should account; but, on the whole, I am of the opinion that, inasmuch as all the respondents entered into the last lease to Mr. Barron, and have thus all co-operated in denying possession to complainants, they are all liable for whatever profits the master may report.

I am somewhat embarrassed by the relations between the railway corporation and the owners of the hotel. The interest of the latter may be diminished in value by the fact that the former has made this additional location. For the purpose of carrying out that part of the contract, which provides that the railway corporation account to the owners of the hotel for their fair interests under an appraisal, I shall direct the master to find what amount shall be allowed by the former to the latter by reason of depreciation, if any, in valuing the hotel, fixtures, and furniture, on account of there being no convenient lot to which it can be removed, if such be found to be the fact. I do not mean to say that there is no convenient lot to which to move the hotel. I have no opinion about it. I shall simply direct the master to ascertain whether such is the fact, and, if such is the fact, to find as already stated. I shall direct the master to permit the respondents to file with him an offer of release of any portion of this location they deem proper to release, to which the hotel may be removed, and to accompany the same with the release duly executed; and thereupon to give the owners of the hotel property the benefit of the increased value, if any, which would come to it by reason thereof. I shall direct the master to permit the respondent railway corporation to make the new location certain as to the point of beginning and otherwise, and to prove that they have executed and filed proper papers therefor; and, in default thereof, that the master shall assume, for the purposes of this case, that it commences at the bolt midway of the stage office. In any event, I shall direct him to assume, for the purposes of this case, that the new location is valid. I shall direct that no final decree be entered in the case until the court is fully advised, and counsel have been heard, touching the injunction granted by Judge Allen in the state court. I will be prepared to consider any further provisions to go into the decree, which may be suggested by counsel on either side, which will tend to work out the equities of this case. It is, perhaps, impossible for me to foresee all the equities which may be disposed of by the master, and I therefore reserve the right to add such further orders as it may appear ought justly to be inserted. The decree for accounting should go against the Concord & Montreal Railroad Company, the Mt. Washington Railway Company, and Walter Aiken, but not against the Boston, Concord & Montreal Railroad Company. The complainants may file a draft decree based on these

notes, on or before rule day in October, and the respondents may file corrections thereof on or before rule day in November. For the present, the court will enter the following order: Decree for specific performance and master, according to notes on file. Draft decree to be filed by complainants on or before October rules. Corrections to be filed by respondents on or before November rules.

ORMAN v. ENGLISH & SCOTTISH MERCANTILE INVESTMENT TRUST, Limited.

(Circuit Court of Appeals, Fifth Circuit. April 10, 1894.)

No. 209.

FRAUDULENT CONVEYANCES—RESERVATION TO GRANTOR.

A corporation conveyed to trustees all its property and assets, its business, and the benefit of all contracts, to secure its debentures; but the deed further provided that the conveyance was to be "by way of floating security, only, and not to prevent the sale or other dealing by the company, in the course of its business, of or with any part of its property, until the trustee shall enter," etc. *Held*, that the conveyance was void as to existing creditors.

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

This was a bill filed by the English & Scottish Mercantile Investment Trust, Limited, against William A. Orman, for an injunction and other relief. A temporary injunction was granted, and defendant appeals.

The original bill in this cause was filed to assert and establish the priority of the rights of the appellee, the English & Scottish Mercantile Investment Trust, Limited, over those claimed and sought to be enforced by the appellant, William A. Orman. The state of affairs out of which the conflict of claims between those parties arises is stated in the bill to be that on or about the 22d day of December, 1890, the North Alabama Development Company, Limited, an English corporation newly organized for the purpose of acquiring and developing, by mines, manufactories, railroads, boat lines, and other enterprises, certain properties in this country, determined to raise and borrow, for the purpose of carrying out such undertaking, a sum of money amounting to about $625,000, and, to accomplish this, issued its debentures, 1,243 in number, for £100 each,—equivalent to about $500 in money of the United States,—which debentures were made, by their terms, a lien and charge upon all its property, then owned or afterwards to be acquired, and conveyed such property to the appellee (the complainant in the bill), as trustee for the benefit of the holders of said debentures. This conveyance is the deed of trust of December 22, 1890, by which the maker of the debentures set forth the execution of said debentures, their terms, and the considerations upon which they were issued, and declared the lien created by them to be further assured by such instrument. This deed of trust, which has never been recorded, contained a covenant for the execution and delivery of all such conveyances, by way of further assurance, as might be necessary for a compliance with the laws of the state in which the property might be situated, to give notice of the rights and interests of such debenture holders; and in conformity to this covenant the North Alabama Development Company, Limited, executed and delivered to appellee, as trustee for said debenture holders, a second deed of trust, dated March 5, 1892, which was recorded in Franklin county, Ala., on April 11, 1892. On the 28th day of November, 1891, William A. Orman, the appellant in this case, on a debt accruing June 18, 1890, sued out an attachment from the circuit court of Franklin county, Ala., against the North Alabama Development Com-

pany, Limited, which was levied on the property of said company by the sheriff of said county. This cause was removed to the circuit court of the United States, where, on the 30th day of October, 1892, a judgment was rendered in favor of said Orman. 53 Fed. 469. After an affirmance of said judgment by this court on appeal (5 C. C. A. 22, 55 Fed. 18), it was attempted to sell the property levied on under execution, and the original bill in this cause was filed to restrain such sale, and to have the superior right of the complainant therein enforced. The bill alleges that Orman had actual notice of the complainant's rights, and also of the facts above recited, and shows that by the threatened sale by the United States marshal, under Orman's judgment and execution, the property of the North Alabama Development Company, Limited, subject to complainant's deed of trust, constituting one complete plant for the carrying out of the undertaking for which the money was raised by the debentures, and consisting of lands, and a large quantity of machinery, implements, and fixtures, suitable for, and connected with, an iron-ore mining plant, would be scattered and injured, the plant, in its entirety, impaired and dismembered by the removal or destruction of any portion of it, which would work irreparable injury to its rights under the deeds of trust, and that it would be compelled, in the discharge of its trust duties, to bring and maintain, if it regained possession of said property, numerous suits at law, with the risk of loss or injury to portions of it, and prayed an injunction to prevent the threatened wrongs and injuries, and the recognition and enforcement of its priority and superiority of right under said deeds of trust. A temporary injunction was granted on this bill, which, on motion of Orman, was dissolved. In his answer to the bill, Orman insists that by the levy of the attachment in his suit at law against the North Alabama Development Company, Limited, prior to the recording of any deed of trust from that company to the complainant in Franklin county, Ala., which would create constructive notice to him, and without any actual notice to him, which he denies having received before the issue and levy of his attachment at law, he acquired, by force of section 2957 of the Code of Alabama (1886), a specific lien on all the property of said company so levied upon, and that this lien of such levy is superior to that of appellee under its deeds of trust. After the dissolution of the first injunction, and on the 14th day of October, 1893, the appellee (complainant below) moved the court for leave to file an amended and supplemental bill of complaint setting forth additional facts touching the rights of appellee, and the debenture holders for whom it is trustee, and affecting the actual notice to Orman of their interests. No answer was filed by Orman to this supplemental bill, and the motion and prayer for injunction were resisted by him on the grounds following, to wit: "(1) Because there is no equity in the complainants' original or amended and supplemental bills of complaint. (2) The complainants, according to the averments of said bills, have a full, plain, and adequate and complete remedy at law. (3) The instrument, a copy of which is made Exhibit A to said bills, and which, by the averments of said bills, is made the basis of the relief asked and the right claimed by complainants, is fraudulent, null, and void, upon its face, as against the claim and attachment of defendant, Orman. (4) Because defendant, Orman, by his attachment proceedings and the judgment therein, acquired a lien upon the property so attached, superior to any claim or lien of complainant thereon, as shown by said bills. (5) The sworn answer of defendant, Orman, hereto attached, to the averments of said bills, is a full and complete replication and denial of all the material averments of fact upon which the right to relief by said injunction is asked. Hence, said injunction should not be granted." On the consideration, supported by the sworn statements of the original and supplemental bill, the judge of the circuit court, on the 11th day of November, 1893, granted leave to file the bill, and a temporary injunction, staying the sale of the property until the further order of the court. From that order the present appeal is prosecuted, under section 7 of the judiciary act of 1891.

Milton Humes and W. I. Bullock, for appellant.

Thomas Roulhac, for appellee.

Before PARDEE and McCORMICK, Circuit Judges.

PARDEE, Circuit Judge (after stating the facts). Under the laws of Alabama, the attachment creditor who perfects his lien by the recovery of judgment is a bona fide creditor from the inception of the lien. Bank v. Pinckard, 87 Ala. 577, 6 South. 364. And the lien, by force of the statute, relates back to, and has priority from, the levy of the attachment. Hardaway v. Semmes, 38 Ala. 657; Hurt v. Redd, 64 Ala. 85; Abels v. Insurance Co., 92 Ala. 382, 9 South. 423. The levy of Orman's attachment, the lien of which was subsequently perfected by the recovery of judgment, was prior to the granting and recording of the deed of trust of March 5, 1892. Therefore, Orman has a prior lien on the property attached to that claim by the appellee under said deed of trust. The sworn bill filed by appellee in the court below charges that at the date of the levy of the attachment, and prior thereto, Orman had full notice of the execution and delivery of the first deed of trust by the North Alabama Development Company to the appellee. This renders it necessary to consider the character and effect of the first deed of trust, and the circumstances existing at its date. Said deed of trust was executed December 22, 1890, after the creation of the obligation in favor of Orman, and has never been recorded. The second clause of the deed grants and conveys to the trustees all lands, mines, buildings, works, and hereditaments, and other real estate of the company, wheresoever situated, and also all the undertaking and business of the granting company, and all other assets, effects, and personal property of the company, other than personal chattels in England, and the benefit of all contracts and agreements, and all options, privileges, and rights, subject to the provisions of clause 15, which are as follows:

"The conveyance and assignment purporting to be made by clause 2 are intended to be by way of floating security, only, and not to prevent or hinder any sale, exchange, lease, or other dealing by the company, in the course of its business, of or with any part of its property, until either the trustees or trustee shall make entry as aforesaid."

In short, the deed of trust conveys all the property of the North Alabama Development Company in this country, real and personal, in trust to secure debts thereafter to be contracted; leaving the grantor to hold, retain, sell, transfer, and exchange the same at will. The appellants contend that this instrument is void against creditors existing at the date of its execution, because it is a conveyance which, leaving the grantor in full possession and management of his property, and with a material interest therein, necessarily hinders and delays creditors. We agree with this construction of the deed in question. See Code Ala. 1886, § 1735; Ruse v. Bromberg, 88 Ala. 628, 7 South. 384; Renfro v. Goetter, 78 Ala. 314, 315; Bank v. Brewer, 71 Ala. 574; Reynolds v. Welch, 47 Ala. 203. The first deed of trust being void as against Orman, an existing creditor at the time it was executed, it was immaterial whether Orman had notice thereof, or not, prior to the levy of his attachment. As Orman's lien under his attachment is prior in rank to the lien granted the appellee under the second deed of trust, the injunction issued by

the court below, postponing Orman's lien, should not have been issued.

The order of the circuit court, of the 11th day of November, 1893, granting an injunction restraining the appellant and the marshal of the district from making a sale of the property mentioned and described in the bill, and from interfering with or disposing of said property until the further order of the court, should be reversed, and the cause remanded to the circuit court, with instructions to further proceed in the same according to the views herein expressed, and it is so ordered.

AMERICAN PASTORAL CO., Limited, v. GURNEY.

(Circuit Court, W. D. Missouri, W. D. April 23, 1894.)

1. FOREIGN CORPORATIONS—CALLS FOR UNPAID STOCK—FOREIGN LAWS.
   The validity of calls made by a British corporation for unpaid stock is to be determined by the British law.
2. SAME—VALIDITY OF CALLS.
   The articles of association of a British corporation authorized the directors, on 20 days' notice, to make calls for unpaid stock, and further stated that each member should be liable to pay the amount of the calls to the persons, and at the times and places appointed by the directors. *Held*, that the naming of such person, time, and place in the resolution adopted by the board of directors was not a prerequisite to the validity of a call, and such omission did not affect the liability of a member to pay the same.
3. SAME—INTEREST ON UNPAID CALLS.
   The articles of association of a British corporation provided that, if any member did not pay calls for unpaid stock on or before the day fixed therefor, he should be liable for interest from that day at such rate as the directors might from time to time appoint by notice to the defaulter. *Held*, that a defaulter to whom no notice was sent of any resolution requiring payment of interest was not liable for any interest.

This was an action by the American Pastoral Company, Limited, against David E. Gurney, a shareholder therein, to recover an assessment for unpaid stock. The case was tried to the court without a jury.

The above cause, by stipulation duly filed, having been submitted to the court without a jury, the court finds the facts to be as follows: (1) The American Pastoral Company, Limited, the plaintiff herein, was, when this action was commenced, a corporation created and organized in accordance with and under the laws of the kingdom of Great Britain and Ireland, and the defendant, David E. Gurney, was a citizen of the state of Missouri, and a resident of the western district thereof. (2) The plaintiff corporation was created and organized in April, 1884, in the city of London, England, for the purpose, among others, of acquiring and improving lands in the state of Texas, and elsewhere in the United States, and to breed and deal in all kinds of stock, cattle, horses, sheep, and produce. The capital stock was originally fixed at £300,000, divided into 30,000 shares of £10 each, but was increased January 27, 1885, to £400,000, and February 10, 1887 to £450,000, and on the 10th day of February, 1890, the capital stock was reduced from £450,000 to £290,000. The articles of association adopted in the organization of the corporation, and the action of the directors in increasing and reducing the capital stock, are found in pamphlet marked "H" attached to the depositions, and the same is made part of this finding. (3) That on or about July 29, 1884, there was allotted to David J. Beals, of the capital stock of said plaintiff corporation, 2,000 shares, on which was paid at the time by said Beals the sum of £5 per share, said shares being

numbered from 28,001 to 30,000, inclusive. (4) That on or about March 23, 1887, the said David J. Beals duly sold, assigned, and transferred to the defendant 106 shares of capital stock by him owned in said plaintiff corporation, and on or about October 25, 1887, said Beals sold and transferred to defendant 277 shares of said stock, on which said shares there then was unpaid and subject to call the sum of £5 per share. Said 383 shares so sold to defendant were duly transferred to him upon the books of the plaintiff corporation. (5) That on the 14th day of October, 1889, the plaintiff corporation, through its board of directors, made an assessment or call on the unpaid capital stock of the company of £1. 10s. per share, payable on or before the 2d day of December, 1889, and on the 15th of April, 1890, a further call of £1 per share was made, payable on or before the 7th day of June, 1890, and on the 17th day of March, 1891, a further call of 10s. per share was made, payable on or before the 1st day of June, 1891, and on the 4th day of November, 1891, a further call of 10s. per share was made, payable on or before December 5, 1891; the resolutions making such calls being in the following form, and being duly entered upon the minutes of the meetings of the directors of the plaintiff corporation: "To meet the liabilities of the company, including the debentures maturing at 31st of December, 1889, which it was resolved to pay off, it was resolved that a call of one pound ten shillings per share be and is hereby made payable on 2d December, 1889, and the secretary was instructed to send notice of the same to shareholders." The resolutions authorizing further calls, as above stated, are in the same form, differing only in the amount of the assessment and the times of payment. (6) The secretary of the plaintiff corporation forwarded by mail notices of these several calls as they were made, duly addressed, and postage paid, to the defendant; the notices containing a statement of the fact of the call having been made, of the amount thereof, of the time of payment, and the further statement that the amount was payable at the Royal Bank of Scotland, 123 Bishopsgate street, London, E. C., or at any branch of said bank. (7) That when said several calls were made, as above stated, the defendant was the owner of 383 shares of the capital stock of said company, and so appeared upon the stock books of the plaintiff corporation. (8) That the defendant has not paid either one of said calls, made as above stated, nor any part thereof. (9) That the call made on October 14, 1889, of £1. 10s., amounted, on the 383 shares owned by the defendant, to the sum of £574. 10s., or to the sum of $2,792.07, counting the pound to be of the value of $4.86 United States currency; that the call made April 15, 1890, of £1 per share, amounted to £383 on the shares owned by defendant, or to the sum of $1,861.38 United States currency; that the call made March 17, 1891, of 10s. per share, amounted to £191. 10s. on the shares owned by defendant, or to the sum of $930.67 United States currency; that the call made November 14, 1891, of 10s. per share, amounted to the sum of £191. 10s. on the shares owned by the defendant, or to the sum of $930.69 United States currency,—or, in the aggregate, to the sum of $6,514.83. (10) Under date of April 24, 1890, the defendant, in response to a letter written him by the secretary of the plaintiff company, wrote to the secretary that he was not disposed to respond to any calls on account of stock; that he thought there had been bad management of the affairs of the company, and that, if he was pressed for the payment of calls, he would seek to have a receiver appointed to take charge of the corporate property.

Warner, Dean, Gibson & McLeod, for plaintiff.
Gage, Ladd & Small, for defendant.

SHIRAS, District Judge. The defendant in this case resists the collection of the calls made upon the shares of stock by him owned in the plaintiff corporation, on the ground that the several calls are invalid for the reason that the resolutions adopted by the board of directors fail to name the persons and place to whom and at which payment of the calls was to be made. I concur in the position of defendant's counsel that the validity of the calls is to be

determined by the law of Great Britain, for certainly, if the calls made in London under the provisions of the charter of the plaintiff company are invalid and nonenforceable as against stockholders residing in Great Britain, they should not be held to be valid and enforceable against stockholders residing in the United States.

Section 11 of the articles of association of the plaintiff company provides that:

"The directors may, from time to time, make such calls upon the members, in respect of moneys unpaid, or not credited as paid, on their shares, as they think fit, but twenty days' notice at the least shall be given of each call; and each member shall be liable to pay the amount of calls so made to the persons and at the times and places appointed by the directors."

The resolutions adopted from time to time by the directors of an association must be read in connection with the provisions of the articles of association in determining the meaning and validity thereof. Under the provisions of section 11, just cited, the directors unquestionably have the authority to make calls for the unpaid portions of the capital stock when the needs of the company require it. The resolutions adopted by the directors from time to time show that the directors deemed that need existed for making the calls, and they fix in each instance the amount of the call, and the time when the same should become due and payable. Is anything further needed to constitute a valid call upon the stockholders, so far as the action of the directors is concerned? Looking for guidance to the rulings of the courts of England upon the proposition, we find that in Railway Co. v. Woodcock, 7 Mees. & W. 574, under the provisions of a railway act which authorized the directors to make calls from time to time as they deemed it necessary, of which calls 21 days' notice was to be given by newspaper publication, it being further provided that the shareholders were required to pay the calls on their shares to such person, at such time and place, and in such manner as the directors should direct or appoint, it appeared that the directors adopted a resolution for a call, giving the amount of the call and naming the day of payment, but not stating where, or the person to whom, payment was to be made, but these were named in the newspaper advertisement, and it was held that the call was valid and enforceable. In substance, the same ruling was made in Railway Co. v. Fairclough, 3 Scott, N. R. 68. In Stone v. City & County Bank, 3 C. P. Div. 282, wherein it appeared that by the articles of association shareholders were required to pay calls to the person and at the time and place appointed by the directors, and that the directors had made a call payable in installments upon certain dates, but without naming the person to whom, or the place at which, payment was to be made, it was held that, after the company had gone into liquidation, the liquidator, after giving notice of the previous call and the place of payment, could enforce the call against the stockholders. In other words, the call made by the directors was held valid and enforceable, although the resolution did not name the place or person at which and to whom payment was to be made. In Cook on Stock and Stockholders, section 115, after consideration of both the English and American authorities, the

rule is stated to be that "the call need not indicate when or to whom or where payment is required to be made. These are to be stated in the notice of the call."

In support of the contention of the defendant, citation is made of the cases of In re Cawley, 42 Ch. Div. 209, and Johnson v. Iron Agency, 5 Ch. Div. 687. Although there are statements in a portion of the opinions which, by themselves, would seem to mean that a call should name the place of payment, I think the stress of the cases turned upon the proposition that the call should embrace the amount and the time of payment, and that it was not intended to question the correctness of the rulings in the previous cases to the effect that a resolution adopted by the directors, which fixed the amount of the assessment and the time of payment, constituted a valid call under the provisions of articles of association like those of the plaintiff company. Under these articles, it seems clear to me that when the directors, being duly convened, determined that there was need for making an assessment upon the unpaid portions of the shares of the company, and fixed the amount of the assessment and the time for the payment thereof, they did all that was necessary to constitute a valid call. A valid call having thus been made, then, under the provisions of article 11, 20 days' notice thereof must be given to each shareholder. It is not required, however, that this notice should be given by the directors. It is clearly sufficient if the notice is sent by the secretary of the company, as was done in regard to each one of the calls in question. The call having been made in due form by the directors, and notice thereof having been sent to the shareholders, then, under the provisions of article 11, a duty is imposed upon the shareholders, and that duty is to pay the amount of the assessment.

Under the provisions of this article, the directors have the power to appoint the place of payment and the person to whom payment may be made. In the case of an association organized in England, but transacting business in the United States, and having stockholders residing in both countries, it might be deemed advantageous to appoint more than one place of payment. Again, a call having been made, circumstances might arise, after notice thereof had been given, which required a change in the person to whom payment should be made. If a corporation, it might fail, or, if an individual, he might die. Under such circumstances it is certainly within the power of the company to designate a new agent to whom payment may be made, without requiring the directors to make a new call or assessment. The validity and enforceability of the call cannot, in any proper sense, depend upon the continuance in actual or business life of the person or corporation appointed to receive payment on behalf of the association. The selection of the place of payment, or person to receive the payment, is no more necessary to the valid exercise of the right to make calls upon the stockholders than is the selection of the location of the offices of the company. These are administrative acts proper for the carrying out of the action of the directors, but not essential to the validity thereof. The duty and obligation to pay the assessment is imposed

upon the stockholder after the expiration of the 20 days from the giving of the notice of the action of the directors in making the call. The obligation to pay thus being imposed upon the shareholder, it is his duty to make the payment. The place of payment is but an incident in the performance of the duty of the shareholder. If the company, through its secretary, notifies him that payment may be made at a given place and to a named bank or person, and payment is there made, the shareholder will be protected in so doing. If the defendant should now pay the amounts sued for in this case into the registry of this court, or, upon judgment being rendered and execution being issued, should pay the amount thereof to the marshal of the court, certainly he would be protected in so doing, and would be held to have performed his obligation of payment to the company. The mere place of payment and the person to whom made is not essential to perfect a payment, so long as it be made to any one who, in that particular, represents the company. When the notices of the making the calls upon the stock of the plaintiff corporation were received by the defendant, notifying him that payment was to be made at the Royal Bank of Scotland, 123 Bishopsgate street, London, he cannot successfully claim that he failed to make payment because he did not know where or to whom payment should be made. He had a right to assume that the place of payment, and the bank at which it was to be made, had been appointed by the directors, and that the action of the secretary was in pursuance of the proper authority. As already said, if he had forwarded the sums called for to the bank named in the notices, he would have fully met his duty, and he could not have been again held liable for the amount of these assessments. Cases might possibly be imagined wherein it might appear that the failure of the stockholder to make payment before suit was due to an uncertainty regarding the proper place of payment, and, prompt payment being tendered upon the suit being brought, a court might be justified in holding the shareholder absolved from liability for interest and costs. But lack of knowledge, even though reasonably existing, as to the proper place of payment, cannot have the effect of releasing the shareholder from liability for a call properly made by the directors. In the case at bar the failure to pay the calls made was not due to any uncertainty touching the proper place of payment. In the letter written by defendant under date of April 24, 1890, to the secretary of the company, he expressly states that, owing to his dissatisfaction with the management of the affairs of the company, he is not disposed to answer any calls made upon the stock, and that, if payment thereof is pressed by suit, he will endeavor to have a receiver appointed to wind up the company.

This letter clearly shows that defendant knew that calls had been made or would be made, and states the grounds of his refusal to pay, which had nothing to do with the mere place of payment. Furthermore, when this action was brought, in effect it was a direction of the company to defendant that he could rightfully pay the amount due on the calls into court or to the attorneys of the com-

pany. His failure to pay, or to make an offer to pay, the sums due after the suit was brought, clearly shows that the question of place of payment, or person to whom payment should be made, had nothing to do with the failure to pay. And I can find nothing in the facts developed in the evidence which would justify a court in holding that the defendant was relieved from liability for the calls made by the directors, by reason of any doubt or uncertainty as to the place or person at which or to whom payment could be made, and I therefore hold that, upon the expiration of 20 days after the giving notice of the several calls made by the directors, the defendant became liable for the amount of the call, and, as it is not claimed that payment thereof has been made in whole or in part, the defendant continues liable to the company for the amounts of the several calls, which, in the aggregate, equal the sum of $6,514.83.

The only other question for decision is whether the defendant is liable for interest upon the amounts thus found to be due upon the calls made. In section 13 of the articles of association it is provided that:

"If before or on the day appointed for payment any member do not pay the amount of any call for which he is liable, he shall be liable to pay interest for the same from the day appointed for the payment thereof to the time of actual payment, at such rate as the directors may from time to time, or at any time before payment of the call, appoint by notice to the defaulter."

Liability for interest is thus made dependent upon two things: (1) The directors must determine or fix the rate; (2) notice of the rate fixed must be given to the shareholder. In the deposition of the secretary of the company it is stated that on the 30th day of July, 1889, a resolution was passed to charge interest at 6 per cent. per annum on all calls in arrear after July 13, 1889. A copy of the resolution is not put in evidence, and the court is not sufficiently advised of its true meaning to be able to hold that it was intended to apply to calls made after the date of the resolution. Furthermore, it does not appear that any notice of the adoption of the resolution was sent to the defendant, and I am therefore of the opinion that the evidence does not show affirmatively that the directors have appointed any rate of interest to be assessed against shareholders in default of the several calls sued for in this action, and for that reason I hold that interest is not recoverable against defendant.

Judgment will therefore be entered in favor of plaintiff for the face of the several calls, without interest, the aggregate thereof being $6,514.83.

KIRKPATRICK v. POPE MANUF'G CO.

(Circuit Court, D. Connecticut. April 14, 1894.)

No. 398.

PRACTICE—PRODUCTION OF BOOKS IN ACTIONS AT LAW—WHEN PROPER.

In an action against a corporation to recover royalties, defendant answered that it had sold its business and assets to another corporation of the same name, and that the returns made by the latter as to the num-

ber of patented articles manufactured were erroneous. Plaintiff replied that the two corporations were practically identical, and that the returns were signed by defendant's officers, and were correct. To substantiate these latter allegations, plaintiff moved that defendant be required, under Rev. St. § 724, to produce its records, and accounts of sales. By the contract for royalties these accounts were to be open to plaintiff's inspection. *Held*, that the case was a proper one for the application of this remedy, and that a subpoena duces tecum would not be adequate.

This is an action brought by Thomas J. Kirkpatrick against the Pope Manufacturing Company to recover royalties. Heard on motion to compel defendant to produce its records and accounts.

Kerr & Curtis, for plaintiff.

Gross, Hyde & Shipman and W. A. Redding, for defendant.

TOWNSEND, District Judge. This is a motion to require the defendant to produce at the trial of an action at law certain books and papers, under the provisions of section 724, Rev. St. U. S., which is as follows:

"In the trial of actions at law, the courts of the United States may, on motion and due notice thereof, require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery. If a plaintiff fails to comply with such order, the court may, on motion, give the like judgment for the defendant as in cases of nonsuit; and if a defendant fails to comply with such order, the court may, on motion, give judgment against him by default."

The action is brought to recover royalties on certain patented bicycle saddles, alleged to be due to plaintiff under a certain agreement. The answer alleges, among other defenses, that the defendant corporation has sold its business and assets to a corporation of the same name, organized under the laws of the state of Maine; and that, since 1887, it has not manufactured any saddles embodying said patented invention; that the royalty returns for subsequent years were made by said Maine corporation, as the successor of the defendant; and that the number of saddles manufactured was erroneously stated therein. The plaintiff avers in reply that the two corporations are substantially the same; that the alleged change was merely nominal, and did not affect the respective rights and obligations of the parties; that said returns were signed and forwarded to plaintiff by defendant's officers; and that said machines were constructed under the authority of defendant, which is liable for the royalty thereon; and that said returns are correct and true. The motion is predicated upon the claim that the production of the books and papers therein named will tend to prove the practical identity of the two corporations. It is addressed to the discretion of the court, which is to be governed by the practice in such cases in chancery. Gregory v. Railroad Co., 10 Fed. 529. The authority should be exercised only in cases where the relief might have been had by a bill of discovery, and as a substitute for that proceeding. Finch v. Rikeman, 2 Blatchf. 301, Fed. Cas. No. 4,788. By such bill a complainant would be entitled to a discovery as to such matters of fact as are material to the prosecution of the whole of his case.

Bisp. Eq. p. 594, § 560; Daniell, Ch. Pr. p. 1817; Downie v. Nettleton, 61 Conn. 593, 24 Atl. 977. And this may include such facts as would tend to impeach or destroy defendant's case. Pom. Eq. Jur. § 201; Edison Electric Light Co. v. U. S. Electric Lighting Co., 45 Fed. 58. The motion calls for the production of the records of the defendant corporation, and of its accounts of sales of saddles during the period covered by the controversy, for the purpose of proving the practical identity of the two corporations. The contract, whose alleged breach forms the basis of the action, provided that said accounts should be open to the inspection of plaintiff. It seems to me that both the records and accounts relate to the plaintiff's title, and are material to his case. Clearly they do not relate solely to the defendant's case. Story, Eq. Pl. p. 281, § 311. The records may be material to support the plaintiff's claim that the defendant, either as principal or agent, constructed said machines; to show the character and extent of its interest in such construction; and that the defendant, and no other party, is liable under said contract. The plaintiff is entitled, to the specific performance of the contract, that he should be permitted to inspect the accounts. They are presumably material, not merely upon his assertion that the returns are correct as to the number of machines constructed, but to show whether they support the returns made, and whether the saddles therein referred to did or did not contain said patented invention.

It is suggested that the rights of the plaintiff will be sufficiently protected by a notice to produce, or a subpoena duces tecum. But a notice to produce does not compel a party to produce the document. The effect of the refusal is merely to lay the foundation for the introduction of secondary evidence of the contents of the papers called for. Iasigi v. Brown, 1 Curt. 401, Fed. Cas. No. 6,993; Life & Fire Ins. Co. v. Mechanic Fire Ins. Co., 7 Wend. 31, 34; Merchants' Nat. Bank v. State Nat. Bank, 3 Cliff. 201, Fed. Cas. No. 9,448. Manifestly this would not avail the plaintiff. "That the process of subpoena duces tecum is a convenient, efficient, and proper method for bringing the paper into court is beyond dispute in this circuit." Judge Lacombe, in Edison Electric Light Co. v. U. S. Electric Lighting Co., 45 Fed. 59; Id., 44 Fed. 294. And its sufficiency has been shown, and its use further approved, in the following cases: In re Shephard, 3 Fed. 12; Bischoffsheim v. Brown, 29 Fed. 341; Johnson Steel Street-Rail Co. v. North Branch Steel Co., 48 Fed. 191, 195. But an examination of the foregoing cases shows that they are all suits in equity. In actions at law, proceedings for obtaining inspection of documents on the trial are regulated by section 724 of the Revised Statutes. Fost. Fed. Pr. §§ 267, 372; Bischoffsheim v. Brown, supra; Jacques v. Collins, 2 Blatchf. 23, Fed. Cas. No. 7,167; Coit v. Amalgamating Co., 9 Fed. 577; Gregory v. Railroad Co., supra; Lowenstein v. Carey, 12 Fed. 811; Colgate v. Compagnie Francaise, etc., 23 Fed. 83; Guyot v. Hilton, 32 Fed. 744. The Connecticut statute (St. 1889, c. 22) contains a similar provision. While the fact that congress, and the legislature of this state have enacted such laws suggests the inadequacy of previously existing provisions, and presents a forcible argument in favor of their necessity, the defendant should not be

required to proceed under the state statute, because its provisions cannot be enforced, when it is otherwise provided by the statutes of the United States. Ex parte Fisk, 113 U. S. 713, 5 Sup. Ct. 724; Myers v. Cunningham, 44 Fed. 347; Anderson v. Mackay, 46 Fed. 105. In Johnson Steel Street-Rail Co. v. North Branch Steel Co., supra, it was held that the president of a corporation, which is a party to a suit in equity, might be compelled, by subpoena duces tecum, to produce drawings material to the issue. The reasoning of the court in Wertheim v. Trust Co., 15 Fed. 716, suggests the limitation of the use of said subpoena to compel the production of the books by an officer, where the corporation is not a party. In view of the possible uncertainty upon this point, and as to what officer of the defendant corporation would be in possession of the papers called for, where the question of the identity of the corporation is involved, I am not satisfied that a subpoena duces tecum would be sufficient under the circumstances of this case.

Inasmuch as a notice to produce is not a safe and adequate remedy, and there is danger of delay upon the trial in case the papers should not be produced, and the present motion is the statutory and usual proceeding, and the affidavits in support thereof allege that the documents therein specified are material to the plaintiff's case, and the determination of this question may be reserved until after examination by the court, I think the motion should be granted.

Let an order be entered accordingly.

DINZY v. ILLINOIS CENT. R. CO.

(Circuit Court, N. D. Iowa, Cedar Rapids Division. April 23, 1894.)

1. JURISDICTION—FOREIGN CORPORATION.
   The federal courts have jurisdiction, upon the ground of diverse citizenship (Act Aug. 13, 1888), of an action against a foreign corporation, brought in the judicial district in which the plaintiff resides, when such corporation is subjected by statute to the jurisdiction of the courts of the state in which the district is located.
2. SAME—SERVICE ON TICKET AGENT.
   Service of a summons upon a station or ticket agent, in accordance with the provisons of the statute of the state in which the district is located (Code Iowa, § 2611), will vest the federal courts with jurisdiction in a suit against a foreign railroad corporation.
3. SAME—DIVISION OF JUDICIAL DISTRICT.
   An action may be brought in the state of Iowa against a nonresident defendant "in any division of either district wherein the defendant may be found." 22 Stat. 172. *Held*, that it is not required, in such a case, that suit be brought in the division of the district wherein the plaintiff resides.

This was an action by Richard W. Dinzy against the Illinois Central Railroad Company to recover damages for personal injuries received while in its employ. Defendant moved to dismiss for want of jurisdiction.

Burns & Sullivan, for plaintiff.

W. J. Knight, for defendant.

SHIRAS, District Judge. The plaintiff herein is a citizen of the state of Iowa, residing in Blackhawk county; and the defendant company is a corporation created under the laws of the state of Illinois, and is engaged in operating lines of railway in Iowa under leases from the original owners of the leased lines. The plaintiff brings this action to recover damages, in the sum of $20,000, for personal injuries received while in the employ of the company as a conductor. The summons was served upon a ticket agent of the defendant company. The defendant appears specially, and objects to the court taking jurisdiction of the case on the ground that the defendant company is an Illinois corporation; that the general office and headquarters of the company are located at the city of Chicago, Ill.; that it is not an inhabitant or resident of the state of Iowa, or of the northern district thereof; that the station and ticket agents have only authority to act in connection with the business tributary to the particular station at which they are located; that the defendant company is engaged in operating lines of railway leased from the Dubuque & Sioux City Railroad Company, —an Iowa corporation,—part of which extend into Linn county, Iowa; and that the defendant has in the state of Iowa no office or place of business, except the local freight and ticket offices, and such offices and officials, only, as are necessarily connected with the management of the leased lines. Thus two questions are presented: First, is the case one of which this court can, under any circumstances, take jurisdiction? And, second, is the service sufficient, in case jurisdiction exists?

The plaintiff, when the action was brought, was a citizen of Iowa, residing in the northern district; and the defendant was a corporation created under the laws of the state of Illinois, and, for jurisdictional purposes, is deemed to be a citizen of that state. The case being between citizens of different states, and involving over $2,000, exclusive of costs and interest, it was and is a case within the federal jurisdiction; and, as the jurisdiction is based upon the fact of diverse citizenship, then, under the provisions of section 1 of the act approved August 13, 1888, the action might be brought in the district wherein either the plaintiff or defendant resides. As the plaintiff resided in the northern district of Iowa when the action was brought, the circuit court of the United States of this district could rightfully take jurisdiction of the case, and could exercise jurisdiction over the defendant, provided proper and sufficient service of the summons could be made upon the company. Thus, in Machine Co. v. Walthers, 134 U. S. 41, 10 Sup. Ct. 485, the plaintiff was a citizen and resident of the state of Nebraska, and the defendant a corporation created under the laws of the state of Illinois. The defendant pleaded that under the provisions of the act of congress of August 13, 1888, it could not be sued in the district of Nebraska, because it was neither a citizen, resident, nor inhabitant of that state or district; but the jurisdiction was maintained, it being said by the supreme court that:

"Where the jurisdiction is founded upon any of the causes mentioned in this section, except the citizenship of the parties, it must be brought in the

district of which the defendant is an inhabitant; but, where the jurisdiction is founded solely upon the fact that the parties are citizens of different states, the suit may be brought in the district in which either the plaintiff or the defendant resides."

See, also, Shaw v. Mining Co., 145 U. S. 444, 12 Sup. Ct. 935.

Is the service in this case such that the court thereby obtains jurisdiction over the defendant corporation? It is settled by the decisions of the supreme court that, within the meaning of the acts of congress conferring jurisdiction on the circuit and district courts of the United States, a corporation cannot be deemed to be a citizen, resident, or inhabitant of any state other than that in which it has been created a corporation. Ex parte Schollenberger, 96 U. S. 369; Railroad Co. v. Estill, 147 U. S. 591–610, 13 Sup. Ct. 444. It is equally well settled that a corporation may engage in the transaction of business in other states; and under the provisions of the judiciary act of 1789, and the acts amendatory thereof, down to the act of 1887, it was uniformly held that a corporation might be found in a state other than that of its creation, for the purposes of suit, after the decision of the supreme court in Ex parte Schollenberger, supra. See, also, Railroad Co. v. Harris, 12 Wall. 65; Railway Co. v. Whitton, 13 Wall. 270. These cases recognize the principle that where a corporation of one state engages in business in another state under such circumstances that, by the law of the latter state, the corporation may be sued in the courts thereof, then it may be sued in the federal courts of that state, if the case is otherwise of federal jurisdiction. Does the act of 1887, as amended by that of 1888, change the rule in this particular? The admitted facts in this case show that the Illinois Central Railroad Company is permanently engaged in the railway business in the state of Iowa. Under the provisions of the laws of Iowa, it has been permitted to lease lines of railway in this state, and is now engaged in operating the same, and is thus enjoying, within the state of Iowa, the full exercise of its powers as a corporation created to carry on the business of railroading. By the provisions of chapter 128 of the acts of the 18th General Assembly of the State of Iowa, it is declared that railroad companies created under the laws of other states, and operating lines within this state, "shall have and possess all the powers, franchises, rights and privileges and be subject to the same liabilities of railroad companies, organized and incorporated under the laws of this state, including the right to sue and the liability to be sued, the same as railroads organized under the laws of this state." In Railroad Co. v. Estill, 147 U. S. 591–608, 13 Sup. Ct. 444, the supreme court held that "the principle applicable under such circumstances is that, if the corporation does business in the state, it will be presumed to have assented to the statute, and will be bound accordingly." And in Ex parte Schollenberger, 96 U. S. 369, 376, it is ruled that the statute does not confine the right of suit to courts of the state, but was intended to confer upon the citizens of the state the right to maintain actions against the foreign corporations, and this right might be exercised in any court within the state, either state or federal, which otherwise

would have jurisdiction. Thus, we find it to be the law that the plaintiff, being a citizen of Iowa, has a right to maintain suits for the protection or enforcement of his rights against the Illinois Central Railroad Company in any proper state or federal court exercising jurisdiction in Iowa, and that the company cannot question the jurisdiction because it is a foreign corporation. Having chosen to enter upon the business of railroading in Iowa, it is presumed to have assented to the provisions of the statute of Iowa above quoted, and thereby to have assumed the liability of being sued by the citizens of Iowa in any court lawfully exercising jurisdiction within the state, of which this court is one. Having come within the state for the purpose of exercising its corporate powers in accordance with the provisions of the state statute, it must accept the burden as well as the benefit of the statute. There is nothing in the act of 1887 and 1888 which changes the rule in this particular. Under these statutes, federal jurisdiction, in the sense of the place of suit, can no longer be sustained in a particular district because a defendant might be found therein, as was the rule under the former statutes. Where jurisdiction is now dependent upon the fact of diverse citizenship, the place of bringing suit is limited to the two districts wherein is the residence of the plaintiff and of the defendant.

In such cases the plaintiff may sue in the district wherein the defendant resides, or he may sue in the district of his own residence. In the latter event, to make the right available in the particular case, the defendant must be found, for the purpose of being served with the summons, subpoena, or other process, within the territorial limits within which the process of the court may be lawfully and effectually served upon the defendant. The facts in this case, read in the light of the provisions of the state statute, show that the defendant company was and is to be found in the state of Iowa, in such sense that it may be subjected to suit in the courts, state and federal, exercising jurisdiction within the state. Upon whom, then, may service be lawfully made, in the case of foreign corporations engaged in business in this state? The answer to this question must be sought in the provisions of the statute of Iowa. By section 2611 of the Code of Iowa, it is enacted that:

"If the action is against any corporation or person owning or operating any railway, * * * service may be made upon any general agent of such corporation or person, whenever found, or upon any station, ticket, or other agent of such corporation or person transacting the business thereof in the county where the suit is brought; if there is no such agent in said county, then service may be had upon an agent thereof transacting said business in any other county."

The summons in this case was served upon the ticket or station agent of the defendant company acting for the company in Linn county, Iowa, wherein is situated the city of Cedar Rapids, at which place the sessions of this court are held. It is urged in argument that the station agent is not a general officer of the company, that he acts for the company only at the particular station to which he is assigned, and that his powers are of the most limited character,

and therefore serving notice upon him does not affect the company, nor bind it in any particular. In the absence of a statute, the question whether the relation of the servant to the corporation is such that service upon the former is notice to the latter is frequently one of difficulty, as the common-law rule is that the service must be had upon some officer whose knowledge can be deemed to be the knowledge of the corporation. Hence, we find that the subject is now generally regulated by statutory enactments in the several states. In Insurance Co. v. French, 18 How. 404–408, it is said:

"Process can be served on a corporation only by making service thereof on some one or more of its agents. The law may, and ordinarily does, designate the agent or officer on whom process is to be served. For the purpose of receiving such service, and being bound by it, the corporation is identified with such agent or officer. The corporate power to receive and act on such service, so far as to make it known to the corporation, is thus vested in such officer or agent."

The case involved the validity of service made upon a foreign insurance company doing business in Ohio by service upon an agent, made in accordance with the statute of Ohio. It was held that the company was bound by the statutory service. In the case now under consideration the service was made upon one of the agents of the company designated by the statute of Iowa as an officer upon whom service of process against the corporation might be made; and it must therefore be held that the service was lawful, and effectual against the corporation.

It is further urged on behalf of defendant that, even if jurisdiction exists in this court, the action has been brought in the wrong division of the district; it being claimed that it should have been filed in the eastern divison, wherein the plaintiff resides. In the act of congress of July 20, 1882 (22 Stat. 172), creating the northern and southern districts in the state of Iowa, are found the provisions creating the several divisions, and by section 9 of the act it is provided that:

"All civil suits not of a local nature must be brought in the division of the northern or southern district wherein the defendant or defendants reside. * * * When the defendant is a nonresident of either district, action may be brought in any division of either district wherein the defendant may be found."

In no case, under this statute, is it required that suit must be brought in the divison wherein the plaintiff resides. As the defendant company is not a resident of either district, the plaintiff was at liberty to bring the action in any division wherein the defendant might be found; and as the company, when the suit was brought, was engaged in operating its railway line within the Cedar Rapids division, the suit was properly brought in that division.

The motion to dismiss for want of jurisdiction in the district or division, as well as for alleged lack of legal service, is therefore overruled.

VANDERVELDEN v. CHICAGO & N. W. RY. CO.

(Circuit Court, N. D. Iowa, Cedar Rapids Division. April 9, 1894.)

1. RELEASE—BAR TO ACTION FOR PERSONAL INJURIES—FRAUD.
In an action at law to recover damages for personal injuries, a release intentionally executed by plaintiff for a money consideration, knowing the legal effect thereof, cannot be attacked, or its effect as a complete bar avoided, by showing that plaintiff was induced to sign it by the misrepresentations of defendant's surgeon, who attended him, as to the permanent character of his injuries. The action, however, may be suspended while plaintiff brings an independent suit in equity to rescind the release for fraud.

2. RESCISSION OF RELEASE—TENDER OF CONSIDERATION.
A suit to rescind a release of a claim for personal injuries cannot be maintained without tendering back the money paid as a consideration therefor, and keeping the tender good.

This was a motion on the part of defendant to exclude certain evidence in an action at law by A. N. Vandervelden against the Chicago & Northwestern Railway Company to recover damages for personal injuries received while in its service.

Struble & Stiger and C. A. Clark, for plaintiff.
J. C. Cook and Hubbard & Dawley, for defendant.

SHIRAS, District Judge. In order to properly state the exact question presented by this motion to strike out part of the testimony, and the view of the court thereon, it is necessary to understand the issues as made by the pleadings. On behalf of the plaintiff it is averred that on or about the 15th of January, 1891, he was in the employ of the defendant company as a brakeman on a freight train running upon part of the defendant's lines in the state of Iowa; that on that day, while engaged in the line of his duty at the station of Havelock, he was injured through the negligence of the engineer in charge of the train, and for the damages resulting from the injuries thus caused him by the negligence of the engineer he seeks to recover in this action. On part of the defendant, all charges of negligence are denied, and, in addition thereto, defendant pleads that the defendant company paid the surgeons who attended the plaintiff during his illness for their services, and that on or about March 6, 1891, the parties compromised and settled all further claims on part of plaintiff, the defendant paying, as consideration thereof, the sum of $300; and as evidence of such settlement, and of the payment of said sum, a release in writing was executed by plaintiff, and delivered to the defendant, reading as follows:

"Read This Release."

"In consideration of the sum of three hundred dollars ($300) to me in hand paid by the Chicago & Northwestern Railway Company, the receipt whereof is hereby confessed, I hereby release and forever discharge said railway company from all claims and demands which I now have, or may have, against it by reason of injuries received by me on or about the 15th day of January, 1891, at Havelock, Iowa, caused by falling from or being thrown off one of said company's cars in a freight train on which I was acting as brakeman, thereby breaking my right leg and otherwise seriously injuring me; and in full for all

claims which I have or may have on account of said accident. Witness my hand and seal at Eagle Grove, Iowa, this sixth day of March, A. D. 1891.

"Nicholas Vandervelden. [L. S.]

'Geo. Kaiser, J. P., Eagle Grove, Iowa."

By way of reply the plaintiff admits the execution of the release, but avers that at the time he executed the same he was in feeble health as a consequence of his injuries, and that he was induced to make the settlement and sign the release through the solicitations of the surgeon of the defendant company who had charge of his case, and more particularly through the misrepresentations of the surgeon to the effect that in a reasonable time his leg would be all right, and that, if he did not settle, he would not be able to collect anything from the company, whereas in fact his injuries are serious and permanent, and his leg has never been restored to a proper condition, and is in fact useless to him.

After the introduction of testimony tending to show the happening of the accident and its result to plaintiff, it was proposed to offer testimony on behalf of plaintiff in regard to the settlement, and the inducements held out to secure the same, to which defendant's counsel objected, stating, however, that the court might hear the evidence, and that defendant would move to strike it out, thus presenting the objection more clearly. The plaintiff thereupon testified, in substance, that he executed the release through the persuasions of the surgeon in attendance upon him, and more particularly in reliance upon his assertion that in a short time his leg would be all right, and that he would be able to be up and about his business. Upon the close of this testimony the defendant moved to strike out the same upon two grounds: First, that the execution of the release is admitted, and neither in the pleading nor in the evidence is it claimed that the plaintiff was in any way misled as to the legal effect and purpose of the release, nor is it claimed that he did not intend to sign the release, or that he did not receive the $300; and, second, that the plaintiff had not paid back, or offered to repay, the $300 by him received under the settlement.

The point presented for decision by the first ground of objection is whether, in an action at law, a written release of the character of that introduced in evidence can be impeached for fraud not inhering in the execution thereof, but which only goes to the extent of the consideration. It is not claimed that the plaintiff did not intend to sign the instrument in question, or that he was misled as to its legal effect. The evidence offered shows that he, at the time he signed it, intended to fully release and discharge the company from all further liability to him by reason of the accident named in the release. The reply filed by plaintiff expressly admits the execution of the instrument. For the execution thereof he was paid the consideration therein named. Upon its delivery the instrument became legally binding. Can the plaintiff, in an action at law, escape the legal force of this release by showing that the injuries he received are more serious and permanent than he believed them to be when he settled therefor, even if such belief was created by misrepresentations made by the surgeon of the company who had the care of his

case? By sections 2112 and 2113 of the Code of Iowa, the use of private seals in written contracts, except in case of corporations, is abolished, and it is declared that all contracts in writing, signed by the party to be bound or his agent or attorney, shall import a consideration. Practically, the distinction existing at common law between instruments under seal and those not under seal is thus abrogated in Iowa. The execution of the release being admitted in the pleadings, no evidence is required on part of the defendant to sustain the defense based thereon. Being in writing, and its execution by the plaintiff being admitted, it imports a consideration, and therefore at law its validity is established. Can the plaintiff, in this law action, attack it on equitable grounds? The ground of attack is not strictly a failure of consideration, for the plaintiff admits that he has received the full consideration named in the instrument, and the full amount which was promised him as an inducement for entering into the settlement and executing the release. The position of the plaintiff is that he was misled as to the future results of his injuries. At the time he made the settlement, in March, 1891, he then knew that his leg was in such a condition that, unless it grew better, it would be of little use to him. The representations of which he complains were as to future results, and it seems to me that, if falsely or ignorantly made, they cannot be availed of in an action at law. The release is a validly executed instrument, and in an action at law must be given its full legal force and effect. Thus, in Hartshorn v. Day, 19 How. 211, 222, it is said:

"Evidence was given on the trial in the court below for the purpose of proving that the agreement of the 5th of September was procured from Chaffie by the fraudulent representations of Judson, which was objected to, but admitted. The general rule is that, in an action upon a sealed instrument in a court of law, failure of consideration, or fraud in the consideration, for the purpose of avoiding the obligation, is not admissible as between the parties and privies to the deed, and more especially where there has been a part execution of the contract. The difficulties are in adjusting the rights and equities of the parties in a court of law; and hence, in the states where the two systems of jurisprudence prevail,—of equity and the common law,—a court of law refuses to open the question of fraud in the consideration, or in the transaction out of which the consideration arises, in a suit upon the sealed instrument, but turns the party over to a court of equity, where the instrument can be set aside upon such terms as, under all the circumstances, may be equitable and just between the parties. A court of law can hold no middle course; the question is limited to the validity or invalidity of the deed. Fraud in the execution of the instrument has always been admitted in a court of law; as, where it has been misread, or some other fraud or imposition has been practiced upon the party in procuring his signature and seal. The fraud in this aspect goes to the question whether or not the instrument ever had any legal existence. * * * It is said that fraud vitiates all contracts, and even records, which is doubtless true in a general sense. But it must be reached in some regular and authoritative mode; and this may depend upon the forum in which it is presented, and also upon the parties to the litigation."

The doctrine of this case was affirmed in the later case of George v. Tait, 102 U. S. 564–570, wherein it was said:

"Proof of fraudulent representations by Myers & Green, beyond the recitals in the bond, to induce its execution by the plaintiff in error, was properly rejected. It is well settled that the only fraud permissible to be proved at law in these cases is fraud touching the execution of the instrument, such as

misreading, the surreptitious substitution of one paper for another, or obtaining by some trick or device an instrument which the party did not intend to give. * * * The remedy is by a direct proceeding to avoid the instrument."

There are doubtless cases to be found wherein the distinction pointed out by the supreme court has not been observed or has not been followed, and especially may this be true in states wherein legal and equitable rights are administered by one court and in one proceeding. This court, however, is bound by the ruling of the supreme court upon the question; and I can see no escape from the conclusion that, as the evidence introduced does not tend to show fraud in the execution of the instrument, but only fraud in the representations used to induce plaintiff to agree to a settlement of his claims, it cannot be availed of, in an action at law, as a defense to the plea of settlement evidenced by the written release. It is not denied, but, on the contrary, is admitted, by the plaintiff in his pleadings and testimony, that in fact he did enter into a treaty with the defendant company touching the settlement of his claim against the company; that terms of settlement were in fact reached; that the defendant performed the terms on its part by the payment of the sum agreed upon; that he (the plaintiff) received the sum agreed to be paid, thereby completing the settlement, and, as evidence thereof, that he (the plaintiff) signed and delivered the written release in question, knowing the character of the instrument he signed, and intending, when he signed and delivered it, that it should have the effect and purpose the law imputes to it. At the time of the execution and delivery of the instrument, a court of law could not pronounce it void. At that time, in a court of law, it was either void or valid. If valid then at law, it is valid now. The real position of the plaintiff is that although in fact he intended to make a full settlement with defendant, and although terms of settlement were reached which were then satisfactory to him, and although the terms of settlement were fully performed by the company and accepted by him, and although he executed the written release, knowing its contents and legal effect, and intending, at the time of its delivery, that it should bar him of all further claims against the company, nevertheless, since that time he has discovered that he was induced to make the settlement by false representations in regard to the nature and permanent character of the injuries inflicted upon him, and that these representations were of such a character, and made under such circumstances, as entitle him to repudiate the settlement, and to relieve himself from the legal bar created by the instrument by him executed.

Whether the equities are such as to justify the setting aside the release and the settlement upon which it is based, it is not for the plaintiff to determine. The other party has rights and equities that must be considered. It is therefore necessary, where the party desires to escape the legal bar created by a written instrument by him duly executed, knowing, at the time of execution, its legal effect, and especially where the other party has performed the contract on his part, that the remedy should be by means of a direct proceeding to avoid the instrument, or, in other words, by a proceeding

in equity. Until the instrument is annulled by a decree to that effect in a further proceeding, its legal effect remains unimpaired. It stands between the parties as a valid legal contract of settlement; and, in an action at law upon the original cause of action, the defendant may plead and rely upon it, and the court of law is bound to construe it and enforce it according to its legal effect. The legal effect of the release in this case is to bar the action of the plaintiff. The plaintiff seeks to avoid this result by evidence tending to show grounds for a rescission of the contract. This course may be open to him, but it must be sought in the proper method and forum, and this requires the institution of a direct proceeding for the purpose of avoiding the instrument. This view of the question requires the sustaining of the motion to strike out the evidence offered tending to show equitable grounds for the rescission of the contract, but which does not tend to show fraud in the mere execution of the instrument.

Under the facts of this case, if plaintiff so desires, the trial of the law action may be postponed, with leave to plaintiff to file a bill in equity for the purpose of attacking and testing the validity of the settlement had between the parties, and of the written release executed in connection therewith.

In view of the fact that this course may be pursued, it may be well for the court to express its views upon the question of the necessity of a tender being made by plaintiff of the money received by him, as a prerequisite to the exercise of the right of rescission, which question has been discussed by counsel at some length. It is not questioned that the general rule is that where a party seeks to rescind a contract on the ground of mistake or fraud, and thereby seeks to relieve himself of the burdens imposed by the contract, he should not be permitted to retain the benefits of the contract to the detriment of the other party to the transaction. Seeking equity, he must do equity. Therefore, the ordinary rule is that as a prerequisite to invoking the action of the court for the purpose of setting aside a contract, and thereby being relieved of the burdens thereof, the plaintiff must, so far as is reasonably within his power, place, or offer to place, the other party in the position he would have occupied if the contract had not been entered into. In short, if he would escape the burdens, he must give up the benefits, of the contract. The acts to be performed in the observance of this general rule are, of necessity, dependent upon the circumstances of the particular case. A court of equity is not insistent as to matters of form, if the substance of the duty is performed, and, furthermore, a court of equity can give due weight to exceptional cases which may demand an exceptional rule. The purpose of the general rule is to enable the court to do justice to both parties, so that, if the contract is set aside at the request of one party, the court may be able to restore the other party to the position he occupied before the contract was entered into, or otherwise the court may be made the instrument whereby great wrong may be wrought, in that the one party is freed from the performance of the contract on his part without being compelled to restore or account for the money or other

thing of value which he received by means of the contract which he now repudiates.

If the contract is of such a nature that by means thereof one party thereto is induced to pay a given sum of money to the other which he would not have paid except for the inducement of the contract, and, after the payment of the money, the party receiving the money seeks to rescind the contract, it is clear that, in justice and equity, he should be required to repay the money as a condition of rescission. There is a class of cases wherein the facts are such that the court, without a repayment or tender on part of the plaintiff, has it within its power to protect fully the interests of the other party in case of rescission, and in such cases the court may proceed to a hearing without requiring repayment or a tender. Illustrations of this class of cases may be found in Thackrah v. Haas, 119 U. S. 499, 7 Sup. Ct. 311, and Billings v. Smelting Co., 3 C. C. A. 69, 52 Fed. 250. The difference between that class of cases and the one at bar is marked and radical. This case is not one which involves the sale and transfer of property, wherein the court of equity having control over the property, and the distribution of the proceeds thereof, can adjust and protect the equities and rights of the parties. In this case, when the question of settlement was in treaty between the parties, the one party asserted a right of recovery against the other for personal injuries received, and the other denied all liability whatever. Under these circumstances, the defendant company was willing to compromise, and thereby buy its peace. The money was paid for the purpose of avoiding, not only the risk of damages being recovered by the plaintiff, but also to save the costs and expenses of litigation, even if the result should be favorable to the company. If the court, without requiring a repayment of the money paid on the settlement, or the equivalent, should hear the issue as to the validity of the settlement, and decree a rescission of the contract, then the plaintiff could prosecute his law action, and therein litigate the question of original liability. If the judgment was adverse to him on that question, he would still have in his possession the money paid him to procure a settlement, and thus, in effect, the company would have been deprived of all the benefits of the settlement without having secured to it the return of the money which it paid to secure the settlement. Cases have been cited in which it seems to be held that of this result the company cannot complain, upon the theory that the company had agreed that the plaintiff should in any event receive the sum paid him. This theory is not sustainable upon any fair consideration of the facts, nor in accordance with the well-recognized principles touching the settlement of disputed claims. It cannot be supposed for one moment that a railway company, or any other company or person, would pay several hundred dollars in way of settlement and for a release from all claims, if it was understood that, after the payment of the money, the other party could ignore the settlement, retain the money, and then sue on the original cause of action just the same as though no release had been executed. The law favors the settlement of claims by mutual arrangement, and the avoidance of litigation, and does so upon well-recog-

nized considerations of public policy. Why should the court be urged to adopt a course, the inevitable tendency of which would be to discourage settlements and promote litigation? We all know that, in carrying on the railway business of the country, many accidents occur to the trainmen which may not be attributable to the negligence of the company, or which may have been caused by the contributory negligence of the party injured, and yet the injury to the employe is undoubted. The tendency of the courts and of enlightened public sentiment is to encourage the railway companies in all cases of injury, regardless of the strict question of legal liability, to deal generously with the injured party; and in the passage of years I believe there is perceptible a marked improvement in this direction, and I do not think I overstate the result in saying that to-day settlements are reached in the majority of cases. If, however, it be now held that the company, by paying to the injured person a sum agreed upon between them as a discharge in full, cannot escape the costs and expense of litigation, but that it is open to the employe to make the settlement, to receive the money agreed to be paid, to execute a full written release of all claims, and then, without paying back the money received or the equivalent, can sue the company for damages, taking his chances of recovering, but not running the risk of losing the money paid him on the settlement in case he is defeated, all inducements to settle on part of the company will be removed. If it be held that the plaintiff in this case, after making a settlement and receiving the sum agreed upon, can ignore the same, and, without repaying the money paid to secure the settlement and release, can bring an action at law upon the original cause of action, and take the chances of a jury finding for him upon the issue of fraud in the settlement as well as upon the issue of liability for the accident, without running any risk of having to repay the money already paid him in case the decision is against him, it is clear that mutual settlements in this class of cases will be greatly discouraged, and litigation will be increased,—results which, upon the ground of public policy alone, are sufficient to require that such a rule should not be adopted.

The same conclusion is reached if we look only to the strict rights of the parties to the record. As already said, the company, in order to avoid the costs of litigation, as well as to escape being held liable in damages in a sum beyond that paid to the plaintiff, entered into the settlement and paid the sum agreed upon. If, now, the plaintiff can, with impunity, subject the defendant to all the costs and expense necessary to meet the charge of negligence in connection with the accident, to that extent the defendant is deprived of the benefit of the settlement agreed upon. Before the plaintiff should be permitted to repudiate the settlement, and involve the defendant in costs and expense, he should place matters in such shape that the court, in case a rescission of the contract is ordered, will be enabled to place the defendant in the position occupied before the settlement was made. Nothing short of this will ordinarily do justice between the parties, and therefore the safer and better practice is to enforce the general rule that, where a party seeks to set aside

a settlement and release knowingly and intentionally executed by him, the other party having performed the conditions on his part, on the ground of misrepresentations such as are charged in this case, it is incumbent upon the party seeking the rescission to repay the money paid him as the consideration for the release; and if, upon tender being made, it is not accepted, the tender should be kept good, so that the court, in its final decree, may properly protect the rights of both parties.

SOUTHERN BELL TELEPHONE & TELEGRAPH CO. v. CONSTANTINE.

(Circuit Court of Appeals, Fifth Circuit. January 9, 1894.)

No. 108.

TRESPASS TO REALTY—TELEPHONE COMPANIES—MUNICIPAL CORPORATIONS.

A telephone company, invested with the power of eminent domain, and authorized by law to erect poles and stretch wires through the streets of a city, was required by ordinance to move its poles and wires from a street to the adjoining sidewalk. In doing so, it was necessary to trim certain trees, and this was done by the servants of the company, under the direction of a city officer. *Held*, that the company was not liable therefor to an action of trespass by the owner of the trees, since the act was done under lawful authority.

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

This was an action of trespass by D. F. Constantine against the Southern Bell Telephone & Telegraph Company. There were verdict and judgment for plaintiff, and defendant brings error.

Hewitt, Walker & Porter and Geo. H. Feasons, for plaintiff in error.

Lane & White and W. K. Terry, for defendant in error.

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

TOULMIN, District Judge. The defendant in error, being the owner of a lot of land abutting on a public street in the city of Birmingham, in the state of Alabama, brought suit against the plaintiff in error to recover damages for the cutting and disfiguring of certain trees growing on the sidewalk in front of said lot. The first count in the complaint claims damages for wrongfully and wantonly cutting and injuring the trees; and the second count, for wrongfully, wantonly, willfully, and maliciously cutting and disfiguring them. The defendant (now plaintiff in error) filed a special plea to the complaint, designated as "Plea No. 4," in which it was averred that, for several years prior to the injury complained of, it had erected and maintained its telephone poles and wires along the street in front of plaintiff's (now defendant in error) lot, on which the trespass complained of is alleged to have been committed; that after it had so erected its poles and wires, and before the commission of the alleged trespass, the municipal authorities of the city of Birmingham, by ordinance duly enacted, required it to move its poles and

wires from the position they had previously occupied, and to place them inside the curb, on the sidewalk; that in complying with this ordinance it became necessary to cut and trim the trees alleged to have been cut by defendant; that the street in front of plaintiff's lot, where said alleged trespass was committed, is a highway of the city of Birmingham; and that the poles and wires were so placed that they did not interfere with the ingress and egress to and from the plaintiff's lot, and did not exclude the air and light therefrom. The ordinance was made a part of the plea. The plaintiff interposed a demurrer to this plea, which was sustained by the court, and this ruling of the court is assigned as error.

The contention on the part of the plaintiff in error is that each count of the complaint is in trespass, that trespass will not lie where the act complained of is done under lawful authority, and that the plea shows the alleged trespass was committed under lawful authority. Our attention has been called to two cases recently before the supreme court of Alabama, identical in all material facts with the case at bar, and the complaints in those cases are almost identical with that in this case. The material averments are the same. In the opinion in those cases, the court say that "concurrent legislative and municipal authority, granted to such a company, to erect its poles and suspend its wires in and over the streets of a city, will protect it from being treated as a trespasser, and its work from being declared a nuisance, if its works are so constructed as not to obstruct or interfere with the use of the streets by the public, or the property owner's right of ingress and egress to and from his abutting property." The court further held that in complying with the city ordinance requiring the removal of telegraph and telephone poles from that part of the street used by vehicles to the sidewalk, "if it became necessary to trim or remove the trees in front of appellee's [defendant in error in this case] property, neither the city nor the appellant [plaintiff in error here], acting under authority of, and in obedience to, the ordinance, can be regarded as trespassers." Telegraph Co. v. Frances; Same v. Allen (cases not yet officially reported; rehearings pending); 2 Dill. Mun. Corp. § 688; Bills v. Belknap, 36 Iowa, 593. The court, in the opinion quoted from, expressly decides that the plaintiff in error had legislative and municipal authority granted to it, and that, in acting under such authority, it could not be regarded as a trespasser. In reaching this conclusion, the court, clearly, had reference to the authority of plaintiff in error under the statutes of the state of Alabama relating to telephone and telegraph companies, and to the charter act and ordinance of the city of Birmingham. We concur in the reasoning and conclusions of that court, and think we can safely adopt the ruling in construing the complaint in the present case. The conclusion is that the facts averred in the defendant's said plea were a complete answer to the complaint, and that the court below erred in sustaining the demurrer to it.

But it may be considered that the ruling of the court on the demurrer was error without injury, inasmuch as it appears from

the record that the plaintiff in error was deprived of no substantial right in presenting the defense set up in the plea. It does appear that the facts averred in the plea were, without objection or restriction, substantially proven on the trial. The question raised on the pleading by said plea is raised on the facts by the general charge of the court and by the first and third special charges as to the first count of the complaint, and by the fourth special charge as to both counts. These special charges, among others, were requested by the plaintiff in error, and were refused by the court, to which refusal exception was taken, and on which error is assigned. The special charges are as follows:

"(1) The court charges the jury that, if they believe the evidence in this case, they must find for the defendant on the first count of the complaint." "(3) That if the jury believe from the evidence that defendant had erected its line of telephone poles and wires along Nineteenth street, and on the outside of the curbing, by the permission of the mayor and aldermen, and had maintained and operated the same for several years, the fire department of the city having the exclusive use of one of the wires for the communication of the alarm of fire to said fire department, and that the mayor and aldermen passed the ordinance introduced in evidence, and you further believe from the testimony that, in order to comply with said ordinance, it was necessary to trim or cut the trees, to some extent, so as to operate the wire on said poles which was used by the fire department of the city, then I charge you that your verdict must be for the defendant under the first count of the complaint. (4) That if the jury believe from the evidence that the defendant had erected its line of telephone poles and wires along Nineteenth street, and on the outside of the curbing, by the permission of the mayor and aldermen, and had maintained the same for several years, the fire department of the city having the exclusive use of the wires for the communication of the alarm of fire to said fire department, and that the mayor and aldermen passed the ordinance introduced in evidence, and you further believe from the testimony that, in order to comply with said ordinance, it was necessary to trim or cut the trees, to some extent, so as to operate the wires on said poles which were used by the fire department of the city, then I charge you your verdict must be for the defendant."

The court, among other things, charged the jury as follows:

"It is admitted in the testimony—the testimony shows—that the employés of the telephone company did the cutting, but it is said it was done under the superintendence of the city; and they say not only that, but there is evidence to show that the hands of the telephone company were all of them paid by the telephone company all the time. I think there is no question about that. But the matter was turned over, in some formal or informal way, by the telephone company, to the city authorities, and the city authorities are responsible, and the telephone company in no way responsible. On that subject I have this to say: That if the city authorities, in what they did by way of superintendence or direction given to these employés of the telephone company, if they did it,—if the action of the city authorities was at the instance and request of the officers of the telephone company, and if the telephone company accepted the result,—then the telephone company is liable for the damages, if any."

To which plaintiff in error excepted, and assigns the same as error.

These charges raise the question whether an action of trespass would lie in the case shown by the evidence. The case is that the plaintiff in error—a corporation invested with the right of eminent domain under the law of the state of Alabama, and authorized by law to erect poles and stretch wires thereon through the streets

of Birmingham, Ala.—was required by an ordinance of that city to remove its poles and wires from the street on which the lot of defendant in error is situated, and to place them on the sidewalk in front of the lot. The trees that were cut were on the sidewalk, about 3½ feet from the curbstone, and were from 12 to 16 inches in diameter. The plaintiff in error claims—and the evidence tends to prove—that, in complying with the ordinance, it became necessary to cut and remove many of the limbs of the trees, in order to move the poles and wires inside the curb on the sidewalk, and to prevent their interference with the wires after the poles were removed, and the wires suspended on them. The mayor of the city was informed of this, and he promised to obtain the consent of the owner of the lot for the trees to be cut. Subsequently, the mayor, having failed to see the owner and obtain such consent, sent an officer of the city fire department to superintend the cutting of the trees, and under his direction the work was done by the employés of the plaintiff in error. It does not appear that the trees were cut more than was necessary to properly suspend said wires. There was also on the same poles a fire alarm telegraph wire, the property of the city, and used in connection with the fire department. This wire was also removed with the poles and wires of the plaintiff in error, and was below and nearer to the tops of the trees than the wires of the plaintiff in error. The ordinance of the city of Birmingham, before referred to, was in evidence. On the case made, there is no liability, in this suit, on the plaintiff in error. The court, in our opinion, erred in sustaining the demurrer to the special plea in the charge given to the jury, and in the refusal to give the charges requested by the plaintiff in error, and set out in this opinion. Reversed and remanded.

GIANFORTONE v. CITY OF NEW ORLEANS.

(Circuit Court, E. D. Louisiana. April 7, 1894.)

No. 12,074.

1. MUNICIPAL CORPORATIONS—WRONGFUL DEATH—MOBS.
   A statute making municipal corporations liable for the destruction of "property" by mobs (Rev. St. La. § 2453) does not include liability for taking of life.

2. SAME—CONSTRUCTION OF STATUTE.
   The Louisiana statute providing that "every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it," and further expressly giving an action for wrongfully causing death (Civ. Code, art. 2315), does not render the city of New Orleans liable to a wife for the killing of her husband, while in prison, by a mob, through the negligence and inefficiency of the police; for liability of a municipal corporation in respect to negligence of its officers or agents in the exercise of its governmental, as distinguished from its private, powers, is not to be inferred from any doubtful language.

Action by Giuseppa Gianfortone, widow of Pietro Monasterio, and as tutrix of her minor children, to recover damages against the city

of New Orleans for permitting the killing of her husband by a mob. Heard on exception of no cause of action.

Henry Chiapella and Sambola & Dueros, for plaintiff.
E. A. O'Sullivan, City Atty., for defendant.

PARLANGE, District Judge. This is a suit in damages against the city of New Orleans, brought by Giuseppa Gianfortone, widow of Pietro Monasterio, on her own behalf and as natural tutrix of her minor children, issue of her marriage with said Monasterio. The petition alleges that Monasterio, together with other persons, was arrested on the charge of having murdered the chief of police of New Orleans; that he was prosecuted, together with said other persons, for said crime, before the criminal district court for the parish of Orleans,—the trial resulting in a mistrial as to Monasterio and two of his coaccused, and in a verdict of acquittal as to six of his coaccused; that immediately after said verdict, a conspiracy was formed by a certain body of men, unknown to the petitioner, with the avowed purpose of setting at naught the findings of the jury in the criminal district court, and with the sole purpose of taking the law into their own hands, and of summarily, and without trial, destroying, by wholesale slaughter, the lives of Monasterio and his coaccused, all of whom were then incarcerated in the parish prison; that, in pursuance of said conspiracy, a mass meeting was called for the next day at Clay statue, on the main street of the city, which assembly was advertised in the morning newspapers of the city; that in answer to said call a crowd congregated at said place, where inflammatory speeches were made, and that, after the passions of the mob had been aroused, it moved in a body to the parish prison; that some 40 or 50 armed men, whose names are unknown to the petitioner, preceded the main body of rioters, and secured admission inside the walls of the prison by breaking open a rear door of the building, meeting with no resistance from the police authorities; that said armed body took possession of the prison, and shot down and killed Monasterio and 10 of his coaccused.

The petition further avers that if the mayor and chief of police of the city, upon reading in the newspapers the advertisement of the proposed mass meeting, had taken the proper steps for the protection by the police of the parish prison, as well as the lives of the prisoners, the riotous assemblage would not have organized, nor have proceeded to the parish prison, nor have taken the same, and the slaughter would have been prevented; that the parish prison is a massive building, easy to defend by a handful of disciplined policemen, for a time, at least, and until the militia of the state, or other police assistance, could have been summoned; that, from the place where the mass meeting was held, to the parish prison, no police officers were stationed, with instructions to arrest the march of the mob; that the police force at the parish prison was insufficient, imperfectly armed, and demoralized, and yielded easily to the mob; that the safety of the prisoners might have been provided for by their prompt removal to another prison; that the mayor was not in his

office that morning, and could not be found, and that he gave no instructions to the police to disperse the mob; that the mayor is the chief magistrate and chief executive of the city, is at the head of the police force, and is charged with the duty of seeing the laws executed, and of preserving peace and good order within its limits; that the chief of police, next in command to the mayor, was equally derelict in his duties, and was, together with the mayor, and all of the employes, agents, deputies, and subordinates, guilty of gross carelessness and culpable negligence; and that by reason thereof, and of their failure to perform the duties of their respective offices, the city of New Orleans is liable in damages to the petitioner in the sum of $10,000, on a cause of action which had accrued to said Monasterio, and which has survived his death, and become vested in petitioner, individually and as mother and tutrix.

Act No. 51 of 1855 (now section 2453, Rev. St. La.) provides that "the different municipal corporations in this state shall be liable for damages done to property by mobs or riotous assemblages in their respective limits." Anterior to the enactment of this statute, there was no liability, under the law of Louisiana, on the part of municipal corporations, for the destruction of property by mobs. In 1855 a similar statute was enacted in the state of New York, and as late as the year 1865, a vigorous attack was made upon its constitutionality, but its validity was sustained by the court of appeals of that state. See Darlington v. Mayor, 31 N. Y. 164. This case is of much value and interest, as setting forth the history of the legislation by which municipal corporations are made liable for the destruction of property by mobs. Judge Dillon, in his work on Municipal Corporations (volume 2, § 959), says: "Public or municipal corporations are under no common-law liability to pay for the property of individuals destroyed by mobs or riotous assemblages, but in such case the legislature may constitutionally give a remedy." [Numerous cases cited.]

"At common law * * * a municipal corporation is not liable for the destruction of property by a riotous assemblage of persons, or for the neglect of its officers in not preserving the peace, and preventing such destruction. But this doctrine is not in accordance with sound public policy, and has been changed by statute in many of the states. * * * But the right to demand reimbursement from a municipal corporation for damages caused by a mob is not founded on contract. It is a statutory right, and may be given or taken away at pleasure." [Numerous cases cited.] 15 Am. & Eng. Enc. Law, verbis "Municipal Corporations," p. 1158.

It is therefore clear that, in the absence of a statute, municipal corporations are not liable for the destruction of property by mobs, and I have stated that as late as 1865 the constitutionality of such a statute was contested. Even now, in a number of states, there are no statutes imposing the liability upon municipal corporations.

Act No. 51 of 1855 cannot be construed so as to include within its purview loss of life caused by a mob. It was not until the enactment of Act No. 71 of 1884 that an action could be maintained in this state for damages caused by the death of a human being. See

Vredenburg Case, 33 La. Ann. 627; Van Amburg Case, 37 La. Ann. 651. As, prior to 1855, municipal corporations were not liable for any acts of violence committed by a mob, it is beyond question that, when the legislature enacted Act No. 51 of 1855,—our jurisprudence then being that no damages could be had for the loss of a human life,—it was not contemplated that such an action as this one could be maintained under that statute. By no possible intendment could "property," in 1855, have been made to include a human life. As, neither by the common law nor by the civil law, could the price of a human life be sued for, and as it has been shown that there is no implied liability on the part of municipal corporations for any acts of violence committed by mobs, it is perfectly clear that if the legislature, in 1855, had intended to innovate in both respects, it would have done so clearly. It is also evident that Act No. 51 of 1855 does not provide for terror, or other injuries to feelings, caused by mobs. That act being the only statute of Louisiana mentioning municipal corporations by name with regard to torts, if the city of New Orleans can be held liable in this action, it must be by force of some other law. I understand that all claim that this action is based on the act of 1855 is abandoned, but it is urged that the city of New Orleans may be held liable under article 2315, Civ. Code La., as amended by Act 71 of 1884, which article now reads:

"Every act, whatever, of man that causes damage to another obliges him by whose fault it happened to repair it; the right of this action shall survive in case of death in favor of the minor children or widow of the deceased, or either of them, and in default of these, in favor of the surviving father and mother, or either of them, for the space of one year from the death. The survivors above mentioned may also recover the damages sustained by them by the death of the parent or child, or husband, or wife, as the case may be."

In support of the view that the city is liable in the present action under article 2315, Civ. Code, the plaintiff cites cases which she contends were decided against the city by virtue of that article of the Code. The particular cases cited may have been decided under article 2315 of the Civil Code, or they may have been based upon the implied liability of municipal corporations. However this may be, those cases bear but incidentally on the matters in hand.

The solution of the question presented in this case is free from difficulty, and results from making a clear distinction between those powers and duties of the city of New Orleans which are private, and those which are public or governmental. It must be borne in mind that the city of New Orleans is not sued in this action for any commission or omission by it in its corporate capacity. It is being sued for the neglect of duties of its officers.

"So far as municipal corporations of any class, and however incorporated, exercise powers conferred on them for purposes essentially public,—purposes pertaining to the administration of general laws made to enforce the general policy of the state,—they should be deemed agencies of the state, and not subject to be sued for any act or omission occurring while in the exercise of such power, unless by statute the action be given. In reference to such matters, they should stand as does sovereignty, whose agents they are,—subject to be sued only when the state, by statute, declares they may be. In so far, however, as they exercise powers not of this character, voluntarily assumed,—powers intended for the private advantage and benefit of the locality and its inhabitants,—there seems to be no sufficient reason why they should

be relieved from that liability to suit and measure of actual damages to which an individual or private corporation exercising the same powers, for purposes essentially private, would be liable." 15 Am. & Eng. Enc. Law, verbis "Municipal Corporations," p. 1141, and cases there cited.

"Neither the federal nor the state governments are liable for the unauthorized torts of their officers, and municipal corporations are entitled to the same exemptions when they act in a governmental or political capacity. But when the tort is committed in the performance of some municipal or corporate duty, which is private in its nature, the corporation is liable." 19 Am. & Eng. Enc. Law, verbis "Public Officers," p. 514, and cases there cited.

Field, in his work on the Law of Damages (page 33, § 37), says:

"The true doctrine is that the powers conferred in the sections we have been considering are of a legislative and governmental nature, for a defective execution of which the city cannot be held liable. In discharging these legislative functions, the city acts as a quasi sovereign, and is not responsible for a neglect or nonperformance of its officials or agents."

Citations from anthoritative text writers to the same effect as the citations just made could be multiplied.

Nearly 40 years ago, in the case of Stewart v. New Orleans, 9 La. Ann. 461, the supreme court of Louisiana distinctly recognized the doctrine that a municipal corporation, in the exercise of power which it possesses for public purposes, and which it holds as part of the country, enjoys the exemption of government from responsibility for its own acts, and for the acts of its officers deriving their authority from the sovereign power. The suit was against the city of New Orleans for the value of a slave wrongfully and unjustifiably killed by the police of the city, in a police raid ordered by the chief of police. The supreme court, in reversing the judgment against the city rendered by the lower court, said:

"The judgment we think erroneous, and the error results from a failure * * * to make the proper distinction between the liability of a municipal corporation for acts of its officers in the exercise of powers which it possesses for public purposes, and which it holds as part of the government of the country, and those which are conferred upon it for private purposes. Within the sphere of the former, it enjoys the exemption of government from responsibility for its own acts, and the acts of its officers deriving their authority from the sovereign power [citing authorities], whereas in the latter it is answerable for the acts of those who are, in law, its agents [citing authorities]. * * * The inquiry which is next presented is whether the powers under which the officers of the municipality acted were conferred for public purposes. If so, it follows that the city is not liable for the acts of its officers, even though illegal, or of such a character as to subject the officers themselves to liability. The act of 1805, incorporating the city of New Orleans, provides for the appointment of a mayor, recorder, and aldermen, and such subordinate officers 'for preserving the peace and well ordering the affairs of the city, as the council shall direct.' Through all the changes of city government, this power has been continued, and the conclusion, therefore, that these powers are governmental, is strengthened by the fact that the constitutions of 1845 and 1852 both provide that 'the citizens of the city of New Orleans shall have the right of appointing the several public officers necessary for the administration of the police of said city, pursuant to the modes of election which shall be provided by the legislature. * * *' (Article 128.) So that the right of regulating the police of the city of New Orleans does not rest alone upon legislative permission, but is authorized by the constitution itself. Under these sanctions, watchmen are appointed as a necessary branch of the police of the city. *Their duties are the preservation of public order and tranquility, and the city, in appointing them, exercised a governmental function, con*

ferred upon it, in its public or municipal character, for public purposes, exclusively, and is not, therefore, liable for the acts of its officers." (Underlining mine.)

It is to be specially noted that article 128 of the constitution of 1845, just cited, or its equivalent, has existed in all the constitutions of this state, except that of 1868. State v. City of New Orleans, 41 La. Ann. 173, 6 South. 592. The present constitution and the city charter of 1882 both recognize the city of New Orleans as one of the political divisions of the state, and as one of the arms of sovereignty for governmental purposes. In the case of Egerton v. Third Municipality of New Orleans, 1 La. Ann. 437, decided in 1846, the supreme court of Louisiana said:

"It is a remarkable fact * * * that the people of Louisiana, in convention assembled, have twice considered the local government of this great metropolis as too important to be placed among those subordinate institutions, and have recognized the city of New Orleans, in its corporate capacity, as entitled to peculiar political powers and privileges. The right of the citizens of the city of New Orleans to appoint the several public officers necessary for the administration of the police of said city, * * * and the right of the officers thus appointed to be commissioned as justices of the peace, and to exercise such criminal jurisdiction for the punishment of minor crimes as the legislature may vest in them, are secured and rendered permanent by article 128 of the state constitution. Those political franchises stand upon the same ground as any other constitutional power, *and the city of New Orleans and its officers are, for purposes of police and good order, and for the punishment of minor crimes and offenses, permanent functionaries of the government.*" (Underlining mine.)

This decision was rendered under the regime of the constitution of 1845, and the recognition of the local government of the city of New Orleans in the constitutions of 1812 and of 1845, which the supreme court said was "a remarkable fact," has since then been emphasized by further recognition in the constitutions of 1852 and 1879.

The Stewart Case, above cited, was affirmed, and its doctrine declared conclusive, in the case of Lewis v. New Orleans, 12 La. Ann. 190, which was a suit against the city of New Orleans for the value of a slave incarcerated in the parish prison by order of his master, the city deriving a pecuniary profit by receiving from the master a per diem compensation for keeping the slave incarcerated. The slave having fallen sick, and the master not being notified, the action was brought to recover the slave's value from the city, because of the gross negligence of the jailer, the agent of the city. It will be noticed that the legal aspects of the Lewis Case are almost identical with the present case. The supreme court held:

"The power of the corporation to erect a police jail, to employ officers to superintend it, and to pass ordinances for its government, *is, in effect, a power granted for public purposes*, and not private benefit or advantage. * * * According to the principle announced in Stewart v. New Orleans, 9 La. Ann. 461, and which we consider conclusive upon the subject, the *city cannot be held liable in the present case for the nonfeasance or misfeasance of the officers of the police jail.*" (Underlining mine.)

The doctrine of the Stewart Case was again affirmed in Bennett v. New Orleans, 14 La. Ann. 120. The court said:

"It seems to be a well-settled principle in respect to the jurisdiction of courts that the sovereign cannot be sued without his consent. * * * This exemption from liability on the part of the government has been extended to municipal corporations vested with, and exercising portions of, the sovereign power,

for the reason that such corporations are considered the representatives of the government, and that their exemption from suit is necessary to make the prerogative available to the government itself;" citing Stewart Case and other cases.

In the case of Howe v. New Orleans, 12 La. Ann. 482, the supreme court of Louisiana said:

"The city is no general warrantor against the acts of individuals. * * * Its police may be applied to for the purpose of preventing injuries, *but if such police err in their judgment, or if injuries are occasioned because they are inefficient in the exercise of the powers with which they are vested, the city at large cannot be held responsible for acts of third persons, which, under a more sagacious and efficient police, might possibly have been prevented.*" (Underlining mine.)

In the case of New Orleans, M. & C. R. Co. v. New Orleans, 26 La. Ann. 478, the supreme court of Louisiana again recognized the doctrine that a municipal corporation possesses two classes of rights,—public and private. In all that relates to the one class, it is merely the agent of the state, and subject to its control,—and that, as to the other class, it is the agent of the inhabitants of the place,—the corporators. The court adopted the language of Judge Dillon, to the effect that municipal corporations possess a double character,—the one, governmental, legislative, or public; the other, in a sense, proprietary or private,—and that the distinction, though sometimes difficult to trace, is highly important, and is frequently referred to, particularly in the cases relating to the implied or common-law liability of municipal corporations for the negligence of their servants, agents, and officers in the execution of corporate duties and powers.

The distinction, which is fully recognized by the supreme court of Louisiana, between the public and the private powers and obligations of municipal corporations, has been just as fully recognized by the highest courts of many of the states. I refer only to a few of the many cases which state the distinction:

The case of Western College v. City of Cleveland, 12 Ohio St. 377, was an action against the city of Cleveland for damages caused to property by a mob. There being no statute in Ohio similar to the Louisiana Act No. 51 of 1855, it was attempted to hold the city of Cleveland responsible by reason of its city charter, which provided that:

"*It shall be the duty* of the city council *to regulate the police of the city, preserve the peace, prevent disturbances* and disorderly assemblages." (Underlining mine.)

The supreme court of Ohio held that the duty intended was that properly appertaining to an administrative and legislative body acting in the government of a city,—the making regulations, by-laws, and ordinances for the purposes specified, to be enforced by the appointment of officers,—and that neither on general principles, nor from the effect of that enactment, was the city of Cleveland responsible for the destruction of property by a riotous assemblage, or for the neglect of the officers in not preserving the peace, and preventing such destruction. The court said:

"It is the duty of the state government to secure to the citizens of the state the peaceful enjoyment of their property, and its protection from wrongful and violent acts. For the proper discharge of this duty, power is delegated in different modes. One of these is the establishment of municipal corporations. Powers and privileges are also conferred upon municipal corporations to be ex-

ercised for the benefit of the individuals of whom such corporations are composed, and, in connection with these powers and privileges, duties are sometimes specifically imposed. It is obvious that there is a distinction between those powers delegated to municipal corporations to preserve the peace, and protect persons and property, whether to be exercised by legislation or the appointment of proper officers, and those powers and privileges which are to be exercised for the improvement of the territory comprised within the limits of the corporation, and its adaptation to the purposes of residence and business. As to the first, the municipal corporation represents the state,—discharging duties incumbent on the state. As to the second, the municipal corporation represents the pecuniary and proprietary interests of individuals. As to the first, responsibility for acts done or omitted is governed by the same rule of responsibility which applies to like delegations of power. As to the second, the rules which govern the responsibility of individuals are properly applicable."

A demurrer to the petition was sustained.

The case of Ulrich v. City of St. Louis, 20 S. W. 467, decided by the supreme court of Missouri, was an action in which the plaintiff alleged that, while incarcerated in the workhouse of St. Louis, he was disabled for life by the negligence of the jailer. A general demurrer having been filed to the petition, the demurrer was sustained by the lower court, and the cause dismissed. The action of the lower court was sustained by the supreme court. In the course of its decision the court said:

"The rule of law is well settled in this state that a municipal corporation is not answerable in damages for the negligent acts of its officers in the execution of such powers as are conferred on the corporation for the public good;" citing cases.

The court cited approvingly the language of Judge Dillon, as follows:

"The police regulations of a city are not made and enforced in the interest of the city, in its corporate capacity, but in the interest of the public;" citing numerous cases.

In the case of Rusher v. City of Dallas, 18 S. W. 333, decided by the supreme court of Texas, it was held that a complaint, in a suit against a city, which alleges the arrest of the plaintiff by a city policeman for a supposed violation of a city ordinance, of which violation he was in fact innocent; that the arrest was made without a warrant or an affidavit; that unnecessary violence was used by the policeman; and that the policeman was incompetent, to the knowledge of the city,—states no cause of action. The court said, inter alia:

"A distinction is made where the act is done in promotion of the interest of the city, in its special corporate rights, and when done in the interest of the public. Where a city has special powers granted by charter, other than those concerning the public good and government of its citizens, so that its officers' acts thereunder are the acts of agents, and not of public officers, the city may become liable; but not where the act is that of an officer in enforcing ordinances of social government, or a general law of the land."

In Whitfield v. City of Paris, 19 S. W. 566, decided by the supreme court of Texas, where a policeman appointed by the city to kill dogs, negligently and recklessly discharged his gun at a dog, and seriously injured the plaintiff, a demurrer to the petition was sustained, and the action of the lower court affirmed by the supreme court. The court said:

"The enactment of the ordinance referred to in the petition [an ordinance directing the killing of dogs by a policeman] was an exercise by the city of its police power. Its purpose was to secure the safety, health, and welfare of the public. The man whose act was complained of was not, therefore, a mere servant or employe, though the petition so denominates him. He occupied the attitude of a policeman engaged in the enforcement of an ordinance of the city. In such a case the maxim, 'respondeat superior,' does not apply. Where a city acts as the agent of the state, it becomes the representative of sovereignty. It is not acting in the management of its private or corporate concerns, but in the interest of the public, and as the guardian of the health, peace, convenience, and welfare of the public. Under such circumstances, it is not liable for the acts of its officers or employes engaged in the execution of its ordinances;" citing numerous cases.

In the case of O'Rourke v. City of Sioux Falls (S. D.) 54 N. W. 1044, a demurrer was sustained to a complaint setting out that plaintiff had suffered great personal injuries by the firing of a cannon in the streets of the city in violation of a city ordinance. The complaint alleged that the city had appointed and continued in office a careless, inefficient, and negligent police force; that, with the full knowledge on the part of the members of the common council that it was to be done, the police officers permitted said cannon to be fired in the street after dark, and at a time when it could not be discovered by travelers on the street. The court said:

"There are two kinds of duties imposed upon a municipal corporation, in respect to which there is a clear distinction: One is imposed for governmental purposes, and is discharged in the interest of the public; and the other arises from the grant of some special power, in the exercise of which the municipality acts as a legal individual. In the latter case, the power is not held or exercised by the municipality as or because it is one of the political subdivisions of the state, and for public governmental purposes, but as and because it is, as an individual might be, the grantee of such power for private purposes. In such case the municipality is on the same footing with a private grantee of the same power, and is, like him, liable for an injury caused by the improper use of such power. But where the power is conferred upon the municipality as one of the political divisions of the state, and conferred, not for any benefit to result therefrom to such municipality, but as a means in the exercise of the sovereign power for the benefit of the public, *the corporation is not answerable for nonfeasance or malfeasance by its public agents.*" Cases cited. (Underlining mine.)

Similarly, it has been held that a city is not responsible for the destruction of a building to stop the spread of fire (Correas v. San Francisco, 1 Cal. 452); that the city of New Orleans was not liable for the neglect of firemen in not extinguishing fires (Yule v. New Orleans, 25 La. Ann. 394); that a municipality is not responsible for neglecting to take precautions to prevent the spread of smallpox (Iowa Case; Field, Dam. p. 33, § 37). The cases cited are but a few of the adjudications on the subject, but they are amply sufficient to show that the distinction between the public and private duties and powers of municipal corporations is well established throughout the country.

But four cases have come under my observation in which actions have been brought against municipalities for loss of human life: Ritz v. City of Austin, 20 S. W. 1029–1031, in which the court of civil appeals of Texas held that a Texas statute which allows actual damages for the death of any person through the wrongful act, neglect, or default of "another" allows recovery only against natural

persons, and not against corporations; City of Atchison v. Twine, 9 Kan. 356; Dale Co. v. Gunter, 46 Ala. 118; and Luke v. Calhoun Co., 52 Ala. 115. The three cases last cited were brought under special statutes distinctly giving a right of action against a municipality or county for loss of life at the hands of a mob.

It is true, as Judge Dillon remarks, that it is sometimes difficult to determine whether a particular case comes under the operation of the governmental, or of the private, powers and duties of a municipal corporation. The difficulty naturally increases as particular cases approach nearer to the line which divides the two sets of powers and obligations. But the instant case presents no difficulty in that respect. It seems to me that it would be impossible to state an instance of public or governmental duty and power which would be plainer or more obvious than that which the instant case presents. I am perfectly clear that the duty, the nonperformance of which is here complained of, was a duty of sovereignty, transferred by the sovereign to the city of New Orleans, and that in its performance the city was merely the representative of the sovereign. I am equally clear that in the exercise of this governmental power the city officers, quoad their acts under that power, are virtually state functionaries, acting for and on behalf of the state. In my judgment, the same exemption as to liability exists in this case in favor of the city as would exist in favor of the state, if state officers, by the nonperformance of duty prescribed by a state law appertaining to the governmental powers and duties of the state, had been guilty of the nonfeasance here complained of.

It may be that there are cases of extreme hardship where no redress can be had because of the malfeasance or nonfeasance of the officers of a municipality in the exercise of its governmental powers. The law of Canute the Dane making the vills responsible for the homicides committed within their limits, and King Alfred's law making the inhabitants of the tithings free pledges to the king for all offenses committed in their districts, may have been wise laws. It may be that every one should have an interest in preventing violence, and maintaining the public peace. But these are considerations which address themselves exclusively to the lawmaker. The courts cannot legislate. They can but apply the law as they find it.

To summarize my conclusions:

1 Act No. 51 of 1855, providing that municipal corporations shall be liable for the destruction of "property" by mobs, does not sustain an action for the taking of human life.

2. The obligations of the city of New Orleans are of two kinds: The first consists of public or governmental duties; the second, of private or proprietary duties. As to the former the city is the representative of the sovereign, and enjoys the exemption of sovereignty from liability to suit. As to the latter, the city may be sued for tort, or on contract, as a private corporation might be sued.

3. The duty of the city, upon the nonperformance of which this action is founded, is a public, governmental duty.

Therefore, the exception of no cause of action must be sustained, and the cause dismissed.

STANDARD GASLIGHT CO. v. WOOD et al.

(Circuit Court of Appeals, Second Circuit. April 19, 1894.)

1. ASSUMPSIT—PLEADING—PERFORMANCE OF CONTRACT.
Where one has performed work in good faith, though not in the manner or within the time prescribed by the contract, and it has been accepted, he may recover its reasonable value under the common counts in assumpsit.

2. CONTRACTS—INTERPRETATION—CONDITIONS—PENALTIES.
Plaintiff contracted to do work for defendant, and complete it "by November 15th, under a penalty of $100 per day, provided you have foundation ready by June 15th." *Held*, that the completion of the foundation was a condition precedent, in default of which defendant could not claim the penalty as liquidated damages for plaintiff's delay.

3. APPEAL—REVIEW—HARMLESS ERROR.
In an action on a contract which embodied a penalty for delay in performance on plaintiff's part, the court ruled during the trial that defendant need not show actual damages arising from delay; and afterwards, in its charge, it called the jury's attention to the fact that no actual damage to defendant was shown. *Held*, that the error was without prejudice where defendant had admitted that it was impracticable to show actual damages.

In Error to the Circuit Court of the United States for the Southern District of New York.

Action by Richard Wood and others, constituting the firm of R. D. Wood & Co., against the Standard Gaslight Company. There was judgment for plaintiffs, and defendant brings error.

Delos McCurdy, for plaintiff in error.

Henry Galbraith Ward, for defendants in error.

Before LACOMBE and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. On April 11, 1891, the firm of R. D. Wood & Co., the defendants in error, made a written proposition to the Standard Gaslight Company, the plaintiff in error, to construct for it a gas holder, which proposition was accepted in writing on the same day. The portion of the contract which is important in the present case is as follows:

"We propose to deliver and erect on a foundation furnished by you, on your property on 131st and 132d Sts., west, a three-lift gas holder and steel tank, the holder to have a capacity of 2,000,000 C. F. General dimensions as follows: * * *. Specifications to be submitted for approval. Workmanship and materials to be of the best, and the entire work to be completed by Nov. 15th, 1891, under a penalty of $100 per day, provided you have foundation ready by June 15th, all complete, for the sum of one hundred and forty-nine ($149,000) thousand dollars, payable as follows: [Then follow the terms of payment.]"

The contractors entered upon the work, but it was not completed and accepted until February 16, 1892, or, in the opinion of the gas company, until February 27, 1892. The gas holder and tank were subsequently, and when the need for their use required, used by the company. R. D. Wood & Co. brought suit against the gaslight company in the circuit court for the southern district of New York to recover $52,293.06, the amount claimed to be due from it for work and material upon the structure.

The complaint alleged the proposition, its acceptance, and the construction of a gas holder and tank in conformity with the specifications laid down by the defendant, "all of which was done by the plaintiffs at the special instance and request of the defendant, and was completed and delivered by the plaintiffs to defendant, and accepted by the defendant." The complaint further alleged "that the work, labor, and service performed by the plaintiffs in and about the construction of the said gas tank were and are of the reasonable value of $149,000;" and further alleged an unpaid indebtedness of the amount which has been stated. The defendant, in its answer, admitted the construction of a gas holder and tank, but denied that it complied with the specifications, or that it was completed and accepted within the time required by the contract, or except subject to the penalties imposed for delay, or that it was worth $149,000, or that the sum of $52,293.06 was due. The answer also contained a counterclaim for $28,800, the amount of penalties incurred by the plaintiff as fixed by the contract for delay, and alleged that by reason of the plaintiffs' default its actual damages were the amount of $30,000, or thereabouts.

Under the issues as thus framed the plaintiffs offered evidence that the foundation which the defendant was to have ready by June 15th was not completed until August 5th; that, therefore, they were not able to complete the work by November 15th, and that it was compelled to be finished in the winter, and was subjected to consequent delays, but was finished in a reasonable time. To the evidence showing excuses for nonperformance of the agreement to complete the work by November 15th the defendant seasonably excepted. The testimony of the defendant was that its delay in completing the foundation was caused by the plaintiffs, and that it was substantially completed on June 15th. It was finally conceded that the plaintiffs substantially conformed to the specifications, that there was no claim for damages predicated upon defects in the character of the work, and that at some time the structure was accepted. The court charged the jury that the plaintiffs were entitled to the balance which they claimed, unless the defendant was entitled to recoup and reduce the amount of the plaintiffs' recovery because of the breaking of contract on their part to complete the structure by November 15th; and further charged that, if the defendant had performed the condition upon its part by having the foundation for this structure ready—ready within the meaning of the contract—on the 15th of June, then the defendants were entitled to recover by way of recoupment against the plaintiffs' claim at the rate of $100 per day for the number of days' delay which elapsed after the 15th day of November until the structure was really substantially completed; and submitted to the jury the question whether the foundation for the structure was ready on the 15th day of June, within the meaning of the contract, and that it was ready within such meaning if the defendant, having done everything within its own control towards completion, had been hindered by the default of the plaintiffs from entire completion. The court further charged that if the structure was not ready, through the

default of the defendants, the plaintiffs were entitled to the whole contract price; but, if the jury found that the defendant performed its obligation in having the foundation ready, within the spirit of the contract, by the 15th day of June, then they were to determine how many days ensued after the 15th day of November of delay in the completion of the work, and were to allow the defendant by way of recoupment $100 for every day. The court further charged that the defendant could be entitled to recover damages for unreasonable delay in completing the structure if damages had been shown, even though it appeared that the foundation was not ready on the 15th of June; but that, when the defendant relied upon the recovery of the $100 per day, then it must appear that the foundation was ready on June 15th. The defendant excepted to the charge that the condition in the contract in regard to the foundation was a condition precedent, and further excepted to the statement that no actual damage by reason of the nonfulfillment of the contract was proved, and called the attention of the judge to his remark during the progress of the trial that he should probably rule that the provision for $100 per day was to be treated as liquidated damages, and to his reply in the affirmative to the question of the defendant's counsel whether the court would rule that actual damages need not be proved. The jury returned a verdict for the full amount of the plaintiffs' claim.

The propositions upon which the exceptions of the plaintiff in error are founded are threefold. The first and second will be considered together: First, that no evidence in excuse for nonperformance of the agreement to complete the work on November 15th was admissible, because the complaint averred performance, and under such an averment evidence in excuse of nonperformance was not admissible. Second, that the provision of the contract which called upon the gas company to complete the foundation by June 15th was not an imperative condition precedent, and that the gas company was entitled to its liquidated damages for delay after November 15th.

The first objection proceeds from a misconception of the character of the complaint, which was in general assumpsit for the reasonable value of work which the defendant had accepted, and was framed in accordance with the rule of pleading stated in Dermott v. Jones, 2 Wall. 1, as follows:

"Where he [the plaintiff] has in good faith fulfilled, but not in the manner or not within the time prescribed by, the contract, and the other party has sanctioned or accepted the work, he may recover upon the common counts in indebitatus assumpsit. He must produce the contract upon the trial, and it will be applied as far as it can be traced; but if, by the fault of the defendant, the cost of the work or materials has been increased, in so far the jury will be warranted in departing from the contract prices. In such cases the defendant is entitled to recoup for the damages he may have sustained by the plaintiff's deviations from the contract, not induced by himself, both as to the manner and time of the performance."

The invalidity of the second exception, which relates to the construction of the contract, and to the obligations of the respective parties in case the contractors' promise to complete the work by

November 15th rested upon the completion of the foundation by June 15th, will be manifest by reference to authoritative decisions of comparatively recent date. The two promises were not concurrent, for the acts to be performed were not simultaneous. 2 Pars. Cont. c. 3, p. 189. The promise to complete on November 15th, and to pay $100 for each day's default thereafter, expressly hinged upon the gas company's completion of its part of the work by June 15th. When the condition upon which the promise depended was unperformed through the default of the gas company, the promise to complete by a certain day was no longer obligatory; but, if the contractors entered upon the work, they were under an obligation to finish within a reasonable time. The gas company had, by its default, waived or abandoned the right to call upon the contractors for strict performance as to time, who, if they entered forthwith upon the work, had the right to a reasonable time for performance. Dannat v. Fuller, 120 N. Y. 554, 24 N. E. 815; Mansfield v. Railroad Co., 102 N. Y. 205, 6 N. E. 386; Dermott v. Jones, 23 How. 220. The evidence on the part of the defendants in error, that, having been thrown over into the winter in consequence of the gas company's delay, they were delayed from prompt completion of the work by the inclemency of the weather, tended to show that they were complying with their duty as to time.

Third. The defendant says that if it was not entitled to liquidated damages it was entitled to prove that it had sustained actual damages for failure to furnish the tank within the limited time, and that it was deprived of an opportunity to do so by the interlocutory ruling of the court. It had a right to prove that it had sustained actual damages by unreasonable delay on the part of the contractors, and, if it was apparent that it had desired to offer such proof, but had refrained from the attempt by the ruling of the court, fairness would require that the opportunity to make such presentation should be afforded. But the record shows that it was in the opinion of the defendant absolutely impracticable for any person to ascertain what damages were suffered from the delay, and consequently it received no injury by reason of the quoted statement which was made by the court during the progress of the trial.

There is no error in the record, and the judgment of the circuit court is affirmed.

MUNDY et al. v. STEVENS.

(Circuit Court of Appeals, Third Circuit. January 23, 1894.)

No. 15.

1. PERFORMANCE OF CONTRACT—QUESTION FOR JURY.

A contract for the excavation of a harbor was sublet (February 2, 1892) under an agreement that the work would be performed "within the time fixed by said contract and the extensions thereof, granted or to be granted," and the further stipulation that the original contractor should have the right to proceed with the completion of the work if there should be a failure under the agreement to perform the contract so as to endanger a forfeiture. The time fixed by the contract for the performance of the work was extended from December 31, 1891, to June 30, 1892, and there-

after to July 31, 1892, and, finally, to December 31, 1892. Pending this final extension (August 16, 1892), the original contractor resumed possession of the work. *Held*, in an action on a bond given by the original contractor to secure payments under the agreement, that it could not be said, as matter of law, that the danger of forfeiture was so great as to justify resumption of the work by the original contractor.

2. ALTERATION OF CONTRACT—DISCHARGE OF SURETIES.
A contract for the excavation of a harbor having been sublet, it was agreed between the parties that the contractor should pay over all moneys received therefor from the government, and that the subcontractor should pay in return a stipulated sum in monthly installments for each yard excavated during the month, with the proviso that, if at this rate any installment fell below $9,000, the deficiency should be deducted from the next payment received from the government. *Held*, where a bond had been given by the contractor, that a subsequent reduction in the amount of the installments to 2½ cents per yard, and the elimination of the provision in relation to minimum payments released a surety who had no knowledge of the change in the agreement.

3. ACTION AGAINST SURETIES—PLEADING AND PROOF.
In an action against sureties on a bond given to secure performance of a contract, the defense of material alterations in the contract, operating to release the sureties, may be made (Pa. Proc. Act, May 25, 1887) under the plea of the general issue, and without previous notice.

4. SAME—BURDEN OF PROOF.
A surety who defends on the ground of an alteration in the contract operating to release him has not the burden of showing that such alteration was without his consent, when the plaintiff himself sets out the alteration in his statement of claim, and introduces it in evidence.

5. DISCHARGE OF SURETY—ALTERATION OF CONTRACT.
A surety who, as attorney in fact for one of the principals, executes a supplementary contract altering the original to his own prejudice as surety, will be presumed to consent to the alteration, and is therefore not discharged.

6. SAME.
When an alteration of a contract to the prejudice of the sureties is assented to by one of them, but not by the other, the one remains bound, but the other is discharged.

7. SAME—PRACTICE ON APPEAL.
In an action on a bond, one of the sureties claimed a release by reason of an alteration, and presented the question of praying an instruction in his favor. The court reserved the question, and a verdict was returned against all the defendants. The surety then moved for judgment in his favor, non obstante, but the motion was dismissed, and judgment entered against the defendants generally. On writ of error, the appellate court decided in the surety's favor. *Held*, that the proper practice was to reverse the judgment, with directions to allow plaintiff to enter a nolle prosequi against the surety, and then to enter judgment on the verdict against the other defendants.

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

This was an action upon a bond given to secure the performance of a contract, and was brought by C. Amory Stevens against James A. Mundy, Joseph Busch, and William B. Johns, doing business as James A. Mundy & Co., as principals, and John M. Sharp and Clarence Busch as sureties. There was a verdict and judgment for plaintiff against all the defendants, and they bring the case here on error.

The material facts were as follows: James A. Mundy & Co. had contracted with the United States to furnish the necessary plant and do the

work required for the improvement of the harbor of Philadelphia, and they were bound to remove 1,075,000 cubic yards of earth by December 31, 1891. At that date they had made but little progress, and they then secured an extension of time until June 30, 1892. In February, 1892, they sublet the work to plaintiff under the following contract:

"Agreement, made this second day of February, 1892, between C. Amory Stevens, party of the first part, and James A. Mundy & Company, consisting of James A. Mundy, Joseph Busch, and William B. Johns, parties of the second part.

"(1) The party of the first part agrees to furnish the necessary plant and do all the work required for the improvement of the harbor between Philadelphia and Camden, as described in the contract between the parties of the second part and Major C. W. Raymond, U. S. army, under date of April 23, 1891.

"(2) The party of the first part agrees to assume all the duties and obligations imposed by said contract upon the firm of James A. Mundy & Company, and to keep and perform all the undertakings, agreements, and covenants which said firm undertook to keep and perform under said contract.

"(3) The party of the first part further agrees to perform the work mentioned in said contract, and the modifications thereof made or to be made, in the manner and within the time fixed by said contract and the extensions thereof, granted or to be granted, and to save said firm of James A. Mundy & Company, and each of them, harmless from all loss or damage which might ensue to them by reason of any failure faithfully to perform said contract, resulting from the wrongful act or omission of said party of the first part or his representatives.

"(4) The parties of the second part agree to pay to the party of the first part for all work done by him hereunder, and as soon as the same is received from the war department by said parties of the second part, the same amount and prices for the work that the parties of the second part shall receive under their above-mentioned contract with the war department, to wit: First. Ten and seven-eighths (10⅞) cents per cubic yard, measured in the scows, for all material excavated, removed, and deposited at the place provided by the said James A. Mundy & Company, and approved by the engineer officer in charge for the entire improvement of the Philadelphia harbor approved by congress. Second. One dollar and ninety cents ($1.90) per lineal foot for piles and timber roofing or revetment removed. Third. Nine and a half (9½) cents per cubic yard, measured upon the scows, for all dredged material deposited and spread upon League island, this price to be in addition to the price per cubic yard paid under item one.

"(5) The parties of the second part will properly forward all applications for payments as soon as the same may be received from the party of the first part, and will make such reasonable requests and applications concerning the terms of said contract or modifications thereof as the party of the first part may suggest.

"(6) The party of the first part, in consideration of the premises, hereby agrees to pay to the parties of the second part the sum of one hundred and seventy-nine thousand dollars ($179,000) as follows: The parties of the second part shall be paid monthly, until the payment of all money becoming due to them under the provisions of this section, the sum of three cents per yard for all material dredged during the month, and if subsequent to June 30, 1892, any such monthly payment shall not amount to at least nine thousand dollars ($9,000), the parties of the second part may deduct from the next payment falling due the party of the first part thereafter, under the provisions of the fourth section hereof, such sum as shall bring the payment for such preceding month up to the said sum of $9,000. The unpaid part of such $9,000 shall draw interest at six (6) per cent. from the date on which it should have been paid until paid or deducted as aforesaid; but no action shall be brought by the parties of the second part against the party of the first part for any such deficit below $9,000 in a monthly payment, unless said party of the first part shall fail to perform the work under this contract, and the parties of the second part shall be thereby compelled to complete the work. Said sum of $179,000 shall be paid within eighteen (18) months from this date; $150,000 thereof shall, if practicable, be paid within one year from

this date, and, in case any part of said sum of $150,000 shall then remain unpaid, such part shall draw interest at six (6) per cent. from that date till payment.

"(7) Upon the completion of the work under the said contract with the war department, or whenever the war department shall make payment of its reservation, the said parties of the second part shall retain (and from the first portion of the reservation so paid) such amount of the reservation made by the war department under said contract as shall, at the date hereof, be due to the said parties of the second part for work already performed; but the said parties of the second part shall pay over to the said party of the first part all such portion of said reservation as shall be hereafter retained by the war department under its contract for work thereunder undertaken, and completed by the said party of the first part on and after the date of this contract.

"(8) The parties of the second part may receive from the government and retain the amount due for work done by them prior to the date of this agreement.

"(9) In case the party of the first part shall fail to perform this contract, so as to endanger the forfeiture of the contract with the war department, the parties of the second part shall have the right to proceed to the completion of the work in order to keep good their above-mentioned contract with the war department."

After the execution of this contract and the making of the bond sued on, the following supplemental contract was made:

"It is hereby mutually agreed by and between C. Amory Stevens, of the first part, and James A. Mundy, Joseph Busch, and William B. Johns, copartners trading under the name of James A. Mundy & Co., parties of the second part, as follows: The sixth section or paragraph of the agreement for the performance of the work of dredging Philadelphia harbor, made and entered into by and between the parties hereto, and dated the second day of February, 1892, is hereby wholly canceled and revoked, and the following is hereby substituted as and for the said sixth section or paragraph of said contract, and the whole thereof, to wit: '(6) The party of the first part, in consideration of the premises, hereby agrees to pay to the parties of the second part the sum of one hundred and seventy-nine thousand dollars ($179,000) as follows: The parties of the second part shall be paid monthly, until the payment of all money becoming due to them under the provisions of this section, the sum of two and one-half cents per cubic yard for all material dredged during the month.' All the other terms and provisions of said contract of February second shall remain in full force and virtue.

"Sealed with our seals and dated this —— day of June, 1892.

"Witness:

"N. H. Rand.	Jas. A. Mundy.	[L. S.]
"N. H. Rand.	Wm. B. Johns.	[L. S.]
"N. H. Rand.	Jos. Busch, "Per C. M. Busch, Atty.	[L. S.]
"N. H. Rand.	C. Amory Stevens.	[L. S.]"

The bond sued on was as follows:

"Know all men by these presents that we, James A. Mundy, Joseph Busch, and William B. Johns, composing the firm of James A. Mundy & Company, as principals, and John M. Sharp and Clarence M. Busch, as sureties, are held and firmly bound unto C. Amory Stevens in the penal sum of two hundred and fifty thousand dollars ($250,000), lawful money of the United States of America, to be paid to the said C. Amory Stevens, his executors, administrators, or assigns, for which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, firmly by these presents.

"Sealed with our seals. Dated the second day of February, one thousand eight hundred and ninety-two.

"The conditions of the above obligation are such that if the above-bounden James A. Mundy, Joseph Busch, and William B. Johns, composing the firm of James A. Mundy & Company, their heirs, executors, or administrators, shall well and truly pay or cause to be paid unto the above-named C. Amory Stevens, his executors, administrators, or assigns, immediately upon the receipt thereof by them from the department of war of the Unit-

ed States of America, all and every sum or sums of money paid the said firm of James A. Mundy & Company by the said department of war for work of any nature whatsoever performed or done by the said James A. Mundy & Company or the said C. Amory Stevens, under and by virtue of an agreement for the improvement of Philadelphia harbor, made by and between the said firm of James A. Mundy & Company and the department of war of the United States of America, and dated the 21st day of April, 1891, as provided in the agreement of even date herewith by and between the said James A. Mundy, Joseph Busch, and William B. Johns, composing the firm of James A. Mundy & Company, and the said C. Amory Stevens; and, further, if the above-bounden James A. Mundy, Joseph Busch, and William B. Johns, composing the firm of James A. Mundy & Company,—in the event that the said department of war of the United States of America, or the representatives of the government of the United States of America, shall, by reason or on account of the execution of the said agreement between the said James A. Mundy, Joseph Busch, and William B. Johns, composing the firm of James A. Mundy & Company, and C. Amory Stevens, of even date herewith, and the rights and privileges acquired by the said C. Amory Stevens thereunder, or by reason of any act, omission, or negligence on the part of the said James A. Mundy, Joseph Busch, and William B. Johns, or the said firm of James A. Mundy & Company, during the existence of said agreements, or either of them, declare the said agreement between the department of war of the United States of America and the said James A. Mundy & Company for the improvement of Philadelphia harbor, dated the 21st day of April, 1891, forfeited or annulled, or shall take any proceedings to forfeit or annul said contract,—shall, immediately upon such agreement being declared forfeited, or proceedings thereunder so taken by said department, well and truly pay or cause to be paid unto the said C. Amory Stevens, his executors, administrators, or assigns, the sum of one hundred and seventy-nine thousand dollars ($179,000), or so much thereof as shall then have been paid unto the said James A. Mundy, Joseph Busch, and William B. Johns, in the manner and as provided for in the said agreement between the said James A. Mundy, Joseph Busch, and William B. Johns, and the said C. Amory Stevens, of even date herewith: Then, and in the event of all the aforesaid conditions being fully carried out and complied with, the above obligation to be void; otherwise, to remain in full force and virtue.

James A. Mundy. [L. S.]
"William B. Johns,
"By John M. Sharp, Atty. [L. S.]
"Joseph Busch,
"By C. M. Busch, Atty. [L. S.]
"John M. Sharp, [L. S.]
"C. M. Busch. [L. S.]

"Sealed and delivered in the presence of
"Edward Kent."

The plaintiff, Stevens, after entering upon the work under his contract, made but slow progress, and, on the expiration of the extended time, only about one-third of the required excavation had been made. Another extension, until July 31, 1892, was then procured, at the end of which time a final extension was granted by the government, until December 31, 1892. The evidence tended to show that, in the latter part of July, work was stopped by the plaintiff, but was begun again early in August, and that Mundy & Co. were then in default for payments. On August 16th they took possession of the plant, and put an end to their contract with plaintiff. The suit is brought to recover payments alleged to have become due at that time.

George L. Crawford, for plaintiffs in error.

John G. Johnson and Henry N. Paul, for defendant in error.

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

ACHESON, Circuit Judge. In treating this case, we will consider, first, the seventh assignment of error, which is based upon the following exception, namely:

"Counsel for defendants except to so much of the charge as states that the verdict should be for the plaintiff unless the jury find that the defendants believed, on August 16, that the plaintiff would not finish the work by January 1."

This was the only exception to the charge, which was very full,—covering every branch of the case. The exception, it will be perceived, does not quote any part of the charge, but goes only to the supposed general effect thereof in the one particular mentioned. It rests upon the following clause of the agreement of February 2, 1892, between Stevens (party of the first part) and Mundy & Co. (parties of the second part):

"(9) In case the party of the first part shall fail to perform this contract, so as to endanger the forfeiture of the contract with the war department, the parties of the second part shall have the right to proceed to the completion of the work, in order to keep good their above-mentioned contract with the war department."

The defendants below (the plaintiffs in error) did not ask the court to give the jury any special instructions with reference to this provision of the contract or its bearing upon the pending controversy. So far as the record shows, they did not present their views upon that subject to the court otherwise than by the brief and vague exception above quoted. Here, as the case is presented in the printed argument, two points are made, namely:

"(1) The real question was, had Stevens, August 16, 1892, endangered the forfeiture of the contract, the judge's charge rather conceding this, and treating it as waived? (2) The evidence is conclusive, requiring the court to say, as matter of law, that Stevens had then so endangered forfeiture as to justify Mundy & Co. resuming the plant under the contract."

But we think it would have been plain error had the court so instructed the jury. The contract of February 2, 1892, whereby Stevens agreed to perform the work which Mundy & Co. had undertaken to do by their contract with the United States government, expressly provided that Stevens was to do the work "within the times fixed by said contract and the extensions thereof, granted or to be granted." It is, then, very clear that Stevens was entitled to the benefit of the extension of the time of performance until January 1, 1893, which the government had granted in the first week of August, 1892. Hence Mundy & Co. had no right to oust Stevens at the very beginning of the extended time without good reason shown. The case, therefore, was not one for peremptory instructions. Whether Mundy & Co. had justifiable cause for taking possession of the plant and work on August 16th was submitted to the jury for their determination, the question being presented to them in two aspects. First, however, the jury were instructed that if, prior to that date, there had been an absolute or substantial failure by Stevens to comply with his contract, he was not entitled to recover anything, and whether he had so failed was referred to the jury. Then the charge proceeded thus:

"The defendants further assert [and thus we approach the real subject of controversy between these parties, in the judgment of the court] that the plaintiff absolutely abandoned the work, voluntarily, in August; and that, even if he did not, he was then so far behind in its performance that he could not have completed it by the end of the year, when the government re-

quired it to be completed, or, at least, that they were justified by past and existing circumstances in believing that he would not so complete it within the time. Herein is embraced the substance of the defense."

Now it is to be observed that the defendants below took no specific exception to this portion of the charge as misstating the real subject-matter of controversy or unduly narrowing the issues.

The court next proceeded to submit to the jury the question whether Stevens, the plaintiff, had abandoned the work when the defendants Mundy & Co. took possession, with instructions that, if they so found, the plaintiff could not recover. Finally, the court submitted to the jury the question whether the plaintiff was so far behind in his work on August 16th that Mundy & Co. were justified in believing that he would not complete the work by the end of the year. Here the court said:

"The only serious source of danger to the contract at the time referred to was from failure to complete the work by the end of the year. The efforts of the engineer in charge were intended principally, as it would seem from past experience, to hasten the work. I repeat that the only real source of danger was involved in the question whether the plaintiff would complete the work within the period named. If you find from the evidence that Mundy & Co. were justified in believing, from all the circumstances, that the plaintiff would not complete it within the year, then they were justified in turning him out, and resuming the work themselves; otherwise, they were not."

And the jury were further instructed that all the circumstances existing at the time the plant was seized by the defendants, and all past experience respecting the work,—the plaintiff's prior failures and his conduct,—were to be taken into account in determining the question whether or not the defendants were justified in believing that the plaintiff would not finish the work by the last of the year, and that if they so believed, or were justified in so believing, they were justified in turning the plaintiff out, and he could not recover. We are not convinced that the defendants below had any right to complain of the manner in which the case was submitted to the jury. From our examination of the evidence, we do not discover that on August 16, 1892, there was any real danger of the forfeiture of Mundy & Co.'s contract with the government other than from the possible failure to complete the work within the extended time. By the extension in August, presumably, the government had waived past delinquencies. Moreover, the uncontradicted testimony is that the extension was unconditional,—not dependent upon an increase of the plant. Our conclusion, then, is that the seventh assignment of error is without substantial merit, and, accordingly, it is overruled.

All the other assignments of error relate to the liability of the sureties in the bond of February 2, 1892, and they will be considered together. The bond was conditioned for the payment to Stevens by Mundy & Co. of all moneys received by them for work done under the contract with the government, "as provided in the agreement of even date herewith" between Mundy & Co. and Stevens. Turning to that agreement, we find that, by the fourth paragraph thereof, Mundy & Co. (parties of the second part) bound themselves to pay to Stevens (party of the first part) the contract price for all work done

by him as the moneys therefor were received by them from the government. The sixth paragraph of this agreement bound Stevens to pay to Mundy & Co. the consideration or sum of $179,000, as follows:

"The parties of the second part shall be paid monthly, until the payment of all money becoming due to them under the provisions of this section, the sum of three cents per yard for all material dredged during the month, and if subsequent to June 30, 1892, any such monthly payment shall not amount to at least nine thousand dollars ($9,000), the parties of the second part may deduct from the next payment falling due the party of the first part thereafter, under the provisions of the fourth section hereof, such sum as shall bring the payment for such preceding month up to the said sum of $9,000. The unpaid part of such $9,000 shall draw interest at six (6) per cent. from the date on which it should have been paid until paid or deducted as aforesaid; but no action shall be brought by the parties of the second part against the party of the first part for any such deficit below $9,000 in a monthly payment, unless said party of the first part shall fail to perform the work under this contract, and the parties of the second part shall be thereby compelled to complete the work. Said sum of $179,000 shall be paid within eighteen (18) months from this date; $150,000 thereof shall, if practicable, be paid within one year from this date, and in case any part of said sum of $150,000 shall then remain unpaid, such unpaid part shall draw interest at six (6) per cent. from that date till payment."

In the month of June, 1892, Stevens and Mundy & Co. entered into a supplementary agreement, whereby the sixth paragraph of the agreement of February 2, 1892, was canceled and revoked, and the following section was substituted therefor:

"(6) The party of the first part, in consideration of the premises, hereby agrees to pay to the parties of the second part the sum of one hundred and seventy-nine thousand dollars ($179,000) as follows: The parties of the second part shall be paid monthly, until the payment of all money becoming due to them under the provision of this section, the sum of two and one-half cents per cubic yard for all material dredged during the month"

Was this change material to the sureties? We are constrained to hold that it was. True, the bond is not conditioned for the performance generally by Mundy & Co. of their stipulations. Yet the payments to Stevens, for which the bond is conditioned, were to be made "as provided in the agreement," and the fourth and sixth paragraphs thereof are so related to each other that, with reference to the obligation which the sureties assumed, they must be read together. Now, the latter paragraph secured to Mundy & Co., after the month of July, 1892, the right to a monthly deduction of not less than $9,000 from the payments to be made by them to Stevens under the fourth paragraph. The benefit of this provision undoubtedly inured to the sureties, and without their concurrence they could not be deprived of this right of defalcation. Navigation Co. v. Rolt, 6 C. B. (N. S.) 550; Calvert v. Dock Co., 2 Keen, 638, 639; Bragg v. Shain, 49 Cal. 131; Dundas v. Sterling, 4 Pa. St. 73. The June agreement, however, did not merely reduce the rate of payment to Mundy & Co., but altogether canceled the provision securing a minimum monthly deduction of $9,000 from the payments to Stevens. That the position of the sureties was thus altered to their prejudice seems to us an unavoidable conclusion. Indeed, it materially affected their liability with respect to the identical fund (the August payment by the government), which is the subject-matter of this suit.

These views are not inconsistent with our rulings in Harper v. Insurance Co., 5 C. C. A. 505, 56 Fed. 281. The agreement there did not appropriate the agent's commissions to the payment of his indebtedness, and the creditor was under no sort of obligation to compel the agent to make such application. The insurance company, at its pleasure, might have required the agent to account for and pay over his commissions in excess of a certain monthly sum, but it had not engaged to do so, and owed no duty in that regard to the surety. The new schedule of commissions was no departure from the contract with the surety, and in no wise altered his position.

The point made by the defendant in error that the sureties could not in the court below raise the defense based on the change of the contract without previous notice thereof is not sustainable. No rule of court requiring such notice has been brought to our attention, and by the Pennsylvania procedure act of May 25, 1887 (P. L. 271), the defense was permissible under the plea of the general issue, and, indeed, a special plea setting it up was not allowable. Nor can we assent to the proposition that the burden of proof was upon the sureties to show that the alteration of the agreement of February 2, 1892, was without their consent. The cases cited in support of this position are inapplicable, for the sureties here were not the actors. The plaintiff set forth the supplementary agreement of June, 1892, in his statement of claim,—made it part of his case, and introduced it in evidence. The burden of proof, therefore, was upon him. Whart. Ev. § 357. We are unable to find in this record any evidence tending to show that John M. Sharp assented to, or even had knowledge of, the alteration of the agreement. This defense, then, avails him. But as respects the other surety, Clarence M. Busch, the case is different. It appears that he signed the supplementary agreement of June, 1892,—acting, it is true, as attorney in fact of one of the principals,—thus, "Joseph Busch, per C. M. Busch, Attorney." That he had full knowledge of the alteration is indisputable. Is he in any position to say that the alteration was without his assent, and, hence, that he is equitably absolved from his liability as surety upon the bond in suit? There is no evidence that he personally objected to the change. This, indeed, is not pretended. He gave no sign of dissatisfaction. The case, however, is not one of simple acquiescence. Clarence M. Busch was not merely passive. He took an active part in making the change in the contract. Without his co-operation the paper of June, 1892, would have been ineffective. He gave it validity. Surely, then, complaint in his mouth is out of place. Can he, under all the circumstances, fairly claim the benefit of the principle that an alteration of a contract without the surety's concurrence discharges him? In Edwards v. Coleman, 6 T. B. Mon. 567, cited by the plaintiffs in error, the surety signed as a mere witness. Moreover, at the time he was told that he was discharged, and with that understanding he attested the instrument. This case is essentially different. Here the surety joined in bringing about the change of which he now seeks to take advantage. His defense is absolutely devoid of merit. In Woodcock v. Railway Co., 1 Drew. 521, it was held that sureties were not released by an alteration in the

terms of the contract, where, as the solicitors of the principal debtors, they had knowledge of the transactions upon which they relied for their discharge, and assisted in the preparation of the instruments for carrying into effect the arrangements of which they complained. The evidence of assent is much stronger here. The surety Busch had knowledge of the proposed change, and participated in effecting it, actually executing the instrument whereby it was consummated. These facts, in the absence of any counteractive circumstance, well warrant the implication of the surety's concurrence in the change. The inference is reasonable and just.

The situation, then, is this: One of the two sureties assented to the alteration of the contract; the other did not. In this state of affairs, the nonassenting surety is discharged, but the other remains bound as before. Wolf v. Fink, 1 Pa. St. 435; Crosby v. Wyatt, 10 N. H. 318. The assenting surety, in such case, in effect agrees that he will stand as surety for the whole liability, and that his cosurety shall be released. Id. Where one of the several defendants sued upon a joint contract sets up a defense personal to himself, the approved practice is to allow a nolle prosequi as to that particular defendant, and to proceed against the others by verdict or judgment after the verdict, as the case may be. Minor v. Bank, 1 Pet. 46; Kurtz v. Becker, 5 Cranch, C. C. 671, Fed. Cas. No. 7,951; Commonwealth v. Nesbitt, 2 Pa. St. 16; Freedly v. Mitchell, Id. 100; Woodward v. Newhall, 1 Pick. 500; Burke v. Noble, 48 Pa. St. 168. In the court below the question of the discharge of the defendant Sharp was raised by prayers for instructions for a verdict in his favor. The court reserved the question of law involved, and a verdict against all the defendants was rendered. After verdict, Sharp moved for judgment in his favor, non obstante veredicto, which motion was dismissed, and judgment on the verdict entered against the defendants generally. In this state of the record the proper course, it seems to us, to pursue is to reverse the judgment, and remand the cause for further proceedings in conformity with the views expressed in this opinion. Accordingly, the judgment is reversed, and the cause is remanded to the circuit court, with directions to allow the plaintiff to enter a nolle prosequi as to the defendant John M. Sharp, and thereupon to enter judgment on the verdict against the other defendants.

Sur Motions to Amend the Reversing and Remanding Order.

PER CURIAM. 1. The motion made by the plaintiff in error to amend our remanding order is denied, for reasons appearing in the opinion of the court heretofore filed.

2. Without meaning to intimate a doubt as to the right of the court, in the exercise of a sound discretion, to enter the judgment which the defendant in error now moves for, we must deny the application, for we are not satisfied that it would be proper for us to enter such a judgment, under all the circumstances of the case. We therefore adhere to our order reversing the joint judgment and remanding the cause for further proceedings in conformity with our conclusions.

KNIGHT v. INTERNATIONAL & G. N. RY. CO. et al.

(Circuit Court of Appeals, Fifth Circuit. April 10, 1894.)

No. 116.

1. REMOVAL OF CAUSES—TIME OF APPLICATION—REVIEW.
It is too late, on appeal, to raise the question that the application upon which the cause was removed from the state to the federal court was not made in time.

2. FALSE IMPRISONMENT—WHAT CONSTITUTES.
Defendant procured, from a judge having jurisdiction, a warrant for plaintiff's arrest, which was directed to the sheriff of any county in the state. It was delivered to the sheriff of S. county, who arrested plaintiff outside of his county, and took him to a third county, to be identified, before bringing him to S. county. *Held*, that there was no trespass for which defendant could be held liable in an action for false imprisonment.

3. MALICIOUS PROSECUTION—PROBABLE CAUSE—CONVICTION.
In an action for malicious prosecution, the conviction of plaintiff upon the charge complained of is prima facie evidence of probable cause for the prosecution, notwithstanding a new trial was granted, and a nolle subsequently entered by the state.

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

This was an action for malicious prosecution, brought by John Knight against the International & Great Northern Railway Company and the Missouri Pacific Railway Company, in which there was judgment for defendants, and plaintiff brings error.

Charles C. Leverett, for plaintiff in error.

Baker, Botts, Baker & Lovett, James Hagerman, and Farrar, Jonas & Kruttschnitt, for defendants in error.

Before PARDEE and McCORMICK, Circuit Judges.

PARDEE, Circuit Judge. The facts of this case appear to be that on January 19, 1885, in the nighttime, Robert Frazier, a conductor in charge of a passenger train of the International & Great Northern Railway Company, was murdered in Smith county, Tex., near Overton, in Rusk county, Tex. At Overton two men got on the forward end of the baggage car. One Hamp Riley, the porter of the train, saw them getting on, and went forward, and ordered them off. They each drew pistols, and refused to get off, whereupon Riley went back, and informed Ed. C. Powers, a brakeman. Both Riley and Powers then went forward to where the men were, and told them they would have to get off. The men refused to do so, pulled weapons, and threatened to shoot, whereupon Robert Frazier, the conductor, was informed, who then opened the door of the baggage car and stepped out on the platform where the two men were. The latter opened fire, shooting Frazier, who fell on the platform, and thence off into a ditch, dying of his wounds the next day. At the time of the shooting Powers was standing in the baggage car, just back of Frazier, and he received bullet wounds which, at the time, were considered fatal, but from which he subsequently recovered. Thomas Furlong, a special agent of the Missouri Pacific Railway

Company, proceeded to the scene of the murder, and, learning that suspicion strongly pointed to John Knight and John Price, who, besides, were more or less identified by the porter, Hamp Riley, went to Tyler, Smith county, Tex., and procured from the judge of the county court of that county a warrant for the arrest of Price and Knight, which was placed in the hands of one Clinkscales, sheriff of Smith county, for service. Clinkscales, with one regular deputy and Phil Wagner, M. McCabe, and Furlong, employes of the railroad company, whom he deputized, went to Overton, Rusk county, Tex., and arrested Price and Knight, and took them thence to Ft. Worth, Tex., (where Powers was in the hospital), for further identification. Powers identified both Price and Knight as the men who shot Frazier and himself. After the identification by Powers, both Price and Knight were carried to Smith county, and lodged in jail. Both were subsequently indicted for the murder of Frazier by the grand jury of Smith county. Price died before the trial. The railroad companies employed counsel to assist in the prosecution of Knight. Knight was tried on the indictment, and by a jury was found guilty, and was convicted of murder in the second degree; his punishment being fixed by the jury at 10 years in the penitentiary. Thereafter the court set aside the verdict, for a reason not apparent of record, and subsequently a nolle prosequi was entered in his case. After the end of the case in the court of Smith county, Knight instituted suit in the district court of Rusk county, Tex., against the International & Great Northern Railway Company, a corporation under the laws of the state of Texas, and the Missouri Pacific Railway Company, a corporation under the laws of the state of Missouri, for damages for false imprisonment and malicious prosecution in the gross sum of $75,000. Exactly when the said suit was instituted the record does not show. On the 29th of June, 1889, the Missouri Pacific Railway Company filed a petition in the district court of Rusk county to remove the said cause to the circuit court of the United States for the eastern district of Texas on the ground of prejudice and local influence, and on the same day filed in the circuit court for the eastern district of Texas a petition, affidavit, and bond to the same purport. Thereafter, on the 5th day of July, 1889, the state court, by order, directed the removal of the case, and the transcript was accordingly filed in the circuit court. On the 28th of the February following, the plaintiff made a motion in the circuit court to remand the said cause on various grounds, which motion was subsequently amended January 11, 1892, after the lapse of several terms, during which the case was continued, so as to show the following reasons: (1) That the petition for removal is unsupported by any proof that there exists in Rusk county, Tex., prejudice or local influence, and because the existence of prejudice and local influence is not sufficiently shown. (2) Because the record shows that this is not a suit wholly between citizens of different states. (3) Because the petition fails to show the citizenship of all the parties to the suit. (4) Because the affidavit in support of the petition for removal does not appear to have been made by authority. (5) Because the record shows a suit wherein the two defendants, the Missouri Pacific Rail-

way Company and the International & Great Northern Railway Company, are sued jointly, and there is no separate controversy between citizens of different states. This motion to remand was overruled on January 11, 1892. Thereafter the case was put at issue, and tried in the circuit court. The amended original petition of the plaintiff sets forth his case in detail, therein alleging the facts hereinbefore recited; charging that the affidavit on which he was arrested and held was false; that the arrest was willful, malicious, and oppressive, and wholly without probable cause, and was illegal, and wholly without warrant of law, and was a wanton disregard of plaintiff's rights; that the imprisonment was illegal, and wholly without warrant of law, and wholly without probable cause, and made with malicious intent to vex, harass, mortify, and humiliate the plaintiff, and all of which the defendants well knew, to his damage, for which he claims vindictive damages in the sum of $25,000. In the second cause of action, which was for $50,000, for malicious prosecution, he charges, among other things, that the prosecution was wholly without probable cause, all of which defendants knew all the while; that the defendants pressed the prosecution against the plaintiff with all the possible vigor and power that money and means could command; that to insure the success of their diabolical plans to rob this plaintiff of his life by convicting him of the murder of said Frazier the defendants employed the ablest attorneys in the land to assist the state's attorney in the prosecution; that in their endeavor to convict the plaintiff on the charge of murder they brought to bear against him the whole power of the criminal courts of the country, and to convict the plaintiff on the charge of murder the defendants and their agents and detectives attempted to bribe witnesses to swear against the plaintiff; that the defendants, their agents and detectives, well knew at and before the beginning of said prosecution that the plaintiff was innocent of said charge of murder brought against him, and all the evidence showed conclusively that the plaintiff was not guilty of the murder of Frazier; that the defendants, with their hired and manufactured testimony, and with the assistance of attorneys, succeeded in securing a conviction against the plaintiff for murder in the second degree, with punishment of 10 years in the penitentiary, which judgment and conviction were afterwards set aside and vacated, etc. On the trial of the case, evidence was introduced by each side to maintain the respective issues, but no evidence was introduced of any kind tending to show that the conviction of the plaintiff in the district court of Smith county was obtained by fraud, false or perjured evidence, or by any unfair means whatever. During the trial some exceptions were taken to evidence as improperly admitted, and the plaintiff requested the court to give several favorable charges, which were refused. At the close of the evidence the judge instructed the jury as follows:

"That, as plaintiff admitted he was arrested on complaint as charged in the petition, was thereafter indicted by the grand jury of Smith county, state of Texas, and in final trial by a petit jury of said county was convicted of murder in the second degree, and his punishment fixed at ten years in the penitentiary, and thereafter he was granted a new trial, and subsequently the prosecution was dismissed, that said conviction was prima facie evidence

of probable cause; and, plaintiff having failed to introduce any evidence proving or tending to prove that said conviction was procured by fraud, false evidence, or any unfair means, that said conviction, under this state of facts, was, as a matter of law, probable cause; and to return a verdict for the defendants."

From a verdict for the defendant in accordance with this last instruction, plaintiff prosecutes this writ of error, assigning numerous grounds of error in relation to the improper admission of evidence and refusals of the court to charge the jury as requested, not necessary to recapitulate.

In this court the plaintiff makes a motion for the reversal of the judgment below, remanding the cause to the circuit court with instructions to remand it to the state court, because, he says:

"This court has no jurisdiction to try this case, because the circuit court had acquired no jurisdiction of said cause, for the following reasons: This cause was originally filed in the district court of Rusk county, Texas, in February or March of 1888, and defendants filed their answer on June 30, 1888, and that at the regular term in July, 1888, defendants suffered the case to be continued till the January term of 1889, at which term the plaintiff filed his amended petition; and again, defendants suffered the case to be continued to the July term of 1889 of said court, at which July term the defendants presented the application for removal to the circuit court for the eastern district of Texas, at Tyler, and at said July term of 1889 the order for removal was made; and, further, that under the law of Texas two regular terms of the district court are held in each year in Rusk county, to wit, on the first Mondays in January and July; that the record shows that the defendants failed to present their application for removal at the first term of the district court at Rusk county, to wit, the first Monday in January, 1888, at which term they were required to answer, and because of defendants' failure to present their application for removal at the proper time the jurisdiction of the district court of Rusk county became final and conclusive upon the circuit court, so far as the right of removal existed, if any such right existed in this case, and the circuit court could not acquire jurisdiction of this cause; wherefore," etc.

This ground for remanding the cause seems to be based upon facts which do not wholly appear of record; but, taking the facts as alleged in the motion to be true, we are of the opinion that the motion comes too late, irrespective of the question whether or not the removal from the state court, being before any trial of the case, and being on the ground of local prejudice, was in time. No such question was made in the circuit court. The matter of time in removal is not jurisdictional, and objection thereto can be waived, and is waived when not urged in time. This is settled by the supreme court of the United States in the case of Gerling v. Railroad Co. (decided Feb. 5, 1894; not yet officially reported) 14 Sup. Ct. 533.

From the view that we take of the case, it is unnecessary to consider the assignment of errors in detail, because, as the case was presented, no other judgment could have been properly rendered in the circuit court than the one actually rendered. The case does not appear to have been tried as one for damages for false imprisonment. The plaintiff made no request to the court to charge the jury upon the law with regard to false imprisonment, and one examining the record would conclude that the count for false imprisonment was practically abandoned. However that may be, the plaintiff, in his petition, shows that he was arrested under a warrant directed to

the sheriff of any county of the state, and issued by a judge having jurisdiction. The undisputed proof shows that the warrant for the arrest of the plaintiff was delivered by the judge issuing the same to Clinkscales, who was sheriff, and who executed the warrant. When the warrant was delivered to the sheriff of Smith county, he crossed the county line into Rusk county, and arrested the plaintiff, and brought him by way of Ft. Worth to Smith county, where he was subsequently indicted and held for trial. The only trespass, therefore, of which the plaintiff could in any view complain was the act of the sheriff in arresting him outside of his bailiwick, and in carrying the plaintiff to Ft. Worth. Carrying the plaintiff to Ft. Worth for the purpose of confronting him with Powers, then and there in the hospital, was in the interest of justice, and in the interest of the plaintiff himself, if he was innocent; for which it does not appear that the defendants can in any way be held responsible.

As to the second cause of action, the authorities are well settled that the question of probable cause in an action for malicious prosecution is one of law, to be determined by the court. Stewart v. Sonneborn, 98 U. S. 187, and cases there cited. The finding of an indictment by the grand jury, and the conviction by a petit jury on such indictment, although a new trial was thereafter granted, was prima facie evidence of the existence of probable cause, and, in the absence of countervailing evidence, warranted the court in giving the instruction to find for the defendants upon that ground. Cooley, Torts, 214; Whitney v. Peckham, 15 Mass. 243; Bacon v. Towne, 4 Cush. 217; Cloon v. Gerry, 13 Gray, 201; Hil. Torts, 457. The indictment by the grand jury and the conviction by the petit jury were admitted by the plaintiff; and while, in his petition, he charges that the same were procured by improper means, and upon false evidence, he offers not a particle of proof to show the same.

The judgment of the circuit court is affirmed.

GOLDBERG et al. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. April 19, 1894.)

CUSTOMS DUTIES—CLASSIFICATION—"JET TRIMMINGS."

Hat trimmings and ornaments composed of black glass and wire, the glass being the component of chief value, and made in imitation of jet, are dutiable, under the act of October 1, 1890, at 60 per cent., as "manufactures of glass" (paragraph 108); and the fact that they are commercially known as "jet trimmings" and "jet goods" does not authorize their classification as "manufactures of jet" (paragraph 459). 56 Fed. 818, affirmed.

Appeal by Goldberg & Co. from the decision of the circuit court for the southern district of New York, which affirmed the decision of the board of general appraisers as to the classification of sundry importations of hat trimmings and ornaments.

Edwin B. Smith, for appellants.

James T. Van Rensselaer, Asst. U. S. Dist. Atty.

Before WALLACE and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. In the years 1891 and 1892 the appellants imported into the port of New York sundry invoices of articles styled "manufactures of jet," which were hat trimmings and ornaments composed of black glass and wire; the glass being the component material of chief value, and made in imitation of jet. Jet is a well-known article, and is defined to be "a variety of lignite, of a very compact texture, and velvet-black color, susceptible of a good polish, and often wrought into toys, buttons, mourning jewels, and the like." Webst. Dict. 1884. The most important jet veins are said, by the authorities upon the subject, to be near Whitby, in Yorkshire, England. The collector classified the merchandise as manufactures of glass, and dutiable at 60 per cent. ad valorem, under paragraph 108 of the tariff act of October 1, 1890. The part of the paragraph which is important in this case is as follows:

"All other manufactures of glass, or of which glass shall be the component material of chief value, not specially provided for in this act, sixty per centum, ad valorem."

The importers protested against this classification, upon the ground that the goods were dutiable under the provisions of paragraph 459 of the same act, which is as follows:

"Manufactures of alabaster, * * * jet, * * * or of which these substances, or either of them, is the component material of chief value, not specially provided for in this act, twenty-five per centum ad valorem."

The question of fact in controversy before the board related to the commercial designation of the articles. The witnesses upon the opposite sides of this controversy, respectively, testified that they were commercially known as "jet goods, jet ornaments, and jet trimmings," or that they were known in trade as "imitation jet goods." The board, without considering the preponderance of evidence, found that "the merchandise is commercially known as 'jet and imitation jet articles,'" and further found that they were manufactures of glass, and were not manufactures of jet, and affirmed the action of the collector. The circuit court sustained the decision of the board. The appellants insist that the testimony clearly shows that the articles in question were universally known in trade and commerce at and prior to October 1, 1890, the date when the act imposing the duty was passed, as "jet goods," or "jet trimmings," and we are of opinion that they were thus generally so styled in the language of commerce. We are also of opinion, however, that this fact does not control the proper classification of these articles, in view of the other provisions respecting jet and its manufactures in the existing tariff act and its predecessors. Unmanufactured jet is upon the free list of the tariff act of October 1, 1890 (paragraph 620), and has been free of duty since the tariff act of July 14, 1870. The jet of the free list is obviously a real jet, and not the black glass from which the dress or hat trimmings in question are made. The existing act makes dutiable manufactures of jet, and in so doing has changed the phraseology of the pre-existing tariff act of March 3, 1883, which imposed a duty upon "jet, manufactures and imitations of." The same provision was contained in the Revised Stat-

utes, and first appeared in the tariff act of July 30, 1846. Thus, in the act of October 1, 1890, the provision which had long previously existed in regard to manufactures of imitations of jet was dropped, and manufactures of jet were left specifically provided for. This history enforces the correctness of Judge Lacombe's conclusion in the circuit court that "the unmanufactured jet of paragraph 620 in the tariff act of 1890 is the material out of which the manufactures of jet provided for in paragraph 459 of the same act are made." Congress had known since 1846 that there were manufactures of imitations of jet, and had made them dutiable by name. In 1890 it omitted to specify this class of manufactures. It retained a duty upon manufactures of jet, and in so doing it used the word "jet" with the meaning that it had had in the tariff acts for a series of years. Inasmuch as unmanufactured jet and manufactures of that substance are specially provided for, it creates a severe strain upon the principle of commercial designation to infer that beads and trimmings called "jet millinery," but made of glass, which is not commercially jet, should be classified as manufactures of jet. It is true that there was scattering testimony that the black glass, before it was manufactured into ornaments, was called "jet," but it was insufficient to establish such commercial name. As the conclusion is succinctly stated in the appellee's brief, "If an article is a manufacture of glass, it cannot be changed into a manufacture of jet simply because the trade has come to call certain black glass trimmings and ornaments by the name of 'jet.'" The principle of commercial designation does not justify such a result. The decision of the circuit court is affirmed.

BRITTON et al. v. WHITE MANUF'G CO.

(Circuit Court, D. Connecticut. April 16, 1894.)

No. 709.

1. PATENTS—LIMITATION OF CLAIMS.
Statements of counsel to the patent office of mere reasons why it is desirable to have claims allowed in a particular form do not estop the patentee from claiming what is clearly granted by the patent.

2. SAME—DESIGNS—FORM OF CLAIMS.
In a patent for a design for coach lamps, consisting of a tulip conventionalized in form, it is proper to allow separate claims for the upper and lower parts, and a third claim for the entire design.

3. SAME—ANTICIPATION AND PRIOR ART—EVIDENCE—"PUBLICATIONS."
A drawing exhibited in a mere trade circular, unaccompanied by any evidence that it was ever actually published, or intended for general use, or accessible to the public, is not admissible as a printed publication for the purpose of showing anticipation.

4. SAME.
A pamphlet purporting to be a number of a coachmaker's magazine, printed for general circulation, bound up with other numbers for the same year, and containing references to advertisements, with terms therefor, is prima facie a publication, within the meaning of the patent law.

5. SAME—EXHIBIT OF DRAWINGS—ABSENCE OF DESCRIPTION.
Drawings exhibited for the purpose of showing anticipation of a design patent are not rendered irrelevant by the fact that they are unaccom-

panied by a written description. This objection merely affects their weight as evidence, and not their admissibility.

6. SAME—INVENTION.
The fact that a coach lamp made to resemble a tulip, conventionalized in form, shows outlines resembling a calyx, while in nature the tulip has no calyx, is strong evidence of original combination or creative thought.

7. SAME—DESIGN PATENTS—INFRINGEMENT—EXPERT EVIDENCE.
Little weight should be attached to the evidence of experienced designers on the question of infringement, since they are liable to be biased by the trained observation of the specialist. But the court should endeavor to place itself in the position of the ordinary purchaser, giving such attention as he would usually give.

8. SAME—VALIDITY—INFRINGEMENT.
The Britton design patent, No. 20,670, for a carriage lamp in the form of a conventionalized tulip, *held* to show patentable novelty, and to have been infringed by defendants.

This was a suit by Channing M. Britton and others against the White Manufacturing Company to restrain infringement of a patent.

Witter & Kenyon, for complainants.
F. W. Smith, Jr., for defendant.

TOWNSEND, District Judge. The bill in equity herein is brought for the infringement of design letters patent No. 20,670, granted April 14, 1891, to the complainants, for a design for a carriage lamp. The defenses are want of novelty, lack of patentable invention, and denial of infringement. The specification states that the invention relates to a design to be imparted to lamps, and consists of a novel shape and configuration. The complete lamp represents a tulip; the sides of the body part being so shaped as to represent the petals, the lower portion the calyx, and the downwardly extending portion the stem, of the flower. The cover of the lamp, by upwardly and outwardly extending projections, surmounted by a central spherical form, represents the pistil of the flower, or, taken alone, represents the tulip after its leaves have fallen; the projections resembling the calyx, and the spherical form the pistil. The claims of the patent are as follows:

(1) The design for lamps, consisting of the body part, A, substantially as shown. (2) The design for lamps, consisting of the upper part or cover, D, substantially as shown. (3) The design for lamps, consisting of the body part, A, and the upper part or cover, D, substantially as shown.

Complainants' lamp fitly embodies the design of a tulip. It consists of two parts, which represent a graceful, harmonious whole. That it found great favor in the eyes of the public, and had a large sale, is abundantly proved. The question is, has it the degree of novelty required to protect a patent for a design?

The file wrapper shows that the patent office rejected four of the original five claims, on the ground that an inventor could only have a claim for a unitary design, and subordinate claims for segregable and distinctive features; and that counsel for complainants amended the claims, and requested their allowance in the present shape, on the ground that the public would be readily deceived, either by a design consisting of the exact cover and a body slightly resembling the body of the patented design, or by an exact copy of

said body combined with a different cover. Defendant claims that these statements limit the second claim of the patent to a construction containing both features exactly, or the exact body and any style of cover, or the exact cover and a somewhat similar body. The patent office has allowed the separate claims. It does not seem that a mere statement by counsel of a reason why it was desirable to include them in a single patent should estop the patentee to claim what was clearly granted him under said patent. Separate claims for the entire design and for its separate parts were properly allowed. Dobson v. Carpet Co., 114 U. S. 439, 446, 5 Sup. Ct. 945.

Defendant further claims that, admitting the novelty of the complete design, the state of the art shown by certain exhibits limits the construction of the patent to a claim for the design as an entirety. Defendant's exhibit, "L'Ecluse Lamp," shows a glass body of the exact shape covered by the first claim of the patent in suit, but without the metal calyxes at the base, and with downwardly extending ornaments not found in the patented design. This drawing is not accompanied by any printed description, but is contained in a pamphlet, which appears to be a mere trade circular of "Ch. De L'Ecluse, Paris," and which had been in the possession of one of defendant's witnesses since November, 1888. There is no evidence that it was ever actually published, or intended for general use, or accessible to the public. Complainants objected to its introduction, on the ground that it was not such a printed publication as would anticipate a patent. The objection is well taken. Rob. Pat. §§ 325, 326; Reeves v. Bridge Co., 5 Fish. Pat. Cas. 467, 468; Fermentation Co. v. Koch, 21 Fed. 587; Parsons v. Colgate, 15 Fed. 600; In re Atterbury, 9 O. G. 640.

Defendant's exhibit, "Saladee Lamp," is a rough wood cut of a carriage lamp, having the outlines of, and bearing a general resemblance to, a tulip, and having curved engraved lines at its base, printed in a bound volume entitled "The Coachmaker's Monthly Magazine. C. W. Saladee, Proprietor. New York, April, 1855," which had been in the possession of one of defendant's witnesses since 1873. The complainants objected to this exhibit also, on the ground that it was not a printed publication; and, furthermore, because it was not set up in the answer. I think the Saladee Coachmaker's Monthly Magazine is admissible as a printed publication, to show the state of the art. The number containing this lamp in question has printed on it, "New York, April, 1855," is bound up with other numbers for the years 1855 and 1856, and refers to its advertisements, and gives terms therefor. It purports to be printed for general circulation, and is characterized as a publication by the witnesses for defendant. These circumstances furnish sufficient prima facie evidence of publication. Rob. Pat. § 328; Reeves v. Bridge Co., supra; In re Atterbury, supra. While, therefore, the defendant could not derive any advantage from this evidence in support of a claim of lack of patentable novelty, the court may, in the light of said evidence, determine what, in the state of the art, was open to the patentee, and what his patent must, therefore, be construed to claim. Rob. Pat. § 1006; Grier v. Wilt, 120 U. S. 412,

429, 7 Sup. Ct. 718; Seymour v. Osborne, 11 Wall. 539; Railroad v. Dubois, 12 Wall. 47, 65; Eachus v. Broomall, 115 U. S. 429, 434, 6 Sup. Ct. 229.

Defendant's "Exhibit Beitschrift" shows a top whose general outlines suggest the top of the patent in suit. It does not embody either calyx or pistil, and is only material, if at all, upon the question of the novelty of the second claim.

It is unnecessary to consider the other exhibits introduced by defendant, except to say that those not excluded under the objections already considered show that upwardly extending covers of carriage lamps, and bodies resembling in outline the general shape of complainants' body, but not embodying the specific design, were known to the art prior to said patent. The indefinite, unsubstantiated evidence of prior use is insufficient to affect the validity of the patent. Zane v. Peck, 9 Fed. 101; Lalance & G. Manuf'g Co. v. Habermann Manuf'g Co., 53 Fed. 375.

The objection to certain of defendant's exhibits that they are merely drawings, unaccompanied by a written description, and therefore not relevant upon the question of anticipation, is not well taken. The objection affects the weight of the evidence, not its admissibility. The decisions referred to by complainants were not rendered in cases of patents for designs. In the latter cases, the effect upon the eye being the chief thing to be considered, there is no reason why a mere drawing, in a proper case, should not be sufficient. Ex parte Crouch, 57 O. G. 845; Dobson v. Dornan, 118 U. S. 10, 6 Sup. Ct. 946. In the case of Untermeyer v. Freund (decided by the circuit court of appeals for the second circuit, October 17, 1893) 7 C. C. A. 183, 58 Fed. 205, the drawings considered by the court in determining the question of patentable invention were not accompanied by any description.

The idea of a flower, conventionalized so as to be symbolized in a lamp, was new, so far as appears from the state of the art shown to the court. Other designs were shown which were graceful, approaching in certain respects some single part of complainants' design, and some resembling the general outlines of complainants' lamp, but none which embodied the complete design covered by the patent. And, admitting over every objection, all designs, enlarged, improved, modified, and with one part of one lamp combined with a different part of another, there is nowhere to be found, in letterpress or cut, a suggestion of a flower, or of such a tulip design, as a harmonious whole. The wood cut of the Saladee lamp is unaccompanied by letterpress description, and and is so roughly and incompletely drawn as to leave it uncertain whether it was intended to imitate a tulip or to merely select a graceful design, such as is shown in the lamp in defendant's Art Journal Illustrated Catalogue.

A further consideration in support of the novelty and originality of this design has forcibly impressed my mind. The court, taking judicial notice of matters of common observation and knowledge, finds that a tulip has no calyx. The outlines at the base of top and body of the patented design are not found in nature, but seem to have been the fanciful creation of the patentee. This circumstance

seems to me to furnish strong intrinsic evidence in favor of his claim of an original combination or contribution of creative thought. It has been well said that in designs "it is the new and original appearance which constitutes mainly the contribution to the public which the law deems worthy of recompense." We are educated, in these later days, to admire, not the mere forms of the carpenter or molder, but the conventionalized forms which suggest the natural objects which they represent. Gorham v. White, 14 Wall. 511. The statement of Judge Robinson in his work on Patents (section 206) seems peculiarly appropriate to this case. He says: "The essence of a design resides in the idea of that configuration or ornamentation which constitutes the new appearance given."

The conclusion reached from these considerations is that the patented design is a meritorious one; that it is not limited by the prior state of the art, as shown; and that the claims for the separate top and body, as well as for the entire design, are valid, and should be sustained.

The defendant has manufactured two differently constructed lamps, which complainants claim infringe said patent. It does not seem necessary to discuss the claim that the top of the second lamp of defendant infringes the second claim of complainants' patent. The claim covers a central spherical form, surrounded by upwardly projecting curved representations of a calyx. Defendant's lamp has a flat cap, surrounded by a downwardly projecting circular rim, which separates it from upwardly projecting semi-circular grooves. There is no resemblance between the two, and no one would be likely to be deceived. The correspondence between the parties prior to the suit shows that complainants claimed that the top of both lamps manufactured by defendant infringed the patent in suit, and that the defendant admitted that the head or top of the first lamp "did conflict with their patent," and ceased from making them. It denied infringement as to the second lamp, but dropped it from its price list. Complainants insisted upon payment of the statutory penalty of $250, and defendant declined to pay it, whereupon this suit was brought. Defendant's secretary, Wilmot, in his testimony, qualified said admission by saying that he should have said that said top "seemed to conflict" with the patent in suit. I do not consider either admission as material, because, under the test applied to design patents, that which seems to conflict would ordinarily be an infringement; and, further, because a comparison of the two heads shows that the top of the defendant's first lamp seems to be a copy of the top part of complainants' lamp.

The vital question in the case is whether the defendant, by the manufacture of its first lamp, has infringed the patent in suit. Three witnesses for defendant—Boudren, Galle, and Fest—testify on this point. Boudren says, "There is so little similarity that nobody not an idiot could make a mistake." Galle says the designs do not resemble each other. Fest says, "I should think, in my experience, a purchaser could easily tell the difference." But Boudren is a lamp designer, a large stockholder in, and the superintendent of,

the defendant corporation. The other two witnesses are carriage or lamp designers, one of them being in the employ of a rival manufacturer. It does not appear that either of them ever sold a carriage or lamp to any one. It does not appear that Boudren ever had any experience to qualify him to testify on this point, other than from making sales of lamps on behalf of defendant corporation to trade buyers. Apart from other objections, this kind of evidence seems to be peculiarly within the class of expert testimony which has not found favor with the courts on the question of infringement of designs. It is not based upon experience in dealings with the ordinary purchaser, giving only such attention as such persons ordinarily give. It is based upon a theory emphasized, and liable to be biased, by the trained observation of the specialist. Gorham v. White, 14 Wall. 528. Inasmuch as the test of sameness is determined by the eye of the ordinary observer, I do not regard such testimony, from such expert designers, as of much importance. Six witnesses for complainants testify that the ordinary purchaser would be misled by said lamp, and would purchase it as one embodying complainants' design. Four of these witnesses were apparently disinterested persons, and neither they nor the two other interested witnesses were expert designers. They were experts only in the sense that they were constantly engaged in selling carriages to the ordinary public, whose testimony, founded upon their judgment and experience in such matters, might be of great assistance.

Apart from the effect of said testimony, the first impression received upon examination and comparison of the exhibits by the side of each other, was favorable to the defendant's claim that the ordinary purchaser would not be deceived. The complainants' exhibit, in all its details of construction, is more artistically constructed and finished. The defendant's exhibit has certain features —notably the extra downwardly projecting top, and the circular ornaments at the bottom—not found in complainants' exhibit. The plain, spherical top of complainants' exhibit is flattened and ornamented in defendant's exhibit. The calyxes of the top are relatively larger in complainants' than in defendant's lamp. The plated divisions between the glass sections of complainants' lamp are more conspicuous than in defendant's lamp. Complainants' lamp has metal calyxes covering the bottom of the glass sides. Defendant's lamp has curved glass bottoms, filled out by the metal base. The bodies are dissimilar in shape. But the construction set forth in the specification and covered by the claims is not confined by such details of size, proportion, and ornament. It "consists of the novel shape and configuration." The test of infringement is whether ordinary purchasers would be likely to mistake the one design for the other, giving such attention as such a purchaser usually gives. Gorham v. White, supra; Monroe v. Anderson, 7 C. C. A. 272, 58 Fed. 398. I have already critically discussed the expert evidence, because it seems to me that the decision of the case may depend upon the definition of the "ordinary purchaser." If thereby is meant the trade purchaser of lamps, the claim is not infringed. He would not be deceived. I have treated this term as applicable to the gen-

eral purchasing public, who buy a carriage with lamps under the ordinary conditions under which such purchases are ordinarily made. In applying this test, the court should endeavor to place itself in the position of such purchaser, and to consider the accompanying conditions. The ordinary purchaser, in such a case, is not the dealer, who is presumably informed as to the various designs and their resemblances and differences. The ordinary purchaser sees the patented tulip lamp upon a carriage in the street, or among complainants' stock of carriages. He examines other carriages in other warehouses and elsewhere, and sees defendant's lamp mounted above his head on the carriage. It has the pistil, the upper calyxes, the curved lines, corresponding to the lower calyxes, and an outwardly extending body. Every element is imitated, except the double curves of the glass. His eyes and attention, distracted by divers other considerations, are not critically directed to details of construction.

The manifest infringement of the upper part, substantially admitted by defendant; the only difference of construction therein—the flattened sphere—being one which would not be noticed from the point of view of the ordinary observer; the allegation that the infringing design was copied from that of complainants, undenied; the appropriation of the name "Tulip" by defendant for its second lamp; the apparent imitation of certain important details; the introduction of unessential variations; the adoption of curved lines simulating calyxes and petals,—these, together with the other circumstances, and the testimony already considered, indicate that the defendant intended so to imitate the patented design as to lead the ordinary purchaser to believe that he was getting complainants' lamp, and that the suggested differences are colorable, and not substantial.

The peculiar merit of the novel idea of thus symbolizing a flower, and its admitted popularity and utility, seem to entitle this design to a more liberal construction than would be applied where old and familiar devices for configuration and ornamentation are merely rearranged in new relations. This view is enforced by the above considerations as to the infringing design. The first claim, for the body part alone, is not infringed. The second claim, for the cover alone, is infringed by defendant's first lamp. If it were necessary to decide the point, I am inclined to adopt the views of the witnesses for complainants, and to hold that there is sufficient similarity between the body of defendant's first lamp and the body of the patented design, so that, when used in connection with the infringing cover, the third claim is infringed; although said body, without said cover, would not infringe. In view of the conclusions reached, an injunction against the infringement of the second claim will sufficiently protect the complainants in this case.

Let a decree be entered accordingly.

MILLER et al. v. HANDLEY.

(Circuit Court, E. D. Missouri, E. D. March 31, 1894.)

No. 3,556.

1. PATENTS—NOVELTY AND INVENTION—SEWING MACHINES.
Improvements in a particular make of sewing machine, which overcome a recognized defect existing for nearly a year after the machine is put upon the market, and render it so much more serviceable and salable as to materially increase the demand, must be considered as involving an invention, although the change from existing devices is comparatively simple, it appearing that these devices, though known to expert mechanics in the manufacturer's employ, did not suggest the improvement to them.

2. SAME—PRIOR USE.
In considering testimony of prior use it is a safe rule to give great weight to the presumption created by the patent, and hold it valid unless a prior public use is shown by evidence of facts or circumstances so persuasive as to leave no room for doubt.

3. SAME—PARTICULAR PATENT.
The Miller patent, No. 419,863, for a "revolving hook machine," being an improvement in sewing machines, *held* to show novelty and invention, and not to have been anticipated.

This was a suit by Anthony Miller and John T. Corn against William W. Handley, the St. Louis agent for the Wheeler & Wilson Manufacturing Company, for infringement of letters patent No. 419,863, granted January 21, 1890, to complainant Miller. Complainant Corn is assignee of a one-half interest in the patent. On final hearing.

The patent is for a "revolving hook machine," the claim being: "The combination, with the stitch-forming mechanism of a rotary hook machine, of a supporting slide ring and means for locking the same in any adjusted position and a bobbin cover; the former provided with two projections on its inner engaging surface, separated a suitable distance, and the latter provided with a single projection upon its outer engaging surface, vibrating between and alternately engaging the two upon the slide ring, whereby the cover is allowed only a limited rotary movement, substantially as shown and described." The invention set forth in the claim is particularly applicable to the ring slide and bobbin cover of a No. 9 Wheeler & Wilson sewing machine, made by the Wheeler & Wilson Manufacturing Company, of Bridgeport, Conn., and sold by William W. Handley, agent for said company in St. Louis, Mo. The object of the invention is to prevent the threads from tangling in the lower sewing mechanism when the machine is started to sew. Before this invention was applied to the No. 9 Wheeler & Wilson machine, the operator had to hold the ends of the thread until the machine had taken two or three stitches. This invention obviated this necessity.

The device sold by defendant on the Wheeler & Wilson No. 9 machine is almost identical with that shown in the patent, the only difference being that, instead of two projections on the inner surface of the slide ring, a notch is cut, into which the finger on the bobbin cover is received and allowed a slight play, to permit the passage of the loop around the bobbin, but which prevents the bobbin cover from turning with the hook, which turning of the bobbin cover causes the thread to tangle. Defendant's device is made in substantially the same way, to meet the same conditions, and accomplish the same result as the device shown, described, and claimed in complainants' patent.

Paul Bakewell and F. R. Cornwall, for complainants.
Silas B. Jones and James H. Lange, for defendant.

THAYER, District Judge. The time at my disposal will not permit me to express my views in detail with respect to all of the ques-

tions at issue in this case, although I have considered them attentively. I shall therefore be compelled to make a brief statement of the conclusions reached and the principles applied, without elaboration or argument.

1. It is manifest from the testimony that there was a defect in the Wheeler & Wilson sewing machine No. 9, which was discovered very shortly after it was put upon the market; that this defect was not remedied for the space of about one year, and that in the mean time it interfered to a considerable extent with the ready sale of the machine. The improvement suggested by Miller in the structure of the slide ring and bobbin cover, which improvement consisted in adding a slight projection to the bobbin cover and two stops to the slide ring, to prevent the rotation of the bobbin cover in either direction beyond a certain point, immediately obviated the existing difficulty, and enabled the operator to start the machine without holding the thread with the hand to prevent it from becoming tangled, as it had been necessary to do theretofore. The utility of the Miller device is demonstrated by the fact that the defendant company at once applied it, when it became known, to all of its No. 9 machines, and is still using it. It is also a fair inference from the testimony that the use of the new device has enhanced the sale of the defendant's machine to a considerable extent by obviating an objection which customers of the defendant company and rival dealers and manufacturers were in the habit of making to the Wheeler & Wilson instrument. It is not shown that the increased demand for the machine from 1888 to 1892 was occasioned by other causes, hence it is fair to assume that it was due in some measure to the use of the Miller device, which rendered it more serviceable and salable. While the Miller device is very simple, and while other patents show devices which approach the Miller device very closely, yet it appears from the testimony that expert mechanics in the employ of the defendant company, who were familiar with the older devices, did not for a considerable period discover the applicability of these older devices to the No. 9 Wheeler & Wilson machine as a means of overcoming the defect which had been found to exist in that machine. Moreover, it may have been (although the court does not decide that such was the fact) that the model of the improvement which was eventually forwarded to the defendant from its Cincinnati office was made from knowledge which its Cincinnati agents had acquired from some source with respect to Miller's proposed improvement. In view of the foregoing considerations, the court has concluded that there is such evidence of invention and patentable novelty as will suffice to sustain the Miller patent, and that the plea to the contrary should be overruled.

2. The evidence shows with certainty that Miller had perfected his invention about the middle of October, 1888, and that he may have had the idea in mind at a much earlier date, but at what precise time the evidence does not disclose with certainty. The testimony in this latter respect is quite unsatisfactory. The same may be said, however, of the defendant's testimony, which tends to show a prior public use of the invention as early as August, 1888. Some

circumstances are disclosed by the record which lead the court to entertain doubts whether the Cincinnati agents of the defendant had constructed and successfully and publicly applied the Miller device to the No. 9 machine as early as August, or even September, 1888. When parties, as in the present case, are each interested in carrying the date of the discovery of an improvement in a machine as far back as possible,—the one for the purpose of supporting a patent, and the other for the purpose of invalidating it,—the testimony on both sides, for obvious reasons, must be scanned with the greatest caution. Perhaps there is no safer rule in such cases than to give great weight to the presumption created by the patent and to treat it as valid, unless the party seeking to overthrow it shows a prior public use of the invention by evidence of facts or circumstances which are so persuasive as to leave no room for doubt or controversy. Applying these principles to the case at bar, the court has reached the conclusion that defendant's evidence is insufficient to establish such a prior public use as will defeat the patent.

3. With respect to the defense of anticipation, it is quite sufficient to say that I do not find in any of the prior patents the exact combination which Miller claims in his patent, No. 419,863. The nearest approach to an anticipatory device is to be found in the Farrar, Van Sant, and Post patents, Nos. 136,314, 172,676, and 281,296. It may be conceded that all of these patents show devices which very closely approach the complainants' device, but the identical combination claimed cannot be found in either. In neither of these patents is it stated that the object of the alleged anticipatory device therein shown was to prevent the tangling of the thread, nor is it apparent that such devices were applicable to the Wheeler & Wilson No. 9 machine without a modification in the form of the device such as Miller proposed. A more important consideration is the fact that these old devices did not for some months suggest a remedy for the defect in defendant's No. 9 machine, although they appear to have been well known to the defendant company and to its machinists.

While the case is not free from doubt, because it is difficult to say in view of the prior state of the art whether the improvement in question rose to the dignity of an invention, yet the views heretofore expressed must result in a decree for the complainants, and it is so ordered.

McKAY & COPELAND LASTING MACHINE CO. v. DIZER et al.

SAME v. CLAFLIN et al.

(Circuit Court of Appeals, First Circuit. March 28, 1894.)

Nos. 77 and 78.

1. PATENTS—INFRINGEMENT—EQUIVALENTS—LASTING MACHINES.
   The substitution of spring rockers for a pivot or hinge, for the purpose of producing a tipping or oscillating motion in one of the plates of a lasting machine, does not avoid infringement, for the two are well-known mechanical equivalents.

2. SAME—INVENTION.
   The discovery of a means of remedying a defect which has long baffled the skill of inventors, and made all previous machines failures, thus pro-

ducing a machine which is recognized as perfected, and goes into extensive general use, constitutes invention, although the new device is simple, and apparently obvious after the event.

8. SAME.

The Copeland, Woodward, and Brock patent No. 197,607, for an improvement in lasting machines, *held* valid, and infringed as to the eighth claim. 58 Fed. 353, reversed.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

These were two bills filed by the McKay & Copeland Lasting Machine Company against M. C. Dizer and others, and William Claflin and others, respectively, for the infringement of letters patent No. 197,607, issued November 27, 1877, to Copeland, Woodward and Brock, for an improvement in lasting machines for boots and shoes. The bills were dismissed by the court below (58 Fed. 353), and the complainant appealed.

Fish, Richardson & Storrow, for appellant.

John L. S. Roberts (Elmer P. Howe and Walter K. Griffin, of counsel), for appellee.

Before COLT, Circuit Judge, and NELSON and WEBB, District Judges.

NELSON, District Judge. In these two cases the plaintiff alleges the infringement by the defendants of the eighth claim of the patent in suit. The claim reads as follows:

"In a lasting machine, the combination of the adjustable carriage, B, provided with means for supporting an oscillating plate, and said oscillating plate, substantially as described."

The patent is for improvements in machines for lasting boots and shoes; that is, for machines which aid the workman in performing the operation of stretching and drawing the upper leather of a boot or shoe over a last. The carriage, B, mentioned in the claim, is the carriage that carries the heel-lasting mechanism, and its adjustability is the longitudinal adjustment on the bed of the machine towards and from the toe-lasting mechanism, to accommodate lasts of different lengths. The oscillating plate is the plate upon which is arranged the heel-lasting mechanism, which consists of plates that slide forward and inward on each side of the heel end of the last, and bend over and press down the edges of the upper leather upon the insole. The means described in the specification for supporting the oscillating plate upon the carriage is a pivot or hinge connection, constituting the axis of oscillation, which is in line with the length of the last. The oscillating plate tilts on its axis of oscillation to accommodate the lasting plates to the ends of the sole of the last. The defendants' machine contains the adjustable carriage and the oscillating plates of the patent, the oscillating plate being supported on the carriage through the intervention of springs on each side of the longitudinal axis of the carriage, and the plate tilting or oscillating with relation to the carriage by the yielding of the springs.

The meaning of the eighth claim is perfectly clear and plain. It is for a combination in a lasting machine of two elements, an ad-

justable carriage provided with means of supporting an oscillating plate, and the supported oscillating plate. The defendants' machine has both these elements combined, the only difference being the substitution of spring rockers for a pivot or hinge in the supporting mechanism. There can be no question that a spring rocker is a perfectly familiar way of obtaining a tipping or oscillating motion, as well as a pivot or hinge, and that one is a well-known equivalent for the other. The defendants' machine is a manifest infringement of the eighth claim of the patent, if the claim is valid. The court below held that it was invalid for lack of invention.

The brief submitted in behalf of the plaintiff contains a clear and accurate statement of the history of the art of lasting by machinery, and the condition of the art at the date of this invention. For many years prior to 1877, inventors had been at work on the problem of lasting machinery, but had not solved it. In an earlier patent, dated June 12, 1877, the three inventors of the patent in suit, who had been engaged for several years in endeavoring to invent a perfected laster, had described the most advanced machine which then existed; but it was not satisfactory, because it could not satisfactorily last the toes and heels of the shoes ordinarily made. Finally these inventors discovered where the defect lay, and the cause of it, and remedied it by introducing a new feature never before used in any lasting machine. The end-closing mechanism had hitherto been carried directly on the main carriage. The improvement consisted in mounting it on a separate bed-plate, which was made capable of lateral tipping by inserting a joint between the bed-plate and the main carriage, thus securing an adjustability never before found, while the direction of the main tip, which was lateral, permitted the tipping-plate to offer the same resistance to the longitudinal and vertical strains required for the operation of the mechanism as if the latter were rigidly attached to the main carriage. The machine with this improvement was accepted as perfected, and went into extensive general use. It was the first that was ever so accepted and used, and no machine without it has ever been commercially used since that time.

We are of opinion that the discovery by these patentees of the proper means for remedying the fatal defect which existed in all prior machines of this character, simple as the device was, amounted to something more than the exercise of merely ordinary mechanical skill, and reached a higher domain of invention. The simplicity of the device, and its apparent obviousness after the event, ought not to detract from its meritoriousness. That it had never been suggested or thought of before, and effectually supplied the one thing necessary to bring success, when before there had been nothing but failure, is sufficient to entitle it to rank as a new and useful improvement in the mechanic arts, within the meaning of the patent law.

In each case the decree of the circuit court is reversed, and the case is remanded to that court, with directions to enter a decree for the complainant upon the eighth claim of the patent in suit for an injunction and an account.

HOLMAN et al. v. JONES.

(Circuit Court of Appeals, Third Circuit. April 13, 1894.)

No. 13.

PATENTS—CONSTRUCTION OF CLAIMS—EASEL ALBUMS.

The Jaegar patent, No. 432,411, for an easel album supported upon rigid, immovable standards, with a longitudinal bar resting thereon, which is pivoted to the back of the book, is valid, but the claims must be narrowly construed, and are therefore not infringed by an album in which the standards are hinged at the base. 58 Fed. 973, reversed.

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

This was a suit by Joshua R. Jones, trading as the National Publishing Company, against William A. Holman and George S. Lare, trading as A. J. Holman & Co., for infringement of a patent for easel albums. The circuit court rendered a decree for complainant in the usual form (58 Fed. 973), and defendants appealed.

H. T. Fenton and George Harding, for appellants.

Augustus B. Stoughton, for appellee.

Before ACHESON, Circuit Judge, and BUTLER and GREEN, District Judges.

BUTLER, District Judge. The suit is for infringement of letters patent No. 432,411, issued to Christian Jaegar, July 15, 1890, and assigned to the appellee.

The circuit court sustained the suit, granting an injunction, and awarding damages; and this is assigned for error.

The validity of the patent, and the alleged infringement, are both denied.

The invention claimed and covered by the patent, comprises a photograph album "having its first and last leaves connected with its covers, without the use of a separate fastening, its covers being connected by a flexible back; a base adapted to support the back of the book, and to permit the flexible back or edge of the book to be rolled over it as the book is opened or closed; and provided with standards; a rod held on, or secured to, the standards, and pivotally connected to the outside of one of the covers of the book, the book always turning on the rod as a fulcrum;" as stated in the specifications and described in the drawings.

The claims involved read as follows:

"(1) In an album, the combination, with a stand provided with standards, and a transverse rod held on the same, of a book pivoted on the outside and at or near the middle of one of its covers to the said rod, substantially as shown and described."

"(3) In an album, the combination, with a stand, of a fixed rod supported on the said stand and a book, provided on one of its covers with bearings engaging the said fixed rod, to permit the said book to swing on the said fixed rod as a fulcrum, substantially as shown and described."

"(4) In an album, the combination, with a stand, provided on top with an incline, of a fixed rod supported on the said stand, a book adapted to rest with its back on the said incline, and eyes secured at or near the middle of one of the covers of the said book and engaging the said fixed rod, substantially as shown and described."

There is nothing new in the elements described. The only novelty is in the combination; and in this respect the device differs so little from others of an earlier date shown by the art, and intended for the same use, that the claims must be narrowly construed. We agree with the circuit court that the proofs do not exhibit anything sufficient to repel the ordinary presumption attending the grant of a patent. But this is only true we think, when the claims are thus narrowly construed. The only distinguishing feature of the device is the vertical standards permanently secured at the bottom, rigid and immovable, with the longitudinal bar resting thereon, and pivoted to the back of the book, as described by the specifications and drawings. These standards and rods provide a secure support and rest for the book, holding it in position under all circumstances. To accomplish the objects of the patentee, as he avows them, no other character of standards would be available—except to a limited and imperfect extent. Without such fixedness and rigidity they would answer the purpose of supports only so long as the back of the book was held in a certain position, and its sides thus kept at a particular angle. As soon as this angle changed the standards would give way and the book fall.

This is well illustrated by the appellant's device. His standards are hinged at the base. They will maintain an upright position and support the rod and book while the back of the latter is kept on its appointed rest on the stands; but the moment it slips off, backward or forward, the supports cease to be supports or "standards," and topple over. Just so long as the back of the book is carefully kept in the place designed for it, or the book itself is so handled as to keep the supports in a horizontal position, they answer the purpose of the appellee's "standards," but no longer. A jolt of the book, or device, or careless handling of either, will throw them down, and subject the book to danger of injury.

It follows that the appellant's device is not an infringement of the appellee's. To construe the claims of the patent so broadly as to cover the appellant's device would render them worthless. It is unnecessary to prolong this opinion by further reference to the art, or comparison of the devices.

The decree is reversed, and the bill dismissed, with costs.

THE POCONOKET.

BACON v. THE POCONOKET.

(District Court, E. D. Pennsylvania. March 6, 1894.)

No. 9.

ADMIRALTY PRACTICE—SUITS IN REM—BOND FOR POSSESSION—POSSESSORY SUITS.

The right of a vessel owner to protect himself from loss resulting from a seizure under admiralty process, by giving bond and retaining possession, extends, under Rev. St. § 941, to possessory actions as well as others; and, if he fails to exercise the right, he cannot require the libelant to give security for such damages.

Libel in rem by Nathaniel T. Bacon to recover the steamer Poconoket from the possession of the Interstate Steamboat Company. Heard on a rule against libelant for security for damages, and for increase of security for costs.

J. Rodman Paul and N. Dubois Miller, for libelant.

Henry Flanders and Edward F. Pugh, for respondent.

(1) As a general rule, a litigation may be carried on at the charge of costs; but, if a litigant seeks to change the possession of property, then he must indemnify the real owner when the claim is decided against him.

(2) In The Acteon, 2 Dod. 48, Lord Stowell, in affirmation of the above rule, said: "The natural rule is that, if a party be unjustly deprived of his property, he ought to be put, as nearly as possible, in the same state as he was before the deprivation took place." "That is," said Dr. Lushington, who quotes this passage in The Elize, 2 Spinks, 34, "he is entitled to restitution, with costs and damages."

(3) In The John, 2 Hagg. Adm. 305, 317, the high court of admiralty reversed the vice admiralty, and pronounced for the restitution of the vessel to the former possessor, and also equitable compensation, in the nature of demurrage, for her detention in the hands of the adversary party under the decision of the lower court.

(4) In The Glasgow, Swab. 145, where the vessel, in a possessory action, remained in the custody of the marshal, the court dismissed the libel, and ordered the libelant to pay the costs, and demurrage during detention.

(5) In The Director, 34 Fed. 57, Deady, J., said: "The libel prayed for process against said bark, wheat, and master, to the end that the first might be sold to pay the damages of the libelants; that the second 'might be delivered to the libelants free of all charges and liens. * * * On reading and filing the libel, an order was made thereon, allowing process to issue, as prayed for in the libel, on the filing of a stipulation by the libelants, in the sum of $50,000, as security to the adverse parties for costs and damages thereby incurred, on which the vessel and wheat were subsequently arrested, and all parties in interest cited to appear."

(6) The foregoing cases are causes of possession, which, admittedly, stand on a different footing from ordinary cases in rem. In The Adolph, 5 Fed. 114, where it was held that the claimant was not entitled to a bond for the damages he might sustain pending the libelant's appeal to the circuit court, Choate, J., said: "Suits for possession stand on a different ground. They are brought to recover the possession and use of the vessel."

(7) Nevertheless, damages have been allowed for the arrest and detention of vessels, even in ordinary proceedings in rem. For example: In Excursion Co. v. Fleming, 40 Fed. 593, which was a libel for alleged wrongful seizure and detention of plaintiff's property, Judge Wales held that a libelant who procures the seizure and detention of vessels for the purpose of enforcing an alleged lien against them, without an order of court, when, on the facts stated in his libel, he has no lien, is liable in damages to the owners, even though he acted in good faith, as an attachment issues, as of course, in such cases, on the filing of the libel.

(8) Excursion Co. v. Fleming was the case of an ordinary attachment, where the property was arrested as security in a cause of damage and where it could at once have been released on the filing of a stipulation. But the arrest was not ordered or directed by the court, the attachment issuing as matter of course; and, as the arrest was wrongful, the libelant was held responsible in damages.

(9) In the present case the writ issued without the knowledge of the court, and without any security for damages, although valuable property was taken out of the hands of the respondent company, who claim the legal title and the lawful possession; and this at the suit of a nonresident, who, presumably, has not a sixpence of property within the jurisdiction of the court. It is a maxim that a court of admiralty always inclines in favor of the person in possession (The Victoria, Swab. 408); and it is respectfully submitted that process should not be permitted to issue, or be enforced, on behalf of the disturber of that possession, without adequate security being first required.

(10) In O'Brien v. Roosevelt, cited by Judge Wales in Excursion Co. v. Fleming, supra, the defendants caused the vessel to be libeled, and seized, by process issuing out of the United States district court, for repairs. On the ground that the vessel had been repaired in her home port, the libel was dismissed. In an action brought for damages, the jury found for the plaintiff; and the verdict was sustained. In The Cathcart, L. R. 1 Adm. & Ecc. 314, the libelants were condemned in damages on the ground that, with adequate knowledge of the facts, they had arrested the vessel when they had no valid claim against her.

(11) Canter v. Insurance Co., 3 Pet. 307, cited by counsel for libelant, is wholly inapplicable to the case now before the court. What was decided in that case was this, to wit, if the libelant does not appeal from a judgment allowing only restitution, when he claims damages, also, then he cannot raise the question of damages in the appellate tribunal.

(12) On the face of the foregoing cases, can it be doubted that the respondent company, in the pending cause, which is a cause of possession, are entitled to the security which they ask?

Can a Stipulation be Entered in a Cause of Possession?

(13) The general rule of law is that, in a cause of possession involving the title to a vessel, the court will not preliminarily restore the property until the question of title is determined.

(14) The American and English Encyclopaedia of Law (volume 23, p. 576) states the rule thus: "A vessel will not be released on stipulation by the claimant, when the object of the libel is to determine the right of possession to the vessel, nor where such discharge would defeat the very object of the suit; for example, to enforce a seizure under the neutrality laws."

(15) In Henry's Admiralty Jurisdiction and Procedure it is said: "In causes of possession, the vessel cannot be released on bail, but the court will expedite the hearing of the case, and of the appeal."

(16) There are exceptions to all rules, and particularly in disputes between part owners with regard to the possession and employment of the vessel. The court will restore her to the party that is desirous of employing her, whether it be the majority or minority, taking a stipulation for her safe return. Cases may be found, doubtless, where restitution has been awarded when the title is involved; but they are English cases, arising under peculiar circumstances, and, admittedly, an innovation upon the long-established practice of the admiralty. There are one or two cases in this district, but the question was not raised. In New York there is a rule of court, adopted only last July, allowing the release of a vessel, in petitory suits, upon such security and terms as the court may determine. It is believed that no such rule exists in any other district.

(17) But the application now before the court is not for restitution, but security for damages. To deny that application, and under the circumstances of this case, as disclosed by the pleadings, to proffer her back, exacting security from the party who has been wrongfully dispossessed, and giving such security to the wrongdoer, would seem, it is respectfully submitted, a hardship and an injustice. The respondent company has paid to the builder of this vessel all that it stipulated to pay, to wit, $42,500. It has, moreover, in completing her,—which the builder, by reason of his insolvency, failed to do,—expended, additionally, $17,500. And she has been taken out of its possession by a nonresident, who has invested in a lawsuit touching her ownership. Under such circumstances, can he be permitted to litigate without risk and without responsibility?

BUTLER, District Judge. Where damages must result from an unwarranted seizure it is reasonable that the owner should be secured indemnification. Ordinarily where seizure occurs—as to enforce liens—the owner may protect himself against loss by giving security and retaining the vessel; and there is therefore no occasion for security. If he may do this where the seizure, as here, is

in a possessory action, there can be no reason for distinguishing such a case (in this respect) from any other. The only question for consideration therefore is: Can he do so? It is difficult to discover a reason why he should not be allowed to do so. There is no occasion in either case for retaining the vessel in custody; and to do so must entail serious loss. Why therefore should it be done in possessory actions? The situation in such cases is precisely the same as in all others. If the respondent can keep possession he should do so; and if he does not his injury is self-inflicted.

Justification may, nevertheless, be found for the respondent's contention in the earlier admiralty practice abroad; but that practice does not, in my judgment, prevail to-day, even there. See The Evangelistria, 46 Law J. Adm. 1, 25 Wkly. Rep. 255, and Pritch. Adm. Dig. (3d Ed.) p. 1554.

In this country I do not think such a practice ever existed, though there seems to have been some difference of opinion about it. In this judicial district vessels have been released, in repeated instances, without question. Since the acts of 1790, 1792, and 1793, as embodied in section 941 of the Revised Statutes, there can hardly have been room for doubt on the subject. The section reads as follows:

"When a warrant of arrest or other process in rem is issued in any cause of admiralty jurisdiction except cases of seizure for forfeiture under the laws of the United States, the marshal shall stay the execution of such process, or discharge the property arrested if the process has been levied, on receiving from the claimant a bond or stipulation in double the amount claimed by the libelant, with sufficient surety to be approved by the judge of the court where the case is pending * * * to answer the decree of the court in such cause. * * *"

The language leaves nothing for interpretation. All seizures are embraced, without regard to the cause of action, and owners are empowered to retain possession, on giving security, in all such cases. Admiralty rule 11, prescribed by the supreme court, conforms to this view; and the rules of the southern and eastern districts of New York provide for it in express terms. See, also, Ben. Adm. (last edition, 1894) § 498. I need not extend this opinion by commenting on the numerous cases to which counsel have invited my attention, but will file the briefs herewith for the benefit of future reference.

In view of the probable extent of the litigation which may occur in this case the security for costs should be increased to $500.

An order may be prepared in conformity with this opinion.

THE REPUBLIC.

In re MYERS EXCURSION & NAV. CO.

(Circuit Court of Appeals, Second Circuit. April 18, 1894.)

SHIPPING—LIMITATION OF LIABILITY—CORPORATE SHIPOWNERS—UNSEAWORTHINESS.

Injuries and death occasioned to excursionists through the inability of an excursion barge to withstand a thunderstorm of no unusual severity cannot be said to occur "without the privity or knowledge" (Rev. St. §

4283) of the corporation owning the barge, so as to limit its liability, when it appears that the president thereof himself undertook to make an examination of the barge at the beginning of the season, but failed to discover rottenness and weakness of parts, which a thorough examination would have disclosed. 57 Fed. 240, affirmed.

Appeal from District Court of the United States for the Eastern District of New York.

Petition by the Myers Excursion & Navigation Company for limitation of liability in respect to their excursion barge, the Republic. The petition was dismissed by the court below (57 Fed. 240), and the petitioner appeals.

Wing, Shoudy & Putnam (on the brief), for appellant.

Fernando Solinger and Mirabeau L. Towns, for respondents. G. W. Cotterill and Raphael J. Moses, advocates.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. The district court dismissed the petition of the appellant, the owner of the barge Republic, to limit its liability for the losses, damage, and injury which occurred upon the barge, upon the ground that the losses, etc., were occasioned by reason of the unseaworthy condition of the barge, of which the owner was chargeable with knowledge, and consequently did not occur "without the privity or knowledge" of the owner, within the meaning of the statute of the United States limiting the liability of shipowners. The appellant insists that the district court erred in its conclusions both of fact and of law.

The Republic was a double-decked excursion barge, 157 feet over all, and 40 feet beam. Above her main deck was a promenade or dancing deck, and 9 feet above this a hurricane deck. The hurricane deck was supported by center posts of yellow pine running down to the keelson, and by outside stanchions, some of oak and some of yellow pine, and averaging about 5 inches square, extending, some of them from the main deck, and some from the promenade deck. There were two masts, made of white pine, 12 to 14 inches in diameter, which ran from the keelson to about 30 feet above the hurricane deck. Attached to the masts were arms, to which were fastened stringers to support the upper deck in the center. The pilot house was forward on the hurricane deck, and was reached by a ladder from the promenade deck. She did not carry sails or motive power.

In the afternoon of August 12, 1891, while the barge was at Cold Spring Harbor, L. I., with a party of excursionists on board, to whom the petitioner had chartered her and a tug to convey them from New York to Cold Spring Grove and back, and while just about to leave the wharf on the return trip, she was struck by a severe squall on the starboard bow, which raised the hurricane deck on the starboard side off its fastenings, doubling it over against the two masts and the pilot house. The masts were broken off, and the pilot house overturned, crushing down the roof, and causing the broken portion to fall on the port side of the barge. Thirteen passengers on the port side of the promenade deck were killed, and many others were injured, by the falling of the roof.

We think the proofs fully justify the conclusions of the district judge that the squall was only a violent thunderstorm, such as are frequent in midsummer, and not so extraordinarily violent that it would have done material injury to an ordinarily sound vessel; and we agree with him that the proofs show that the hurricane deck was inadequately secured to the stanchions and the deck below, and that the accident was attributable to that cause, and to the unsound condition of the masts, which gave way, and fell upon the upper deck. The barge was an old vessel,—26 or 28 years old,—and had been used for the previous 20 years in carrying excursion parties in the summer, and as a freight or hay barge in the fall and winter. She had been owned by the petitioner since 1877. She had been overhauled, and quite extensively repaired, in the spring of 1890, and some trifling repairs were made upon her in the spring of 1891. Nevertheless, her masts were rotten; many of her stanchions were rotten; some of them were insecurely fastened to the framework of the hurricane deck; and some of her center posts, where they intersected the main and hurricane decks, were rotten. She was well enough adapted for the pleasant-weather excursions for which she would ordinarily be used, but was too weak to encounter the stress of a severe windstorm.

The district judge did not find, in terms, that the officers of the petitioner were aware of the unfit condition of the barge, but placed his decision against the right to limit liability upon the ground that there was an implied warranty on the part of the corporation that the barge was reasonably fit for the service for which she was chartered; that it was the duty of the corporation, before dispatching her upon the voyage, to know whether she was in a fit and seaworthy condition; that a prior examination of the vessel would have disclosed that she was not in such condition; and that the corporation was chargeable with knowledge of what its officers might have known, and were bound to know. Throughout the summer preceding the accident, as well as for several years previously, the barge had been employed in the immediate business of the corporation. The corporation was the lessee of various places of resort near the waters in the neighborhood of New York City, where it had an office; and it owned a number of tugs and barges, and its business was the conveying of excursion parties by its tugs and barges to and from these places of resort. The president of the corporation was personally cognizant, in a general way, with the condition of all the barges of the corporation, including the Republic. Among his other duties, he supervised the repairing of the barges; and he was accustomed to go over them once a year, to ascertain what repairs were necessary. In the spring of 1891 he examined this barge, and ordered some new stanchions put in. He testifies that he did not discover any unsoundness in the masts, and found no unsound stanchions, except those which he ordered removed and replaced by new ones. Yet at that time, in view of her condition as subsequently revealed, the masts and many of the old stanchions of the barge must have been so rotten that their condition could not have escaped his observation, if he

had made a reasonably thorough examination. We are constrained to conclude that he did not do so, and did not cause necessary repairs to be made, because, expecting she would be used in fair weather, for holiday purposes, he thought her to be sufficiently strong and fit for such occasions, and overlooked the contingency that she might be exposed to such a peril as overtook her.

We do not find it necessary to consider whether a shipowner is denied the protection of the statute whenever the loss has occurred from the unseaworthy or defective condition of his vessel. The warranty of seaworthiness which is always implied on the part of the shipowner holds him to the obligation of providing a vessel which is in all respects reasonably fit for the voyage and employment in which she is to engage. Yet there may be a breach of this obligation without his knowledge, and without his personal negligence. He may have employed a most competent expert to make all necessary examination of the vessel just prior to the voyage, an expert possessing skill and experience far beyond his own, and the expert may have failed to exercise sufficient care to discover defects which ought to have been found. It would be a hard construction of the statute which would deprive the shipowner of protection under such circumstances. Certainly, this case does not require us to consider whether such a construction of it is necessary.

The question we are to decide is whether a shipowner is entitled under the statute to limit his liability when the loss arises from a defective condition of his ship, of which he was ignorant because of his own negligent examination of the vessel. The statute was principally taken from the English statutes of 26 & 53 Geo. III. These statutes, instead of the words "privity or knowledge," use the words "privity and knowledge," or "fault or privity," to express the exception. In the later English statutes (the merchants' shipping acts of 1854 and 1862) the phraseology was varied so that the exemption was limited to losses occurring without the "actual fault or privity" of the shipowner. There is no reason to suppose that the diverse phraseology of these acts was employed for the purpose of expressing different rules of exemption, as there were no decisions of the English courts which indicated that the terms were not synonymous. The English courts have always construed the acts as intending to exempt the shipowner when he himself has not been in any way to blame, and to deny him the limitation of his liability only when personal blame is attributable to him. The Warkworth, 9 Prob. Div. 20, 145; The Spirit of the Ocean, 34 Law J. Adm. 74. Undoubtedly, by our statute, as by the English statutes, the common-law liability of the shipowner is not restricted in cases where his personal neglect has been an inducing cause of the loss. It was the intention of congress to relieve shipowners from the consequences of all imputable culpability by reason of the acts of their agents or servants, or of third persons, but not to curtail their responsibility for their own willful or negligent acts. Moore v. Transportation Co., 24 How. 1; Walker v. Transportation Co., 3 Wall. 150; Craig v. Insurance Co., 141 U. S. 638, 12 Sup. Ct. 97; Quinlan v. Pew, 5

C. C. A. 438, 56 Fed. 111; Hill Manuf'g Co. v. Providence & N. Y. Steamship Co., 113 Mass. 495. A loss is not occasioned without the knowledge or privity of the shipowner, when it arises from his personal neglect to inform himself of the defective condition of his vessel, the vessel being under his immediate personal supervision.

Where the shipowner is a corporation, the privity or knowledge which precludes the statutory right must be that of the managing officers. Craig v. Insurance Co., supra. In the present case the privity or knowledge of the corporation consisted in the negligence of its president, who, by his omission of proper care in his examination of the vessel, failed to discover her defective condition. We do not understand it to be seriously argued that section 18 of the act of congress of June 26, 1884, displaces the liability of shipowners for losses occasioned by their own negligent acts. The section does not purport to repeal any pre-existing law, but is legislation in pari materia with the act of 1851. The scope and object of the section are pointed out in Force v. Insurance Co., 35 Fed. 778; The Amos D. Carver, Id. 669; and Gokey v. Fort, 44 Fed. 364. It has no application to the present questions.

The decree of the district court dismissing the petition is affirmed, with costs.

THE ALERT.

BERGH et al. v. CEBALLOS.

(Circuit Court of Appeals, Second Circuit. April 19, 1894.)

No. 101.

1. SHIPPING—LOSS OF CARGO—LIABILITY OF SHIP AND CHARTERER.
   A ship chartered so that the charterer is deemed to be the special owner is nevertheless not freed from liability on his contracts of affreightment; and a decree for loss by negligence may be made directly against the ship, and need not provide that collection shall first be made from the charterer, and only the deficiency, if any, from the ship. The Freeman v. Buckingham, 18 How. 182, followed.

2. SAME—FINAL DECREE—APPEAL—PRACTICE.
   A ship was libeled for loss of freight shipped under contract with her charterer. The owners filed a petition, alleging that the charterer was alone responsible for the loss. The charterer answered both the libel and petition, and, after hearing, the court entered a decree for the full amount against the ship, but, as the question of responsibility as between owners and charterer had not been cleared up by the evidence, retained the cause as between them for further proceedings. *Held*, that the decree was final and appealable as between libelants and the ship, and the appellate court could properly affirm the same, and allow the remainder of the cause to proceed in the district court as there determined.

Appeal from the District Court of the United States for the Southern District of New York.

This was a libel by Juan M. Ceballos against the steamship Alert, of which Olaf Bergh and others were claimants, to recover for loss of cargo. At the time of the loss the ship was in possession of the New York & Yucatan Steamship Company as charterer; and on the petition of the claimants, alleging that the charterer alone was liable for the loss, that company was made a defendant, and required to

answer both the petition and libel. 40 Fed. 836. This was done, and subsequently a final decree was entered against the ship for the amount of the loss, but, as the evidence had failed to clear up the issues as between the claimants and charterer, that part of the cause was retained for further proceedings (44 Fed. 685), and thereupon the claimants appealed to this court.

John A. Deady, for appellants.

J. Langdon Ward, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. On September 5, 1889, Juan M. Ceballos filed a libel in the district court for the southern district of New York against the Norwegian steamship Alert, in which he alleged that on July 16, 1889, he shipped on board said vessel in the port of New York, and bound to Progresso, in Mexico, a steam tugboat, to be carried to the latter port for an agreed freight, which was paid, and bills of lading therefor were received from the agent of the steamship; that, it was carried to Progresso, but, owing to the negligent manner in which it was handled, and the carelessness of the master and mariners, it was dropped overboard, and lost in deep water. The libel prayed for the payment of damages. On November 2, 1889, the owners of the Alert filed their answer, in which they denied the nondelivery of the tugboat, or any carelessness on the part of the vessel or its mariners, and further alleged that the steamship had been at the time of the shipment of the tug chartered to the New York & Yucatan Steamship Company, and was then in its possession, as the libelant knew; that the master was informed that the tug was to be carried and delivered without risk or responsibility on the part of the steamship; and that her master and crew had nothing to do with the handling of the tug during her discharge. On November 14, 1889, the claimants filed a petition in the district court, alleging that the steam tug was shipped on board the steamship at the risk of the charterers, and without liability on the part of the steamship, and praying that the charterers be required to answer the libel and the petition. The petition having been granted, the charterer filed its answer to the libel and the petition, in which it denied its individual liability. The case having proceeded to trial, the district court entered an interlocutory decree for the recovery by the libelant from the steamer of his damages, and a reference to a commissioner to ascertain their amount, reserving for further consideration all questions between the claimants and the charterer. The reason for this interlocutory decree was clearly stated by Judge Brown as follows:

"The evidence taken in the cause, while it leaves no doubt that the libelant is entitled to a decree against the Alert, is, notwithstanding, insufficient to clear up the matters in dispute as between the steamer and the steamship company, who, as charterers, were brought into the cause upon the steamer's petition, and may possibly be bound to respond for any judgment recovered by the libelant. After so long a delay, for the purpose of securing all attainable evidence as between the defendants, the libelant's right to a decree, as it now appears from the testimony, should not be longer postponed; and a decree may therefore be entered in his behalf as against the Alert, which is

no doubt responsible to him, and an order of reference taken to compute his damages. The decree will be made without prejudice to the rights of the co-defendants as between themselves, or to any further decree that may be taken upon additional testimony as to the liability of the steamship company to bear the whole or a part of the same damages, or to indemnify the steamer in respect thereto. Instead of dismissing the steamship company, the case, as between the two defendants, should, I think, be continued as between them, rather than send them to a new action; not merely in order to preserve the testimony already taken, but that the company may also be bound by the adjudication in regard to the amount of damages in case the company should ultimately be held answerable therefor, it being not improbable that controversy may arise as to the rule of damages as well as to the amount."

Upon the commissioner's report a final decree was entered for the recovery by the libelant from the claimants of $4,659.85 damages and costs. From this decree the claimants have appealed. No exceptions were taken to the amount of damages, and no attempt was made upon the appeal to show that the steam tug was not lost through negligence, or that the contract of affreightment was complied with, or that there was any agreement with the shipper by which the ship was to be freed from responsibility to him for the safety of the tug. The three points which the appellants did make were: First. That the court did not decide the whole case, and determine the rights of all the parties thereto, and that, therefore, the cause should be remitted to the district court for the purpose of a complete adjudication as to the rights of the codefendants as between themselves. Second. That the charterers, being deemed to be owners, were alone responsible. Third. That, if there was a liability on the part of the ship, the decree should have provided that the libelant collect of the charterers in the first instance, and that the deficiency, if any, should be collected from the ship.

Reliance was principally placed upon the first point. An attempt was made to support the second and third points, and to assert that a chartered vessel was not liable upon contracts of affreightment made by a special owner, but, in view of the law upon the subject as stated by Mr. Justice Curtis in The Freeman v. Buckingham, 18 How. 182, that branch of the case requires no further comment. The facts which have already been stated are a sufficient answer to the appellant's first position. The decree was a final one, as between the libelant and the claimants. It directed the payment of a specified sum of money to the libelant by the claimants, and ordered its immediate execution. Forgay v. Conrad, 6 How. 201; Thomson v. Dear, 7 Wall. 342. The retention of the libel in the district court for the purpose of an ascertainment of the right of the claimants to an indemnity from the codefendant does not prevent the decree which was made from being a finality, and presented no adequate reason for delaying its execution. The fact that the claimants have brought the charterer into the case, so that the questions between them, as to the amount of the damages which each may ultimately bear, can be adjudicated in one suit, does not call upon this court to remit a final decree as between the parties thereto to the district court for further delay.

The decree of the district court is affirmed, with costs of this court.

THE PRINCETON.

HOBOKEN FERRY CO. v. THE PRINCETON.

(District Court, S. D. New York. March 26, 1894.)

COLLISION—STEAM VESSELS—FOG—SIGNALS—FERRYBOAT INSIDE OF PIER LINE.

A ferryboat, in a fog, which had made her trip across the Hudson river, and arrived inside of the line of the New York piers, and was there maneuvering to get into her slip, was *held* not bound to continue the fog signals which she had stopped on getting inside of such line, nor liable for damages by collision to another ferryboat, which, through lack of proper caution and watchfulness, had got within the pier lines.

Stewart & Macklin, for libelant.
Robinson, Biddle & Ward, for respondent.

BROWN, District Judge. On the 11th of August, 1893, at about quarter past 6 in the morning, the ferryboat Orange, from Hoboken, in making her trip to the Barclay Street ferry, during a thick fog, came in collision with the ferryboat Princeton, near the latter's slip at Desbrosses street. The place of collision was nearly half a mile above Barclay street, and was so near the Desbrosses Street slip as to be within a line running from the end of pier 41, just above, to the end of the pier just below the ferry racks.

There is considerable difference in the testimony of the witnesses as to the distance at which objects could be seen. But if, as the pilot and other witnesses for the Orange testify, the masts of vessels in the slips above could be seen shortly before reaching Desbrosses street, there was no sufficient reason why pier 41 should have been approached so near without being perceived, or at such speed as the Orange was evidently making. It is clear that the Orange was intentionally brought near to the New York shore in order to make her way down towards Barclay street; but in that situation, and in so thick a fog, she was bound to proceed with the greatest caution. I cannot credit the testimony of her witnesses, that she was going so slowly as they claim; nor that she was moving backward in the water at the time of collision. I am obliged to find that through a speed excessive for such a fog, and through a lack of proper caution and proper watchfulness in approaching the New York piers, she got inside the line of the piers, and that this was the primary cause of the collision.

As respects the Princeton, which was embarrassed in making her slip by a tug and tow that crossed ahead of her, the only question is whether, while maneuvering inside of the line of the piers, she was bound to continue sounding her fog signals, which had been stopped from the time she got inside that line. She first got across her slip, and was unable to enter it. Up to that time she had continued her fog signals. After that she was simply maneuvering within the line of the piers sufficiently to get inside of the lower ferry rack, but did not again before collision go outside of the piers. The evidence shows that objects within these limits could be seen. There was no need of whistles for the benefit of any vessels maneuvering within

these narrow limits. No vessels from outside were to be expected there. The Orange had no business in such a situation, and came there by her own negligence alone. Whistles given from such a situation might mislead vessels navigating outside, instead of benefiting them.

On the whole, I am of the opinion that the rule requiring fog signals is not applicable in such a case; and that the lack of such signals was not a breach of any duty which the Princeton owed to the Orange, or to which the latter is entitled to take exception.

The libel is dismissed, with costs.

THAMES TOWBOAT CO. v. CENTRAL R. CO. OF NEW JERSEY.

(District Court, D. Connecticut. April 7, 1894.)

No. 976.

COLLISION—TUGS ON CROSSING COURSES.

Tugs on crossing courses at night saw each other a quarter of a mile apart. Each whistled, and shortly afterwards ported her helm. About a minute later, danger signals were exchanged, and each reversed until collision. The one having the other on her starboard hand was incumbered by two car floats. *Held*, that it was her plain duty, on discovering the other, to immediately reverse in order to keep out of the way (rules 19 and 21, § 4233, Rev. St.), and that the special circumstance rule (No. 24) had no application. The Emma Kate Ross, 41 Fed. 826, and 46 Fed. 872, applied.

This was a libel by the Thames Towboat Company against the Central Railroad Company of New Jersey to recover damages for a collision.

Samuel Park, for libelant.

Stewart & Macklin, for defendant.

TOWNSEND, District Judge. On the evening of December 5, 1892, at about 7:40 o'clock, the libelant's steam tug Nathan Hale, 135 feet long, 750 horse power, left Brown's dock, Jersey City, to go down the North river to Jersey flats for a tow, taking a south and west course, parallel to the Jersey shore, and about a quarter of a mile out therefrom. On the same evening the respondent's steam tug Red Ash, 95 feet long, started from Thirty-Second street, East river, to go to respondent's pier No. 6, at Communipaw, N. J. She rounded the Battery at a distance of about 600 feet, and took a westerly course across the river towards said pier. She had a loaded car float lashed on either side, the heavier float being on her starboard side. So far as is material to this case, each boat carried regulation lights, had a sufficient lookout, and was properly officered and manned. It was a moonlight night, the tide was flood, and there were no vessels near to interfere with the navigation of the tugs.

The captain of the Nathan Hale saw the Red Ash when she was about a quarter of a mile distant, and about five points on his port bow, and gave a signal of one whistle, which was immediately answered by one whistle from the Red Ash. In about a minute the

captain of the Red Ash gave an alarm whistle, which was answered by an alarm whistle, followed by three short whistles, from the Hale. Four witnesses from each vessel swear that, immediately after the first whistle, each tug ported her wheel, and, after the alarm whistle, each stopped and backed full speed, and continued so to back until they collided, the port bow of the Nathan Hale striking the starboard side of the starboard float. There is no testimony in the case other than that of the aforesaid witnesses, except as to the angle of collision. The time between the first whistle from the Hale and the collision was probably about two or three minutes.

The libelant claims the Red Ash was in fault in that, having the Nathan Hale on her starboard side, she failed to obey rule 19, § 4233, Rev. St. U. S., and keep out of the way of the Nathan Hale. The testimony of the Red Ash witnesses shows that the course of the Red Ash was not changed. The reason alleged by them is that the boat was backed immediately after the wheel was put to port, and, owing to the heavier float being on the starboard side, she backed nearly straight. The respondent claims that while, ordinarily, under said statutory rule 19, it would have been the duty of the Red Ash to keep out of the way of the Hale, yet, under the circumstances of this case, rule 24 is applicable. Said rule provides that "in construing and obeying these rules due regard must be had to all dangers of navigation, and to any special circumstances which may exist in any particular case rendering a departure from them necessary in order to avoid any immediate danger." In support of this claim, respondent alleges certain faults on the part of the Hale. These will be considered later. But, assuming the truth of the statements of the witnesses for the Red Ash, they do not justify her failure to stop and back as soon as she heard the whistle from the Hale, and saw that she was close to her, and on her starboard side. No "special circumstances" either rendered a departure from this manifest duty necessary or justified a disobedience of the nineteenth rule. As it is not claimed that to hold her course tended to avoid the danger, whichever proper course the Hale should take, rule 24 did not apply. The most that can be said is that the captain of the Red Ash may have thought that the Hale would pass across his bow, and that, therefore, obedience to said rule was not necessary. In this it appears he was mistaken, and the presumption applied in such cases, that the accident was caused by his negligence, must be applied here. It is the settled rule that, where a vessel has committed a positive breach of statute, she must not only show that probably her fault did not contribute to the disaster, but that it could not have done so. Belden v. Chase, 150 U. S. 674, 699, 14 Sup. Ct. 264; The Pennsylvania, 19 Wall. 125; Richelieu & O. Nav. Co. v. Boston Marine Ins. Co., 136 U. S. 408, 432, 10 Sup. Ct. 934; The Bolivia, 1 C. C. A. 221, 49 Fed. 169.

The deck hand on the Red Ash saw the Hale a few seconds before she whistled, but failed to report the fact. The master of the Red Ash saw her a quarter of a mile off, on his starboard bow. He was in fault for not having seen her sooner. She was then so near

as to involve risk of collision. It was his duty to keep out of her way, under said rule 19, and, if necessary, to stop and reverse, under rule 21. It was the right and duty of the Hale to "keep her course, subject to the qualifications of rule 24." Rule 23, § 4233, Rev. St. But, in defiance of these rules, the master of the Red Ash, although he clearly saw the lights and hull of the Hale, and thought she was going eight or ten miles an hour, speculated on his chances, and first slowed, then ported partially, although, going 5 or 6 miles an hour by land, and with such a tow, he knew that "for a few minutes the boat will keep the same motion, but gradually she will slow down;" and, during a period which he testified might be 30 seconds, he continued on his course with the headway she had on. She held her way for a considerable distance, or "a little over 200 feet," and then he blew an alarm whistle, and backed full speed, over a minute after the time he first heard the Hale's whistle, when it was too late to avoid the collision; and the Hale struck the float, which was lashed stern end ahead, only 25 or 30 feet from the stern. Under these circumstances, it seems to me that the Red Ash is solely responsible for the collision. The two vessels being upon crossing or interfering courses, the vessel whose duty it is to keep out of the way is liable for the damage, provided she fails to allow a sufficient margin for the contingencies of navigation. The Laura V. Rose, 28 Fed. 104; Wells v. Armstrong, 29 Fed. 216; The Helena v. O'Neil, 26 Fed. 463.

The respondent alleges that the Hale was in fault because she did not port her wheel after having given the signal of one whistle. This claim is supported only by evidence from the Red Ash witnesses that they saw no change of course. Her captain says he could not see what was done on the Hale, and that "you only tell from the churning of the water whether the wheel was ported." The Hale's witnesses swear she ported her helm immediately after her first whistle. The relative value of the testimony of those on board the Hale as to her movements is greater than of the witnesses on the Red Ash, especially in view of the indefinite and uncertain character of their testimony. The Hope, 4 Fed. 89; The Wiman, 20 Fed. 248, 249; The Avon, 22 Fed. 905; The Alberta, 23 Fed. 810; The Columbia, 29 Fed. 718; The Alexander Folsom, 3 C. C. A. 165, 52 Fed. 411; The Havana, 54 Fed. 413. The respondent further alleges that the Hale did not seasonably stop and back, and keep out of the way of the Red Ash. But it is not denied that she was reversing her wheel at the time of the collision, and the evidence of the Hale's witnesses shows that she began to stop and back a few seconds after the first whistle,—as soon as the Red Ash sounded her alarm whistle. The claim that "the Hale knew, or ought to have known, that the tow she saw was a Central Railroad tow, bound for the New Jersey Central slip," is not supported by the evidence. The conclusions already reached dispose of the claim that, as the Hale was running against the tide, she was bound to port her helm. As to the angle of the blow, the Hale's witnesses claim she was heading towards the Jersey shore, and struck the float a glancing blow; the Red Ash witnesses claim the float was struck at right

angles. The evidence as to the bow of the Hale after the accident shows it was twisted to starboard, but does not show how she struck. The dent in the float indicates a blow at right angles.

I conclude, upon all the evidence, that the Hale was probably going at a somewhat faster rate than was testified to by her witnesses; that the captain ported his wheel as alleged, but that the time was so short between the answering whistle from the Red Ash and her alarm whistle that the course of the Hale was not materially changed before he reversed and began to back water, and that for these reasons she was practically "dead in the water" when the collision occurred. In that event she would have struck the float at nearly right angles. I find no evidence sufficient to support the claim of negligence on the part of the Hale. It is unnecessary to consider the inspector's rules, which, by stipulation, are to be considered in evidence. The case of The Emma Kate Ross, 41 Fed. 826, affirmed 46 Fed. 872, presents the same questions raised in this case, and supports the conclusions herein reached.

Let a decree be entered for the libelant, with the usual reference to a commissioner.

THE OLYMPIA.

WEEKS et al. v. WILSON TRANSIT CO.

(Circuit Court of Appeals, Sixth Circuit. February 19, 1894.)

No. 109.

1. COLLISION—INEVITABLE ACCIDENT—BREAKING OF TILLER ROPE—BURDEN OF PROOF.
   When a collision results from the breaking of a steamer's tiller rope, the burden is upon her to rebut the presumption of negligence, either by showing the cause which broke the rope, and that the result of that cause was inevitable, or by showing all the possible causes which might have produced the break, and then showing that the result of each one of them could not have been avoided.

2. SAME—EVIDENCE.
   A collision having resulted from the breaking of a steamer's tiller rope, it was shown in her behalf that the rope was of charcoal iron wire, of suitable size, of the usual kind, and externally sound; and that it had been bought of a reputable outfitter, and used less than two seasons, while the minimum life of such a rope is about three years; and that it had been inspected a few hours before the accident. Witnesses who saw the broken ends of the wires testified that there were no indications of defects. The steering gear was worked by steam engines capable of putting severe strain on the rope, but the evidence showed that the wheel was not suddenly handled. *Held*, that the collision was due to inevitable accident, and not to the steamer's fault. 52 Fed. 985, affirmed.

Appeal from the District Court of the United States for the Eastern District of Michigan.

This was a libel by Charles H. Weeks and others against the steamer Olympia, of which the Wilson Transit Company is claimant, to recover damages for a collision. The court below dismissed the libel (52 Fed. 985), and the libelants appeal.

This is a case of collision between the schooner John Sherman and the steamer Olympia. It occurred about 4 p. m., May 8, 1891, on Detroit river. The day was bright, and there was neither wind nor sea. The Olympia was bound up the river, and was on the American side, when the colliding vessels came in sight. The Sherman was bound down the river, in tow of the steamer Lovell. Astern of the Sherman, and in the same tow, was the schooner Roberts. The Lovell and her tow were on the Canadian side of the channel. The river at point of collision was one-half mile in width. The Olympia, when nearly abreast of the Lovell, was headed to pass under the stern of the Roberts, and well off the starboard side of the Sherman. The second article of the libel avers: "That said propellers were on courses that would have carried them a considerable distance apart, and that no accident would have occurred had the propeller Olympia kept on her course, as it was her duty to have done, and that the said propeller Olympia, instead of keeping her course, departed therefrom, and turned to starboard, and towards the propeller Lovell and her tow, and came on with great speed, and without properly stopping and backing, or making any other effort to avoid the collision which ensued, struck the said schooner Sherman upon her starboard side, crushing in her side, rail and planking, and so breaking and injuring said schooner as to render her a total wreck. That said collision occurred in broad daylight, and that it was impossible for said schooner to avoid or get out of the way of the said Olympia." Among other things, the answer of the claimants states: "That when opposite the lower end of the Detroit the Olympia checked down, and drew in toward the American dock for the purpose of being met by the reporter's boat, which came out to her nearly opposite Woodward avenue, in said city. That the Lovell was coming down the river near mid-channel with the Sherman and another barge in tow. That, after dismissing the reporter's boat, the Olympia ported slightly, to go under the stern of the tow, and get out into mid-channel, and the course past the Belle Isle, and gave the all-right signal to her engine for the usual full speed. She started to swing, and was swinging slowly to starboard, when the order to steady was given, the Olympia then heading astern of the tow, and all clear of them, and the wheelman turned the wheel, and attempted to starboard the helm, in order to stop her swing and steady the steamer, when it was found that the helm could not be starboarded; whereupon, instantly, the reversing signal was given, and her engine was promptly reversed and backed, with all its power, and an alarm whistle was blown to the tow. That the Sherman could and might have been sheered with her helm over to her port far enough to entirely avoid the collision, without letting go of her towline, but respondent says that no one on board the Sherman paid any heed to the warning signal. That no effort was made on her either to shift her course, or to let go the towline, but she continued to go on, passing the starboard bow of the Olympia, which had been thrown some to starboard by the reversing of her propeller wheel, so that the starboard bow of the Olympia came glancing against the starboard quarter of the Sherman, the headway of the Olympia being by that time nearly, if not quite, stopped. That, owing to the manner of their coming together, as aforesaid, and the angle of contact, the force of the collision was not great or severe, and would not and could not have materially injured a seaworthy vessel, or one of ordinary soundness and strength, and did not in any manner or to any extent injure the Olympia. That the cause of the steering gear failing to work was ascertained to be the breaking of the wire wheel rope aft on the starboard side. That it was a wire rope of suitable and ample size, which had been bought at a price which should have insured the best material for that purpose, and was properly rigged and fitted in the most approved manner. That it had been overhauled at Cleveland the day previous to this collision; and her steering gear had been put, so far as human knowledge and ingenuity could do so, in perfect condition; and that, according to the standing rule in said steamer, the mate had looked over and examined the steering gear, including this rope, before the vessel entered Detroit river, but a few hours before the accident, on which occasion he had apparently found everything in good order and condition. Respondent avers that the breaking of said wheel rope, and the consequent inability to steady the ves-

sel, was due to no fault, negligence, or omission on the part of this respondent, or the officers and crew of said steamer, but the same was due to, and was caused by, unavoidable accident, which could not be foreseen, and against which human prudence could not guard." The cause was submitted to the district judge, who sustained the defense of inevitable accident, and dismissed the libel, each party paying its own costs.

F. H. Canfield, for appellants.

H. D. Goulder, for appellee.

Before TAFT and LURTON, Circuit Judges, and RICKS, District Judge.

LURTON, Circuit Judge (after stating the facts as above). We quite agree with the district judge "that the proof acquits both the Sherman and the Olympia of the omission of any measure which would have averted or mitigated the collision after the breaking of the latter's wheel rope." The collision being, on the clear weight of the evidence, inevitable, after the Olympia's tiller rope broke, the judgment must depend upon her responsibility for that mishap. Was that the result of inevitable or unavoidable accident? The case must turn upon the answer. The maritime law is well settled that when a collision occurs through inevitable accident the loss must be borne by the party upon whom it happened to fall. Pars. Ship. & Adm. 525. No one is responsible if the accident was inevitable. The Morning Light, 2 Wall. 556; Marsd. Coll. 11. The circumstances alleged in the libel are so far admitted in the answer as to make out a prima facie case of negligence on the part of the Olympia. Her sudden change of course was the immediate cause of the collision. Prima facie that change, of course, was a violation of very plain rules of navigation, and the burden is upon the claimants to explain. The defendants say, "Our tiller rope broke, and the vessel became unmanageable, and the collision unavoidable." That only shows that the breaking of the tiller rope was the cause of the collision. They must go further, and show that the cause which operated to break the tiller rope was unavoidable. The collision was but the result of the cause which produced a broken tiller rope. If that cause is not shown to be unavoidable, how can it be said that the collision was an inevitable accident? Unless the defendants can get rid of the negligence proved against them by showing the cause which broke this wheel rope, and that the result of that cause was inevitable; or by showing all the possible causes which might have produced such an effect, and then showing that the result of each one of these possible causes could not have been avoided by them, they have not met the burden of proof which rests upon them. This is the doctrine of the late case of The Merchant Prince, decided in 1892 by the court of appeal, and reported in the Law Reports, Probate Division, 179. The case was in many respects like the one at bar. The libelants' vessel was at anchor in the river Mersey. The Merchant Prince came down the river by daylight, and in passing the vessel at anchor became unmanageable. A collision ensued. The defense was that the steam

steering gear of the defendants' vessel failed to act in consequence of some latent defect which could not have been prevented by due care. Fry, L. J., said:

"The defendants had failed to sustain the plea of inevitable accident, as it was necessary for them either to show what was the cause of the accident, and that, though exercising ordinary care, caution, and nautical skill, the result of that cause was unavoidable, or to enumerate all the possible causes, one or the other of which might have produced the effect, and show with regard to every one that the result was unavoidable."

The fullest and leading opinion was by Lord Esher, M. R. Among other things, he said:

"Unless you can get rid of it, it is negligence proved against you that you have run into a ship at anchor. * * * He can only get rid of that proof against him by showing inevitable accident; that is, by showing that the cause of the collision was a cause not produced by him, but a cause the result of which he could not avoid. * * * If he cannot tell you what the cause is, how can he tell you that the cause was one the result of which he could not avoid?"

The opinion proceeds by discussing the evidence, which showed that defendants had a new chain, that a new chain was very liable to stretch and become loose on the leading wheel; that a loose chain was liable to kink, and that the kinking of the wheel chain was the probable cause of the sudden and momentary refusal of the wheel to turn. This was a thing which the court thought ought to have been foreseen and provided against. Lord Esher concludes his opinion by saying:

"It seems to me in this case, from what one can see of the facts proved of the conduct of the ship here, to show a probable cause, and if that was the cause it could have been avoided. Here the defendants either have not shown any cause, and then they cannot have shown a cause the result of which was one that they could not avoid, or they have shown a probable cause, which, if it was the real cause, which seems most likely, was one, the effects of which they could have avoided."

This was, in substance, the principle upon which the learned district judge relied in disposing of this case. He said:

"Every practical precaution seems to have been taken to forefend this casualty. Its occurrence may with equal reason be referred to a sudden and extraordinary strain, which is the theory of masters of experience, or to a latent undiscovered defect in the rope, or the co-operation of both these causes. Whether occasioned by either or both, it was inevitable."

The Olympia was comparatively new, having been run less than two seasons at the time of this disaster. She had a steam steering gear of the most approved pattern, and her tiller rope was of charcoal iron wire, an inch in diameter. She was also provided with relieving tackles, adjustable in from three to five minutes. Her steam steering gear was worked by double steering engines of seven horse power, geared to a screw worm. Many witnesses have testified as to the sufficiency of her steering gear, the manner of its adjustment, and the competency of her officers and crew. Many experts in machinery and navigation have likewise testified as to the sufficiency of her wire tiller rope and as to the probable cause of its giving way. Does all this evidence show the cause which pro-

duced the effect? If not, we must then look to all the possible causes to which such an effect may be attributed, and determine whether, in respect to the proven cause or the possible cause, the defendants have further shown that, if the effect be attributed to a known or a possible cause, it was equally unavoidable by that degree of foresight and care imposed upon them by law. From the whole body of the proof we may enumerate the possible causes to which may be attributed the breaking of the Olympia's wheel rope: (1) Patent defects in the rope, due to original unfitness or resulting from use; (2) mismanagement of the steering engine; (3) extraordinary strain, due to unexplained caprice of steam without negligence, or produced by the rudder striking an obstruction; (4) latent defects due to negligence of manufacturer, or to use, and not discoverable by such an examination and test as was possible for defendants to make.

1. There were no patent defects in the rope. In diameter it was, on all the proof, such as experience had shown ample for a vessel such as the Olympia. The material was charcoal iron wire, and it was such a rope as was commonly in use for such purposes. Externally it was a sound rope, thoroughly adapted to the use to which it was put. Neither had use developed any patent defects. It had been in use less than two seasons. The minimum life of such a rope is, on the evidence, about three years. It had broken the year before, and as a result she ran aground on Boston shoals. Prima facie this would condemn the rope, and make its subsequent use an act of negligence. But the evidence thoroughly demonstrates that that break was not due to defect in the rope. It occurred at the forward sheave abreast the pilot house. The block through which this rope ran became warped from contact with a steam pipe. The block being thrown out of its horizontal position, thereby caused the tiller rope, under the power of the steering engine, to be brought against the pin of the sheave. This caused such chafing as to part one strand of the rope, and cause a jam, which stopped the wheel from drawing the rope. This chafed part of the rope was cut out, and a short splice put in. The rope was changed end for end, so as to throw this splice on the barrel of the wheel. The warped block was removed. The splicing which took place at Cleveland the night before the accident has no possible connection with the parting in question. The night before, and just before leaving Cleveland, the master, "for the purpose of bringing into a horizontal position the block next to the quadrant on the rudder post, caused a short splice to be inserted in the tiller rope between that block and the block on the starboard quarter." "With the wheel hard over, the forward end of this splice was brought within a foot of the starboard block aft, no part of the splice traveling on the sheave." The parting now under consideration did not in any way involve this splicing, for the rope parted at a point where it had not been spliced, and between the last splice and the starboard quarter block. Thus neither of the splicings mentioned were due to any known defect in the rope, and there is no causal connection

between the splices and this parting. The splicing done at Cleveland the night before involved such handling of the rope by the rigger who made it, and the mate and others who assisted, as to enable them to say that the rope at the place where it parted the next day presented no appearance of a defect. The rope was presented in court at the hearing, and examined by experts, who testified that it was apparently sound, smooth, pliable, and of good quality. The evidence of those who saw the rope after the accident was that the break extended for some four feet, and presented the appearance of having been pulled apart. The wires in the ends were fagged and of uneven length. These witnesses were not mechanical experts, but they say that the fagged ends presented no indications of defect. Some comment has been made by counsel that the rope has not been presented in court in its original condition. The piece presented shows that the fag ends had apparently been broken or chopped off. This is probably due to the fact that the fag ends were broken or chopped off by some person carelessly, or with a purpose to conceal defects. When it parted, the broken rope was taken out, and suffered to lie among other worthless articles. A sailor was seen on one occasion to be engaged in pulling out some wires to make fender ropes. He was stopped, and the mate ordered to put it away and keep it. That mate died, and the rope was lost sight of, a part only being found pending the trial, coiled up in a barrel in the hold of the ship. So many witnesses speak positively as to the appearance of the fag ends, now gone, that we can see no motive moving defendants to destroy evidence, and we are disposed to believe that at most they have not been duly mindful of the propriety of preserving the broken rope intact. The rule on the Olympia regarding inspection of the steering gear was that it should be examined before entering rivers or ports, and the evidence is that such examinations were ordinarily made. Two or three hours before this collision, the Olympia had entered the Detroit river, coming off Lake Erie. The master testified that the mate, who died before this suit was brought, was sent by him to make this investigation. In obedience he went, and returned in a few moments, reporting, "All right." Our conclusion is that this rope was in an apparently sound and serviceable condition at the time it parted.

2. Was it due to mismanagement of the steering wheel? The full force of the power of the steering engines suddenly thrown upon the steering gear might produce such a sudden strain as to snap the wheel rope. This full force could only be exerted by very suddenly putting the steering wheel hard over. If there was no necessity for putting the wheel hard over suddenly instead of slowly, and a parting was the result, negligence might well be imputed. But the evidence rebuts the theory that this was the probable cause. The evidence of the wheelman does not show that the wheel was put hard over, or suddenly handled in any way. The expert evidence is that, if broken by a strain due to the power of the steering engines, the greatest force would have been exerted forward, and not aft, where this break occurred.

3. If the break was due to a strain from the steering engine, then the effect was not the result of any negligence in managing that engine, but was attributable to an uncontrollable caprice of steam or an inherent weakness in the rope. In either event, the accident was unavoidable. A severe strain would be produced on the rope by the contact of the rudder with an obstruction; such as a submerged log. In that case the greatest strain would be aft, just where this parting occurred. There is no evidence whatever tending to show that such a blow was received by the rudder. While a possible cause, it was not the probable cause. Regarded as a possible cause, the defendants would be guilty of no fault in that respect, for the obstruction was a hidden one, against which no precaution would have availed.

4. Was it due to any latent defect in the rope? There is no affirmative proof that there was such a defect. But if, by exclusion, we have ascertained that it was due to no other possible cause, we must conclude this to be the probable cause. Under such circumstances the doctrine "res ipsa loquitur" would have application. Whether this defect was due to the fault of the manufacturer or was the result of use, the defendants would not be in fault, unless it was of such a character as that by such examination as was in their power to make it could have been disclosed. The rope was, when bought, such as a prudent and cautious owner might safely put in his vessel. No test, save that of the hand and eye, was possible. It was bought, as the best of its kind, from reputable outfitters. The manufacturer is undisclosed. We do not think this important. The article was such as was adapted to the purpose for which it was used, and was such as was customarily used by prudent men engaged in the same business. The owners of vessels are not, as to strangers, under any liability as warrantors of the sufficiency and soundness of machinery or equipment. They are bound to use that degree of care in the selection of machinery and equipments which persons of ordinary prudence are accustomed to use and employ for the same purpose.

In the case of The Lizzie Frank, reported in 31 Fed. 477, the rule was stated thus:

"When a vessel is constructed and equipped in the mode usual and customary with other vessels of like character, and in a mode approved by competent judges and previous experience, then, in case of an accident happening by reason of a latent defect in the equipment and construction, there is no negligence on the part of the owner."

In the case of The Flowergate, 31 Fed. 762, it was held that:

"The use of an eye bolt, apparently sufficient for the purpose for which it was employed, but in reality insufficient, solely because of a latent defect, entails no liability for a personal injury caused by such a defect."

See, also, The Litania, 19 Fed. 101; Marsd. Coll. 11–24. At page 33, Mr. Marsden sums up the rule thus:

"A ship is not one of those things dangerous in themselves, which entails upon their owners the responsibility of insuring safety, but the law casts upon the shipowner the duty of using reasonable care to insure that his ship when she sails, and while she is under way, is in a condition in which she

may be navigated with safety to other ships. If she damages another ship in consequence of the giving away or inefficiency of her gear or equipment, a prima facie case of negligence arises. The presumption of negligence may, however, be rebutted by showing that the defect was latent, that reasonable care was in fact used to put and keep her in good condition, or that the giving way of the gear was due to stress of weather, or other unavoidable cause."

In the case of The Grace Girdler the question of what would be an inevitable accident was considered, and the rule of diligence defined in these words:

"The highest degree of caution that can be used is not required. It is enough that it is reasonable under the circumstances, such as is usual in similar cases, and has been found by long experience to be sufficient to answer the end in view,—the safety of life and property." 7 Wall. 196.

This states the measure of care applicable to the navigation of a ship, and we think is equally applicable to the equipment of a vessel and the use and care of that equipment. It was the rule which met the approval of the learned district judge, and fully meets our approval. Upon the whole body of the proof, we find ourselves unable, as was the district judge, to say that we are convinced that the effect was due to any one of the possible causes suggested by the evidence, or in argument. It was probably due to one or both the causes suggested by the opinion of the district court. If it was attributable to a sudden strain (about which we have much doubt), that strain was an effect consequent upon a careful and proper use of the power of the steering engine, and is ascribable to some undefinable law of steam known only by capricious manifestations. If due to an inherent and latent defect in the rope (as we think more probable), then the defendants were not in fault, for it was such a defect as was only discoverable by taking the rope to pieces, and subjecting it to expert examination. If defendants have shown, with respect to each possible cause, that the effect could not have been avoided by the use of care, caution, and skill, then the effect was in law unavoidable, and the collision, in legal phraseology, inevitable.

It is not meant by the expression "inevitable accident" one which it was physically impossible, from the nature of things, for the defendant to have prevented. We only mean that it was an occurrence which could not be avoided by that degree of prudence, foresight, care, and caution which the law requires of every one under the circumstances of the particular case. The rule in maritime law does not differ from that at common law, where there is no contractual relations between the parties. The able proctor who has appeared for libelants has himself defined an inevitable accident as an occurrence which could not possibly be prevented "by exercise of care, caution, and maritime skill." Marsd. Coll. 8–11; The Michigan, 52 Fed. 507. In the case of The Morning Light (a collision case) the court said that "inevitable accident may be regarded as an occurrence which the party charged with the collision could not possibly prevent by the exercise of ordinary care, caution, and nautical skill." 2 Wall. 560, 561. The common-law definition is

substantially the same. An accident is said to be inevitable when it is not occasioned in any degree, either remotely or directly, by the want of such care and skill as the law holds every man bound to exercise. Dygert v. Bradley, 8 Wend. 473. A distinction exists between the liability of one in contractual relations to another as to the soundness and safety of machinery or appliances, as in the case of carrier and passenger, and the liability to a stranger. That distinction is recognized and stated in the Nitro-Glycerine Case, 15 Wall. 537, 538, and Railroad Co. v. Elliott, 149 U. S. 271, 13 Sup. Ct. 837. In the Nitro-Glycerine Case, the court held that a steamship company was not liable for damages resulting from the explosion of nitrogylcerin while in its possession as a carrier. It held that the accident, under the circumstances, was unavoidable, and that the consequence of all such accidents must be borne by the sufferer as his misfortune. In discussing the circumstances under which an accident might be regarded as inevitable, and therefore to be borne by the person upon whom its consequences fall, the court said:

"This principle is recognized and affirmed in a great variety of cases,—in cases where fire originating in one man's building has extended to and destroyed the property of others; in cases where injuries have been caused by fire ignited by sparks from steamboats or locomotives, or caused by horses running away, or by blasting rocks, and in numerous other cases which will readily occur to every one."

Proceeding, the court said:

"The rule deducible from them is that the measure of care against accident which one must take to avoid responsibility is that which a person of ordinary prudence and caution would use if his own interests were to be affected, and the whole risk were his own. And the principle is not changed whether the injury complained of follows directly or remotely from the act or conduct of the party." 15 Wall. 538.

Tried by this rule, we think, on the evidence, that no sufficient error is shown to justify a reversal of the district court. Whether the effect was due to one or the other of the possible causes suggested on the record, it is sufficiently shown that the effect could not have been prevented by that degree of foresight, care, and caution required by law. The decree must be, therefore, affirmed.

CABOT v. McMASTER.

(Circuit Court, N. D. Illinois. April 27, 1894.)

JURISDICTIONAL AMOUNT IN FEDERAL COURTS—SUIT ON PENAL BOND.

When one sues for the full amount of a penal bond which exceeds $2,000, but at the trial his own evidence shows that he actually claims less than $2,000, the case must be dismissed. Act March 3, 1875, § 5. Postmaster General v. Cross, 4 Wash. C. C. 326, Fed. Cas. No. 11,306, distinguished.

This was an action by Samuel Cabot against William I. McMaster, as surety on a penal bond. Defendant moved to dismiss the case for want of jurisdiction.

Dent & Whitman, for plaintiff.
Hand, Milchrist & Smith, for defendant.

BUNN, District Judge. This is an action brought against the surety on a penal bond given by the defendant, with one Edwin A. Mason as principal, in the sum of $6,000. The bond was given for the faithful performance of a contract with the plaintiff made by Mason, the principal in the bond, and for the payment over of all moneys coming to his hands under said contract. The declaration sets out the bond and contract in full, and charges a breach of the contract on the part of Mason, and a breach of the conditions of the bond, in the sum of $6,000 damages, for which sum the plaintiff prays a judgment against the defendant. Several pleas were pleaded by the defendant, the effect of which is to deny the indebtedness charged, and the breach of the conditions of the bond, and to put the plaintiff to prove the same. Upon the trial, which was without a jury, the plaintiff, by his own showing, proved a breach of the contract upon Mason's part, and consequent breach of the conditions of the bond in suit, in the sum of $1,496; and there was no contest on the trial as to this being the amount due the plaintiff from Mason, and which he had failed to pay over according to his contract and the terms and conditions contained in the bond. But it was insisted by the defendant that he was, in law, released from his obligation, as surety, to pay this sum, because of an extension in the time of payment given by the plaintiff to Mason. Then a motion was made on the trial by the defendant's counsel to dismiss the action for the want of jurisdiction in this court, on the ground that the amount in controversy does not exceed the sum of $2,000. On the part of the defendant, it is contended that the amount in controversy is the sum actually due by reason of the breach of the condition of the bond; and, on the plaintiff's part, it is claimed that the amount in controversy is determined by the amount named as the penalty in the bond. The defendant's contention, it seems pretty clear, is the one that must prevail. If nothing but the pleadings in the case were to be looked to, no doubt the amount in dispute should be adjudged to be $6,000; but when the proof is taken, and the plaintiff, by his own evidence, shows that he is only claiming a recovery of $1,590, it would seem preposterous to say that the sum in actual

dispute is any more than the plaintiff claims by his proofs, simply because he alleged a breach of the conditions of the bond in damages to the extent of $6,000, and because, in form, he would take a judgment for that sum, but could issue execution only for $1,590.

If this contention could be supported, it would completely nullify the provisions of section 5 of the act of congress of March 3, 1875 (18 Stat. pt. 3, p. 472), which provides "that if, in any suit commenced in a circuit court * * * it shall appear to the satisfaction of said circuit court, at any time after such suit has been brought * * * that such suit does not really and substantially involve a dispute or controversy, properly within the jurisdiction of said circuit court * * * the said circuit court shall proceed no further therein, but shall dismiss the suit * * * and shall make such order as to costs as shall be just." Whatever the rule may have been previous to the enactment of the jurisdiction law of 1875, it would seem pretty clear, under this provision, that the parties cannot, by making the proper allegations in the pleadings, give this court jurisdiction, if it shall appear by the plaintiff's own showing that the amount really and substantially in dispute does not exceed the sum of $2,000, exclusive of the interest and costs, according to the provision of the jurisdiction act of August 13, 1888 (25 Stat. p. 434).

The provision of the law first above cited was new in the jurisdiction act of 1875, and it is difficult to see why it does not cover the case at bar. If the court could take jurisdiction of this case, it could take jurisdiction of any case on a penal bond for more than $2,000, provided the claim for damages in the declaration exceeded that sum, though the amount actually and equitably due on the bond might be but $50. It was the purpose of the above provision to meet just such cases, and to prevent the court from taking jurisdiction on account of merely colorable allegations to give jurisdiction unwarranted by the facts. Of course, if there appears to be an actual controversy involving more than $2,000, though the recovery may be reduced, by payments or otherwise, below that sum, the court would retain jurisdiction. But if there is no such controversy in the case the plaintiff cannot, by alleging damages in a sum greater than he knows, or has any reason to believe, he can recover, give the court jurisdiction. A suit is brought upon a promissory note for $5,000. The plaintiff sets out the note properly, and alleges that no part of it has been paid, and claims judgment for $5,000. The defendant sets up payment of the note. On the pleadings the sum in dispute is $5,000, and the court assumes jurisdiction. On the trial the plaintiff introduces in evidence the note, on which there are, in his own hand, and under his own signature, indorsements of payments which reduce the amount due to $1,500; and he claims judgment for that sum. Should not the court dismiss for want of jurisdiction? I think so. But, in substance, that case is like the one at bar, and cannot be distinguished on principle. But if the plaintiff introduces his note without any indorsement of payment, and the defendant introduces evidence of payment which is controverted by the plaintiff's testimony in rebuttal, showing a real controversy,

and the jury find payments which reduce the plaintiff's recovery to a sum less than $2,000, the court would still retain jurisdiction, for, though the recovery is less than $2,000, the sum in controversy is more.

It is evident that the plaintiff in the case at bar knew when he brought his suit that he was entitled to recover but $1,590. That sum is all he claimed on the trial, and all his own evidence had any tendency to show he was entitled to recover. It would seem quite anomalous to hold, as matter of law, that the sum really in dispute is more than the plaintiff claimed on the trial, or attempted to prove. It has been repeatedly held by the United States supreme court that, for purposes of jurisdiction in action upon penal bonds, the true criterion of jurisdiction, so far as the amount in controversy is concerned, is not the penalty named in the bond, but the sum actually and justly due by reason of the breach of the condition. There would be little sense in any other rule. While, in form, the plaintiff takes a verdict and judgment for the amount of penalty, his actual recovery is confined to the sum equitably due on account of the breach. This was ruled first in U. S. v. McDowell, 4 Cranch, 316. In that case the penalty of the bond was $20,000. The amount due by reason of the breach was $328. This was held to be the sum in dispute, and as it was less than $2,000 the supreme court dismissed the case for want of jurisdiction. The same rule is affirmed in U. S. v. Hill, 123 U. S. 681, 8 Sup. Ct. 308. Here the penalty of the bond was also $20,000, but the sum equitably due by reason of the breach was but $517.07, which was held to be the amount in dispute, rather than the penal sum named in the bond, and the case was dismissed.

The case of Lozano v. Wehmer (decided in the eastern district of this state) 22 Fed. 755, holds the same rule, though not a case upon a penal bond. But I do not think that a material difference. The same rule that governs in other actions on a money demand governs in this. That rule, as laid down in the numerous cases decided by the supreme court, is this: That the question of jurisdiction is governed by the value of the actual matter in dispute, as shown by the whole record, and not by the damages claimed, or the prayer for judgment, alone. Lee v. Watson, 1 Wall. 337; Schacker v. Insurance Co., 93 U. S. 241; Gray v. Blanchard, 97 U. S. 564; Tinstman v. Bank, 100 U. S. 6; Banking Ass'n v. Insurance Ass'n, 102 U. S. 121; Hilton v. Dickinson, 108 U. S. 174, 2 Sup. Ct. 424; The Jessie Williamson, Jr., 108 U. S. 305, 2 Sup. Ct. 669; Jenness v. Bank, 110 U. S. 52, 3 Sup. Ct. 425; Webster v. Insurance Co., 110 U. S. 386, 4 Sup. Ct. 79; Bradstreet Co. v. Higgins, 112 U. S. 227, 5 Sup. Ct. 117; Bowman v. Railway Co., 115 U. S. 611, 6 Sup. Ct. 192. In Hilton v. Dickinson the court says:

"It is undoubtedly true that, until it is in some way shown by the record that the sum demanded is not the matter in dispute, that sum will govern, in all questions of jurisdiction; but it is equally true that, when it is shown that the sum demanded is not the real matter in dispute, the sum shown, and not the sum demanded, will prevail."

That, I think, is the rule in this court. There is no reason for a different rule in this court from that prevailing in the supreme court.

Much reliance has been placed by plaintiff's counsel upon the case of Postmaster General v. Cross, reported in 4 Wash. C. C. 326, Fed. Cas. No. 11,306, as an authority to show that the penalty of the bond is the amount in dispute, rather than the sum justly due. But that case, as I understand it, is not an authority for the plaintiff. It is in strict accord with the cases above referred to, decided in the United States supreme court. It was a case originating in the district court, and taken to the circuit court by writ of error. The sum in dispute, to give the circuit court jurisdiction, was $50. The action was by the postmaster general against a deputy postmaster and his surety on his official bond, in the penal sum of $1,000. There was a plea of non est factum and payment. There was no allegation in the declaration of any breach or damage for a less sum than the penalty of the bond. The district attorney for the government produced the account, as settled by the postmaster general, by which it appeared that the sum claimed as being really due by the principal in the bond was upwards of $400. There was, however, no verdict or finding fixing the sum actually due the government. There was, in place of that, a special verdict finding the bond to be the deed of the defendant, and a number of other facts tending to tax the plaintiff with neglect in not bringing suit on the bond while the principal was able to pay, and omission to give the sureties notice of the default of the principal. Defendants' counsel moved to dismiss the writ for want of jurisdiction, but the court held that, the declaration containing no breach showing that a smaller sum than the penalty of the bond named was claimed, and no verdict of the jury or finding as to the amount, the penalty of the bond must be taken as the amount in dispute. But the court say, if there had been a verdict for a less sum than $50, that would have been the matter in dispute, and the court could not have entertained the writ; and this is in strict accord with the other cases above cited. The circuit court did not undertake to overrule or qualify the case of U. S. v. McDowell, above cited, but refers to it approvingly. The case was reversed because there were no breaches assigned in the declaration or replication, and for other reasons.

The case must be dismissed for want of jurisdiction in this court, the sum in dispute being less than $2,000.

BERTHA ZINC & MINERAL CO. v. CARICO et al.

(Circuit Court, W. D. Virginia. August 3, 1893.)

REMOVAL OF CAUSES—WHO MAY REMOVE.

A corporation, being sued for personal injuries, presented, after issue joined, a petition alleging that a certain other corporation was solely interested in the litigation, and asked that the latter might be made a defendant, exhibiting at the same time certain papers tending to show a transfer of defendant's assets to it. The petition was denied, whereupon the other corporation presented a petition and bond for removal, alleging that it was a defendant, that the controversy was wholly with it, and that it was a citizen of another state. Plaintiff objected to the filing of these papers, offering, however, to agree that the applicant might become a party to the

record if it would admit liability in case plaintiff showed a right to recover. This the applicant refused to do. The court then refused to allow the filing of the removal papers, and proceeded to trial. *Held* that, as the applicant never became a party to the record, it had no right of removal, and that an injunction obtained by it from the federal court restraining the prosecution of the case in the state court, on the ground that a removal had been effected by force of the statute (Act 1887–88, § 3), was improvidently awarded.

This was a suit by the Bertha Zinc & Mineral Company to enjoin Elbert Carico and others from prosecuting an action at law in the circuit court of Wythe county, Va.

This cause was submitted on the petition and motion of the complainant to enter an order perpetuating injunction orders awarded by Hon. Hugh L. Bond, on the 14th day of March, 1892, and on the 21st day of April, 1892, and, on the motion of certain of the defendants, to dissolve said injunctions. The cause shows the following state of facts: In the month of May, 1890, Elbert Carico, a citizen of Virginia, instituted in the circuit court of Wythe county, Va., an action at law against the Bertha Zinc Company, a corporation under the laws of Virginia, claiming damages for $20,000 for injuries done to the plaintiff in the month of November, 1889, while he was in the employment of the defendant, which was a mining corporation. At the September term, 1890, of the circuit court of Wythe, the defendant appeared, and demurred to the declaration, and, the demurrer being overruled, it pleaded not guilty, to which the plaintiff replied generally, and issue was joined on the plea, and the case continued. At the March term, 1891, the case was continued generally. At the September term, 1891, it was continued on the motion of the defendant. At the March term, 1892, the defendant, the Bertha Zinc Company, presented a petition to the court, alleging that it had no interest in the subject-matter of the suit, that there was no liability on it on account of the matter of complainant set up in the declaration, but that a third party, the Bertha Zinc & Mineral Company, was solely interested in the defense in the action, and liable to pay any recovery that might be had by reason of the injury complained of, and asking that the said Bertha Zinc & Mineral Company be required, by notice to be served upon it, to appear and maintain the defense of the case. The defendant filed as exhibits with its petition—First, a copy of an agreement entered into the 1st day of February, 1887, between George W. Palmer, of Saltville, Va., party of the first part, who is stated to be the owner or in control of all of the capital stock of the Bertha Zinc Company, and John H. Inman and others, as trustees, parties of the second part, the purpose of this agreement being to form what it terms the "Mineral Trust;" second, a deed made the 20th day of February, 1892, between the Bertha Zinc Company, party of the first part, and the Bertha Zinc & Mineral Company, a corporation existing under the laws of the state of New Jersey, party of the second part, conveying to the latter company several tracts of land, therein described, together with personal property, etc. The plaintiff objected to this petition being filed, and the court sustained the objection. Thereupon the defendant, the Bertha Zinc Company, asked leave to file the following petition:

"In the Circuit Court of Wythe County, State of Virginia.

"Elbert Carico, Plaintiff, vs. The Bertha Zinc and Mineral Co., Deft.

"Petition for the Removal of this Cause to the Circuit Court of the United States for the West. District of Virginia.

"To the Honorable Samuel W. Williams, Judge of the Circuit Court of Wythe County, State of Virginia: Your petitioner respectfully shows that it is a defendant in the above-entitled suit, and that it is a nonresident of the state in which said suit was brought, to wit, the state of Virginia; and that the matter and amount in dispute in the said suit exceed, exclusive of interest and cost, the sum or value of two thousand dollars. That the said suit is of a civil nature, namely, an action of trespass on the case for an injury complained of, in which action the plaintiff claims damages to the amount of twenty thousand dollars. That the controversy is wholly between citizens of different

states, to wit, between your said petitioner, who avers that it was at the time of being made a party to this suit, and still is, a citizen of the state of New Jersey, and the said plaintiff, who, as your petitioner avows, was then, and still is, a citizen of the state of Virginia. And your petitioner offers herewith a bond, with good and sufficient surety, for his entering in said circuit court of the United States, on the first day of its next session, a copy of the record of this suit, and for paying all costs that may be awarded by said circuit court, if said court shall hold that this suit was wrongfully or improperly removed thereto. And your petitioner prays this honorable court to proceed no further herein, except to make an order for the removal of this cause to said circuit court, and to accept said surety and bond, and to cause the record herein to be removed to the said circuit court of the United States in and for the western district of Virginia, and it will ever pray.

"Bertha Zinc and Mineral Company,
"By George M. Holstein,
"Attorney in Fact."

The court entered the following order: "To the filing of which said petition of removal and bond by the Bertha Zinc and Mineral Company the plaintiff by his counsel objected, and the plaintiff by counsel thereupon announced that if the said Bertha Zinc and Mineral Company would admit on the record that in the event the plaintiff showed himself entitled to recover in this case, that in that event the said Bertha Zinc and Mineral Company would be liable therefor; then, in that event, the plaintiff would not object to the said Bertha Zinc and Mineral Company's entering itself a party defendant; and thereupon the said Bertha Zinc and Mineral Company by counsel declined to make any such admission; then, on objection by the plaintiff, the court refused to permit said petition of removal and bond to be filed; to which ruling of the court the defendant, the Bertha Zinc Company, excepts, and to save the benefit of said objection it tenders this, its bill of exception No. 2, which it prays may be signed, sealed, and made a part of the record, which is accordingly so done. Samuel W. Williams. [Seal.]"

The court then impaneled a jury and proceeded with the trial of the case. Pending its trial, the Bertha Zinc & Mineral Company, the complainant in this suit, applied to the circuit judge of this court for a writ of injunction to restrain the plaintiff, Carico, his agents and attorneys, from pressing, prosecuting, or proceeding in said action at law in the circuit court of Wythe. In its bill the complainant alleges: "That there has been removed, under and by virtue of the statutes of the United States providing for such removal, from the circuit court of Wythe county, Virginia, to this court, upon the petition of your orator, who is the real and substantial defendant, the Bertha Zinc Company, of Virginia, being a nominal defendant therein." The circuit judge awarded the writ of injunction as prayed for, and on the 16th of March, 1892, during the progress of the trial in the circuit court of Wythe, the writ was served on the plaintiff, Carico, and his attorneys. The record shows the following: "And the said Bertha Zinc and Mineral Company asked leave to file an attested copy of said writ, with the return thereon, to which motion to file the same plaintiff by his said attorney objected; and the court having asked the counsel whether this paper was filed for or by the Bertha Zinc Co., the defendant of record, or by and for the Bertha Zinc and Mineral Co., to which counsel replied that they appeared on behalf of the Bertha Zinc and Mineral Co., and not on behalf of the defendant, the Bertha Zinc Co., the court then sustained said objection, and refused to allow the said writ of injunction, with the return thereon, to be filed." The state court proceeded with the trial; a verdict was rendered for the plaintiff, judgment entered thereon, and execution issued. The complainant then filed in this cause a petition and supplemental bill, alleging that the sheriff of Wythe county was proceeding to levy said execution on the complainant's property, and praying for a writ of injunction as a supplement to the original writ of injunction, perpetually enjoining and restraining the said Elbert Carico and his said attorneys, and the said sheriff and his deputies, from all further proceedings under the judgment of the said circuit court of Wythe county in the name of Carico, as plaintiff, against the Bertha Zinc Company, as defendant; that the levy and sale of complainant's property in execution of said judgment be likewise perpetual-

ly enjoined; that this petition be filed with leave to stay all proceedings upon said judgment in the said state court, and, upon the hearing, that the said case be declared to have been removed to this court, and that the said Elbert Carico and his attorneys be compelled to revoke and mark null and void all proceedings obtained in the state court after the service of said writ of injunction upon them, etc. On this petition and supplemental bill a writ of injunction was awarded on the 21st day of April, as prayed for, and rules awarded against Carico and his attorney, requiring them to show cause why they should not be adjudged in contempt of this court and its writ of injunction, issued on the 15th day of March, 1892, on the original bill in this cause. Copies of the order were served on the defendants, as directed in the order.

To the original bill, and to the petition and supplemental bill, the defendants filed a demurrer and their joint and several answers. The chief grounds of defense presented by the demurrer and answers are: That the Bertha Zinc & Mineral Company, at the time its petition for removal was offered in the state court, was not a party to the suit of Carico against the Bertha Zinc Company, and was never a party to said suit, but, on the contrary, declined to enter itself as a defendant in said cause, when respondents offered to consent to its being a party defendant, when it presented its petition for removal, if it desired to do so, and admit that it was the real party defendant, and liable to the plaintiff's demand in the event there should be a recovery. It denies that the Bertha Zinc Company sold by contract of February 1, 1887, its stock and property to the Mineral Trust of New York, or that it was a party to such contract, or bound thereby. It alleges that the contract of 20th of February, 1892, made between the Bertha Zinc Company and the Bertha Zinc & Mineral Company, nearly two years after the suit of Carico v. Bertha Zinc Company was brought, and fifteen days before the commencement of the term of the court at which it was to be tried, was made with intent to hinder, delay, and defraud said Carico out of any just recovery he should obtain in said suit. That the restraining order was obtained by misrepresentations, and fraud practiced on the judge granting it. That no record of the proceedings in the state court was filed with the bill, and that it was falsely alleged that that suit had been removed from the state court on petition of the complainant, that the complainant was the real defendant, and that the Bertha Zinc Company was a nominal defendant only, and that it misrepresented the facts as to the removal, and as to complainant being a party to the suit.

The answer denies that respondents, or any of them, had levied or attempted to levy on the personal property of the complainant, or ever threatened to levy any execution on, or in any way interfere with, the property of the complainant. It claims that both the judgment creditor and the judgment debtor are citizens of the state of Virginia, and denies the jurisdiction of this court in the premises. The complainant, subsequent to the filing of the answer of respondents, presented to this court its petition and amended petition, with an assignment from Elbert Carico, the plaintiff in the judgment against the Bertha Zinc Company, to one B. F. Garnet, of said judgment, principal, interest, and costs, and asking that the injunction in this suit be perpetuated, and that the action at law pending on the law side of this court be dismissed; also, an assignment and release by said B. F. Garnet to the said complainant, the Bertha Zinc & Mineral Company, of the full amount of principal, interest, and costs of said judgment; also, praying that said B. F. Garnet be made a party defendant to this cause.

F. S. Blair and J. E. Moore, for plaintiff.
Walker & Caldwell and R. L. Kirby, for defendants.

PAUL, District Judge. The principal question presented by the foregoing statement of facts, and the only one necessary to be considered by the court, is that of jurisdiction. Was the case of Carico v. Bertha Zinc Company, pending in the circuit court of Wythe county, one that could be removed into the United States circuit court, and did this court have authority to grant the writs

of injunction asked for in the original bill, and in the petition and supplemental bill, and which were granted? Section 2 of the act of congress of March 3, 1887, as amended by act of August 13, 1888, provides.

"And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the circuit court of the United States for the proper district."

Section 3 of said act provides:

"That whenever any party entitled to remove any suit such as is mentioned in the next preceding (the 2nd) section, except such cases as are provided for in the last clause of said section, may desire to remove such suit from a state court to the circuit court of the United States he may make and file a petition in such suit in such state court at the time, or any time before the defendant is required by the laws of the state or the rule of the state court in which suit is brought, to answer or to plead to the declaration or complaint of the plaintiff, for the removal of such suit into the circuit court to be held in the district where such suit is pending, and shall make and file therewith a bond, with good and sufficient surety, for his or their entering in such circuit court on the first day of its then next session, a copy of the record in such suit and for paying all costs that may be awarded by the said circuit court if said circuit court shall hold that such suit was wrongfully and improperly removed thereto, and also for their appearance and entering special bail in such suit if special bail was originally required therein. It shall then be the duty of the state court to accept such petition and bond, and proceed no further in such suit."

It is clear that the statute contemplates the removal shall be made by a defendant or defendants who are actual parties to the suit. It makes no provision for removal at the instance of persons who may be beneficially interested. It makes no provision for compelling or allowing other parties to interplead in a case, and thereby make the case removable from a state to a United States circuit court, which was not so removable as between the original parties to the action. The court knows of no principle of law or statutory provision that gives the defendant the power to require the plaintiff to summon and bring in a third party, and make him the defendant in an action at law in place of the party whom he has chosen to proceed against; and there is no rule of practice, certainly in this court, that allows such a proceeding. The only provisions of the Code of Virginia by which a third party can be made a defendant and required to interplead in an action at law are found in sections 2998 and 2999, Code of Virginia, 1887. They clearly do not apply to an action for damages such as Carico instituted against the Bertha Zinc Company; and, the plaintiff and the defendant both being citizens of the state of Virginia, the case was not removable into a court of the United States, nor had the Bertha Zinc & Mineral Company any right to remove that case into the federal court. It was not a party to the record, and peremptorily refused to enter itself as a party defendant to the action, though claiming and demanding all the rights and privileges secured a defendant under the statute. It was an entire stranger to the occurrences out of which the action grew. Carico's contract of service was with the Bertha Zinc Company. It was in the service of that company he was injured. If he desired to recover damages, he was

compelled to sue the Bertha Zinc Company. There was no privity between him and any other. At the time Carico entered into the service of the Bertha Zinc Company, and at the time he was injured, the Bertha Zinc & Mineral Company, so far as the record shows, was not in existence; certainly it had no interest in the property of the Bertha Zinc Company until the 20th day of February, 1892, when it purchased the property of the Bertha Zinc Company. This was over two years after the injury sustained by Carico, and nearly two years after he had commenced his suit against the Bertha Zinc Company; fifteen days before the term at which the trial was had, and three terms of the court having passed since the defendant was required to plead to the declaration. Under these circumstances, the state court could not remove the case into the federal court, and the same was not removed by operation of law, as claimed by the complainant, the Bertha Zinc & Mineral Company. As we have said, it was not a party defendant to the suit, and refused to enter itself on the record as such. It would be a strange construction of the statute allowing removals to permit the complainant, standing entirely outside of the record of the case in the state court, to present its petition and secure the removal of a case in which the defendant of record had no right to ask for a removal. On this subject Dillon says:

"Where the jurisdiction of the federal court depends on citizenship, it is the citizenship of the parties to the record that is alone considered, and not of those who, although not parties, may be beneficially interested in the litigation." Dill. Rem. Causes (5th Ed.) § 101.

The case in the state court not being removed or capable of being removed into the federal court, the writ of injunction granted on the original bill, restraining the plaintiff Carico from prosecuting his suit in the state court, was improvidently awarded. The same is true of the writ of injunction granted on the petition and supplemental bill, restraining the plaintiff Carico, his attorneys, and the sheriff of Wythe county from levying and collecting the execution issued on the judgment rendered in his favor in the state court. These writs were evidently granted under a misapprehension by the learned circuit judge of the true status of the case in the state court.

It is unnecessary to discuss the question as to the power of a federal court to enjoin proceedings in a state court. It is sufficient on this point, in view of the facts presented in this case, to refer to section 720, Rev. St. U. S. Diggs v. Wolcott, 4 Cranch, 179; Dial v. Reynolds, 96 U. S. 340; Fost. Fed. Pr. § 211; Garrett v. Terminal Co., 36 Fed. 513; Hemsley v. Myers, 45 Fed. 283.

The objection urged by counsel for the complainant, the Bertha Zinc & Mineral Company, that the court cannot entertain the motion to dissolve the injunction, because Carico, one of the defendants, asks that it be perpetuated, is not well taken. Walker, Caldwell, Kirby, and Harkrader, the other defendants, have a right to move, as they do, for its dissolution. If no one moved for its dissolution, it would be the duty of the court to dismiss the suit when it found that it had no jurisdiction. Section 5, c. 137 (18 Stat.), provides:

"That if, in any suit commenced in a circuit court or removed from a state court to a circuit court of the United States, it shall appear to the satisfaction of said circuit court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court * * * the said circuit court shall proceed no further therein, but shall dismiss the suit, * * * and shall make such order as to costs as shall be just."

The court being without jurisdiction in this suit, it cannot enter the order asked for by the complainant in its petition and amended petition, perpetuating the injunctions heretofore awarded.

The demurrer, and motion to dissolve the same, must be sustained, and the cause dismissed, at the costs of the complainant. The case of Carico v. Bertha Zinc & Mineral Co., pending on the law side of the court, will also be dismissed.

DAUGHERTY v. WESTERN UNION TEL. CO.

(Circuit Court, D. Indiana. April 24, 1894.)

No. 9,007.

REMOVAL OF CAUSES—DELAY IN FILING PETITION—ACT OF GOD.

The court has no power to permit a removal after the time prescribed (25 Stat. 435, § 3), even when defendant's attorney has been prevented by a storm, which stopped the trains, from reaching the place of holding court until the morning after the last day on which the petition and bond could be filed.

This was an action by Hester J. Daugherty against the Western Union Telegraph Company. The action was commenced in a state court, and, defendant having moved therein for an order awarding a removal to this court, the same was denied, on the ground that its petition and bond were not seasonably filed. Defendant now presents a certified copy of the record, and moves for leave to docket the case in this court.

Ibach & Reiter, for plaintiff.
Agnew & Kelly, for defendant.

BAKER, District Judge. This action was brought in the state court by the plaintiff against the defendant, a foreign corporation, by complaint filed on the 27th day of January, 1894. On the 12th day of February, 1894, the defendant, by counsel, entered of record its voluntary appearance to the action. A rule of the court, duly adopted, and then in force, made the answer of the defendant due "the day succeeding the return day or voluntary appearance;" hence the answer was due on the 13th day of February, 1894. On the 14th day of February, 1894, the defendant filed in the state court its verified petition and bond for the removal of the case into this court, and moved the court to make an order awarding such removal. The motion was denied by the state court solely upon the ground that the application was not seasonably made. The defendant now presents a certified copy of the record, and moves the court for leave to docket the cause in this court. The excuse for failure

to file the application to remove at or before the time when the answer was due is set forth in two affidavits filed in this court in support of the motion for leave to docket. These affidavits show that the counsel for the defendant resided in a county adjoining that in which the action was pending, and that one of them started on a passenger train for that place on the morning of the 13th day of February, and that if the train had been able to run on its usual time he would have reached the place of holding court about 10 o'clock a. m. of that day, and in ample season to have filed the petition in proper time. The sole cause of delay was occasioned by the blockading of the train by a great and unusual fall of snow on the previous day and night, which wholly interrupted the movement of trains between the point where the blockade occurred and the place of holding court. The blockade continued during the whole of the 13th day of February. The petition and bond for removal were filed and presented to the state court at its opening on the morning of the 14th of February.

In my opinion, the failure to start for the place where the court was sitting until the day when the answer was due was such an act of negligence as to defeat the right of removal, without regard to the delay occasioned by the storm. I do not wish, however, to dispose of the motion on this ground. I prefer to place it upon the ground principally argued and relied upon by counsel for the defendant. They concede that the answer was due on the 13th day of February, but they earnestly contend that the storm and the consequent blockade were the acts of God, and that the present case falls within the maxim, "Actus Dei nemini nocet." The present removal act requires, with regard to the time within which the right of removal is to be asserted, that the petition shall be filed "at the time, or at any time before the defendant is required by the law of the state or the rule of the state court in which the suit is brought to answer or plead to the declaration of the plaintiff." 25 Stat. p. 435, c. 866, § 3. It is settled that the present statute was intended to abridge the right of removal previously existing, and it ought to be so construed and enforced as to effectuate, rather than to defeat, its obvious purpose. It has been said by the supreme court in construing this statute "that it is imperative that the application to remove must be made when the answer is due." Railroad Co. v. Daughtry, 138 U. S. 298, 11 Sup. Ct. 306. The right of removal is created and regulated by the act of congress, and its enjoyment cannot be claimed except within the time and in the manner prescribed by the statute. It is firmly settled that the time within which the removal may be had cannot be enlarged by continuances, demurrers, motions to set aside service of process, pleas in abatement, or by stipulations of the parties, or by orders of the court extending the time to answer. This doctrine rests upon the solid foundation that the statute is mandatory, and that the right of removal ceases to exist when the time limited therefor has elapsed. The limitation of time within which a removal may be had is not a floating one, to be regulated by stipulations, motions, dilatory pleas, or orders of the court bottomed upon considerations of diligence or unavoidable accident. The right of

removal is fixed and stable, measured in regard to the time of its exercise by the statute of the state when it fixes the time to answer or plead, or by the rule of court where the time of pleading is so determined in the absence of state law. The act of congress limiting the time of removal would cease to be mandatory if the federal courts are invested with power to relieve from its operation because of the intervention of the vis major or the act of God. The court is clothed with no such dispensing power. The time within which the right of removal may be exercised is a subject for legislative, and not for judicial, discretion. If the court may enlarge the time because the making of the application to remove has been prevented by the act of God, it can do so only because it is clothed with discretionary power to extend the time prescribed by the act of congress. If it possesses such discretionary power, it may enlarge the time to apply for a removal whenever, for any cause, the court might be of opinion that the delay was without fault on the part of the party asking a removal. Under such a construction the time within which the application to remove must be made would not be prescribed by law, but would be determined by the discretion of the court, to be exercised upon the facts of each case. In my judgment, an inflexible rule of law determines the time within which an application to remove must be made, and the court possesses no discretionary power to enlarge it. This construction of the statute may at times operate with harshness, but any other would defeat its plain language and manifest intent.

The motion for leave to docket the cause is therefore denied, with costs.

UNITED STATES v. MANEY.

(Circuit Court, D. Minnesota. May 28, 1894.)

1. COURT-MARTIAL—JURISDICTION—PLEADING.
   The charge on a trial before a court-martial was "conduct to the prejudice of good order and military discipline;" the specification set up to be proved certain acts showing homicide by the accused. *Held*, that there was nothing in the charge itself alleging that the accused had committed murder; that the offense charged was within the jurisdiction of the court-martial, and it was for it to decide upon the validity and the sufficiency of the pleadings.

2. SAME—WRIT OF PROHIBITION.
   Where accused is charged before a court-martial with "conduct prejudicial to good order and military discipline," and the specification shows that he is alleged to have committed a homicide, a plea of former acquittal by a civil court is a defense going to the merits of the case, and not to the jurisdiction of the court, and a civil court cannot interfere to prevent the exercise of such jurisdiction.

3. SAME—INTERFERENCE OF CIVIL COURTS.
   The power to make rules and regulations for the government of the land and naval forces, and the power to establish the civil courts, were conferred upon congress under different articles of the constitution. They are independent powers; and when courts organized under those respective powers are proceeding within the limits of their jurisdiction they must be free from interference.

Application of James A. Maney for a writ of prohibition restraining a court-martial from proceeding with the trial of said Maney under the first charge and specification under examination before said court-martial.

F. P. Blair, for petitioner.
Col. Thomas F. Barr, Judge Advocate, for the United States.

NELSON, District Judge. I shall assume that all the allegations of fact presented in this application for a writ of prohibition are true; that it sets forth succinctly everything that has transpired up to this time. I have listened very attentively to the argument of counsel in this case. It is a very interesting one. The argument has been an exhaustive one upon the subject presented, and many questions have been discussed which, it seems to me, it is not necessary to decide. The application for the writ of prohibition, as stated by counsel, is a novel proceeding. I think this is the first time that the circuit court of the United States has been asked to employ this remedy for the purpose indicated in this petition. In the case cited by counsel (Smith v. Whitney, 116 U. S. 167, 6 Sup. Ct. 570), the supreme court of the District of Columbia was asked to employ the writ of prohibition. While it presents a very novel and interesting question, and there is great doubt in my mind of power in the court to issue a writ of prohibition, I shall concede that there is power in this court, upon an application in a proper case, to issue the writ. This court has no inherent power, it is true, to issue the writ of prohibition, and there is nothing in the statutes of the United States which confers, in express terms, such power. Section 716 of the Revised Statutes does authorize this court, in aid of its jurisdiction, to issue all writs which may be necessary for the exercise of its jurisdiction, and "agreeable to the usages and principles of law." The power imparted by this statute must be exercised under the qualifications indicated by the law. It is a very doubtful question, but I shall concede, for the purposes of this decision, that this court, even to a court-martial, has the power to issue the writ.

Now, what is the claim made by the counsel for the petitioner? He asks this court, upon the petition presented here, to restrain the court-martial now in session, trying the petitioner for a military offense, as alleged, from further proceeding in that case—First, for the reason that the court has no jurisdiction of the offense; second, that the court is proceeding in excess of its jurisdiction. In other words, that the first charge is the charge of murder, and that the military court has no jurisdiction to try an officer, in time of peace, for murder, except in cases of mutiny. Counsel claims that, although the charge is "conduct to the prejudice of good order and military discipline," the specification which informs the accused party of the acts which are set up to be proved states acts showing homicide by the accused, and that, consequently, murder is charged. I cannot agree with counsel in such a construction of this charge and specification. There is nothing in the charge itself alleging that Lieut. Maney has committed murder. It is only by reading the specification that we find homicide alluded to. The manner of stating it is

a question of pleading rather than of jurisdiction. The charge against Lieut. Maney is "conduct to the prejudice of good order and military discipline." The military court has jurisdiction to try that charge, and it is for the court having such jurisdiction to decide upon the validity and sufficiency of the pleadings necessary to bring that charge before the court. It is a question of pleading over which this court has no control, and which the military court must decide.

Upon the other point raised by the counsel for the accused, to wit, that the court is proceeding in excess of jurisdiction, I have very little doubt of the principle upon which that must be decided. The supreme court of the United States in many cases has decided what constitutes jurisdiction. Jurisdiction is the right to hear, try, and determine a cause. I have jotted down, in a memorandum I have here, a definition of jurisdiction which is found in Grignon's Lessee v. Astor, 2 How. 338. The court in that case said:

"The power to hear and determine a cause is jurisdiction. It is coram judice whenever a case is presented which brings this power into action. If the petitioner presents such a case in his petition that, on a demurrer, the court would render a judgment in his favor, it is an undoubted case of jurisdiction; whether on an answer denying and putting in issue the allegations of the petition the petitioner makes out his case, is the exercise of jurisdiction, conferred by the filing a petition containing all the requisites, and in the manner required by law."

And again:

"The jurisdiction of the court can never depend upon its decision upon the merits of the cause brought before it, but upon its right to hear and decide it at all." Ex parte Watkins, 7 Pet. 572.

Let us now apply the principles enunciated in those cases to the question here. Excess of jurisdiction is claimed against the court-martial because the defendant has once been tried for the same offense; that he has been acquitted, and the court-martial has no right to try him again. In all cases I know of, pleas of that character are matters of defense, and go to the merits, and the jurisdiction of the court does not depend upon its decision upon the merits of the cause brought before it. It is for the court having jurisdiction to try the charge, in the exercise of that jurisdiction, to decide all matters,—all questions of law or of fact,—and no other court can interfere. A case illustrating that doctrine was decided by my Brother Caldwell upon a writ of habeas corpus, where the question of jurisdiction was presented. See Ex parte Ulrich, 43 Fed. 663. In that case he said:

"Errors in law, however numerous and gross, committed by the trial court in the cause within its jurisdiction, can only be reviewed by appeal or writ of error in the court exercising supervisory or appellate jurisdiction over the trial court in the particular case. It is only where the trial court is without jurisdiction of the person or the cause, and a party is subjected to illegal imprisonment in consequence, that the writ of habeas corpus may be invoked, and the party discharged from the illegal imprisonment."

He also cites in that case the opinion of the supreme court of the United States, delivered by Mr. Justice Miller, in Ex parte Bigelow, 113 U. S. 328, 5 Sup. Ct. 542, this being a case in which the plea was that the accused had been twice put in jeopardy for the same offense, in violation of the fifth amendment to the constitution of the United States. The court said:

"But that court had jurisdiction of the offense described in the indictment on which the prisoner was tried. It had jurisdiction of the prisoner, who was properly brought before the court. It had jurisdiction to hear the charge and the evidence against the prisoner. It had jurisdiction to hear and to decide upon the defenses offered by him. The matter now presented was one of those defenses. Whether it was a sufficient defense was a matter of law, on which that court must pass so far as it was purely a question of law, and on which the jury, under the instructions of the court, must pass, if we can suppose any of the facts were such as required submission to the jury. If the question had been one of former acquittal,—a much stronger case than this,—the court would have had jurisdiction to decide upon the record whether there had been a former acquittal for the same offense; and, if the identity of the offense were in dispute, it might be necessary, on such a plea, to submit that question to the jury on the same issue raised by the plea. The same principle would apply to a plea of a former conviction. Clearly, in these cases, the court not only has jurisdiction to try and decide the question raised, but it is its imperative duty to do so. If the court makes a mistake on such trial, it is error which may be corrected by the usual modes of correcting such errors; but that the court had jurisdiction to decide upon the matter raised by the plea, both as matter of law and of fact, cannot be doubted."

Delay might have enabled me to have elaborated my views upon this question, and perhaps more clearly presented them, but as I am satisfied that the case is correctly decided, although I have grave doubt about the power to issue the writ, I deem it proper, without delay and without elaboration, to announce my decision. The counsel thinks he has no remedy; that, if this court refuses the writ of prohibition in this case, he is remediless. But that is no reason for issuing the writ. The constitution has conferred upon congress, in the third article of the constitution, the power to create this court. In the first article of the constitution, power is granted congress to make rules for the government and regulation of the land and naval forces. These are independent powers, derived from different articles of the constitution, and, when courts organized under these respective powers are proceeding within the limits of their jurisdiction, they must be free from any interference. I shall refuse the writ of prohibition, as asked for in this case, for the reason that I am satisfied there is no sufficient cause presented for the issuing thereof.

UNITED STATES v. UNION PAC. RY. CO. et al.

(Circuit Court, D. Kansas. April 9, 1894.)

No. 6,886.

PUBLIC LANDS—RAILROAD GRANTS—EXCEPTED CLAIMS—PRE-EMPTIONS.

The mere filing of a declaratory statement, without any previous settlement, as required by the pre-emption laws (Rev. St. § 2264 et seq.), was not sufficient to cause a pre-emption claim to become "attached" to the lands so as to except it out of the grant made to the Union Pacific Railway Company by the act of 1864. Whitney v. Taylor, 45 Fed. 616, disapproved.

This was a suit by the United States against the Union Pacific Railway Company, William Hoard, and others, to cancel a patent issued to that company for certain lands which, at the time of the suit, were claimed by said Hoard under mesne conveyance from it.

W. C. Perry, U. S. Atty., and Morris Cliggitt, Asst. U. S. Atty.
N. H. Loomis and A. L. Williams, for defendant.

RINER, District Judge. This is a bill in equity to cancel a patent, issued September 10, 1874, to the Union Pacific Railway Company, and to have a deed executed by one Jacob Quinn to William Hoard, one of the defendants herein, declared void. It is alleged in the bill that at the time the map of definite location of the Union Pacific Railway Company, eastern division, was filed, as required by the act of congress, a pre-emption claim had attached to the land in controversy, and for that reason the land was excepted from the grant to the railroad company. The evidence in the case discloses that the map of definite location of the railroad was filed on the 8th of May, 1867; that the land was thereafter conveyed by warranty deeds, as follows: March 11, 1873, Union Pacific Railway Company to Milo D. Powers; September 3, 1875, Milo D. Powers to Hartman Berg; April 22, 1881, Hartman Berg to William H. Whitman; July 28, 1883, William H. Whitman to Jacob Quinn; September 1, 1885, Jacob Quinn to William Hoard, who now resides upon the land, and has ever since the date of his purchase in 1885. The evidence further shows that on the 21st day of June, 1866, one Charles Elder filed in the land office at Junction City, Kan., a declaratory statement as follows:

"I, Charles Elder, of Saline county, Kansas, a single man over the age of twenty-one, a citizen of the United States, did on the 8th day of June, A. D. 1866, settle and improve the N. E. ¼ of section 1, town 15 south, of range 3 west of the 6th principal meridian, in the district of lands subject to sale at the land office at Junction City, Kansas, which land has not been offered at public sale, and thus rendered subject to private entry; and hereby declare my intention to claim said tract as my pre-emption right under the provisions of said act of the 4th of September, 1841. Given under my hand this 21st day of June, A. D. 1866. In the presence of Edward Martin. Charles Elder."

I think the evidence establishes beyond all question that Elder never made settlement on the land in controversy, and the statement in his declaration filed on the 21st of June, 1866, that he did on the 8th day of June, 1866, settle and improve the land in controversy, is not sustained by the proof. The act of congress of 1862, as amended in 1864, granted to the defendant railway company, within designated lines, every alternate section of public land, designated by odd numbers, on each side of the line of road not sold, reserved, or otherwise disposed of by the United States, "and to which a pre-emption or homestead claim may not have attached at the time the line of said railroad is definitely fixed." Thus we are brought to a consideration of the question whether by the mere act of Elder's filing this declaratory statement in the land office, without having made previous settlement, as required of pre-emption claimants under the laws of the United States, it can be said that a pre-emption claim had attached to this land within the meaning of the granting act of 1862, and that the land was thereby excepted from the grant to the railroad company. This necessarily leads to an examination of the pre-emption laws of the United States,

and the method of initiating a claim thereunder, as distinguished from initiating a claim under the homestead laws of the United States. The word "attached" means, according to Webster, "to bind; to fasten." Therefore, for a pre-emption or homestead claim to attach to a piece of land, the claimant must perform the acts required by the laws of the United States to be performed by him, to bind or fasten his claim to the land. In other words, he must initiate his right to the land in the way provided by law, so that, if he thereafter complies with the requirements of the statute, the inchoate right to the land thus initiated could ripen into a perfect title. The first thing required of a party desiring to make a pre-emption claim, under the pre-emption laws of the United States, is to make a settlement on the land in person; second, to inhabit and improve the same; and, third, to erect a dwelling house thereon. Section 2259, Rev. St. This he must do. He is not authorized by the statute to make a declaratory statement until after settlement, because in his declaratory statement he must set forth that, prior to the date of the declaration, he has settled upon and improved the land he seeks. An examination of the statute relating to pre-emptions will show in almost every section that settlement is the first step required by the pre-emption law to initiate a pre-emption claim. Thus, section 2264 provides that, wherever a person settles or improves a tract of land subject at the time of settlement to private entry, he must file a declaratory statement within 30 days from the date of settlement. Section 2265 provides that every claimant under the pre-emption law for land not yet proclaimed for sale shall make his declaratory statement within three months of the date of settlement. Section 2266 provides, in regard to settlements which are authorized upon unsurveyed lands, that the claimant shall file his declaratory statement within three months from the date of the receipt at the district land office of the plat of the township embracing such pre-emption settlement. Section 2268 provides: "Where a pre-emptor has taken the initiatory steps required by law in regard to actual settlement, and is called away from such settlement by being in the military service, that the time for making the proof shall be extended," etc. Section 2271 provides that this chapter shall be so construed as not to confer upon any one a right of pre-emption by reason of a settlement made on a tract theretofore disposed of, when such disposal has not been confirmed by the general land office. Section 2273 provides that, when two or more persons settle on the same tract of land, the right of pre-emption shall be in him who made the first settlement. Section 2274 provides that when settlements have been made upon agricultural public lands, prior to the survey thereof, and it has been or shall be ascertained, after the public surveys have been extended over such land, that two or more settlers have improvements upon the same legal subdivision, it shall be lawful for such settlers to make joint entry, etc. Section 2275 provides, where settlements with a view to pre-emption have been made before the survey of the lands in the field which are found to have been made on sections 16 and

36, those sections shall be subject to the pre-emption claim of such settlers. Thus it will be seen that settlement is made the initiatory step by the laws of congress to secure to a party the right of pre-emption. Indeed, it is so declared by the statute in section 2268. This section provides, "when a pre-emptor has taken the initiatory steps required by law in regard to actual settlement," he shall have the right, etc. It is not unusual for a number of declaratory statements to be filed on the same piece of land; but there can be but one pre-emption claim attached or fastened to the land, and that, as declared by the statute, shall be the one in which the first settlement was made. The language of the granting act does not recognize more than one pre-emption claim to a particular piece of land. The language is, "And to which a homestead or pre-emption claim may not have attached." That means a claim which is fastened to the land in the manner provided by law, so that if the subsequent steps in the matter of proof and payment are complied with the inchoate right thus initiated might ripen into a perfect title. No man could get a perfect title to land under the pre-emption laws without settlement. That is the first thing to be done. If he settles, he may have this right, and may file his declaratory statement within 30 days in one case, or within three months in the other two cases, or even at a later period, if no other rights have intervened. Johnson v. Towsley, 13 Wall. 90.

In the case above cited the record disclosed that settlement was made eight months prior to the time the declaration was filed; yet the supreme court held that the claim was a valid one, no rights having intervened, and that he might then file his declaration. A very different proceeding is required to initiate a homestead entry. Under the homestead laws, the first step required of the person applying to make a homestead entry is that he shall make affidavit before the register and receiver that he is the head of a family, etc., and that the application is made for his exclusive use, and that it is his purpose to settle and cultivate the land, and that he does not make the entry for the use or benefit of any other person. Upon filing this affidavit with the register or receiver, and on payment of $5 if the entry is for 80 acres, or $10 if it is more than 80 acres, he shall be permitted to enter the land specified in his application. Thus it will be seen that, before he can initiate any right under the homestead laws, he must make this affidavit and payment, and then, and not until then, is he allowed to settle upon the land for the purpose of securing any rights under the homestead laws. Counsel for the government contend that the question of settlement is immaterial, that the granting "act does not require that the claim shall be a lawful one, or that it shall be initiated properly or otherwise. It is sufficient that there is a claim (pre-emption or homestead) that may have attached." I do not see how it can be said that a pre-emption or a homestead claim has attached (that is, fastened) to a piece of land until the party has performed the acts required by law to initiate his right. True, he may not be able to perfect his title because of his failure to comply with the requirements

of the statute subsequent to settlement, and such failure would not operate to take the land out of the exception in the granting act, because if he had made a settlement with intention to pre-empt the land, that being the first act required by the statute, the pre-emption claim by virtue of that act had attached to the land, and it was therefore excepted. The same would be true in a homestead if he had filed the affidavit and made the payment which is required by statute as the first step. In either case, subsequent failure to make the proof and payment in order to get a perfect title would not have the effect to take the land out of the exception mentioned in the granting act. In the case of Hosmer v. Wallace, 97 U. S., at page 779, Mr. Justice Field, delivering the opinion of the court, says: "To create a right of pre-emption there must be settlement, inhabitation, and improvement by the pre-emptor." If there can be no right of pre-emption without settlement, how can it be said that a pre-emption claim attached to the land by the mere filing of the declaration where no settlement was made, and where if the party performed each successive step thereafter, as required by the statute, yet his title must necessarily fail. But counsel for the government in his brief says: "The mere filing exhausted the right of the person filing a declaratory statement. The pre-emption right was thus exhausted by having been used or exercised. If such filing was not a claim, what was it? If it did not attach to the land, why did it withdraw the land from further or other sale, and why did it prevent another pre-emption or homestead claimant from filing on the same land in utter disregard of this prior filing? Why was a contest or proceeding of any nature to declare the entry invalid necessary if a claim did not attach by the mere act of filing, and if a claim did attach as against a subsequent pre-emptor or a homestead claimant to the same land? Why did not such claim attach as to the defendant railway company? The trouble with this proposition, and with the questions propounded in connection therewith, is, first, that the lands in the case before us were not subject to private entry, as appears affirmatively from the declaratory statement, and therefore the filing of this declaratory statement did not exhaust the right of the person filing it. See Johnson v. Towsley, 13 Wall. 89, 90. To the first question I answer that the filing of this paper amounted to absolutely nothing, so far as acquiring any right of pre-emption by reason thereof is concerned. The other questions contained in the paragraph above quoted from the plaintiff's brief are easily answered. The filing of this paper did not withdraw the land from further or other sale, and did not prevent another pre-emption claimant from filing on the same land in utter disregard of this prior filing, and no claim attached as against a subsequent pre-emptor, or a homestead claimant to the same land. It is no unusual thing for two or more persons to file declaratory statements in the land offices of the United States, claiming settlement and improvement upon the same piece of land. But the statute provides, in such case, "the right of pre-emption shall be in him who made the first settlement."

In regard to the Dunmeyer Case, infra, I wish to be understood

that my suggestions at the hearing went to the extent only of indicating that if the principles announced in that case were to be applied to a pre-emption claim, it would be obiter, for the reason that the court did not have the pre-emption law under consideration in that case. There was no question arising in the case with reference to the pre-emption law, but the question, and the sole question, was as to when a claim attached under the homestead laws of the United States. A careful examination of that case, however, will disclose that the court did not attempt in any way to discuss or to announce any rule applicable to a pre-emption claim, and made no suggestion whatever as to when or how a pre-emption claim would attach to a piece of land, but, on the other hand, confined its discussion strictly to the case before it, namely, to a homestead. That is why Mr. Justice Miller, in writing the opinion, in the closing paragraph said that the word "attached" "did not mean mere settlement, residence, or cultivation of the land; but it meant a proceeding in the proper land office, by which the inchoate right to the land was initiated. It meant that by such a proceeding a right of homestead had fastened to that land, which could ripen into a perfect title by future residence and cultivation." He was there discussing a homestead entry, in which, under the laws of the United States, the first step to initiate the right was a proceeding in the land office. A homestead entry could not have been initiated by settlement, residence, or cultivation. By settlement, residence, or cultivation a right of homestead could not have fastened to the land which could ripen into a perfect title. But by a proceeding, and only by a proceeding first, had in the land office, and followed up by future residence and cultivation, could the right of homestead fasten to the land in such a way that it could ripen into a perfect title. On the other hand, the same learned judge, in announcing the opinion of the court in Johnson v. Towsley, held that a pre-emption claim was initiated by settlement, and, although the party neglected to file his declaratory statement in the land office for a period of eight months after the date of his settlement, yet, by reason of his settlement upon the land, he had initiated a right of pre-emption, and that his right thus initiated was not barred from the mere fact that he neglected to file his declaratory statement within the time prescribed by the statute, no rights having intervened.

I have examined every case I could find which would tend to throw any light upon this question, and with one exception have been unable to find any case which goes to the extent contended for by the government in this case. That exception is the case of Whitney v. Taylor, reported in 45 Fed., at page 616. In that case the learned judge holds that by the mere filing of a declaratory statement a pre-emption claim attached to the land, and, in support of his view, he cites the cases of Railroad Co. v. U. S., 92 U. S. 734; Newhall v. Sanger, Id. 761; Railway Co. v. Dunmeyer, 113 U. S. 629, 5 Sup. Ct. 566; Railroad Co. v. Whitney, 132 U. S. 357, 10 Sup. Ct. 112. An examination of these cases will disclose that they were either homestead entries or reservations under Indian or Mexican grants, and that in no one of them was the pre-emption

laws under consideration. In the course of the opinion the learned judge, in commenting upon these cases, says:

"It is true that in several of these cases there was either a valid homestead claim initiated by settlement followed by an entry, or a pre-emption claim initiated by a settlement followed by a declaration of intention to purchase; but the decisions are based upon the fact of the filing of the declaratory statements in the proper land office."

The trouble about this statement is that a homestead claim can never, under the laws of the United States, be initiated by a settlement followed by an entry. Upon the other hand, it must be initiated by an entry followed by a settlement. Hence the decisions in homestead cases are properly based upon the fact of filings made in the land office, for that is the first step required by the statute to initiate a homestead entry, while, as I have already shown, a very different proceeding is required to initiate a pre-emption claim, the first step being a settlement with three months to file the declaration after settlement. In the first case, a homestead entry attaches by reason of the filing; in the second case, a pre-emption attaches by reason of the settlement. In the case of a homestead, the filing segregates the land from the public lands of the United States, and the inchoate right to the land is initiated by that act. In the case of a pre-emption, the settlement segregates it from the public lands of the United States, and the inchoate right is initiated by that act.

Where a homestead claim had attached by reason of the filing in the proper land office, or where a pre-emption claim had been initiated, and therefore attached to the land, by settlement at the time the map of definite location was filed, the land was excepted from the grant, no matter if the parties did thereafter fail to comply with the laws and to perfect their title. If the entry was canceled for that reason, the land would not go to the railroad company, but would be open for settlement. But without settlement and improvement, in the case of a pre-emption, no claim whatever attached to the land.

The testimony shows that the defendant Hoard purchased this land in good faith, relying upon the patent from the government to the railroad company; that he at the time of his purchase paid $5,000 for the land; that he has since made valuable and expensive improvements thereon. In making his purchase, I think he had the right to rely on the patent as being an act of the government which was final and controlling as to the title. Under the facts of this case, I must decline to give my consent to a decree which would deprive him of the benefits of his investment and years of labor, unless the court of appeals shall by its mandate direct me to enter such a decree. A decree will be entered in this court dismissing the bill and allowing an appeal.

CUTTING v. TAVARES, O. & A. R. CO. (FLORIDA CENT. & P. R. CO. et al., Interveners).

(Circuit Court of Appeals, Fifth Circuit. April 17, 1894.)

No. 212.

1. APPEAL—INSUFFICIENCY OF TRANSCRIPT.
   An appeal will not be dismissed for insufficiency of the transcript where the records were burned while the case was pending below, and the transcript contains all the subsequent proceedings, and so much of the prior record as has been re-established, and no one of the several appellants was to blame for not fully re-establishing it.
2. MORTGAGES—PAYMENT OF COUPONS.
   A decree of foreclosure provided, in accordance with the terms of the mortgage, that the purchase money should be applied "first to the payment in full, if it be sufficient, or, if not, to the payment, pro rata, of all defaulted coupons" belonging to the bonds secured, and the balance, if any, to payment of the bonds. *Held*, that a decree of distribution of the proceeds of the sale which directed a pro rata payment on the bonds themselves, before paying the interest coupons due, was erroneous.
3. SAME—CREDITS.
   Where the decree confirming a mortgage sale allows the purchaser a credit by reason of a certain receipt filed by him, it is error to reject such credit in the subsequent decree distributing the proceeds of sale.
4. SAME—CLAIMS PRIOR TO RECEIVERSHIP.
   Upon the sale of a railroad on foreclosure, it is error to direct payment of claims for supplies furnished prior to the receivership out of the purchase money, where no provision was made for such payment when the receiver was appointed, and there is no evidence that current earnings, before or after his appointment, were diverted to paying interest on the bonded debt.
5. SAME—TAXES ON FORECLOSURE.
   The purchaser of property on foreclosure is entitled to a credit for taxes paid by him only where the taxes were a lien on the property; and where the date of the assessment does not appear, that being the date when the lien attaches (Sess. Acts Fla. 1887, Act. No. 1, § 42), it cannot be said that the refusal to allow him such a credit is error.

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

This was a suit for foreclosure by William Bayard Cutting against the Tavares, Orlando & Atlantic Railroad Company, in which the Florida Central & Peninsular Railroad Company intervened. From certain decrees made in the cause, the interveners appeal.

William Bayard Cutting, as trustee, brought suit in the circuit court against the Tavares, Orlando & Atlantic Railroad Company to foreclose a mortgage on thirty-two miles of road in Orange county, state of Florida. The mortgage was given to secure the payment of two hundred and fifty-six (256) bonds of one thousand dollars each, with interest at eight per centum per annum. Such proceedings were had in said suit that on the 24th of December, 1890, a decree of foreclosure and sale was rendered. The decree provided, among other things, as follows: "At the conclusion of the sale, all deposits shall be returned except the deposit of the bidder to whom the property shall be struck off, and he shall have credit for the amount thereof, as a payment in cash on account of the purchase price. In addition to the said deposit of ten thousand dollars, so much of the purchase money as shall be necessary to pay off all obligations, if any there be, incurred by the receiver under the orders of this court, which shall then have come due and payable, shall be paid in cash, and the receiver is hereby ordered to furnish to the master, at least five days before the sale, a sworn statement of

all such obligations, and of all other outstanding contracts made and obligations incurred by the receiver under the orders of this court, and not then paid off or discharged, subject, however, to revision by the court, at the suggestion of complainant, and the purchaser shall take the property, subject only to the performance of the contracts and the payment of the obligations so stated; and the amount of the purchase price to be paid in cash shall be fixed by the master, and shall be announced by him at the time of the sale, and the cash payment, including the said ten thousand dollars, shall be deposited by the master in the National Bank of Jacksonville, to the credit of this cause, subject to be drawn out by the master on his check; and out of the funds so deposited the master shall pay the costs, fees, allowances, and compensation herein provided for, or which may hereafter be allowed by the court, and the said obligations of the receiver which shall have become due and payable; and, upon the confirmation by the court of such sale, the residue of the purchase price shall be paid to the master within thirty days thereafter, at a place to be appointed by him at the time of the sale, either in cash, or, at the option of the purchaser, in bonds of the defendant above described, and in interest coupons belonging to said bonds, such bonds and coupons, if such sale be for less than the amount due thereon, to be taken as equivalent to so much of the said purchase money as would be distributable and payable thereon. All bonds and coupons so received by the master in lieu of cash, unless thereby paid in full, shall be stamped with a statement of the amount of the purchase price thereby paid, which amount shall be deemed and held to be a payment on account of the amount due such bonds and coupons; and the said bonds and coupons, after being so stamped, shall be returned by the master to the parties presenting the same. All bonds and coupons paid in full shall be stamped accordingly or otherwise canceled by the master, and delivered by him to the defendant. * * * It is further ordered, adjudged, and decreed that the master pay out of the proceeds of such sale the amounts which shall hereafter be fixed and allowed by the courts for his fees and the expenses of sale, the costs of this suit, the expenses and compensation of the receiver, the compensation of the complainant, W. Bayard Cutting, for his services as trustee, the allowances to counsel and solicitors; and out of the surplus, if any, the master shall pay all obligations incurred by the receiver under the orders of this court, which shall have become due and payable, and shall have been announced by the master at the time of the sale as aforesaid; and shall apply the residue of this surplus, if any, first to the payment in full, if such residue be sufficient, or, if not, to the payment, pro rata, of all the defaulted coupons belonging to the said bonds, and the interest thereon hereinbefore adjudged to be due and payable, together with interest on the amount thereof from the date of this decree to the time of payment by the master, at the rate of 8 % per annum, and the interest hereinbefore adjudged on the principal of the said bonds and accrued since June 4, 1888, and interest thereon from the date of this decree, to the time of payment by the master, at the rate of 8 % per annum; and, secondly, to the payment in full, if such residue be sufficient, or, if not, to the payment, pro rata, of the principal of the said bonds; and, if afterwards any surplus remain, the master shall pay the same into court, subject to the further order of the court." Sale was made under the said decree on the 2d day of March, 1891, and the properties were purchased by the Florida Central & Peninsular Railroad Company, through its agent, for the sum of one hundred and seventy-six thousand dollars ($176,000). On the 14th of April following, the court rendered a decree confirming said sale, wherein, after reciting the sale of the properties and the bid of the Florida Central & Peninsular Railroad Company for the sum of $176,000, it was further recited: "And it further appearing that the bid so made was preceded by a deposit of ten thousand dollars by the said Florida Central and Peninsular Railroad Company as security that the said bid would be made good, and that it was the highest and best bid therefor, and that the said purchaser has made a further payment to the said master as follows: In cash, the sum of ten thousand one hundred and sixty-eight 86/100 dollars; the receipt of Florida Central & Peninsular Railroad Company, as successors to the right of the receiver of the Florida Railway & Navigation Company, on traffic balance, the sum of ten thousand three hundred and sev-

enty-one and 46/100 dollars ($10,371.46); the receipt of the Rogers Locomotive & Machine Works for engines, &c., twelve thousand seven hundred and ninety-five 61/100 dollars ($12,795.61); the receipt of the Pullman Palace Car Company for equipment, fourteen thousand two hundred and five 23/100 dollars ($14,205.23); notes of the receiver, principal and interest, amounting to the sum of thirty-eight thousand nine hundred and twenty-three and 22/100 dollars ($38,923.22); and, for the assurance of the payment of a part of the balance of said purchase money, has filed with Philip Walter, master, the evidence that said purchaser, the Florida Central and Peninsular Railroad Company, is the owner of and is possessed of two hundred and twenty-two (222) of the two hundred and fifty-six (256) one thousand dollars ($1,000) bonds, with attached coupons of the said defendant company, which it is ready to file with the master in the further proceedings to be had under this decree; and that, as to the rest and residue of said purchase money, the same shall be paid as is hereinafter provided." And it was ordered and adjudged as follows: "And it is further ordered, adjudged, and decreed that it be referred to Philip Walter, Esq., as master of this court, to call in, upon giving thirty days' notice by publication in the Tribune, published in Jacksonville, Florida, weekly, for four (4) weeks, all of the outstanding bonds and coupons of the said defendant company, and that said master do make and report the application of the proceeds of the sale of said railroad property of the defendant company, other than as herein allowed, as aforesaid, to the said purchaser on the receipts as filed as follows: First. The costs of this proceeding, including an allowance to the master for his proceedings under said decree, the amount to be settled on coming in of his final report; and the compensation to the complainant, as trustee, one thousand dollars (1,000.00); to Burrill, Zabriskie & Burrill, complainants' solicitors, two thousand dollars (2,000.00); to T. L. Clark, complainants' solicitor, twelve hundred and fifty dollars (1,250.00); to Joseph H. Durkee, receiver, as per agreement, twenty-seven hundred and fifty dollars (2,750.00). Second. And to the intervening petitioners reported by the receiver in his report of January 29th, 1891, amounting to eight thousand nine hundred and twenty-seven and 63/100 ($8,927.63), or to such of them as upon investigation before said master shall be ascertained to come within the provisions of the terms of the amended decree herein filed, with privilege to the purchaser to contest before the master and before this court on the report of the master any and all of such claims. And it is further ordered and decreed that the said master ascertain and report the amount payable on each coupon and bond so filed with him, and that upon so ascertaining the amount to be due hereunder to each party filing either bonds or coupons of said defendant company with the master in the limit of time as aforesaid, the said purchaser shall forthwith pay to said master the balance due on said purchase, after making allowance for the payments as already made, and after allowing to him the proportionate value of such bonds and coupons as shall be so filed by the said purchaser."

On the 23d of May, at the same term of the court in which the foregoing decrees were rendered, W. C. Lewis, alleging himself to be the owner of twenty (20) of the bonds under the issues secured by the mortgage, by intervening petition, attacked the ownership of nineteen (19) of the two hundred and twenty-two (222) bonds tendered by the purchaser towards payment of the part of the balance of his purchase money, alleging that said bonds belonged to the defendant railroad company, never having been issued in such a way that the railroad company parted with its ownership. The Florida Central & Peninsular Railroad Company appeared and answered said intervening petition, asserting that only 16, and not 19, of the bonds were involved, and asserting that the bonds had been issued by the company to the Pullman Palace Car Company as collateral, and that, upon default, they had been sold; and claiming that the Florida Central & Peninsular Railroad Company held said bonds as proper outstanding obligations of the defendant railroad company, and was entitled thereon to participate in the distribution of the purchase money. The intervening petition and answer were referred to a master, who reported that the 16 bonds were deposited as collateral security with the Pullman Palace Car Company, that the Pullman Palace Car Company had been paid out of the funds arising from the sale of the prop-

erty, and that, therefore, the said bonds should not participate in the distribution of the property of the defendant company. This report was excepted to by the Florida Central & Peninsular Railroad Company on the ground that the report was not sustained by the facts in the case. Thereupon, on the 23d day of February, 1892, the court rendered a decree to the effect that the 19 bonds of the defendant company presented and filed in the cause of the Florida Central & Peninsular Railroad Company were not legally outstanding in the hands of said company, and that said company was not entitled to share in the proceeds of the sale of the property of the said company on account of such bonds, or any of them, and the clerk of court was ordered to cancel the said 19 bonds, and each of them, by writing across the face thereof the words, "Canceled by order of court." Thereafter, on the 29th of March, 1892, at the same term, the Florida Central & Peninsular Railroad Company filed a petition for a rehearing in the matter of the nineteen bonds, alleging that the order of cancellation was made altogether upon an erroneous impression of the facts as they exist; and thereupon setting out alleged facts showing that the bonds pledged to the Pullman Palace Car Company to secure the payment of a car-trust debt were bonds which had been duly issued by the company, and belonged to Messrs. Peck Bros., who, as large stockholders, were interested in maintaining the credit of the company. Upon this petition for a rehearing, the court entered an order as follows: "This petition coming on to be heard, the petitioner is allowed to file his petition as prayed for, which, being done, is referred to Ph. Walter, Esq., for examination and report without delay. [Signed] Charles Swayne, Judge. Done in open court this March 29th, 1892." On May 4, 1893, it appears the special master made a report in the nature of a general report, reciting the fact of sale, and as to the amount paid by the purchaser, and bonds surrendered in compliance with his bid, reported as follows:

"Amt. deposited by purchaser before sale	$10,000 00
Amt. deposited by purchaser since	7,418 86
Receipt of Rogers Locomotive Works	12,795 61
Receipt of Pullman Palace Car Company	14,205 23
Receiver's notes amounting to	38,923 22
Receipt of Joseph H. Durkee, Receiver, for compensation	2,750 00
Making a total of	$86,092 92

"The purchaser also filed two hundred and twenty-two of the bonds of the defendant company, 19 of which have since been declared not to be a lien on the property of the defendant corporation, leaving 203 bonds that have been deposited by the company. Out of the cash deposit of $17,418.86 I have paid claims amounting to $14,292.12, leaving a cash balance of $3,126.74. I would recommend that the following accounts, which are being vigorously prosecuted before me as master, be paid, to wit: H. Drew & Brother, $19.80; C. A. Boone & Company, $41.54; Standard Oil Company, $249.90; Valentine & Company, $110.24,—and that all other claims be turned over to the F. C. & P. R. R. Company, to dispose of as to them may seem just and proper, the parties having had two years in which to prove these claims. I would further recommend that the coupons filed by the Merchants' National Bank be paid for their face value, and that the balance of the fund, after paying any legal costs that there may be outstanding, be distributed, pro rata, among the 237 bonds declared to be a valid lien against the property; and that the purchaser pay into the registry of the court eighteen hundred and forty-three dollars and fifty-five cents, to be distributed in like manner, being the moneys turned over to them by the receiver, he, the said receiver, having been paid his allowance out of the sale of the property."

Exceptions were filed to this report by the Florida Central & Peninsular Railroad Company, purchaser, and by W. C. Lewis and others, bondholders, which exceptions coming on to be heard, the court ordered the report recommitted, and the matter referred back to the master. Thereafter, on June 10, 1893, the special master submitted another report, and thereafter, on June 14, 1893, an additional report, and thereafter, on June 19, 1893, a still further report. These three reports cover, to a large extent, the matters in controversy with regard to the payment of the purchase price of the Tavares, Orlando & Atlantic Railroad, the deductions therefrom authorized to be made,

the balance due by the purchaser, the claims of interveners, the contested holding of twenty-six bonds, the proper distribution of the balance of the purchase money, and the compensation of the master. The Merchants' National Bank, claiming to be the holder of coupons, but not of bonds, appeared, and excepted to the report of June 19, 1893, on the ground that the coupons for past-due interest were entitled to be paid in full prior to anything being paid upon the bonds themselves. The Florida Central & Peninsular Railroad Company, purchaser, excepted as follows: "* * * To so much of the said master's report, herein filed on the 19th day of June, A. D. 1893, as reports that there is due from said purchaser, the Florida Central and Peninsular Railroad Company, the sum of $10,601.81, to be distributed as therein stated as per Schedule A attached to said master's report aforesaid. (2) And further excepts to so much of said report as reports that there should be distributed to the Merchants' National Bank for its coupons the sum of $422.57. (3) And further excepts to so much of said report as reports that there should be distributed and paid to Adams & Co., on bonds and coupons (11), the sum of $4,041.40. (4) And further excepts to so much of said report as reports that there should be distributed to Geo. A. Lewis, for 20 bonds, $7,348.00. (5) And further excepts to so much of said report as reports that there should be distributed and paid to John G. Sinclair, 2 bonds, $734.80. (6) And further excepts to so much of said report as reports and asks that final compensation of said master be fixed at the sum of $4,415.00 for the sale of road,—2½ %. (7) And further excepts to so much of said report as reports and asks that there be allowed said master, for nearly three years' services as master, and the various and numerous reports thereunder, and the many special references, the sum of $1,500.00." Thereafter, on the 8th day of November, the court rendered a decree overruling all exceptions to the master's report, confirming the said report, and ordering the Florida Central & Peninsular Railroad Company to pay into the registry of the court, within 30 days, the sum of $10,801.81, and directing the master to make distribution of said sum in accordance with the report.

From this decree, and from each and every order and decree in said cause since the decree of confirmation of sale, the Florida Central & Peninsular Railroad Company appealed. The Merchants' National Bank appealed from the decrees rendered on the 16th day of August, 1893, and on the 8th day of November, 1893. W. C. Lewis and John G. Sinclair, styling themselves defendants in the cause, appealed from the order entered on the 15th day of June, 1893, also the order entered on the 7th day of June, 1893, and also on the 8th day of November, 1893; and each of said appellants assigned, at more or less length, errors relied upon to reverse or amend the decrees appealed from, all of which are considered in the opinion of the court.

H. Bisbee, John A. Henderson, and John C. Cooper, for appellants.

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

PARDEE, Circuit Judge (after stating the facts). A motion was made to dismiss the appeals in this case on the ground that the certificate of the clerk of the circuit court to the transcript of record is insufficient. The certificate of the clerk, appended to the transcript, is:

"That the foregoing papers, numbered from 1 to 215, both inclusive, is a true, full, and complete transcript of so much of the said record, papers, exhibits, and proceedings in the said cause of W. Bayard Cutting, as trustee, v. The Tavares, Orlando and Atlantic Railroad Company as now appears, and is of file and of record in my office; said transcript being true and correct copies of the originals of the several papers, proceedings, depositions, files, and orders therein contained, as they now are of file and of record in my office."

The certificate does not comply with the requirements of rule 14 of this court (47 Fed. vii.), and as the record itself is in a very un-

satisfactory condition in regard to showing all the proceedings that were had in the circuit court in the case in hand, and necessary for our consideration, we would be disposed to dismiss the appeals, were it not for the fact that the record shows that the records in said cause were destroyed by fire on May 19, 1891, and what is now presented as so much of the said record, papers, exhibits, and proceedings is necessarily all the record prior to May 19, 1891, which has been re-established, and such proceedings as have been since had in the cause, and we are unable to lay upon any one of the appellants in this cause the fault of not fully re-establishing the record. The decree of foreclosure rendered December 24, 1890, was a final decree, which settled between the parties the rights therein adjudicated. As by that decree, in pursuance of the terms of the mortgage, it was provided that, after paying out of the proceeds of the sale the court costs and expenses, including compensation to the complainant and his counsel, and the obligations incurred by the receiver under orders of the court, "the residue of the purchase money should be applied first to the payment in full, if such residue be sufficient, or, if not, to the payment, pro rata, of all the defaulted coupons belonging to the said bonds, and the interest hereinbefore adjudged to be due and payable, together with interest on the amount thereof from the date of this decree to the date of the payment by the master, at the rate of 8 per cent. per annum, and the interest hereinbefore adjudged on the principal of the said bonds, and accrued since June 4, 1888, and interest thereon from the date of this decree to the time of payment by the master, at the rate of 8 per cent.," it follows that the decree of distribution appealed from in this case was erroneous in so far as it provided for a pro rata payment upon the mortgage bonds before paying the interest coupons and interest due. The decree of confirmation rendered on the 14th of April, 1891, was a final decree, settling the rights and obligations of the purchaser so far as they were therein adjudicated. As by that decree a credit was allowed to the purchaser for the sum of $10,371.46, on account of the receipt of the Florida Central & Peninsular Railroad Company as the successor to the right of the receiver of the Florida Railway & Navigation Company on a traffic balance, it follows that the decree of distribution appealed from, in so far as it rejected a credit to the purchaser of said sum of $10,371.46 traffic balance paid, was erroneous. The decree of the 23d day of February, 1892, declared that 19 bonds of the defendant company, filed in the cause by the Florida Central & Peninsular Railroad Company, are not legally outstanding in the hands of the said company, and not entitled to share in the proceeds of the sale of the property, and that the same should be canceled, was not and never became a final decree, because, at the same term, on petition of the Florida Central & Peninsular Railroad Company, the court allowed a petition for rehearing to be filed, and referred the same to a master for report, and adjourned the term of court, leaving the matter open. Goddard v. Ordway, 101 U. S. 748; Smelting Co. v. Billings, 150 U. S. 35, 14 Sup. Ct. 4. The evidence shows that the eight bonds pledged by the defendant railroad company to the Rogers Locomotive Works, as collateral security to a

car trust, were never lawfully acquired by the Florida Central & Peninsular Railroad Company, but remained from the beginning the property of the defendant railroad company, and, as such, were not legally outstanding, and entitled to share in the distribution of the proceeds of sale. In this respect we find no error in the decree appealed from.

The Florida Central & Peninsular Railroad Company assigns as error the allowances made to the master as commissions on the sale, and as compensation for other services. As, on the face of the record, the allowances complained of appear to be excessive, particularly in view of the character of the work as exhibited by the transcript, and as the case must necessarily be remanded and another reference ordered, and largely because there is no sufficient master's report in the record, we are of the opinion that the parties who are to be required to pay the apparently excessive allowances should be allowed the right to regularly contest the same. The decree appealed from requires the purchaser to pay into court the sum of $1,843.55, being the moneys alleged to have been turned over by the receiver to said purchaser, the said deceiver having been paid his allowance out of the sale of the property. There is no evidence in the record tending to show whether this item is properly chargeable to the purchaser or not. The record shows that in July, 1891, the receiver turned over to the purchaser the sum of $1,843.55, cash. Whether this was for earnings of the road subsequent to the sale, or for earnings prior thereto, does not appear, and we are unable to determine whether or not the purchaser should account for such sum.

The Florida Central & Peninsular Railroad Company further assigns as error that numerous small claims allowed to be due by the defendant the Tavares, Orlando & Atlantic Railroad Company, for supplies furnished prior to the appointment of the receiver under the bill for foreclosure, were allowed by the court, and ordered to be paid out of the proceeds of the corpus of the property. As the court in appointing the receiver made no provision for the payment of such claims, and as there is no evidence in the record tending to show that current earnings, either before or after the receiver was appointed, were diverted to paying unearned interest, or, in fact, any interest, upon the bonded debt, we are unable to sanction the order authorizing the payment of said claims from the proceeds of the sale of the property. See Fosdick v. Schall, 99 U. S. 235. It is also contended that the purchaser should be allowed a credit for the amount of the taxes due on the property for the year 1891. Whether the taxes for that year on the property purchased by the Florida Central & Peninsular Railroad Company should be paid by the purchaser, or out of the funds derived from the sale, depends upon whether or not the said taxes were a lien upon the property at the time of the sale. The statute of the state of Florida, in relation to this matter (Sess. Act 1887, Act No. 1, § 23), provides that:

"The assistant assessor shall begin the assessment of property on the 1st of January and complete the same as early as possible, and he shall return his list of assessments, so made out, to the county assessor immediately upon the

completion thereof, and not later than the 1st of May, and the two shall then revise such list at such stated time or times before the 1st day of June as the county assessor may designate, and make such changes as may be agreed upon between them as to descriptions or values of property."

Section 39 of the same act provides "that all taxes shall be due and payable on and after the 1st Monday in October of each and every year;" and section 42 provides "that an assessment of taxes shall be a lien upon the property assessed from the date of the assessment."

The record in this cause does not show facts sufficient to enable us to determine when, in and for the year 1891, the property of the Tavares, Orlando & Atlantic Railroad Company was assessed, nor the time the lien for said taxes attached. The sale of the property was made on the 2d day of February, 1891, and was confirmed by the court on the 14th of April, 1891. Under the law, the assessment may have been made after the sale of the property, and even after the decree of confirmation. It is contended on the part of Lewis et al., appellants, that the court below erred in overruling the exceptions of Lewis and Sinclair to the master's report, refusing to charge the purchaser, the Florida Central & Peninsular Railroad Company, with interest on the balance of the purchase price remaining unpaid. The record shows that on the 1st of March, 1892, on the petition of William C. Lewis and Adams & Co., the court ordered that the Florida Central & Peninsular Railroad Company be required and ordered to pay into the registry of the court, on or before the 10th day of March, 1892, the sum of $150,000, or show cause on or before that date why it should not do so. The decree of the court confirming the sale rendered on the 14th day of April, 1891, giving credit to the purchaser for the amounts of cash, and credits equal to cash, paid in by the master on account of the purchase, shows no such sum as $150,000 to be due from the purchaser. The case made by the record does not appear to be one in which the purchaser has been so put in default for nonpayment of the purchase price that interest should be exacted, even if such remedy is available against the purchase under the terms of the decree of confirmation.

We have considered all the questions presented by the assignments of error on the appeals in this case. Our conclusion is, and this court orders and decrees, that the decrees of the circuit court rendered on June 7, 1893, June 15, 1893, August 16, 1893, and November 8, 1893, be, and they are, reversed, and this cause is remanded, with instructions to refer the same to a master to report (1) the amount due and unpaid by the Florida Central & Peninsular Railroad Company on account of the purchase of the Tavares, Orlando & Atlantic Railroad properties, in accordance with the decree of April 14, 1891, and consistent with the views herein expressed, and as equity may require; (2) a schedule of distribution of the proceeds of sale in accordance with the provisions of the decree of foreclosure and sale rendered December 24, 1890, consistent with the views herein expressed, and as equity may require; (3) to take evidence and report on the claim of Philip Walter, Esq., for compensation for

services rendered in the progress of the cause as special master and master commissioner. The costs of the appeal and of this court are ordered paid out of the fund in the cause.

OREGON SHORT-LINE & U. N. RY. CO. v. NORTHERN PAC. R. CO.

(Circuit Court of Appeals, Ninth Circuit. April 12, 1894.)

No. 115.

1. INTERSTATE COMMERCE LAW—CONNECTING LINES—DISCRIMINATION.
The provision of the interstate commerce law forbidding discrimination against any locality or description of traffic (24 Stat. 380, § 3, cl. 1) is for the protection of the locality or traffic itself, and cannot be invoked by a carrier as against a connecting carrier which discriminates, in the matter of requiring prepayment of freight and car mileage, between goods which come from different sections of the country over the line of the complaining carrier. 51 Fed. 465, affirmed.

2. SAME.
The provision requiring carriers to afford all reasonable, proper, and equal facilities for interchange of traffic, and forbidding discrimination between connecting lines (section 3, cl. 2), is not violated by receiving and forwarding, without prepayment of freight or car mileage, cars of other companies containing goods coming from one locality, and refusing to do so, unless prepayment is made, when the goods are from a different locality. 51 Fed. 465, affirmed.

3. SAME—NORTHERN PACIFIC RAILROAD CHARTER.
The provision in the charter of the Northern Pacific Railroad Company requiring that company to permit other railroad companies "to form running connections with it on fair and equitable terms" (Act July 2, 1864, § 5), includes only such arrangements as to the time of arrival and departure of trains, and as to stations, platforms, and other facilities, as will enable companies desiring to connect to do so without detriment or serious inconvenience, and does not apply to alleged discrimination in the matter of prepayment of freight and car mileage on goods tendered by connecting lines. 51 Fed. 465, affirmed.

Appeal from the Circuit Court of the United States for the District of Oregon.

This was a suit by the Oregon Short-Line & Utah Northern Railway Company to enjoin the Northern Pacific Railroad Company from continuing to make an alleged unlawful discrimination against complainant in the matter of receiving and forwarding freight tendered by it at Portland, Or. The circuit court denied the injunction, and dismissed the bill. 51 Fed. 465. Complainant appeals.

W. W. Cotton, John M. Thurston, and Zera Snow, for appellant.

Dolph, Bellinger, Mallory & Simon, for appellee.

Before McKENNA, Circuit Judge, and KNOWLES and HAWLEY, District Judges.

McKENNA, Circuit Judge. As is said by appellant's counsel, "the controversy between the parties in this suit is mainly one of law, and not of fact;" and, succinctly stating the relations of the parties, also said: "The appellee owns and operates a line of railroad extending from St. Paul, Minnesota, to Portland, Oregon, passing through Tacoma and other points in the state of Washing-

ton, on Puget sound. The appellant owns and operates a line of railway connecting with the lines of the appellee at Portland, and extending from Portland to Granger, Wyoming, where a connection is made with the lines of the Union Pacific Railway, extending thence to various points on the Missouri river. The appellee and appellant are therefore competing lines in the transportation of traffic from Missouri river points to places upon the Pacific coast. The only rail connection which the lines of the appellant have from Portland to Puget sound is by means of the lines of the appellee." The connection, however, is not direct, but through the lines of the Northern Pacific Terminal Company. The latter, however, are leased to appellee. We shall consider the case as if the connection was direct.

The bill is very long. In substance, it charges appellee with discriminating against traffic, passengers and freight, starting east of a given meridian, and destined for Puget sound points via Portland, Or., and also discriminating against localities situate east of a given meridian. There is also a charge that facilities are given to the Southern Pacific Company which are denied to appellant. This charge is not sustained by the evidence, and may be dismissed from consideration. The discrimination against traffic and localities consists in receiving goods at Portland which start west from the meridian in cars other than those of appellee without requiring payment to the owners of the cars of the usual mileage, and without exacting prepayment of freight, while goods which start east of the meridian are denied these facilities; and in receiving through tickets issued by appellant to passengers starting west of the meridian, and refusing such tickets issued to passengers starting east of the meridian; the condition and other circumstances of the freight and passengers being the same. The action, appellant contends, is contrary to the custom and practice of railroads which have the force of law, and infringes section 3 of the interstate commerce act, so called. This section is as follows:

"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. 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 first part of this section prohibits preference to persons, firms, or corporations, and to localities and traffics, and prohibits the subjecting of either to prejudice or disadvantage. The evidence shows that there was no preference given any person, firm, or corporation in the sense of this section, and no traffic or locality is complaining.

unless the complaint of appellant is such. But we do not think it is competent for a railroad company to appropriate the grievance of a traffic or locality under section 3, and complain on account of it.

In Express Cases, 117 U. S. 1, 6 Sup. Ct. 542, 628, certain railroad companies made contracts with certain express companies granting them facilities on their trains, refusing contracts and facilities to other express companies. The supreme court sustained the railroad companies, reversing the judgment of the circuit court. The court said:

"The question is not, whether these railroad cars must furnish the general public with reasonable express facilities, but whether they must carry these particular express carriers for the purpose of enabling them to do an express business over the lines."

And again, on page 28, 117 U. S., and page 556, 6 Sup. Ct., the court says:

"If the general public were complaining because the railroad companies refused to carry express matter themselves on their passenger trains, or allow it to be carried by others, different questions would be presented."

And the court further said:

"So long as the public are served to their reasonable satisfaction, it is a matter of no importance who serves them."

This language is applicable to the case at bar. Whether appellant shall unload its cars at Portland as an alternative to paying car mileage, however it may involve expense or inconvenience to appellant, is not necessarily the concern of the freight or its shippers or the locality of its shipment. When it becomes such, a complaint will no doubt be made. None now is made, nor does it appear that either the traffics or localities discriminated against are even competitors. In Hozier v. Railroad Co., 1 Railway & Canal Traffic Cas. p. 30, of the traffic act, it was said:

"It provides for giving undue preference to parties pari passu in the matter, but you must bring them into competition in order to give them an interest to complain."

In Swindon M. & A. R. Co. v. Great Western R. Co., 4 Railway & Canal Traffic Cas. 349, it is implied that to make undue preference, traffic must go between same places. And in 1 Railway & Canal Traffic Cas. 32, the same rule is asserted as to passengers. To construe the section so as to authorize a railroad to complain for a traffic or locality would seem to confound the distinctions made by it, and make the second part of it superfluous. The regulation of the roads was undoubtedly in the interest of their customers, but it left them powers and privileges, between themselves, which might affect their customers; indeed, left powers and privileges in them as regards their customers, because all favor and all discrimination is not forbidden, even between them.

This view takes out of consideration the rights of the traffic originating and the rights of localities situate east of a given meridian, and confines the inquiry to the rights and obligations of the railroads between themselves under the second paragraph of the section.

As an aid to the interpretation of this paragraph, a number of cases which arose under the English act are cited by appellant.

They are not of much assistance. The English act is different from ours. It is fuller and more precise. There is little or no ambiguity about it. At any rate, our act is different, and the difference has been construed as substantial. Little Rock & M. R. Co. v. St. Louis, I. M. & S. Ry. Co., 41 Fed. 559, and Kentucky & I. Bridge Co. v. Louisville & N. R. Co., 37 Fed. 567. See, also, the first decisions of the interstate commerce commission. But in Little Rock & M. R. Co. v. East Tennessee, V. & G. R. Co., 3 Interst. Commerce Com. R. 1, the commission holds that our act was intended to effect similar results, but omitted the machinery to accomplish them. It would seem like better reasoning to assume that, if congress had intended the same results as the English act, having it and its history and construction before them, it would have adopted its language and machinery, and made the results certain.

We get little light, therefore, from the English act or decisions, and not much from the debates in congress. There was little or no comment on section 3. Section 4 (the long and short haul provisions) appeared to have engaged almost exclusive attention. Senator Cullom, who had charge of the bill in the senate, said:

"The third section is broader and more general in its terms, and should perhaps have been made the second section, as it contains a general prohibition of every variety of unjust discrimination. The section covers all subjects. The first paragraph prohibits the giving of any undue or unreasonable preference to any particular person or locality, or to any particular description of traffic in any respect whatever. * * * The language adopted in this paragraph is substantially that of the English statute on the subject, which has been repeatedly construed by the English courts, so that its meaning has been practically established. The second part of the section is modeled in part upon the English and in part upon similar statutes in several of the states. Its purpose is to require railroads to furnish connecting roads all reasonable and proper facilities for the interchange of traffic that may be necessary for the convenience of the public, and to prevent one road, or a combination of roads, from 'freezing out' connecting lines by refusing to accept from it, or deliver traffic to it, upon any terms, as has been done." Senator Cullom's Speech Explaining the Bill, section 1, p. 3577, Cong. Rec. 49th Cong., April 15, 1886.

This is not very explicit. The first part of section 3, he says, is adopted from the English statute, and that its meaning has been practically established. So far, so good. But the second part is selected from the English and certain states' statutes, and, besides, very important language is omitted which is in the English statute. And, as Justice Field states:

"Whenever an intention has been manifested, in the creation of railway charters, that a connecting company shall have the power to run its cars over the lines of another, or to require one company to haul over its lines the cars of another, such intention has been expressed in unequivocal terms, such as is found in the constitutions or statutes of several of the states respecting railway companies, which is substantially in these terms: 'And they shall receive and transport each other's passengers, tonnage, and cars, loaded or empty, without delay or discrimination.' ".

Senator Cullom stated the evil which was to be remedied. Railroads had refused to accept or deliver traffic on any terms, and thereby froze out connecting lines. This the act was intended to correct, and did correct. But confining it to this, appellant contends,

makes no advance on the common law; and that, under the latter, the appellee was bound to carry freight in its own cars, and that, therefore, congress intended to impose a duty beyond that. This is begging the question somewhat, and does not consider the distinction between rights and remedies; but whether the common law required a railroad company to carry freight delivered to it by another we need not consider. The fact was, as said by Senator Cullom, it was not done, and the act was deemed necessary to compel it. Whether common-law rights were enlarged thereby or only affirmed we need not decide. If we assume the former, as appellant has, we cannot also assume that the independence of the roads between themselves was entirely destroyed. Not all preference is prohibited,—only undue and unreasonable preference; and the facilities which are required to be granted have two limitations: They do not include tracks and terminal facilities, and they must be reasonable and proper. How must the latter be determined? Surely not only of themselves, but in the circumstances, and these must include the proper interests of the road from which the facilities are required. Any other construction would be too abstract, and we concur in the opinion of the learned justice who rendered the judgment of the circuit court "that the refusal to transport freight on foreign cars, where the freight originated east of the ninety-seventh meridian, when its own cars were not in use, but were free to be employed in the transportation desired, or was made where a transfer of freight would not have been injurious to it, can in no respect be deemed an unreasonable discrimination against complainant, or a denial to it of reasonable and proper facilities."

Of course, if appellant's construction of section 3 be correct, and it can compel appellee to receive one car, by the same right it may compel the receipt of many, and what more would be necessary to take the use of tracks? We think nothing. The attachment of the locomotive would only affect the degree of use. The same conclusion was reached after a careful consideration of all the cases by the circuit court of the eighth circuit in Little Rock & M. R. Co. v. St. Louis, I. M. & S. Ry. Co., 59 Fed. 408. A construction which permits the use of tracks we are forbidden to entertain.

Of the complaint of appellant that appellee denies it facilities for passenger traffic in refusing to honor tickets or coupons for passage over appellee's lines north of Portland issued by it, the lower court said:

> "It is sufficient to say there is no evidence to support it. The practice of railway companies operating connecting lines to honor tickets or coupons for passage over their respective lines issued by a connecting company, which is very general, is founded entirely upon arrangements between the connecting companies. In the absence of such arrangements, there is no obligation on the part of either company to honor tickets issued by the other. All the witnesses examined on this point concur in their statements in this respect."

We concur in this statement and the conclusion of the court.

Appellant further urges that the facilities which it asks of appellee are required to be given by the fifth section of the act incorporating the Northern Pacific Railroad Company, which contains the following provision:

"It shall be the duty of the Northern Pacific Railroad Company to permit any other railroad which shall be authorized to be built by the United States or by the legislature of any territory or state in which the same may be situated to form running connections with it on fair and equitable terms."

In answering this contention we can do no better than to adopt the language of Justice Field:

"The running connection," he said, "which must be permitted by the defendant is not, as contended by complainant's counsel, a running over its line, but only in connection with it, a provision intended to secure the transportation and exchange of freight between connecting lines, and not the use of each other's roads by the cars of such companies. * * * We are of opinion that a running connection of one road with another, within the meaning of the defendant's charter, only includes such arrangements as to the time of arrival and departure of trains, and as to stations, platforms, and other facilities, as will enable companies desiring to connect to do so without detriment or serious inconvenience."

The effect of a custom among railroads to grant the facilities contended for we have not considered, because the existence of such a custom is not established by the evidence. The finding of Justice Field on the facts seems to be concurred in by Judge Deady. His dissent is based entirely on a different interpretation of section 3 of the interstate commerce act, and of section 5 of the act incorporating the Northern Pacific Railroad Company.

Judgment is therefore affirmed.

MUDSILL MIN. CO., Limited, et al. v. WATROUS et al.

(Circuit Court of Appeals, Sixth Circuit. February 5, 1894.)

No. 39.

1. EQUITY—RESCISSION—FRAUD—MATTERS OF OPINION.
A bill for the rescission of the purchase of a silver mine on the ground of fraud alleged that defendant represented that the ore therein contained a certain average of pure silver, making it very valuable, whereas in fact the average was so low that it was worthless; and that defendant had "salted" the samples which complainant took from the mine, and upon the faith of whose analysis the purchase was made, by fraudulently mixing native silver therewith. *Held* that, where the latter allegation is sustained, defendant cannot shelter himself behind the plea that his representations were mere expressions of opinion as to the value of the mine.

2. SAME—EVIDENCE—"SALTING" MINES—ACCIDENT.
In a suit to rescind the sale of a silver mine on the ground of fraud perpetrated by defendant by "salting" the samples of ore taken by complainant for assay, it was shown that there was no native silver in the ore of the mine, but every one of thirty samples taken contained from 80 to 90 per cent. of powdered silver. The assays were made at different places and by different persons, but all with substantially the same result. *Held*, that the evidence showed that the presence of this powdered silver in the samples could not have been accidental.

3. SAME—EVIDENCE—OTHER FRAUDS.
In a suit to rescind the sale of a silver mine on the ground of fraud perpetrated by defendant by "salting" samples of ore, upon the assay of which complainant was induced to purchase, it is competent to show that defendant had "salted" samples used in prior negotiations with other persons for the sale of the same mine.

4. SAME—EVIDENCE—SUFFICIENCY.

In a suit to rescind the sale of a silver mine on the ground of defendant's fraud in "salting" the samples by means of which complainant was induced to purchase, it was shown that defendant had a substantial pecuniary interest in effecting the sale; that some of the samples were tested immediately after being taken from the mine, in which operation they were put into the hopper of a crusher by complainant, and were received by defendant as they came out, at a point which was out of complainant's sight, while the samples not then tested remained for some days in defendant's exclusive possession and control; that the "salting" was done with powdered metallic silver, such as was easily procurable in the market, and which might have been introduced into the samples with a syringe without breaking the seals of the bags; and that, after the presence of metallic silver in the samples was accidentally discovered, defendant opposed the erection of a mill adapted to its separation, he having an interest in the company for which complainant had bought the mine, and knowing that there was no native silver in the ore. *Held*, that the evidence showed that the "salting" was done by defendant.

5. SAME—LACHES—WAIVER.

Complainant purchased a silver mine from defendant, and afterwards discovered that the samples by which he had been induced to purchase had been "salted." He at once attempted to persuade defendant to take the property back, but he refused to do so. Complainant then erected a small mill in order to make more complete tests of the quality of the ore, and also sought to discover evidence to convict defendant of the "salting." He did not reach conviction upon this point until a year after the sale was consummated, and he at once filed a bill for rescission. *Held*, that there was not such a dealing with the property as amounted to a waiver of his right to rescind, nor was he guilty of laches.

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

This was a bill by the Mudsill Mining Company, Limited, and Walter McDermott, against Orville A. Watrous and Stewart A. Van Deusen, for the rescission of a sale. The circuit court dismissed the bill, and complainants appeal.

This is a bill for rescission. The subject-matter of the suit is a mining property known as the Mudsill mine, or group of mines, situated eight miles from the town of Fairplay, Park county, Colo. The complainants have tendered to the defendants a deed to the property, and demanded rescission upon the ground of fraud practiced in the sale. The title to these mines, at the time of the sale, was in the defendant Orville A. Watrous. The defendant Stewart A. Van Deusen was interested in the property by virtue of an indefinite parol agreement, and was the active agent in making the sale. The complainant Walter McDermott is a professional mining engineer and assayist, having offices and carrying on business both in London and New York. In the purchase of the Mudsill mine he, as defendants well knew, represented and acted for himself and others, promoters of a corporation intended to be organized for the purchase and operation of these mines. After certain preliminary negotiations, partly with each of the defendants, a proposition in writing was made for the sale of the mine, under date of October 24, 1887, and signed by the defendant Stewart Van Deusen. After referring to the negotiations and understandings theretofore had, this proposal was, in substance, that McDermott should form a company in England, with capital stock at £75,000 sterling, in 75,000 shares of £1 each; of this Van Deusen was to receive 37,500 shares, of which he agreed to transfer to the company 1,000 shares, to go into the treasury, and to be sold for not less than par value. In addition to the 37,500 shares, the proposal required that he was to receive $110,000, with which he agreed to pay off all mortgages, debts, and claims, of every description, against the Mudsill property. The company is to have a paid-up working capital of 15,800 pounds sterling. The proposal further required the company to erect a first class 20-stamp mill, with amalgamation pans and

frue vanners, and that work should begin on the same as early in 1888 as the weather would permit,—not later than May 1st. It concluded by requiring an acceptance of these terms within 30 days from date. The mines in question had been opened and operated to some extent for several years, and an extensive ore body had been developed, and was so exposed as to be capable of measurement, and the cubic contents calculated with reasonable certainty. The bill charges, in substance, that Van Deusen, who was an experienced miner and for many years in charge of the development and operation of this property, represented that the body of ore thus developed, and technically "in sight," amounted to 30,000 tons, and that "an average assay of the ore taken from different parts of the mine, so far as opened, showed thirty-five ounces of silver to the ton;" and that Van Deusen represented, as an inducement to the sale, "that his own estimate, based upon his own knowledge of the mine, was that the real average throughout the whole vein was not less than thirty-five ounces per ton." The bill charges that such a mine as thus represented, with suitable mills and machinery, would be very valuable and productive. The evidence submitted clearly indicates that the commercial value of such a mine, as it is charged this was represented to be, was not less than one-half million of dollars. The bill, in substance, charges that in point of fact the average richness of the ore body "in sight," and estimated at 30,000 tons, was inconsiderable. That the average of the whole exposed mass of ore was so low as to be worthless for milling purposes. It, in fact, charges that the defendants, from long and intimate acquaintance with the property and its history, knew, or ought to have known, that the average assay value of this developed ore body indicated so low a grade of ore as to make the average ore of no commercial value; that they knew that ore of value sufficient to justify milling existed only in irregular pockets or thin veins, and could only be obtained by the most expensive mining and careful selection; and that the mine, so far as known and developed, was commercially of no value. The preliminary correspondence between McDermott and each of the defendants, as well as the testimony of the parties, shows that McDermott was, before acceptance of the proposal of sale, to go personally to the mine, and be permitted every opportunity for examination and for sampling the ore body, and ascertaining for himself the truth or falsity of the representations made by the vendors as to the value of the property. The bill then charges that complainant McDermott went out to the mine for the purpose of availing himself of the proposal that he should be afforded opportunity to examine the mine, and take samples from the exposed body of silver ores for assay, by means of which he could intelligently exercise his own judgment as an expert as to the probable value of the large mass of ore in sight; that he went into the mine, and took therefrom a large amount of ore, broken from different parts of the mine, in such way as to thoroughly indicate the average grade of the ore in sight, and the characteristics of the ore; that he made a large number of assays from the samples thus taken, and procured other assays to be made from the same samples by other competent assayists; that the result of these assays showed that the average richness of the whole of the developed ore body, which his measurements and calculations proved to contain about 30,000 tons, was 34 ounces per ton. These results the complainants allege strikingly corroborated the representations of defendants, and indicated a property of very great value. These assays indicated that some 85 or 90 per cent. of the silver value of the ores consisted in native silver, which was found to be present in every sample in the form of finely divided particles, crystalline in character. The bill alleges that the high average of the assays was due to the presence of this native silver, "and was the essential fact upon which plaintiff McDermott determined to purchase the property, and he so informed the defendants." The bill then charges that, in reliance upon the fairness and representative character of the samples thus taken, the property was purchased. The whole of the money payment was made to defendant Watrous, the last payment being anticipated in order to secure title and possession. The deed was made to complainant Walter McDermott as trustee, the company for which he was acting not having completed its organization. Contemporaneously with the execution of the deed, a declaration of the trust upon which he held the deed, and substantially as stated in the proposal of

October 24th, 1887, was executed and delivered to Van Deusen. Subsequently McDermott conveyed the property to the Mudsill Mining Company, as under his trust he was bound to do.

The bill now charges that after the completion of the purchase, and after taking possession of the property, other samples were taken from all parts of the mine, as had been done before, with a view of certainly determining the kind of mill which was best adapted to the reduction of the ore. The assays of this sampling, made in February and March of 1888, demonstrated the startling fact that native silver did not exist in the ores of the mine, and that the average silver contents of the ores, consisting of chlorides and sulphides of silver, was less than seven ounces to the ton. This led to the opinion that the samples upon which the trade had been concluded had been tampered with by a process called "salting," and native silver in the form of fine powder injected into each of the bags containing samples. The complainants now charge that this sampling was done by or under procurement of the defendants, for the fraudulent purpose of deluding and entrapping complainant company into the purchase of a mine of no commercial value. This discovery that the mine contained no native silver in its ores was the result of the assays made upon the resampling done in February, 1888, and the conclusion was then entertained by complainants that the presence of native silver in the samples upon which the mine had been bought was the result of "salting." The formal demand of a rescission upon the ground of fraud was not made until April of 1889,—more than one year afterwards. Between these two dates the complainants put up a small mill, and reduced a large quantity of ore, and did much exploration and development work. To avoid the effect of this dealing with the property as an adoption of the contract, the bill alleges, among other things not now necessary to mention, that "all of the time from the moment that the plaintiffs found reason to suspect that they had been fraudulently drawn into the purchase of the property—that is to say, on or about the 25th of February, 1888—had been occupied in efforts to test the property, and fix beyond question its actual value, and to search for evidences of the fraudulent practices of the defendants, for the purpose of seeking the relief prayed for in this action." "Ever since it has had possession of the said mining property, the plaintiff company has prosecuted a thorough examination of it, and made repeated assays of fairly selected samples of the ores therefrom, with the result that the ores have been proven to be of an average value of about four ounces to the ton, and that there is no native silver in the ore vein." "Repeated attempts were made to induce the defendants to settle, on some equitable basis, the apparent difference between the represented and the actual value of the property." The bill prays (1) for a decree rescinding the contract of sale, and for a decree against the defendant for the entire sum of purchase money paid him, with interest; (2) that defendant account for all stock received and sold by him; (3) for general relief. The circuit court dismissed the bill.

Sidney D. Miller (John H. Bissell and Otto Kirchner, of counsel), for appellants.

Chester L. Collins (Benton Hanchett and T. F. Shepard, of counsel), for appellees.

Before TAFT and LURTON, Circuit Judges, and RICKS, District Judge.

LURTON, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

The evidence in this case is voluminous, covering more than 2,000 pages of the record. Any detailed statement of the testimony upon controverted questions of fact would be unprofitable, and extend this opinion to an unwarrantable length. The specific grounds upon which relief is sought are as follows: (1) That the defendants falsely and knowingly misrepresented the value of the

mine and the average silver contents of the ore "in sight;" (2) that the examination and sampling of the mine done by complainants was rendered abortive and misleading by the willful and fraudulent conduct of defendants in secretly and fraudulently procuring the admixture of native silver, which does not exist in the ores of the Mudsill mine, with the samples of ore taken by complainants from that mine; (3) that the complainants, in reliance upon the representations of the defendants, were, by their active fraud and deceit, led to purchase the mine in question, and part with their money in payment of the purchase price; (4) that the average silver contents of the ore "in sight" at time of sale has been by subsequent developments demonstrated to be less than eight ounces per ton, and the mine therefore of no commercial value whatever.

The evidence, in our judgment, thoroughly establishes that the representations made by defendant Stewart Van Deusen pending the negotiations for sale, and while acting for himself and the defendant Watrous, were, in substance, as follows: (1) That the ore body developed so far as to be technically "in sight" (meaning thereby ore-bearing rock so separated and blocked off by being worked around on two or more sides that it was subject to examination and measurement) was 30,000 tons. This representation was substantially confirmed by the examination, measurements, and calculations of complainants before the sale was consummated. (2) That the average silver contents of this 30,000 tons of ore was not less than 35 ounces of silver per ton.

It is perhaps too well settled to admit of controversy that a misrepresentation, in order to constitute fraud, must be an affirmative statement of some material fact, and not a mere expression of opinion. Gordon v. Butler, 105 U. S. 553; Development Co. v. Silva, 125 U. S. 247, 8 Sup. Ct. 881. This distinction between the misrepresentation of a fact and the expression of an opinion is peculiarly applicable in the sale of a property so speculative and uncertain as a silver mine. In Jennings v. Broughton, 17 Beav. 234, which was a case brought to set aside the sale of shares in a mining venture on account of fraud in the sale, Knight Bruce, L. J., said:

"First, in the statements or representations concerning the mine, was there any untrue assertion material in its nature; that is to say, which, taken as true, added substantially to the value or promise of the mine, and was not evidently conjectural merely?"

The representations made verbally, and which it is alleged were false, related alone to the average richness of the exposed body of ore. Though in form the affirmation of a fact, yet, when applied to the subject-matter of the negotiation, it was in its very nature conjectural, and amounted to an expression of opinion. But this rule that a mere expression of an opinion will not constitute fraud must not be pushed beyond the reason for the rule. If a false statement is to be given immunity because it is mere "puffing" or "trade talk," and only the expression of an opinion, it is because the party to whom the opinion is addressed has no right to rely

upon the mere expression of an opinion, and is assumed to have the ability and opportunity of forming his own opinion and coming to an independent judgment. In speaking of the difference between the legal effect of a representation as to a fact and the expression of an opinion, Mr. Pomeroy says:

"The reason is very simple: While the person addressed has a right to rely on any assertion of a fact, he has no right to rely upon the mere expression of an opinion held by the party addressing him, in whatever language such expression be made. He is assumed to be equally able to form his own opinion, and to come to a correct judgment in respect to the matter, as the party with whom he is dealing, and cannot justly claim, therefore, to have been misled by the opinion, however erroneous it may have been." Pom. Eq. Jur. § 878.

If, therefore, the party making false statements as to a matter conjectural in its character, and therefore relating to a matter of opinion, actively intervene to prevent investigation and the discovery of the truth, and such intervention be effective in the concealment of the facts and in the deception of the buyer, a clear case of operative fraud is made out. In every such case immunity will not be extended to false expressions of opinion, upon the ground of "puffing" or "trade talk," if it appear that the vendor has, by his conduct, prevented investigation, and induced reliance upon the statements of the seller. In such a case the subsequent conduct of the seller in actively preventing the buyer from the formation of an independent opinion so connects itself with the original misrepresentation as to become part and parcel of the false statement, and amounts in law to the false affirmation of a fact. A false representation may, and most often does, consist in language alone, expressed or written; but it may also consist in conduct alone, or external acts. Whenever the purpose is to induce belief in the existence of a fact which does not exist, every word and act intended to produce conviction and induce action becomes a misrepresentation if, through their instrumentality, the party upon whom they are practiced is induced to act. 2 Pom. Eq. Jur. § 877. The gravamen of the alleged fraud lies in the allegation that when the complainants undertook to examine this property, and form an independent judgment as to its value, through the active and willful intervention of defendants, their samples were rendered untrustworthy by the secret admixture of silver in a form in which it did not exist in this mine; that the purpose was to give to these samples, otherwise representative of the average value of the ore in sight, a false and fictitious value, which would confirm the untrue statements expressed theretofore as to the silver contents of the mine. Now, it must be evident that, if this was done, a most abominable fraud was practiced, and that no court would suffer a contract resting upon such a foundation to stand. The evidence upon which it is sought to establish this fraud is almost purely circumstantial. We may assume that two important facts in the chain of circumstances are so thoroughly proven as to be treated as practically conceded—First, that in each bag of samples taken by complainant McDermott, and under his personal supervision, there was subsequently found a large per cent. of practically pure silver, in the form of a

very finely divided powder; second, that the ores of the Mudsill vein contained no native silver whatever. From these two facts the conclusion is inevitable that this native silver in the samples taken by complainants as representative of the exposed ore body did not come from the Mudsill mine, and was therefore an admixture operating to make the assay results obtained from those samples wholly unrepresentative and misleading.

Was the presence of this native silver in these samples accidental, or was it placed in the bags designedly? One or the other of these hypotheses must be true; no other can be suggested. Upon the hypothesis of accident what can be said? The doubt expressed in the opinion of the circuit court as to whether the metallic silver found by the assayist, Young, and by McDermott, was the product of the October samplings, is based upon the suggestion "that a week intervened between the test and the discovery of the metallic silver, during which the work of testing ores was carried on continuously in the ore-milling and testing works." There is not the shadow of a doubt engendered by the fact referred to. The intimation is that this fine silver powder might have accidentally gotten into the October Mudsill samplings from tests or assays of other ores which might have contained this form of silver. (1) There is not a particle of evidence that any other ore tested in the assay establishment of Mr. McDermott had shown the presence of native silver in that form. (2) Both McDermott and his assistant, the witness Young, say the discovery of this metallic silver in this form was a great surprise. It was to them an unusual occurrence. (3) The witness Young, whose testimony is referred to as suggesting the possibility of an accidental intrusion, by his statement that it was perhaps a week between the test and discovery of the metallic silver, says: "We never started another test until that was finished; we worked on one test until it was completed before we started another; in other words, we took one test at a time." (4) The history of the discovery of this metallic silver, as detailed both by McDermott and Young, completely explodes the suggestion. Its presence was not discovered in the assays. Silver in every form entered into the assay result, but no test for native silver was made in the earlier assays made by McDermott, Young, Arthur, Van Deusen, or Burlingame. After the ores had been sampled down,—that is, crushed, mixed, and divided and redivided to get small samples, representative of the larger ones,—the remainder not accepted or desired for assay purposes was used to make what are designated as "mill tests;" that is, the ores are treated precisely as they would be on a larger scale at a reduction mill. The crushed ores in this instance were first put through the stamp mill, by which they were reduced to a powder. A sample of the ore after it came from the stamp mill was assayed. The ores intermingled with a stream of water then ran over the copper plates in the troughs, which carried off the lighter materials. The passing over copper plates was in this case accidental, as it was not usual to so treat silver ore in a milling test, and the plates had not been placed for that purpose. After the pulverized ore had been subjected to this washing, it was

again tested by an assay. These tests, made after passing over the copper plates, developed a very remarkable discrepancy between the assay of the pulverized ore before and after it had passed over the copper plates. This led to an investigation, which developed the fact that large quantities of metallic silver had been deposited on the copper plates. The fact of this discrepancy between the assay after pulverization, and before passing over the copper plates, and the assays after passing over the copper plates, led to the discovery of the native silver, and demonstrates the want of substance in any suggestion that the native silver might have been intruded from other samples by accident. (5) When complainant McDermott brought his samples from the mine to Fairplay, they were left in an ore-crushing mill belonging to the defendant Van Deusen overnight. The next morning some bags of the poorest class of ore were then crushed, and one sample of rich ore. These bags thus crushed were separately sampled down in the manner above indicated, and small samples from each lot obtained for assay purposes. These samples were then subdivided. One part was given to Arthur Van Deusen, a brother of the defendant Stewart Van Deusen, for assay; another portion was taken by McDermott to Denver, and given to Mr. Burlingame, an assayist in the public assay establishment in that city. Neither Arthur Van Deusen nor Burlingame tested for native silver, and neither reported any. The assays made by them were, however, highly satisfactory, and indicated that the poorest of the ore body was very valuable; the average silver contents in the six samples submitted to them for assay indicating an ore running about 27 ounces to the ton. Arthur Van Deusen's assays ran something higher. Burlingame did not assay the whole of the sample sent him, retaining, as is usual, a part as a means of verifying his first assay. These check samples were assayed afterwards by Mr. West, who found in them a large per cent. of native silver, corresponding in character to that found by McDermott and Young in the samples assayed or tested in New York. It is therefore demonstrable that, if the presence of native silver in these samples was due to accident, the accident occurred before the samples left Fairplay. (6) The hypothesis of an accidental admixture is weakened by the number of instances in which it must have occurred. If metallic silver had been found in only one or two tests or assays out of a large number, or it had been found in only one or two of the thirty or more samples from different parts of the mine, an accidental origin might seem possible; but when every test made on the October samples for the purpose of ascertaining its presence indicated a like "accident,"—when it was found in the samples taken from all parts of the mine and kept in separate parcels, and in all instances to represent from 80 to 90 per cent. of the total silver contents of each sample,—the theory of accident ceases to be believable, and the hypothesis of design is established. The frequency of the "accident" and the uniformity of its characteristics is contrary to all human experience, and justifies the utter rejection of the hypothesis of accident, and the acceptance of the only other possible theory, which is that it originated in design. Who was the designer? By

whose instrumentality was this admixture brought about? Here, again, we are without any affirmative testimony as to the perpetrator. If the hidden hand is to be discovered, it will be alone by the rightful use of a mass of circumstances in evidence which form the res gestae of a most mysterious and abominable fraud. All the evidence touching upon this aspect of the case is to be weighed in the scale of natural logic. "Each piece of evidence * * * is to have the weight attached to it by sound reason, unfettered by artificial rules." We know of no other way to try a question of fact dependent upon circumstantial evidence. Fraud, it is said, must be proven, and not presumed; yet fraud, like all other questions of fact, may be, and in most cases is, made out by circumstances from which the main fact is inferred. No witness has been introduced who testifies that he saw this metallic silver intruded into these bags of samples; yet circumstances so strong in their nature may be produced as to satisfy the mind and conscience that the guilty man is pointed out. As to the uses and character of circumstantial evidence, Mr. Sheldon, in his very valuable treatise upon the Science of Jurisprudence, has said:

"From whatever cause, the fact in question cannot itself be approached; but the surrounding facts, past, present, or succeeding, may have been seen, heard, or felt, either by the investigator, or by somebody else more or less likely to speak the truth about them. Circumstantial evidence is, then, the sort of evidence to a fact taking place which is supplied, not by anybody having observed it taking place, but by a number of other facts or circumstances having been observed which are held to furnish a legitimate ground for an inference from them to the fact in question."

We shall again resort to the hypothesis as a means of testing the evidential value of facts tending to discover the instrumentality by which these samples were "salted." "Hypothesis," to quote from Lindsay's translation of Uerberweg's Logic (section 134), "is the preliminary admission of an uncertain premise, which states what is held to be a cause, in order to test it by its consequences. Every single consequence which has no material truth, and has been derived with formal correctness, proves the falsehood of the hypothesis. Every consequence which has material truth does not prove the truth of the hypothesis, but vindicates for it a growing probability which in case of corroboration, without exception, approaches to a position where the difference from complete certainty vanishes. The hypothesis is the more improbable in proportion as it must be propped up by artificial auxiliary hypothesis. It gains in probability by simplicity, and harmony or (partial) identity with other probable or certain presuppositions." Subject to the conditions thus stated, the hypothesis has been of great value in the extraction of scientific truth, and, says Mr. Wharton, in his very scientific work upon Evidence, "is of no less value in the extraction of juridical truth." That author vindicates in a most satisfactory way the use of the hypothesis, and sums up his conclusion by saying that "juridical conviction may be therefore defined to be the fitting of facts to hypothesis. If, in criminal issues, there is reasonable doubt whether the facts fit the hypothesis of guilt, then there must be an acquittal. In civil issues, when there

are conflicting hypotheses, the judgment must be for that for which there is a preponderance of proof." Whart. Ev. § 14.

If we are right in the conclusion that the metallic silver found in McDermott's October samplings was not the result of accident, and is therefore attributable to a human agency, the admixture being by design, then there are two opposing hypotheses which cover every possible solution of the next step in this investigation. The first is that which the complainants must establish or fail in their case, and is, that the defendants, or one of them, or some one at their procurement, placed the native silver in the October samples taken from the Mudsill mine. The second, or opposing, hypothesis, is, that the admixture was done by some unknown person, and not with the procurement, knowledge, or consent of the defendants, or either of them.

The Motive. The first fact which tends strongly to support the hypothesis of guilt of the defendants is that they had a strong motive to induce such action. If Van Deusen's proposal was accepted, its results would be $110,000 in money, to say nothing of the use which could be made of the shares to be assigned them in the new corporation. How this money was to be distributed, and how it was in fact distributed, is left very indefinite by the evidence of the defendants, who could, if they had chosen, have made this very plain. This much we do learn, and that is that Stewart Van Deusen received at least $10,000, and probably much more, while Arthur Van Deusen, a brother, also received $10,000. This mining property, while owned by the East Leadville Mining Company, had been mortgaged for a loan of $8,000. Stewart Van Deusen induced the defendant Watrous to buy the claim thus secured. Arthur Van Deusen was the trustee under the mortgage, and Stewart Van Deusen was the owner of one-fourth of the stock in the East Leadville Company, and its resident general manager. Watrous was invited and urged by Stewart Van Deusen to buy in the property at the trustee's sale, which he did for the amount of his debt. Certain other debts of the company, in judgments and liens, also seem to have been paid off by Watrous to protect his title. The precise character and amount of these other debts is left in a very indefinite and unsatisfactory shape by the evidence of the defendants. The full facts were manifestly known to them. From what is to be gleaned from the guarded statements made as to these other debts, it is inferable that they amounted to but a few thousand dollars. Thus a property which had cost the East Leadville Company more than a hundred thousand dollars passed into the hands of defendant Watrous for perhaps not over 10 per cent. of what the Leadville Company had paid for and expended upon it. There is evidence that the company then owned personal property ample to have paid the claims through which Watrous acquired the property. Curiously enough, Stewart Van Deusen turns out to have some vague and indefinite parol agreement with Watrous, by which he is to share in the purchase with Watrous, or receive a share in the proceeds when sold. This share, according to Watrous, was to be subject to future adjustment, though Van Deusen

says, in one portion of his evidence, that the understanding was that he was to share equally. After the sale, Van Deusen remained in possession of the property, and continued the work of developing the mine, Watrous furnishing the money. A large part of the time of defendant Stewart Van Deusen was thereafter occupied in endeavoring to find a customer for the property. During this time he was supported by Watrous, who seems to have honored all of his drafts for his own support, as well as for expenses incident to the development of the mine and of a purchaser. All the obligations incurred in this way by Stewart Van Deusen were paid by this sale. Arthur Van Deusen was likewise deeply interested in a sale. He remained on and about the property, receiving during the time between the purchase of Watrous, in July, 1884, and the sale to complainants, in December, 1887, from his brother, as he states, but a few hundred dollars, but was to receive, in case of a sale, $150 per month from 1882 down to time of sale. Thus he was to be paid for about two years before Watrous bought the property. This is the way he accounts for his share in the proceeds of sale, which he says his brother paid to him in March, 1888. His own account of it is that he was paid in a check on Watrous' bank. He says: "Mr. W., my brother, and I walked to the bank, and they gave me the money." The circumstances attending the acquirement of this property—if it had any such intrinsic value as Van Deusen subsequently professed to believe—by Watrous for so insignificant a sum, coupled with the interest which the agent of the debtor company is developed to have had, furnish a strong presumption of a breach of trust by defendant Van Deusen towards the East Leadville Mining Company, and a reason for the placing of the title in Watrous with a parol understanding as to the interest the guilty trustee should thereafter have in the property. Watrous seems to have had no practical knowledge of this mine, and he probably entertained an honest opinion that it had great possibilities. The interest of Van Deusen was to make him think so, and he doubtless was not neglectful in this regard.

The effect of the proof in regard to the real opinion entertained by the defendant Van Deusen as to the value of this property leads us to these conclusions: (1) That he knew that the average silver contents of the ore "in sight" was nothing like so much as he represented it to be to complainants; (2) that he did entertain the opinion that the ore "in sight" might be profitably worked by a company with large capital, and supplied with extensive milling machinery, by which low-grade ores could be worked economically; (3) that he entertained a hope, natural to all connected with such enterprises, that further working and development might develop a higher grade of ores than those in sight. He had, since 1882, been intimately connected with this mine as manager. He was therefore not ignorant as to its past history, or as to any fact which could be discovered by examination or assays. He knew that the preceding owners, the McLean Mining Company and the East Leadville Mining Company, had expended more than $100,000 in developing and working the mine, with a yield of less than $5,000. He knew that ore

of a grade equal to that which he represented as the average of the whole ore body in sight had been found only in small pockets or thin streaks, and that the great body of the ore, in which was found an occasional pocket or a thin rich streak, was of very low grade. His own experience as manager, and with contractors, had been such as to leave him with no doubtful opinion as to the necessity of very careful selection of the rich ore from the poor ore, and that the ore of a grade equal to that which had been taken out and shipped to stamping mills was scarce, and that no reliance could be placed in a sufficiency of such ore being obtained to run even a very small mill. He knew that a mill erected at the mine would have to rely upon the average ore, and that it was of low grade, not approaching his representations as to its richness. Doubtless he entertained a hope that richer ores might be found, and that by economical processes the aggregate value of the ores, developed and undeveloped, if milled on a large scale at the mine, would ultimately prove profitable. Actuated in part by this hope of a richer development, wholly unjustified by facts connected with the past history of the mine, which would ultimately justify any representations he might make, he sought for a purchaser. His interest in getting his debts paid, his sharing in the cash to be received, and his hope that with plenty of capital the mine would prove profitable, furnished a powerful motive to mislead an intending purchaser as to the probable value of the mine he was undertaking to sell. The existence of a motive to perpetrate a crime or a fraud by no means establishes the complicity of the person having the motive. It is, however, an element for consideration.

The Opportunity. Did Van Deusen have an opportunity to mislead complainants by "salting" their samples? This is a necessary step in considering the hypothesis which presupposes his guilt. If he did not, then the hypothesis is worthless. McDermott occupied three days in examining this mine and taking his samples. The first day was spent in an examination of the mine as opened. He was accompanied by defendant Van Deusen. The next two days were spent in sampling the exposed ore body. He was assisted in this by two experienced miners, long in the employment of Van Deusen. His effort was to so sample the mine so that the average value of the 30,000 tons of exposed silver-bearing ore should be indicated. He therefore broke down the exposed surface clear across the exposed vein. This would, of course, include any rich streak, as well as the poorer ore within which it was embraced. He took his samples from many places in the mine, the total number taken being 31, making 33 bags of ore in all. As each sample was broken down, it was placed in sacks, described as ordinary sacks such as used for ore in Colorado. The material is described as "canvas and gunny sacks; chiefly canvas." The sacks were furnished by Van Deusen, and were branded in stencil, "Mudsill." In each sack was placed a paper with a memorandum showing the place in the mine from which it was taken. Each sack was then sealed up by complainant McDermott "by means of a twisted wire, which was passed through two sides of the sack, and twisted twice around the neck of

the same, then secured by means of small lead seal with two holes through it, which was forced onto the twisted wire by the pressure of a tool I had for the purpose of giving at the same time a clear impression on the lead seal, having upon it two letters, M. & D." These sacks, as thus secured, were left in the mine until the fourth day, when they were removed by wagon, accompanied by McDermott, to Fairplay, a village eight miles from the mine and on the railroad. The ore reached Fairplay after dark, and was placed for the night in an old crushing mill owned by defendant Van Deusen, where it was locked up. The next morning McDermott, accompanied by the two Van Deusens and the two men who had assisted in taking the samples, went to the mill. Eight of the sacks were opened, and there crushed in Van Deusen's mill for the purpose of obtaining assay samples. After taking twenty-five samples in the mine, McDermott took other samples as a check on those, and, as he states, for the special "purpose of determining the character of the rock and certain portions of the vein which appeared to be of very low grade," and which he says he "found could not contain value sufficient to pay for working." The twenty-five samples first taken, McDermott says, he regarded as fairly indicating the general average of the exposed ore. The last eight samples, with one exception, he regarded as representative of the poorer ores. Six of these eight samples last taken he decided to test before leaving the mine, "so that he could cable to London the prospects of the average samples." The samples thus selected for crushing in Van Deusen's mill, he says, represented, with one exception, what he was convinced was the lowest grade of ore in the mine. McDermott personally selected the sacks to put the crushed ore in, by turning them inside out and dusting them. The ore to be crushed was dropped by McDermott into the rock breaker, and from that dropped into a pair of crushing rollers, which reduced it so that no piece was larger than three-eighths of an inch cube. The ore as it fell from the crushing mill was received in the sacks prepared for it, "and each sample, as completed, was set out in the center of the floor by the defendant Van Deusen until the whole six samples had been crushed." Each sample was then taken by Van Deusen and McDermott, and spread on a large oilcloth and thoroughly mixed, so as to make a homogeneous mixture of the fines and the coarse resulting from the crusher. "It was then divided into four quarters, the two opposite quarters being thrown away until reduced to a size which could be handled on a special sampling machine, which consisted of a sort of charcoal shovel. One-half of the ore passed through between the solid portions of the shovel, the other remaining on it, so that one-half was retained in that way, and was thus reduced to about four pounds, representing a fair average grade of the whole 60 to 200 pounds of the original sample. This small sample was divided into two, and placed in paper bags." Each sample was separately crushed, and a small sample of each of the large samples obtained in the way above described by complainant McDermott. In this way six small samples were obtained in duplicate from the six large samples. One bag of each of the small sam-

ples was given to the defendant Stewart Van Deusen for assay by his brother Arthur Van Deusen. The paper bags of samples were numbered from 1 to 6. An assay was made at once by Arthur Van Deusen, the result being as follows: No. 1, 26 ounces per ton; No. 2, 30 ounces per ton; No. 3, 29 ounces per ton; No. 4, 27 ounces per ton; No. 5, 55 ounces per ton; No. 6, 40 ounces per ton. The six duplicates were taken by complainant McDermott to Denver, and were assayed for him by Mr. Burlingame. He reported the following results: No. 1, 11 ounces per ton; No. 2, 19.70 ounces per ton; No. 3, 25.50 ounces per ton; No. 4, 36.50 ounces per ton; No. 5, 42.70 ounces per ton; No. 6, 26.50 ounces per ton. Neither made any test for native silver, and neither reported any, though the check samples retained by Burlingame were, about the middle of March, 1888, assayed by Mr. West, who then found large quantities of native silver in them, corresponding in character to that found by McDermott in all his samples assayed in New York. On the strength of these assays McDermott cabled his associates in London his satisfaction with the outlook. The crushed ore not used was resacked and sealed. These sacks, together with the sacks of uncrushed ore, were left in charge of defendant Van Deusen, with directions to send the sacks of crushed ore by express, and the rest by freight, to New York. This was done, and they arrived there in due time, without any appearance of having been tampered with. In the subsequent testing of the ore thus shipped to New York, the presence of native silver was found to account for from 80 to 90 per cent. of the silver contents. This discovery was made late in November following.

The question we have to deal with is as to the opportunity afforded defendant Van Deusen to "salt" or have these samples "salted" before they passed from under his control. Complainant McDermott very frankly and confidently expresses the opinion that his samples had not been "salted" when the process of crushing began upon the morning after the ores reached Fairplay. He bases his opinion upon the appearance of the sacks, and upon the more important fact that the ore he there crushed was in lumps, and that as he took each lump out of the sack "he dusted it off" to remove the fine particles before dropping it into the rock breaker. His judgment is that this would have removed any silver in such a powdery form as that subsequently discovered. Accepting this conclusion, it settles the fact that the ores had not been tampered with either at the mine or at the mill the night before, and we need not consider the opportunities afforded the defendants of access up to the time that McDermott began the crushing of certain of his samples the day after they reached Fairplay. Between the time that the process of crushing began and the completion of the preparation of the small samples was there an opportunity to have placed this powdered silver in the ores crushed? Undoubtedly, there was. About one-half of the area of the mill floor was under an upper floor, open in front, so that the floor of the mill not under this upper floor or platform was open to the view of any one on the upper floor. McDermott's bags of samples were on this

platform or second floor. The mouth of the rock breaker was on that floor. On that floor McDermott stood, putting his samples, rock by rock, into the crusher. The samples went into the crusher on one floor, and came out of the hopper on the floor below, at a point not within the observation of McDermott. On this lower floor the crushed ores were received by the defendant Van Deusen, who, as each sample was crushed, would unhook the bag into which it fell as crushed, and set it out on the mill floor at a point within the observation of McDermott. While the defendant was engaged at the lower extremity of the crushing machinery, he was not, by the great weight of the evidence, within sight of McDermott, who was feeding the mill above. During this opportunity it was altogether possible to clandestinely place enough metallic silver in each bag to greatly increase the apparent value of the sample. After the six samples were crushed, the entire lot of crushed and uncrushed ore passed from under the observation and control of McDermott, and was left in the care and custody of the defendant Van Deusen for shipment. Thus he was afforded access to the bags of uncrushed ores, and with proper means could, before the shipment of these bags, have added to each sample such quantity of native silver as, with the natural silver contents, would bring its gross silver value up to a value corresponding with his representations.

The Means. The material used for "salting" was a finely divided form of metallic silver, resulting from the precipitation of silver held in solution. The particles were nearly as fine as flour, though under the microscope they were crystalline in character. The process for the reduction of silver ores employed by some reduction mills involved the production of just such a powder as one stage in the reduction to bullion. This was notably the case at the Boston & Colorado Smelting Works, at Argo, Colo. Just such a form of silver could be bought from that company, and was in fact bought and produced in evidence in this case. This silver, mixed with the crushed or uncrushed ore, would by contact lose its brightness, and take on the color and stain of the sample. In that condition its presence could only be detected by a microscope or a test made, having such a discovery in view. Its general resemblance to crystalline native silver found in some silver ores was such as not to excite any suspicion. An ounce of this powder mixed with a hundred pounds of the average ore of the Mudsill mine would operate to add twenty ounces per ton to the apparent silver contents of such ores. But a moment was needed to empty the required quantity of this material in each sack of ore as it was taken from the lower end of the crushing rollers by defendant Van Deusen. The unopened sacks could have been "salted" by forcing the point of a syringe or funnel through the meshes of the coarse canvas sacks, and squirting the fine silver in and upon the contents. The subsequent crushing and mixing intended to distribute the coarse and the fines, the richer and the poorer ores, as evenly as possible, would operate to distribute this foreign material more

or less evenly through the mass. That in the handling of the bags during shipment some part of this fine metal might have escaped through the sacks is possible. That enough remained to make these samples worthless as representative of the ore body was subsequently made most evident.

It is manifest from the foregoing that the defendant Van Deusen had a powerful motive to induce such an admixture, and that the opportunity and means existed, if he chose to avail himself of them, to accomplish his end. While other persons had the same opportunities and access to the same means, the defendants alone had any motive or interest in "salting" these samples. The interest of complainant McDermott was to get at the true value of this property. He was buying for himself as well as for others, and no possible motive is suggested which would account for his complicity in such a fraud. It is possible that some one, from enmity to him, or those with whom he was acting, might have sought a mean revenge in this way. Such a possibility is not to be seriously considered when there are no facts shown indicating the operation of such a cause. Having established that this metallic silver was, by design, placed in these samples, the hypothesis propounded by the complainant—that the defendants were the designers—is supported by these circumstances (1) that they had a powerful motive inviting just such a fraud; (2) that Van Deusen had access to the samples at a time antecedent to the first assays made from them; (3) that the means necessary to the commission of the fraud were accessible to them; (4) that no other person or persons had any motive or interest in committing such a fraud; (5) no one could hope to profit by the admixture, other than the defendants.

We shall not stop now to consider the probative effect of these facts in establishing the hypothesis presupposing the guilty agency of the defendants. There are other circumstances entitled to consideration before a conclusion is reached. Pending the purchase, defendant Van Deusen informed complainant McDermott of three examinations and samplings other than that by Rathbone, made for intending purchasers by disinterested mining engineers, and also of the assay results from those samplings. The examinations referred to were those made by John B. Farrish, Ridley and Stanton, and a man named Jacobs. Farrish's report showed, as McDermott stated, 30,000 tons of 30-ounce ore in sight. In this connection he said that Farrish's estimate was a little lower than the actual average, and that 35 ounces would be nearer. Subsequently, when McDermott embodied this statement as to Farrish's report and examination in a prospectus for the new company, Van Deusen corrected him, in a letter dated November 19, 1887, in which he said that Farrish had told him that there was 50,000 tons of ore in sight, of an average value of 40 ounces of silver to the ton. He represented Ridley and Stanton as reporting 40,000 tons of 45-ounce ore. This, too, was corrected and enlarged in the letter referred to, so as to raise the ore in sight to 57,000 tons. The Jacobs report he said showed 50,000 tons of 50-ounce ore. This is changed by his letter to 46,000 tons.

The confidence placed in these statements of former estimates and assays is indicated by the fact that McDermott embodied two of them in the proposed prospectus for the new company, prepared while en route from the mine in October, 1887, and embodying the conviction then entertained by him as to the value of the property from all he had heard and seen. Evidence has been introduced tending to show that one of these reports, and possibly a second (of the three mentioned above), which found a place in McDermott's prospectus, were the product of frauds of like character to that charged in this case. Its competency for this purpose will not admit of controversy. If defendant Van Deusen used these reports for the purpose of inspiring confidence in the value of this mine, and in the truth of his own representations as to its value (about which we have no doubt), then it was competent to show that these reports had their own origin in fraud concocted and executed by the man who thus pretended to rely upon them as bottomed upon representative ores of the mine he was trying to sell. It is likewise competent as tending to sustain the hypothesis presupposing the agency of defendants in corrupting the samples taken by complainants. That defendant Van Deusen interfered with samples taken by other intending purchasers does not of itself prove that he was guilty of like conduct in subsequent efforts to sell; but, when subsequent samples are shown to have been tampered with by somebody unknown, the fact that defendants, in former efforts to make sale of the same property, had resorted to just such frauds in order to sell, becomes competent and cogent evidence tending to establish their complicity in the like fraud now under consideration. Did they believe that they had a valuable property? Did they believe it was of the value they represented it to be? Were they acting in good faith in holding this property out as having a great commercial value? Or, on the other hand, did they believe the property could only be sold by giving it a fictitious value through the means of fraudulent samples? Their former efforts to make a sale by resorting to fraudulent interferences with the samples taken by experts acting for possible buyers so connect themselves with the last effort to make a sale as other acts in furtherance of the same general design. It is not, in such a case, essential that these former acts of fraud were not contemporaneous with the transaction under inquiry. If they were frauds of like character, and especially if they concerned former efforts to sell the same property, they are admissible. Remoteness in point of time may weaken their evidential value, but will not ordinarily justify exclusion. The case of Hoxie v. Insurance Co., 32 Conn. 21, is directly in point. There the court said:

"Upon the question of good faith, knowledge, or intent, any other transaction from which any inference respecting the quo animo may be drawn is admissible; and where fraud is imputed, and within the issue, and provable by various circumstances, a considerable latitude must be indulged in the admission of evidence. * * * It has sometimes been thought that the other transactions should be contemporaneous, or nearly so; but that is not essential. A fraudulent combination and fraudulent motive may be inferable from a series of successive transactions of a fraudulent or suspicious character and in respect to such a subject-matter."

Ross v. Miner, 67 Mich. 410, 35 N. W. 60; Rafferty v. State, 91 Tenn. 655, 16 S. W. 728; Bottomley v. U. S., 1 Story, 136, Fed. Cas. No. 1,688; Jordan v. Osgood, 109 Mass. 461; Castle v. Bullard, 23 How. 174; Butler v. Watkins, 13 Wall. 457; Insurance Co. v. Armstrong, 117 U. S. 598, 6 Sup. Ct. 877; Blake v. Assurance Society, 4 C. P. Div. 94.

In the case last cited, Lindley, J., said:

"I agree that, in order to prove that A. has committed a fraud on B., it is neither sufficient nor even relevant to prove that A. committed fraud upon C., D., or E. Stopping there, I admit that proposition; but, let it be shown that the fraud on B. is one of a class of other transactions having common features, then I disagree altogether with that proposition."

The testimony admissible upon the principles above stated is that of the witness Wardle, who was railroad and express agent at Fairplay from March, 1883, to October, 1886. That witness testified that, upon three several occasions, bags of ore samples in the depot at Fairplay for shipment, and being samples taken by experts for possible buyers, were tampered with by the defendant Stewart Van Deusen and his brother Arthur Van Deusen, assisted by witness. These cases occurred in 1884 and 1885. The first lot of samples as to which he testifies he describes as having been taken by a Mr. Loth, in the summer or fall of 1884. Loth's samples were in the depot in bags, tied with cords. The sacks were untied, and other ore, previously put in the depot by the Van Deusens, was substituted for ore taken from the bags. The second instance occurred afterwards. The name of the expert taking the samples was not known to the witness. The bags had been tied and sealed with ordinary sealing wax, stamped, as if with the back of a knife blade, with three straight lines. The seal was broken, the bags untied, and the substitution of one ore for another was made, and the original seal duplicated. The third instance was with reference to the lot of samples taken by J. B. Farrish in the fall of 1885. The samples were in small bags, inside a large one. The big sack was fastened and sealed with wax stamped with the letter F. The small sacks were sealed the same way. These sacks were opened at bottom, an exchange of part of the contents made, and again sewed up. Witness says that defendant Van Deusen explained that this substitution was in each case made to improve the average and induce a sale. The testimony of one who admits himself an accomplice is, of course, to be cautiously received. The character of the witness is also attacked by evidence going to his general reputation. He is, on the other hand, supported quite strongly. His evidence has been carefully scrutinized. It contains many inherent marks of honesty. It accounts for high averages obtained by former examinations, which, in the light of the history of this mine, and the other facts of this case, would be inexplicable. The testimony fits into the surroundings so much like truth that we are led to accept it as worthy of consideration.

The conduct of the defendant Van Deusen after the discovery of metallic silver in McDermott's October samples has been relied upon by the complainants as full of suspicion, while the defendants, on the other hand, claim to find in it very high evidence of

innocence. We think it is explained by a consideration of the very embarrassing circumstances incident to the unexpected discovery of the native silver in those samples. If it be assumed that he had a guilty agency in the matter, was there anything in his conduct which tends to corroborate or weaken the assumption? Mr. Van Deusen could well assume that it was not likely that the presence of native silver in McDermott's samples would be discovered. Neither Burlingame nor Arthur Van Deusen reported any such discovery. Very many assays were made by McDermott and Assayist Young without its presence becoming known. The accidental presence of some copper plates in a milling test produced a precipitation of the metallic silver upon the plates. A discrepancy between assay results before the powdered ore passed over these plates of copper resulted in a "clean-up," and the discovery of the precipitated silver. This discovery was a surprise to Van Deusen, and his whole after-conduct was influenced by the necessity of confirming McDermott's opinion as to the gross contents of the ores in the mine, while preventing him from putting up a mill built with a special view to the saving of free metallic silver by the screening process. This antagonism in the ends he sought was the result of McDermott's discovery that from 80 to 90 per cent. of the silver contents of the ore could be cheaply and certainly saved by a screening mill instead of an amalgamating mill. The proposal for a sale required the buyer to at once erect a 20-stamp mill with frue vanners. Such a mill was more expensive, and not so economical in its operation as a screening mill. If, as McDermott's samples showed, the average silver contents of the Mudsill ores was 34 ounces of silver per ton, and if, as his tests demonstrated, 80 per cent. of the silver contents was in the form of metallic silver, and could be saved by screening, then it was clear that a mill adapted to screening the ore, and thus eliminating the free silver, was the proper mill to put up. Now, if Van Deusen knew that the metallic silver found by McDermott was a foreign intrusion, he knew that a screening mill would be worthless. We have, in a former part of this opinion, stated that the whole body of this evidence convinced us that while Van Deusen knew that the average silver contents per ton of the ores in sight was nothing like so good as he represented, yet he did entertain the opinion that with a large stamp mill, such as he required the purchaser to put up, and plenty of capital, the ores of the mine might be profitably worked, and, moreover, there was a prospect of discovering higher-grade ores by the further development of the mining claim. The greater part of the nominal consideration for the mine was to be paid in shares of the new company, which shares he was to take. Entertaining these views, he could do nothing which should shake McDermott's confidence in the average silver contents, as indicated by his tests and assays. Yet it was essential to his own future interests that the kind of a mill required by the contract should be put up, and not a screening mill, as desired by McDermott. The role he had to play was a difficult one. It led him to feebly and qualifiedly express doubts

as to the existence of native silver "in paying quantities;" it led him to state that his own experience in screening had been unsatisfactory; and yet all this was done and stated in such a way as to assume the character of a mere difference of opinion as to the kind of mill adapted to these ores. He soon learned that McDermott's confidence in the representative character of the samples he had taken was absolute. He also early learned that his confidence in the gross silver contents per ton of the ore in sight, as shown by his assays and milling tests upon those samples, was equally strong. To McDermott it was a clear case that his samples had been "salted," or his results were reliable, and he put it in this way to Van Deusen, stating in a letter to him that nothing could prevent his going on with the purchase of the mine unless, by a new examination, he should be convinced that his samples had been "salted." His confidence in Van Deusen was manifested in an extraordinary manner, for he said in his letter of January 4, 1888, to him, that, if he (Van Deusen) thought the salting possible, he should so telegraph him to visit the mine again. This mark of confidence so strengthened Van Deusen's confidence in the success of his game that he responded by replying, in substance, that he had every confidence in the future success of the mine; that, if he (McDermott) entertained any suspicion that all was not right, he should have no hesitation in giving up the sale; that, if he concluded to go ahead, then to so telegraph Watrous, etc. This letter had the effect anticipated. It confirmed McDermott in his faith, and he did not go to the mine. He did make two efforts to get other samples sent to him, taken from points he indicated in his letter. These samples were not for the purpose of reconsidering the question of the average value of the ore body. That question he treated throughout as settled by his former sampling and the resulting assays. He wished the other samples to settle the question as to the kind of mill. But to do this he wished and directed Van Deusen to send him samples which would be characteristic, and directed the places in the mine from which they should be taken. If he had obtained what he requested, he would have gotten average samples representing the whole body of ore in sight. This would have certainly led to the discovery of the poverty of the ore, and have shown that native silver did not exist in the mine. This result was deliberately defeated, for in each instance he was sent selected ore, running way above the average, as shown by even the "salted" samples. The defendant Van Deusen carefully informed him in each case that the ores were from the points indicated, but were selected ores. The excuse given for sending them was that they were characteristic of the kind of ores which the mill would have to reduce. These samples, of course, showed no native silver, and were calculated to aid Van Deusen in his effort to prevent the putting up of a screening mill, and yet not calculated to shake McDermott's opinion as to the average silver contents of the ores in sight.

When the trade was concluded, December 8, 1888, and part of the price paid, it was upon a private understanding that he (McDermott) was to have further samples for the purpose of determining the kind

of mill, and that if, upon these other samples, he was not satisfied, he might withdraw at any time before March 1st,—the date when the last payment was to be made. We have detailed his efforts to get further average samples and the results of those efforts. The interpretation put upon this agreement by both the defendants was such that the right of resampling had been fully permitted by the sending of the samples we have above alluded to. McDermott's efforts to get further ore, he not being entitled to possession until all the purchase money was paid, were absolutely refused by Watrous; Van Deusen explaining that Watrous felt that the private understanding as to the right of withdrawal might be affected if further sampling was permitted. The effect of this conduct was not to arouse suspicion, but to lull McDermott into confidence. This is evident from his telegram of January 7, 1888, to defendant Van Deusen, in which he said:

"Your brother telegraphs cannot ship ore without order of Watrous. This seems unnecessary blocking of progress. Forces me to decide on mill without more tests. Shall simply hurry Watrous' payments and take chances of process. Does Watrous no good."

Subsequently, Watrous relented, and authorized Arthur Van Deusen to send the samples wished. McDermott had written for average samples, saying that the rich samples sent before by Stewart Van Deusen would not enable him to settle the problem as to kind of mill. The result of this was a second lot of very rich selected samples. Whether they came out of the Mudsill mine at all is, on the evidence, somewhat in doubt. Mr. Tobin, the chairman of the complainant company, came over to America in February following. McDermott applied to have the right of withdrawal renewed so that Tobin, after examining the mine, could accept or reject. He was informed that this was unbusiness-like, and refused. To get possession was necessary to settle the question of kind of mill to be put up. To do this the last payment, due March 1, 1888, was anticipated, it being made February 15th. Possession was then taken, and a re-examination and resampling made with a view of settling the mill question. These samplings and tests resulted in the discovery that there was no native silver in the mine, and that the average value of the ore in sight was probably so low as to be commercially valueless. Many other details might be given, tending to the conclusion that the conduct of defendant Van Deusen, after he learned of McDermott's discovery, was not that of an innocent man. If he had been free from complicity in this matter, and honest in his opinions and purposes, he would have said to McDermott: "Your tests and assays are all wrong, or your samples were 'salted.'" Knowing, as he did, that there was no native silver in the ores of this mine, he would have realized that McDermott was mistaken, or his samples had been tampered with. One conscious of an honest purpose would have demanded a re-examination and a resampling, instead of throwing obstacles in the way.

To sum up our conclusions upon this branch of the case, we have, in support of the hypothesis presupposing Van Deusen's guilty agency in this matter, the following: (1) That the samples were not

accidentally "salted." (2) If not by accident, then they were "salted" by design. (3) Van Deusen had a motive prompting a line of conduct which would support his untrue representations. (4) He had the opportunity, and the means were accessible. (5) No other person had a like motive, and no one could profit by the fraud except the defendants. (6) He knowingly misrepresented the average silver contents per ton of the ore in sight, for the purpose of thereby inducing a sale. Though these misrepresentations were, in effect, the expression of an opinion, yet the opinion as expressed was put in form of fact, and was not honestly entertained. (7) There is evidence of former acts of fraud of like character to that now charged, and with reference to the same subject-matter, indicating a systematic scheme of fraud by which a sale of this property was purposed to be brought about. (8) The conduct of the defendant Van Deusen after the discovery of the fraud was calculated to lull the complainants, and was such as indicated a fraudulent purpose. The whole body of the proof generates a strong conviction that the defendant Van Deusen directly, or through his agents, corrupted the samples relied upon by complainants. We use the word "proof," in the foregoing sentence, in its broad and comprehensive sense, and as embracing, in addition to evidence, all those grounds upon which may rest a juridical conviction, including facts, circumstances, and presumptions of fact which result from evidence of other facts. Upon the "proofs" adduced, we find sufficient reason for assenting to the hypothesis presented by complainants. While we recognize that, in the absence of direct evidence of the principal fact, there is a possibility that this metallic silver found its way into complainants' samples by accident, or through the intervention of some agency beyond the control of defendants, yet the weight of the proof so decidedly preponderates upon the side of the hypothesis presupposing the guilt of the defendants that it brings about that degree of conviction necessary for judgment in a civil case. The denial of Van Deusen, as a witness, of any complicity in this "salting," cannot shake this conviction. He does not, and cannot, explain how it otherwise happened, and a mere negative fails to shake the evidential force of the proof which points to his guilt.

The defense of accord and satisfaction has been suggested, rather than pressed. After the purchase money had been all paid, and after complainants had taken possession, they resampled the mine with a view to settling the character of the mill which should be put up. The contract required a 20-stamp mill of expensive character. As before shown, McDermott's discovery that from 80 to 90 per cent. of the silver contents was native silver led him to the conclusion that a mill adapted to the reduction of an ore from which so large a proportion of its silver contents could be taken by screening was the mill needed. We have before shown that Van Deusen, the largest stockholder in the new company, opposed this kind of a mill, and stood upon his contract. His reasons for this attitude we have before considered. So far did he go in his insistence that he privately offered to McDermott personally 2,500 shares of the Mudsill stock if he would give up the idea of a screening

mill, and at once carry out the contract. After the assay of the samples taken in February had satisfied McDermott that there was no native silver in the Mudsill ores, and induced a belief that his samples had been "salted," he was confronted with the agreement with Van Deusen, requiring the immediate erection of the mill provided for in the declaration of trust executed December 8, 1887. The belief that a fraud had been practiced had not yet acquired the solid foundation of knowledge. The complicity of the defendants in the "salting" remained to be established by evidence. It was, upon consultation with Mr. Tobin, deemed best to say nothing about their suspicions. Opinion of counsel was taken as to the effect of the agreement with Van Deusen as to erection of mill. They were advised that the contract was imperative. McDermott informed Tobin of Van Deusen's former proposition to give him 2,500 shares if he would go on with the stamp mill. It was deemed very desirable to get the contract so modified as to allow the erection of a smaller mill in the first instance, to be followed by a large one if the results should justify it. It was also agreed that no charge of fraud should be intimated. To accomplish these purposes, Tobin went to see Van Deusen. The result was a modification of the agreement as to the mill, and a concession to the company of the shares offered McDermott. That agreement was, as stated by Van Deusen in a letter to McDermott, in these words:

"Dear Mr. McDermott: Mr. Tobin arrived here this a. m., and I have had a very full talk with him regarding the programme of work at the Mudsill mine and the most judicious expenditure of the capital of the company. Understanding you have stopped the erection of the sizing mill, we have agreed, in substance, as follows: I agree to allow you to, and Mr. Tobin agrees that you shall, at once erect a five-stamp mill; and I therefore authorize you to build such a mill at once, complete with frue vanners and amalgamating pans; and in consideration of this agreement to build such five-stamp mill complete, and agree that the erection of a larger mill may be postponed until the value of the mine has been proved by this five-stamp mill, by crushing at least two thousand tons of at least twenty-ounce ore, though you and the company have the power of building a larger mill at earlier date should you think advisable, and as Mr. Tobin wants to make sure that the company does not run short of capital for further development of the mine, and to assure the company, I have further agreed with him as follows: 'I hereby authorize you to transfer to the company two thousand five hundred of the shares you are to receive from the company on my behalf, as bonus given by me for the benefit of the company; and I further hereby authorize you to transfer to the company seven thousand five hundred of the shares of the company which you are to receive on my behalf, on condition that the company undertake to return to me the seven thousand five hundred shares, or the proceeds thereof, at the par value of the same, at the option of the company, on the payment of the first dividend made by the company, or as soon as the company shall have made a net earning of ten per cent. for one year on its capital stock.'

"Yours, truly, S. A. Van Deusen."

This was satisfactory to Tobin and McDermott, and the erection of a five-stamp mill begun. The board of directors of the complainant company, upon being advised of the agreement, repudiated it, and refused to accept the shares thereby offered, fearing its effect in case the facts should develop that the company had been defrauded. The proposed agreement had no element of an accord and satisfaction. It related only to the contract concerning the

mill to be put up, and was an agreement inter sese; that is, between the company and one of its shareholders. Its rejection by the company when submitted to it is, however, conclusive.

There remains to be considered the question as to whether the demand for rescission was made in time, and suit prosecuted without laches. When a purchaser acquires knowledge that he has been defrauded, he has an election of legal remedies. He may keep the property and sue for damages, or repudiate the contract and demand rescission. These remedies are not concurrent, but inconsistent, and the adoption of one of necessity excludes the other. The rule is well settled in equity that after knowledge of the fraud the party must, within reasonable time, make an election as to whether he will affirm the trade, notwithstanding the fraud, or offer to restore the property and demand the return of his purchase money. If, after the knowledge of the facts which entitle him to rescind, he deal with the property as owner, it is evidence of acquiescence and an affirmance of the contract. The authorities to this point are numerous, and the principle well settled. The more important cases are: Pence v. Langdon, 99 U. S. 578; Johnston v. Mining Co., 148 U. S. 370, 13 Sup. Ct. 585; Oil Co. v. Marbury, 91 U. S. 587; Upton v. Tribilcock, Id. 54; Cobb v. Hatfield, 46 N. Y. 533; Schiffer v. Dietz, 83 N. Y. 308; Lawrence v. Dale, 3 Johns. Ch. 23; Tanner v. Smith, 10 Sim. 411; Gilbert v. Hunnewell, 12 Heisk. 293; Oakes v. Turquand, L. R. 2 H. L. 325. But, before a purchaser is compelled to elect whether he will affirm or disaffirm, he must be aware of the facts which raise such an election. Delay will not defeat his right to relief, unless the fraud was known to him, or ought to have been known by due diligence. In Pence v. Langdon, 99 U. S. 581, Mr. Justice Swayne, in discussing a question of alleged acquiescence in a fraud, laid down what we deem the true rule upon this question. He said:

"Acquiescence and waiver are always questions of fact. There can be neither without knowledge. The terms import this foundation for such action. One cannot waive or acquiesce in a wrong while ignorant it has been committed. Current suspicion and rumor are not enough. There must be knowledge of facts which will enable the party to take effectual action. Nothing short of this will do. But he may not willfully shut his eyes to what he might readily and ought to have known. When fully advised, he must decide and act with reasonable dispatch. He cannot rest until the rights of third persons are changed. Under such circumstances, he loses the right to rescind, and must seek compensation in damages. But the wrongdoer cannot make extreme vigilance and promptitude conditions of rescission. It does not lie in his mouth to complain of delay, unaccompanied by acts of ownership, and by which he has not been affected. The election to rescind or not to rescind, once made, is final and conclusive. The burden of proving knowledge of the fraud and the time of its discovery rests upon the defendant."

The contention of defendants that complainants have waived their right of rescission is based upon the admission of Mr. McDermott, in his evidence, as to the effect upon him of the results of the assays upon the resampling of the mine after complainants took possession, in February, 1888. He says from that time he believed his samples had been "salted." The question as to whether the defendants were responsible for that "salting" was

not settled by that discovery alone. His belief in their complicity was not necessarily evidence that he had knowledge of facts which would justify the charge or support a demand for rescission. The witness, in other parts of his evidence, draws a distinction between his belief in the fact of "salting" and his conviction that the evidence connected the defendants with it. When asked the direct question as to when he became fully persuaded in his own mind that the defendants were responsible for the fraud, he says: "It was a gradual growth of conviction, as I collected the evidence. I don't know that I can specify the exact date when I was able to fasten it upon them in my own mind." The fact that misrepresentations had been made as to the average value of the exposed ore body, and that his resampling had shown such results as to make the untruthfulness of these representations probable, was not the discovery of a fact which, by itself, put him to an election. This we have already ruled. Those misrepresentations were in the nature of an opinion. Without evidence that his samples had been tampered with by defendants, he had no knowledge of facts entitling him to rescission. Knowledge of their guilty complicity in the intrusion of metallic silver was and is the knowledge upon which the option of rescission or adoption arose. The knowledge which would have required prompt action was knowledge of facts convincing as to the agency of defendants in imposing on him fraudulent samples. Neither rumors nor suspicion required an election. Either would demand diligence in effort to discover the truth, for, after facts are known calculated to excite suspicion, laches would be imputed if there was negligence in inquiry. That an advantage had been obtained by reason of the unfair character of the October samples was not enough to justify rescission. In defining fraud, Mr. Pomeroy calls attention to the necessity that the undue advantage acquired should be the result of willfulness. He says:

"Every fraud, in its most general and fundamental conception, consists in obtaining an undue advantage by means of some act or omission which is unconscionable; or 'a violation of good faith' is the broad meaning of the term in equity,—the 'bona fide' of the Roman law. Furthermore, it is a necessary part of this conception that the act or omission itself, by which the undue advantage is obtained, should be willful,—in other words, should be knowingly and intentionally done by the party. The willfulness of the act or omission is the element which distinguishes fraud from other matters by which undue advantage may be obtained so as to furnish an occasion for the equitable jurisdiction." 2 Pom. Eq. Jur. 353, 354.

It was, therefore, essential that complainants should be aware of the fact that the "salting" had not occurred by accident, or through the intervention of agencies beyond the control of defendants, but by and through their responsible instrumentality. If, after knowledge of this fact, complainants dealt with the property as owners; if, after knowledge, they experimented with the property, that they might see whether to keep it or throw it up,—then they have waived their right of rescission, and must rely upon other remedies for relief. That complainants had no purpose to hold onto the property for the purpose of ascertaining whether it would be most profitable to adopt or rescind is made most manifest by their efforts to induce

defendants to take it back. (1) On February 27th, immediately after the result of the resampling was known, McDermott wrote Watrous, stating the result of assays, and his great disappointment. He said most of his friends had taken shares upon his original sampling and assays, showing native silver; that they might wish to withdraw,—and proposed that he should take 20,000 shares at par, as he had proposed to do only a month before, and let such of his friends withdraw as should desire, in view of the changed aspect of affairs. He wrote Van Deusen to the same effect, and offered to abandon all private arrangements between them. This proposition was declined upon the statement that other investments had been made. On May 10, 1888, he again wrote defendant Watrous, in which, after stating certain facts as to his inability to get a resampling before payment of all the purchase money, his purchase on the results of the October assays, and subsequent discovery that the mine contained no native silver, he concluded by saying:

"I have given you this full statement so that you will understand my sudden change of views about the purchase, and my desire to withdraw from the same before the mine is worked or the mill started. The company has built a complete stamp mill, with concentrators and pans of a capacity of 10 tons daily, which is arranged for quickly doubling its capacity by addition of stamps. This mill will be ready to start early in June. We have practically done nothing in the mine since my last visit. My proposition is as follows: You have written your very favorable opinion of the property, and expressed a willingness to work the mine and build a mill yourself rather than grant a few days extra time for resampling by me last November. I have done nothing to the mine to change its value, and have nearly completed a very effective mill, such as Mr. Van Deusen knows is adapted to the treatment of the pay ore. I offer now to return the whole property as assigned to me, together with the mill site and Kentucky lode claim, since acquired, and with a completed mill ready to start. With the property I turn over supplies and tools, cars, track, boarding-house outfit, telephone line, etc., on which, in all, over $1,000 has been expended; you to return cash paid you, $110,000. In other words, you get your property back as a going concern, ready to produce, and enhanced in value above what it was when you sold, by the amount of our expenditures, say fully $20,000, and before a stroke of work has been done to in any way change the value of the mine. Should you consider the proposition favorably, I will at once cable London for a meeting of stockholders to be called to decide whether the company will accept terms I offer. An immediate answer is necessary, because, if you refuse to consider the offer, we must actively push work at the mine to get ore out for the mill, and this present offer is entirely disconnected with any ultimate success or failure in working, but rests simply on the facts surrounding the purchase by me. I have the authority of the board of directors to open this negotiation, subject to shareholders' approval, since property has been deeded to company now, and some shareholders have purchased stock above par considerably. Begging the favor of an early reply, and hoping that you will see the proposition in a favorable light, I remain, yours, truly."

This proposition was absolutely declined by letter of May 16th. We think that these proposals demonstrate that complainants have acted in the utmost good faith, and remained in possession of the property only until they learned facts which would justify a demand for rescission. In Pence v. Langdon, supra, it was expressly decided that, where the defense of acquiescence or waiver is set up to defeat rescission for a fraud, the burden is upon defendants to make it out. This burden has not been discharged. The suspicions and opinions entertained by complainants were not knowledge of

the facts necessary to require election. Facts enough were known to require diligence in inquiry from and after the February assays. The record is full of evidence indicating that in this duty there was no slothfulness. Detectives were employed. A small mill was put up, and mill tests made upon several hundred tons of ore, by which it was clearly shown that the average ores of the mine were commercially worthless. After that date, in the prosecution of inquiry, Wardle was discovered, and his important evidence communicated to complainants' detectives. After that date it was discovered that the small sample of crushed ore sent to Burlingame for assay contained metallic silver, by which it became most probable that the "salting" occurred at Fairplay, and while defendant Van Deusen had access to the bags of samples taken in October. After that date, it was discovered that metallic silver in the form of that placed in the samples was a purchasable commodity, and to be had in Colorado. The past history of the mine was investigated, and facts enough learned to establish the proposition that Van Deusen knew his representations as to average silver contents of the ore in sight were not true. Other circumstances might be enumerated which came to light after the assays of February, 1888, which, with those mentioned above, served to throw a flood of light upon a transaction otherwise wrapped in mystery, though full of suspicion.

The argument has been urged that complainants ought not to have been misled by the presence of metallic silver; that what was said to them when this discovery was made should have put them on guard; that, if they proceeded with the purchase afterwards, it was at their own peril. Whether most persons would have continued, under the circumstances detailed in this record, to go on to the completion of the trade, is debatable. McDermott, looking back to the occurrences antecedent to the last payment of the purchase money through the light of the subsequent discoveries, pronounces himself a fool for going on with the matter. His judgment is too severe. The precautions he had taken to get average samples, and to guard against their corruption, were sufficient to justify his faith. His assays he knew were trustworthy. He had too high a degree of confidence in the common honesty of defendant Van Deusen, but of this defendants cannot complain. All that was done or said by Van Deusen only tended to lull any suspicion and quiet any doubt. That he (McDermott) placed implicit confidence in the existence of native silver in the average ore of the Mudsill mine was known to defendants. That this confidence was the direct result of the "salting" of his samples was equally well known to them. To say that he ought not to have had such confidence does not come well from one whose intentional fraud brought it into action. It is for the defendants to clearly show that the complainants were not misled by their fraudulent conduct. In the case of Reynell v. Sprye, 1 De Gex, M. & G. 548, Cranworth, L. J., in discussing the effect of an untrue representation innocently made, said:

"The case is not at all varied by the circumstance that the untrue representation, or any of the untrue representations, may in the first instance have been the result of innocent error. If, after the error has been discovered, the

party who has innocently made these innocent representations suffers the other party to continue in error, and to act on the belief that no mistake has been made, this, from the time of the discovery, becomes, in the contemplation of this court, a fraudulent misrepresentation, even though it was not originally."

This principle applies with greater force where the representation was originally false. If the party making it repent, he must fully undo the consequences of his wrong. Vague hints and more doubtful warnings will only aggravate the wrong, and will furnish no protection if the fraud continues to mislead, and was an inducement to action. We find no evidence in this case of any effort to undeceive complainant, but much calculated to throw him off his guard and continue the deception. The conclusion upon the whole case is that the decree of the circuit court must be reversed. The prayer for relief as against defendant Watrous must be granted, with interest from date of each payment to him. Defendant Van Deusen must account for the proceeds of all shares sold by him, with interest, and all shares standing yet in his name will be canceled. Defendants will pay the costs of the cause.

EXCHANGE NAT. BANK OF ATCHISON v. WASHITA CATTLE CO.

(Circuit Court, E. D. Missouri, E. D. April 27, 1894.)

PRACTICE—PRODUCTION OF BOOKS AND PAPERS.

The power given the federal courts to order the production of books and papers (Rev. St. § 724) includes power to grant an inspection before trial, with permission to make copies.

This was an action by the Exchange National Bank of Atchison, Kan., against the Washita Cattle Company. Plaintiff moves for an order for the inspection of books and papers.

McDonald & Howe, John T. Cochran, and B. P. Waggener, for plaintiff.

Lee, McKeighan & Priest, for defendant.

THAYER, District Judge. This is a motion by the plaintiff to obtain an inspection of the defendant's books and permission to take copies of entries therein, the case being now at issue. The jurisdiction to make such an order must be derived from section 724, Rev. St. U. S. as the state statute is not applicable. Gregory v. Railroad Co., 10 Fed. 529. The statute (section 724) says nothing about an order for the inspection of papers and permission to take copies of entries, etc., but it must be presumed that the purpose of compelling a party to produce his books is to enable the opposite party to examine them, and, if necessary, to make copies of entries. Therefore it is reasonable to hold, and the court so decides, that the power to order the production of books includes the power to grant an inspection; and so it was ruled by Judge Love in Gregory v. Railroad Co., supra. In some cases it has been decided that, on motions of this kind, the proper order to be entered is to require the production of the books at the trial. Merchants' Nat. Bank v.

State Nat. Bank, 3 Cliff. 201, Fed. Cas. No. 9,448, and Iasigi v. Brown, 1 Curt. 401, Fed. Cas. No. 6,993. Other courts have adopted the practice, which seems to me more reasonable, of granting an inspection previous to the trial. Bank v. Tayloe, 2 Cranch, C. C. 427, Fed. Cas. No. 2,548; Jacques v. Collins, 2 Blatchf. 23, Fed. Cas. No. 7,167; and Gregory v. Railroad Co., supra.

Upon the whole, I conclude that an order of inspection, with permission to take copies, should be granted.

Ordered on the written application of the plaintiff by its attorney, due notice of which has been given, that the plaintiff's attorneys have leave to inspect the records of the Washita Cattle Company containing the proceedings of its stockholders and board of directors, and to take copies of such entries or proceedings therein as they may deem necessary, such examination to be made at the defendant's office or elsewhere between the hours of 9 a. m. and 3 p. m. on any week day or week days, between April 30, 1894, and May 14, 1894, and said defendant, its officers and agents, having the custody of such records or books, are hereby required to permit such examination to be made.

BRECKINRIDGE COUNTY v. McCRACKEN et al. (two cases).

(Circuit Court of Appeals, Sixth Circuit. March 6, 1894.)

Nos. 113 and 142.

1. RAILROAD COMPANIES—MUNICIPAL AID—PARTS OF COUNTIES.
   The charter of a railroad company (Act Ky. Feb. 24, 1888) provided that any county through which it might pass, or any magisterial precinct or precincts of such county, might subscribe to its capital stock (section 9); that, when any precinct or precincts made such subscription, bonds of the county should be issued, showing on their face the precincts making the subscription, which alone should be bound to pay the bonds (section 10); and that its provisions should not apply to a defined portion of R. precinct in a county named (section 19). *Held*, that the residue of R. precinct, not excepted from the provisions of the act, might join with another precinct of such county in making a subscription, and joint bonds be issued therefor.

2. SAME—BONDS—TAXES TO PAY—ASSESSMENT.
   The charter of a railroad company (Act Ky. Feb. 24, 1888) authorized the magisterial precincts of counties through which it should pass to subscribe to its capital stock (section 9), and provided that such subscriptions should be paid by taxes levied in such precincts alone. Such a subscription was made jointly by one precinct and part of another, the residue having been expressly excepted from the operation of the charter. *Held*, that the assessor might be required to list separately the property of the district making such subscription, and liable to a tax therefor, under Acts Ky. 1891–93 (volume 1, p. 283, § 4), which requires him to make separate books for each "taxing district of his county, by wards or other subdivisions, as convenience may require."

3. SAME—DELIVERY—CONDITIONS.
   Act Ky. April 9, 1873, which provides that, before county bonds issued in aid of a railroad are delivered, the president of the road shall give bond for the faithful application of their proceeds to the construction of the road, has no application where the road has been completed before the bonds are delivered.

4. SAME—ACTION ON BONDS—PLEADING.
In an action on railroad aid bonds, a simple allegation in the petition that "an election was duly held" to determine whether the subscription should be made is sufficient; and any irregularities in the mode of holding such election are matters of defense.

5. SAME—RESERVATION IN BONDS.
In an action on county bonds issued in aid of a railroad, plaintiff need not allege a reservation made in the bonds by the county as to the time of payment, where there was no such reservation in the act authorizing the subscription, for the power to issue the bonds was in no wise affected thereby.

6. SAME—COUNTY BONDS—JUDGMENT.
The charter of a railroad company (Act Ky. Feb. 24, 1888) authorized magisterial precincts of any county through which it passed to subscribe to its capital stock (section 9), and provided that the bonds of the county should be issued in payment of such a subscription in every respect as if such subscription was made by the county, but that such precincts should be alone bound to pay such bonds (section 12). *Held*, that the county is liable to actions on such bonds, but judgment against it is to be satisfied out of a tax levied on such precincts alone.

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

The case first named was a suit brought by McCracken and others, partners under the name of W. V. McCracken & Co., and citizens of the state of New York, against the county of Breckinridge, one of the counties of the state of Kentucky. The subject-matter of the suit was 180 coupons of $30 each, being for three installments of interest accruing upon certain bonds issued by the defendant county as obligor for certain unincorporated precincts of said county. The county filed a general demurrer to the petition of plaintiffs, which being overruled, it declined to further plead. Thereupon, the circuit court rendered a special judgment against the county, to be paid only by levy and collection of a tax upon the property of the tax districts for which the bonds had been issued. Subsequently, a petition for a writ of mandamus was filed, by which it was sought to compel the levy and collection of a special tax upon the property of the precincts issuing the bonds to pay off that judgment. The county answered this petition. A demurrer to the answer was interposed and sustained. The county refusing to further plead, the circuit court granted a writ of mandamus as prayed. The county of Breckinridge has sued out a writ of error in each case.

The bonds in question were issued to the Louisville, Hardinsburg & Western Railway Company in payment of a subscription to the capital stock of that company of $60,000, made by the Hardinsburg and Rough Creek precincts, except a definite part of the latter especially excluded under the act authorizing the subscription, they being precincts of Breckinridge county. The charter of said railway company was granted February 24, 1888. The parts which affect the questions to be decided are sections 9, 10, 12, 14, and 19, and are as follows:

"Sec. 9. That any county through which the Louisville, Hardinsburg and Western Railway, or any branch or branches of same, may be constructed or propose to be constructed, and any cities, towns or magisterial precinct or precincts of said counties, may subscribe to the capital stock of the said railway company, as herein provided and may pay therefor in the negotiable coupon bonds of said counties, cities, towns or magisterial precinct or precincts payable not more than thirty (30) years after date, and bearing interest at a

rate not exceeding six per cent per annum, payable semi-annually, and which bonds and interest shall be payable at a place designated therein.

"Sec. 10. Whenever application shall be made to the county judge with reference to counties or parts of counties, or to the city council with reference to cities, or town trustees in reference to towns, by said railway company, requesting that the question of subscribing to the capital stock of said railway company, upon the terms and conditions set forth in said application, be submitted to a vote of the legal voters of said county, part of county, city or town, the county judge, when directed so to do by a majority of a county court composed of the justices of the peace in commission, living within the bounds of the territory in each county to which the question of taxation shall be submitted, it being in the discretion of said justices of the peace to so submit or not; and the city council or town trustees to whom said application is addressed may, in their discretion, order an election to be held in such county, part of county, city or town, as the case may be, on a day named in the order (not later than fifty days after the making of said order), to ascertain the sense of the legal voters in the territory to be affected upon the question of making such subscription, and to cause notice thereof to be published in such county in a newspaper published therein not less than thirty days, and to be posted at the court-house door in such county and at such other public places therein as may be directed by said order; and at such election votes shall be received (for the railway subscription and against the railway subscription). Officers of such election shall, when the territory to be affected is a county or magisterial precinct or precincts therein, be appointed and hold such election, and make return thereof to the county judge thereof in the manner provided in ordinary county elections; and when the territory to be affected is a city or town, in the manner provided for officers of elections in cases of city or town elections."

"Sec. 12. Whenever any magisterial precinct or precincts in any county shall subscribe to the stock of said company, under the provisions of this act, it shall be the duty of the county judge and clerk of such county to sign, execute, issue or deliver the bonds of such precinct or precincts in payment thereof, in every respect as if such subscription had been made by the county, except that the bonds shall show on their face the precinct or precincts for which they are issued, and such precinct or precincts shall be alone bound to pay said bonds and their interest."

"Sec. 14. An annual tax sufficient to pay the semi-annual installments of interest on such bonds, and the principal, when it shall become due, shall be collected and paid out by the officers of such county, city or town, as provided in the case of other county, city or town taxes."

"Sec. 19. Provided, the provisions of this act shall not apply to the magisterial district of Bowleyville, Cloverport, Union Star or Hudsonville, in the county of Breckinridge, nor to any city or town embraced therein, nor shall its provisions apply to that portion of the Forks of Rough or McDaniel's magisterial district, in Breckinridge county, included within the following boundary, to-wit: Beginning at the mouth of the North Fork of Rough creek; thence up the same to the mouth of Calamese creek; thence up said creek to the line between Hudsonville and McDaniel's voting precinct; thence with said line to the South Fork of Rough creek to the beginning. The provisions therein in reference to the Union Star," etc.

J. Proctor Knott and T. J. Edelen, for plaintiffs in error.

David W. Fairleigh and James P. Helm, for defendants in error.

Before TAFT and LURTON, Circuit Judges, and RICKS, District Judge.

LURTON, Circuit Judge (after stating the facts as above). A number of objections have been urged as operating to avoid liability upon the coupons in suit, which will be considered in such order as is most convenient.

The first and most serious defense is as to whether the act authorizing a subscription to the stock of the Louisville, Hardinsburg & Western Railway Company, by the "magisterial precincts" of any county through which that road should be constructed, authorized a joint subscription by two precincts, or by one and a fraction of another. A justice's district, or "magisterial precinct," is a local subdivision of a county, and has no corporate autonomy. Its boundaries are fixed by the county court, and serve to define the territorial jurisdiction of justices of the peace and constables. It generally constitutes an election district, and the county assessment rolls are made out by precincts, as is the case with the wards of cities. The relation of such a precinct to the county under the law of Kentucky is substantially that of a ward to a city. While not an autonomous, self-governing body, it is a geographical and semipolitical entity. There can be no serious question, under the decisions of the supreme court of Kentucky, that the legislature of that state has the constitutional power to authorize any subdivision of a county to subscribe for the stock of a railway company, and to issue bonds in payment of such subscription. So it may authorize a county to impose a special tax on the district making such subscription, and issuing such bonds, to pay the interest and principal thereof. To this end the legislature may create a political district with corporate powers, or it may authorize magisterial districts, constable districts, or carve out a special district, and confer authority upon such territory by vote to charge such district with a subscription. So it may empower the county, of which such district is a part, to issue such bonds in behalf of the territory empowered to charge itself, the bonds to be payable only out of taxes levied and collected from the taxables of that tax district. The Kentucky decisions clearly settle these propositions. City of Lexington v. McQuillan's Heirs, 9 Dana, 513; County Judge of Shelby Co. v. Shelby R. Co., 5 Bush, 226; Kreiger v. Railroad Co., 84 Ky. 66; Allison v. Railway Co., 10 Bush, 1; Carter Co. v. Sinton, 120 U. S. 518, 7 Sup. Ct. 650; Hancock v. Railroad Co., 145 U. S. 414, 12 Sup. Ct. 969.

The contention here involves solely a construction of the act under which the coupons in suit were issued. The contention of appellant is: (1) That the charter in question only authorized a subscription by separate action of each precinct desiring to aid in the construction of the road authorized by the charter; that an election jointly held by two or more districts or precincts, and bonds issued by two districts acting as a unit, would not be a valid exercise of any power conferred by the charter. (2) That, even if two entire precincts could combine for such a purpose, it was not lawful for a portion of Rough Creek precinct to combine with the Hardinsburg precinct. A careful reading of the sections heretofore set out seems to indicate that the parts of the county subscribing should act together as a taxing district, and that but one election was contemplated. That part might be but one precinct, or it might be several. The territory to which the proposition was to be submitted might embrace all the precincts permitted by the charter to subscribe, or it might embrace but one or two of the whole number entitled to

contract. This we think is observable particularly in the tenth and twelfth sections. In the tenth section the term "parts of a county" is used synonymously with precinct or precincts. In the twelfth section the issuance of bonds by more than one precinct co-operating as a taxing unit is clearly contemplated. It provides that the bonds to be issued by the county judge and county clerk should be "in every respect as if the subscription had been made by the county, except that the bonds shall show on their face the precinct or precincts for which they are issued, and such precinct or precincts shall be alone bound to pay said bonds and their interest." The power existed in the legislature to arbitrarily carve out a geographical district, and authorize its inhabitants to exercise the functions of a corporation, either through agencies created by themselves or through the agencies of the county. It was not essential, under the decisions of the Kentucky court, that precinct lines should be regarded in conferring the power and functions of subscribing for stock. It is therefore only a question as to what the legislature has done in this instance. Did it require each precinct to act separately, or may they co-operate? We think the construction put on this act when the affected territory acted was entirely reasonable, and supported by the letter, as well as the spirit, of the legislative grant. By the nineteenth section certain precincts and towns, and a definite part of Rough Creek precinct, were excepted out of the provisions of the act. The clear meaning was that the excepted precincts and parts of precincts should not be within the terms of the act so far as it would otherwise authorize them to subscribe for stock in that road. By excluding a part of Rough Creek precinct it was clearly implied that the unexcluded part should constitute a territory authorized to subscribe to the stock and issue bonds in payment. The remainder of that precinct constituted the precinct, for the purpose of the act.

2. The next objection is that no power is conferred to assess a tax to pay either the interest or principal of the bonds to be issued, and that, therefore, no authority to issue the bonds or subscribe for the stock has been conferred. To support this proposition, counsel rely upon a dictum to that effect in Kentucky Union Ry. Co. v. Bourbon Co., 85 Ky. 111, 2 S. W. 687. The same principle was laid down by Mr. Justice Miller in Citizens' Savings & Loan Ass'n v. City of Topeka, 20 Wall. 660, when it was said that "the validity of a contract which can only be fulfilled by a resort to taxation depends on the power to levy the tax for that purpose." The language was applied in a case where the validity of bonds was in question issued by the city of Topeka to aid a private manufacturing establishment. The court said, as such bonds could only be paid by taxation, they were void unless taxes might be constitutionally levied for the purpose of aiding a purely private enterprise. Here we have no such question, for, under the constitution of Kentucky, taxes may be levied to aid a railway line, it being deemed a public enterprise. There can be in this case no serious doubt but that the power to assess a special tax upon the property in the affected district has been conferred on the county court of Breckinridge county for the purpose

of paying off the interest and principal of these bonds. Section 14 of the charter provides that "an annual tax sufficient to pay the semiannual installments of interest on such bonds, and the principal when it shall become due, shall be collected and paid out by the officers of such counties, city or towns, as provided in the case of other county, city or town taxes." The criticisms on this provision are (1) that no means are provided, and none existed before, for ascertaining the amount of taxable property in the unorganized district; (2) that in attempting to confer the taxing power it does so by referring to a criterion which has no existence in law. We think these objections quite untenable. The power to assess, levy, and collect a tax would be necessarily implied from the power to create the debt, there being nothing in the act indicating an expectation that payment should be made in any other way, and no constitutional obstacle, either in the character of the debt or to the granting of such power by the legislature, being suggested. Citizens' Savings & Loan Ass'n v. City of Topeka, 20 Wall. 656; Ralls Co. v. U. S., 105 U. S. 735; Quincy v. Jackson, 113 U. S. 335, 5 Sup. Ct. 544. The purpose that this debt shall be paid by taxation is made clear. That no general authority exists to levy an ad valorem tax for general county purposes is not important. The power to assess and levy a special ad valorem tax is by implication clearly conferred in section 14, to say nothing of the implication which results from the grant of power to create the debt and issue the bonds. The answer of the county to the petition for a writ of mandamus sets up as a defense that there has been no separate assessment of the property in the district issuing these bonds. The assessment for the purposes of state taxation has been made upon all taxable property in each of the two precincts of Hardinsburg and Rough Creek. The point is that, as a part of Rough Creek is excluded by section 19 of the act, the county court has no means of eliminating from the roll the taxables in that district which are liable to a special levy to pay this judgment from those not subject to such a burden. The duty of the assessor is defined by the Kentucky act of November 11, 1892 (volume 1, Acts 1891–93, p. 283). Sections 4 and 12 of article 2 of the act are as follows:

"4. The assessor shall commence the duties of his office on the fifteenth of September of each year, and he shall assess his county by justices' districts, in separate books, and he shall also make a separate book or books for each incorporated city, town, or taxing district (except school districts) of his county, by wards or other subdivisions, as convenience may require."

"12. The assessor shall make out his tax book in a fair, legible handwriting, in alphabetical order, according to justices' districts and incorporated cities, towns, and taxing districts therein, and make additions of each column so as to show the aggregate amount, value, and number of each column in said tax book, and prove the accuracy before he returns the same."

That act was fully applicable to this case, as by section 16 the assessor was required to commence the duties of his office September 15, 1892. Under the law of Kentucky a single assessment serves the purpose of both state and county. By the act of October 17, 1892 (volume 1, p. 270, Acts 1891–93), it is provided that:

"The fiscal courts shall hold their sessions at the county seats of their respective counties, and shall have jurisdiction to levy each year for county pur-

poses a poll-tax on each male inhabitant of the county, over twenty-one years of age, not exceeding one dollar and fifty cents, and an ad valorem tax on all property subject to taxation within the county, whether belonging to natural persons or corporations, companies or associations, not to exceed fifty cents on each one hundred dollars in value as assessed by state processes, unless an additional tax be required to enable the county or taxing district thereof to pay the interest on and provide a sinking fund for the extinction of indebtedness of the county or district created prior to September twenty-eight, one thousand eight hundred and ninety-one; and for that purpose the fiscal court shall have jurisdiction to levy such additional tax as may be authorized by law in force prior to September twenty-eighth, one thousand eight hundred and ninety-one, and shall superintend the collection of all such tax."

Under these statutes we think that it was the duty of the assessor to assess his county by justices' districts, and to make a separate book or books for each "taxing district of his county, by wards or other subdivisions, as convenience may require." The debt here involved was created by law, and a levy authorized by law, in force before September 28, 1891; and that under the act of October, 1892, above set out, it has the power to require an assessment book to be separately drawn off by the assessor of the taxables in the district liable for these bonds, and to have levied such additional tax as was necessary to pay the accrued interest on these bonds.

3. It is next objected that these bonds were delivered by the county judge without requiring the president of the railway company to execute a bond, as required by the Kentucky act of April 9, 1873, conditioned that their proceeds should be faithfully applied to the object for which they were issued. Without considering the effect of the failure of the county judge to require such a bond upon the bonds themselves, in a case where the act was applicable, we are of opinion that the act had no application in this case. These bonds were never delivered until the road had been constructed and trains passed over it. Pending the construction, they were placed in escrow, to be delivered only when the road should be finished. When delivered to the president of the company, the road had been fully constructed, and there was no reason for the application of the act, the purpose of which was to protect the subscription by compelling the application of the bonds to purposes of construction.

4. It is next objected that the petition is insufficient on its face, in that it is not shown that the notice of election was given for the time, and in the manner, prescribed by section 10 of the railway company's charter. The allegation of the petition is that the election required "was duly held." This is substantially an averment that the election was held according to the requirements of the law. It was not, however, important that the pleader should aver the preliminary facts requisite to the exercise of the power granted by the legislature to subscribe for the stock and issue bonds in payment. The power to hold an election, subscribe for stock, and issue the bonds is averred. If there was any defect in the steps preliminary to the exercise of that power, it is for the defendant to plead and show such irregularity. The performance or nonperformance of acts requisite to the valid exercise of the

power are matters of defense. This precise question arose in Lincoln Tp. v. Cambria Iron Co., 103 U. S. 412. The declaration in a suit upon certain bonds issued by a Michigan township did not aver that an election was held to authorize the issuance of the bonds, as required by law, and did not aver certain other prerequisites to such issue. After considering the effect of a verdict for the plaintiff as a waiver of such objection to the pleading, the court said:

"But we do not think that there was any defect in the declaration to be cured. We think that it would have been good on demurrer. The township had authority by law to issue its bonds by way of a donation to a railroad. It did issue its bonds. They got into circulation as commercial securities, and were purchased by the plaintiff. All the plaintiff had to do in case of nonpayment was simply to sue on the bonds. If there was any defense to them by reason of want of performance of any of the requisites necessary to give them validity, or for any other cause, it was for the defendant to show it. A bond, especially a negotiable bond, is a prima facie obligation of the obligor if he has capacity to make it, and is binding according to the terms and conditions apparent on its face until the contrary be shown. Whether an alleged defense, when set up, is or is not good against the particular holder, is to be determined by the court in each case." 103 U. S. 416.

The case of Hopper v. Town of Covington, 118 U. S. 148, 6 Sup. Ct. 1025, is relied upon by appellant. It is not in point. The defect in the declaration went to the power of the corporation. In that very case the court drew a distinction between the want of power and an irregularity in the exercise of a power. See, also, County of Clay v. Society for Savings, 104 U. S. 586.

The next objection is of like character. The subscription made by the county, as shown by the exhibit filed with the bill, required that the bonds should be issued, reserving to the districts the right to pay them off after five years from their date. It is objected that the petition does not aver that the bonds issued contained any such reservation. No bond is filed with the petition, nor any copy of one. Whether, as matter of fact, such a reservation appeared on the bonds, does not appear. No such requirement is contained in the act. That provision was part of the contract between the company and the district subscribing. We do not think that it was incumbent on the plaintiff to make any averment as to that provision. It did not involve the power of the district to subscribe and issue bonds. It was matter of defense to be set up by answer.

5. Finally, it is objected that the county is not liable on these bonds, and it was error to have rendered judgment against the county. The districts subscribing were not corporations, and could not, without further legislation, execute and deliver bonds. Some one could be authorized to become the obligor. This duty was imposed on the county. This was authorized under the Kentucky decisions before cited. That the charter of the Louisville, Hardinsburg & Western Railway Company contemplated that the county should execute the bonds when the subscription was by a precinct or other subdivision of the county is to us very clear. Section 12 provided that in such a case the bonds of the precinct or precincts should be signed, executed, and delivered by the county judge and county court clerk, "in every respect as if such sub-

scription had been made by the county, except that the bonds shall show on their face the precinct or precincts for which they are issued, and such precinct or precincts shall be alone bound to pay said bonds and their interest." While the district subscribing is the debtor, yet in form the county is the obligor. Through the county the indebted district is to act, and through the same agency the indebted district is to be coerced by the assessment of the tax essential to meet its obligations. Such a district becomes, for the purposes of the subscription, a corporation quoad hoc. Kreiger v. Railroad Co., 84 Ky. 66; Hancock v. Railroad Co., 145 U. S. 409, 12 Sup. Ct. 969. It is suable only through the county, which, in respect to the subscription, the issuance of the bonds, and the assessment of a special levy, stands for and represents the debtor. The judgment was properly rendered against the county, collectible only from tax levied on property in the indebted district. The charter, in this respect, is substantially like the provision construed in Davenport v. Dodge Co., 105 U. S. 237. The special judgment rendered by the circuit court was like that approved in the same case. The result is that the judgment of the circuit court in each case must be affirmed.

WILCOX & GIBBS GUANO CO. v. PHOENIX INS. CO. OF BROOKLYN.

(Circuit Court, D. South Carolina. April 16, 1894.)

1. PLEADING—EQUITABLE DEFENSE—ACTION AT LAW.
   In an action at law in the federal court on an insurance policy, it was alleged in defense that a suit was pending in the state court for the reformation of the policy, and defendant prayed that all proceedings be stayed until that suit was determined. *Held*, that this was an equitable defense, only, and should be stricken from the answer, as not admissible in an action at law.

2. ABATEMENT—FORMER SUIT—STATE AND FEDERAL COURTS.
   An action on an insurance policy was removed to the federal court, and defendant answered therein, alleging that a suit was pending in the state court for the reformation of the policy. *Held*, that this was not good as a plea in abatement, for the pendency of the prior suit in the state court is no bar to the action in the federal court.

Action by the Wilcox & Gibbs Guano Company against the Phoenix Insurance Company of Brooklyn, N. Y. On motion to strike out answer.

Bryan & Bryan, for the motion.
Trenholm, Rhett & Miller, opposed.

SIMONTON, Circuit Judge. This is a motion to strike out a part of an answer constituting a further defense to a complaint. The plaintiff brought its action in the court of common pleas for Charleston county, upon a policy of insurance, against the defendant. The summons and complaint were served 27th January, 1894. On the 6th February, 1894, Hon. D. A. Townsend, a circuit judge of the state of South Carolina, granted an extension of time to defendant, within which to file its answer, to 10th March, 1894. On the 8th day of March, of the same month, the defendant filed its petition, with bond for removal into this court. On 17th March it presented this

petition to the state court, and by its order the petition and bond were approved. On 23d March the plaintiff filed the record in this court, and made a motion to remand, which was refused. The defendant filed the record in this court on the first day of the present term. The removal having been perfected, the cause proceeds in this court as if it originated here. Henning v. Telegraph Co., 40 Fed. 658; Thompson v. Railroad Co., 6 Wall. 134.

The action is at law. It appears that on 17th February, 1894, before the petition for removal, and before answering the complaint, the defendant in this suit filed an original complaint in the court of common pleas for Charleston county, setting forth the fact that, when the policy in this case sued on was originally issued, it had attached to it a coinsurance clause, the result of which was that the insured and insurer shared proportionately the risk insured against, and that on the first renewal of the policy the same clause was attached, but that on the third renewal of the policy it was either attached, and subsequently became detached, or it was inadvertently omitted. The complaint prayed that the policy be reformed, and that in the mean time the suit on the policy be stayed. The defendant has filed its answer in this court, which sets up as a further defense the pendency of this last-named complaint in the state court, its prayer for a reformation of the policy and for an injunction, and ends with a prayer in the answer that all proceedings in the present cause be stayed until the determination of the action in the state court. The plaintiff now moves to strike this defense out of the answer, as irrelevant. This is in accord with the practice in South Carolina. State v. Norris, 15 S. C. 256. This being a case at law, no defense can be interposed which is not strictly a legal defense. Railroad Co. v. Paine, 119 U. S. 562, 7 Sup. Ct. 323. If, therefore, we treat this as a defense, it is wholly inadmissible. The defendant seeks precisely the same relief which he would seek by bill in equity. In effect, he seeks the relief which he would have if he had obtained an injunction in the state court, and if such injunction could operate in this court. If we consider it as a plea of a suit pending, it would be equally inadmissible. The pendency even of a prior suit in another jurisdiction is not a bar to a subsequent suit in this court. Stanton v. Embrey, 93 U. S. 554. It could not operate even as a plea in abatement. Gordon v. Gilfoil, 99 U. S. 178; Insurance Co. v. Brune, 96 U. S. 593. If the defendant has a right to equitable relief, he must seek it in the circuit court of the United States, on its equity side. The motion to strike out this defense in the answer is granted.

UNITED STATES v. CHEW CHEONG.

(District Court, N. D. California. April 12, 1894.)

No. 3,032.

1. REGULATION OF CHINESE—DEPORTATION OF FELON.

A Chinese laborer, convicted of felony, is not entitled to register under the act (Nov. 3, 1893) extending the time for registration, and such person

may therefore be deported upon the expiration of the time fixed by the original act (May 5, 1892) for failure to register.

2. SAME—EXTENSION OF TIME—EX POST FACTO LAWS.

The act (Nov. 3, 1893) extending the time for registration of Chinese laborers is not ex post facto on the ground that it excepts from its provisions those who had been theretofore convicted of felony, as the deportation was only the consequence of a failure to register under the original act (May 5, 1892), and had no relation to the felony.

These were proceedings for the deportation of Chew Cheong under the provisions of the act of May 5, 1892, as amended by the act of November 3, 1893.

W. G. Witter, Asst. U. S. Atty.
John T. Dare, for defendant.

MORROW, District Judge. It has been established by the evidence in the case that the defendant is a Chinese laborer, and was, on the 25th day of July, 1879, tried in the municipal criminal court of the city and county of San Francisco, and convicted of the crime of an attempt to commit burglary in the second degree, and, on the 2d day of August, 1879, it was adjudged and decreed by the said court that the defendant should be punished by imprisonment in the state prison of the state of California for the term of two years, the sentence thereby fixing the grade of the crime as that of a felony. The present proceeding is for the purpose of having him deported, under the provisions of the act of May 5, 1892, as amended by the act of November 3, 1893. It is contended, however, on behalf of the defendant, that, notwithstanding he has been convicted of a felony, he is entitled to the full period of six months to register, as provided in the amended act, and that the proceeding is therefore premature; and, second, that to deport the defendant because of a crime committed in 1879 would be to give to the later act an ex post facto operation.

By the act of May 5, 1892, it was required that all Chinese laborers in the United States at the time of the passage of the act, and who were entitled to remain in the United States, should apply to the collector of internal revenue of their respective districts within one year after the passage of the act for a certificate of residence; and it was provided that any such Chinese laborer who should neglect, fail, or refuse to comply with the provisions of the act, or who, after one year from the passage thereof, should be found within the jurisdiction of the United States without such certificate of residence, should be deemed and adjudged to be unlawfully within the United States. It is a well-known fact that but few of the Chinese laborers in the United States made application for the certificate of residence as provided in that act. It has been claimed, as an excuse for such disregard of the law, that these people were advised by counsel that the law was not constitutional. The law was, however, sustained in the case of Fong Yue Ting v. U. S., 149 U. S. 698, 13 Sup. Ct. 1016. After this decision, congress passed the amendatory act of November 3, 1893, extending the provisions of the previous act relating to the certificate of residence for the period of six months. This period has not yet expired, but there

is a proviso in the amendatory act withholding the privilege of the extended period from Chinese persons who have been convicted of a felony. It is as follows:

"Provided, that no Chinese person heretofore convicted in any court of the states or territories or of the United States of a felony shall be permitted to register under the provisions of this act; but all such persons who are now subject to deportation for failure or refusal to comply with the act to which this is an amendment shall be deported from the United States as in said act and in this act provided, upon any appropriate proceedings now pending or which may be hereafter instituted."

The defendant allowed the year to expire in which he might have obtained a certificate of residence under the act of May 5, 1892. He had an opportunity to secure the evidence of his right to remain in the United States, but he declined to avail himself of that opportunity. It was his own fault that he did not comply with the requirements of the original act, and now that the period provided by it for registration has passed, how can he be heard to complain that he is not privileged to register under the terms of the amendatory act? So far as he is concerned, the act of May 5, 1892, is in full force and effect, and he is subject to be deported from the United States, because he failed to obtain a certificate of registration as required by that act. It is true that congress extended the period for obtaining a certificate of registration to certain Chinese persons, but not to the defendant. Having been convicted of a felony, he does not come within any of the privileges of the extended period, and cannot now, or at any time hereafter, obtain a certificate of residence under its provisions. This proceeding is, therefore, not premature.

It is contended, further, that at the date of the passage of the amended act the defendant was not subject to deportation, because proceedings were not then pending against him; but this objection is without force, in view of the fact that the statute provides for his deportation not only upon proceedings then pending, but upon a proceeding that might thereafter be instituted.

The claim that the amendatory act is ex post facto in this: that it adds an additional punishment for the crime of which the defendant was convicted in 1879, is also without merit. He is not being deported because of his conviction of a felony, but because he refused to comply with the act of May 5, 1892, and obtain a certificate of residence, when he had the opportunity to obtain it, in accordance with the provisions of that act. He determined to violate an existing law, and congress has simply refused to relieve him from the consequences of that act. There is clearly nothing ex post facto in such legislation. It does not inflict a greater punishment for the original offense than the law annexed to the crime when committed, nor does it, by reason of the original offense, alter the situation of the defendant to his disadvantage. His deportation arises out of the fact that he failed to comply with the act of May 5, 1892, and not because he has committed a felony. The latter fact operates simply to deprive him of a second opportunity to apply for a certificate of residence, and nothing more. But it is not necessary to rest this decision upon the determination

that the statute does not have an ex post facto operation. In the case of Fong Yue Ting v. U. S., supra, the supreme court held that:

"The right to exclude or to expel all aliens, or any class of aliens, absolutely or upon certain conditions, in war or in peace, is an inherent and inalienable right of every sovereign and independent nation, essential to its safety, its independence, and its welfare."

And that:

"Chinese laborers, therefore, like all other aliens residing in the United States for a shorter or longer time, are entitled, so long as they are permitted by the government of the United States to remain in the country, to the safeguards of the constitution, and to the protection of the laws in regard to their rights of person and of property, and to their civil and criminal responsibility. But they continue to be aliens, having taken no steps towards becoming citizens, and incapable of becoming such under the naturalization laws; and therefore remain subject to the power of congress to expel them, or to order them to be removed and deported from the country, whenever, in its judgment, their removal is necessary or expedient for the public interests."

The power of congress to deal with aliens is, therefore, an absolute power, under which it may expel those of a particular class, and permit others to remain upon specified conditions. Under such a power, a classification that selects alien criminals for deportation is certainly the exercise of a just discrimination in the administration of the laws, and a wise authority in preserving the institutions of the country.

Ex parte RICKELT.

(Circuit Court, S. D. Ohio, W. D. April 25, 1894.)

No. 4,695.

HABEAS CORPUS—WHEN LIES.

Habeas corpus will not lie to determine the simple question of law whether the facts proved before a United States commissioner on preliminary hearing are sufficient to constitute the crime for which the prisoner has been committed.

This was a Petition by Gustave Rickelt for a writ of habeas corpus to procure his release from the custody of the marshal by whom he was held under commitment of a United States commissioner.

Jones & Herholz, for petitioner.

Harlan Cleveland and Henry Hooper, for respondent.

TAFT, Circuit Judge. This is a proceeding in habeas corpus to obtain the release of one Gustave Rickelt. On April 3d, W. W. Dickson, a post-office inspector, made an affidavit before S. C. McCandless, United States circuit court commissioner for the western district of Pennsylvania, at Pittsburgh, that Gustave Rickelt, on the 17th of February, 1894, in that district, "did unlawfully secrete, embezzle, or destroy a certain letter which had been in the custody of the post-office establishment of the United States, before the same had been delivered to the person to whom it was directed, with the design to obstruct the correspondence or pry into the business or secrets of other persons, the said letter then and there hav-

ing indorsed upon it the following: Upon the left-hand upper corner thereof the following printed matter, to wit: 'Return to Dr. Julius H. Eichberg, No. 50 W. Ninth St., Cincinnati, O.,' and having upon the envelope the following address, 'To Miss Seraphine Ernau, Member of German Theatrical Co. from Cincinnati, Seventh Ave. Hotel, Pittsburgh, Pa.' And upon the right-hand upper corner thereof a United States two-cent postage stamp." This was charged to have been a violation of section 3892 of the Revised Statutes of the United States, which provides as follows:

"Any person who shall take any letter, postal card, or packet although it does not contain any article of value or evidence thereof, out of a post-office or branch post-office or from a letter or mail carrier, or which has been in any post-office, or branch post-office, or in the custody of any letter or mail carrier, before it has been delivered to the person to whom it was directed, with a design to obstruct the correspondence, or to pry into the business or secrets of another, or shall secrete, embezzle or destroy the same, shall for every such offence be punishable by a fine or not more than five hundred dollars, or by imprisonment at hard labor for not more than one year, or by both."

Upon the affidavit a warrant was issued by John E. Bruce, Esq., United States commissioner of the circuit court of this district, for preliminary examination and commitment, to await the issuance of the warrant of removal by the district judge of this district. A preliminary examination was held, and evidence was introduced before the commissioner tending to show that a letter like that described in the affidavit had been received at the Seventh Avenue Hotel in Pittsburgh, Pa., and delivered to the clerk of the hotel; that the hotel clerk handed the letter to Rickelt, who was the stage manager of the company of which the addressee of the letter was a member, and that he at first refused to take it, but finally said, "Give it to me, and I will give it to her," and that the addressee never received the letter. The evidence shows that letters not claimed at the hotel office after 10 days are always returned to the post office; that when carriers leave letters in the office, they are distributed, and put in pigeonholes kept in the hotel office for the use of the guests of the hotel; that three or four letters came to Miss Ernau during the same week, addressed to the care of the hotel, and were received by her through that agency. The commissioner, upon this evidence, committed accused to the custody of the marshal to await the issuance of the warrant of removal by the district judge. Pending this commitment, and before the action of the district judge, these proceedings were brought.

The petition and writ of habeas corpus must be dismissed. The only question which it is sought to make here on behalf of the petitioner is that the facts developed before the commissioner were not evidence sufficient to constitute the offense described in section 3892. That is a mere question of law, the decision of which is in the first instance committed by section 1014, Rev. St., to the jurisdiction of the United States commissioner before whom the preliminary examination is had. There is no doubt that the consideration of the offense charged was within the jurisdiction of the commissioner before whom the examination took place. There is no doubt that the courts of the United States for the western

district of Pennsylvania have jurisdiction to try the offense charged in the affidavit upon which the warrant has issued. The question of law here raised will come up regularly for decision before the grand jury of the western district of Pennsylvania when it considers the finding of an indictment, and before the district court of that district when the indictment found is tried. The writ of habeas corpus cannot be used as a writ of error to review the action of the United States commissioner within his jurisdiction. If it were a question whether the crime charged had been committed in the district to which the removal was about to be made,—that is, whether the crime charged was within the jurisdiction of the courts of that district,—this would be a proper proceeding to test it. If it were a question whether the act under which the prosecution is being conducted was constitutional, that, too, might be tested by habeas corpus proceedings. Not so, however, the simple question whether the facts alleged and proven are in law sufficient to constitute the crime described in the statute. That is a question for the consideration of the regular tribunals before whom it may be raised in the due procedure of preliminary examination, indictment, and trial. The writ of habeas corpus is a collateral proceeding, and its scope is limited, as above stated. This conclusion is fully supported by the decision of the supreme court of the United States in Horner v. U. S., 143 U. S. 570, 12 Sup. Ct. 522. In that case it was sought by writ of habeas corpus to test the question whether the prisoner was properly committed by a United States commissioner under the lottery act for sending circulars through the mails for the sale of certain Austrian bonds, which were charged to be nothing but a scheme for a lottery.

The question made on the petition for the writ of habeas corpus was that the bonds were not a lottery, within the meaning of the federal statute. The supreme court held that the question whether the scheme was a lottery was a question to be determined by the commissioner, by the grand jury, and by the district or circuit court in which the indictment was to be tried, and that it was not for the circuit court or for the supreme court, on the writ of habeas corpus, to determine this question in advance. Mr. Justice Blatchford cites a number of cases to sustain this holding, one of which was an extradition case,—In re Luis Oteiza y Cortes, 136 U. S. 330, 10 Sup. Ct. 1031.

The writ is accordingly dismissed, at the costs of the petitioner.

In re McKANE.

(Circuit Court, S. D. New York. April 11, 1894.)

HABEAS CORPUS—APPEAL—CUSTODY OF PRISONER.

Pending an appeal from a refusal to grant the writ in behalf of a person confined under sentence of a state court, the custody of the prisoner cannot be disturbed (Rev. St. § 765; Sup. Ct. Rule 34, cl. 1); and the fact that he is daily required to perform hard labor pending the appeal gives no authority, under Rev. St. § 766, for any interference on a subsequent application for the writ.

This was a petition by John Y. McKane for a writ of habeas corpus, alleging that he was imprisoned at Sing Sing, N. Y., in violation of the laws of the United States.

Thos. A. Atchison, for petitioner.
E. M. Shepard, for respondent.

LACOMBE, Circuit Judge. The petitioner heretofore applied to this court for a writ of habeas corpus, under section 753, Rev. St. U. S., alleging that he was in custody in the state's prison at Sing Sing, under sentence of a state court, after conviction of a criminal offense, and that such custody was in violation of certain provisions of the constitution of the United States, which he duly set forth in his petition. His application for a writ was denied by this court, and from such final decision he duly appealed to the supreme court of the United States, under section 764, Id., as amended by the act of March 3, 1885, and, so far as appears, has complied with all the requirements of law and practice in the orderly prosecution of such appeal. That appeal is still pending, and the petitioner remains in the same custody in which he was held when his first application to this court for a habeas corpus was made and refused. Section 766, Id., is as follows:

"Sec. 766. Pending the proceedings on appeal in the cases mentioned in the three preceding sections, and until final judgment therein, and after final judgment of discharge, any proceeding against the person so imprisoned or confined or restrained of his liberty, in any state court, or by or under the authority of any state, for any matter so heard and determined, or in process of being heard and determined, under such writ of habeas corpus, shall be deemed null and void."

The United States supreme court, in Re Jugiro, 140 U. S. 295, 11 Sup. Ct. 770, held that the object of this section was, "in cases where the applicant was held in custody under the authority of a state court, or by the authority of a state, to stay the hands of such court or state while the question as to whether his detention was in violation of the constitution, laws, or treaties of the United States was being examined by the courts of the United States having jurisdiction in the premises;" that is, until final determination of the appeal to the supreme court, if such appeal be taken.

The petitioner now presents this second application for a habeas corpus; contending that a law of the United States, to wit, section 766, above quoted, is being violated. He shows in his petition that by the terms of his sentence, and by the provisions of the state law regulating state's prisons, he is required to do hard labor when therein confined. Thus, as he contends, his sentence, under the conviction now coming on for review by his appeal to the United States supreme court in his first proceeding, is being executed on his person dies in diem, and the warden or others in authority are each day proceeding against his person, by requiring him to do hard labor. Thus, as he insists, the hands of the state are not being stayed, as the federal statute, and the decision of the supreme court in Re Jugiro, supra, say they should be.

This is a new phase of an old question. Heretofore, the provisions of section 766 have been invoked, at least in this circuit, solely to

postpone the execution of persons under sentence of death. By reason of the circumstance that the federal statutes allow an indefinite number of applications and appeals, each appeal bringing section 766 into operation, without requiring any judicial certificate of reasonable doubt either by the court appealed from or by the court appealed to, these earlier attempts to postpone such execution were uniformly successful, whenever the attorneys conducting them were careful to conform to the statutes, the rules, and the practice of the federal courts. A reference to these proceedings will be found in Fost. Fed. Pr. § 367n. See, also, Ex parte Jugiro, 44 Fed. 754. The attention of the public being thus called to the unsatisfactory condition of federal legislation on this subject, a bill to correct possible abuses of the process of the federal courts was introduced in the senate by Mr. Senator Vest on January 12, 1891, and was referred to the judiciary committee. Apparently, it never passed, and the statutes remain as before.

The point raised here, however, is a new one. Manifestly, the infliction of the death penalty is a further "proceeding against the person" of the prisoner who has appealed from a refusal of the writ of habeas corpus. Whether the daily imposition of hard labor is or is not a further proceeding is an interesting question, which, however, need not be decided on this application. This is not a proceeding to enjoin state officers from doing any particular act, nor to punish them criminally for an assault committed in violation of law, nor to recover damages from them civilly for some wrong done to the complainant. It is an application to be discharged from a custody alleged to be illegal, and, if no sufficient warrant of law is shown for taking the prisoner out of that custody, a writ of habeas corpus will not be granted. Referring to the United States Revised Statutes, we find that sections 752 to 762 provide for writs of habeas corpus, and prescribe generally the practice to be followed upon applications therefor. Sections 763 and 764 authorize the taking of appeals from final decisions of the courts to which such applications are made, including cases where such final decision is a refusal of the writ. Then follows:

"Sec. 765. The appeals allowed by the two preceding sections shall be taken on such terms, and under such regulations and orders, as well for the custody and appearance of the person alleged to be in prison or confined or restrained of his liberty, as for sending up to the appellate tribunal a transcript of the petition, writ of habeas corpus, return thereto, and other proceedings, as may be prescribed by the supreme court, or in default thereof, by the court or judge hearing the cause."

Under this section the supreme court, in 1886, established the following regulations:

"Rule 34. Custody of Prisoners on Habeas Corpus. (1) Pending an appeal from the final decision of any court or judge declining to grant the writ of habeas corpus, the custody of the prisoner shall not be disturbed. (2) Pending an appeal from the final decision of any court or judge discharging the writ after it has been issued, the prisoner shall be remanded to the custody from which he was taken by the writ, or shall, for good cause shown, be detained in the custody of the court or judge, or be enlarged upon recognizance as hereinafter provided. (3) Pending an appeal from the final decision of any court or judge discharging the prisoner, he shall be enlarged upon recognizance, with surety, for appearance to answer the judgment of

appellate court, except where, for special reasons, sureties ought not to be required."

This rule is determinative of the pending application. It supplements section 766 by providing that, although "proceedings against the person" by state court or state authority are to be deemed null and void, the custody in which the prisoner was when he applied for the writ shall remain undisturbed despite the pendency of his appeal.

Relator's counsel insist that this clause of the rule is inconsistent with section 766, and therefore void. Evidently, the supreme court did not think so, or it would not have adopted the rule. In conformity to the regulations thus made by competent authority under a law of the United States (section 765, Rev. St. U. S.), McKane should, during the pendency of his appeal from this court's denial of his first application, remain in the custody in which he was when such application was denied. In that custody he now is, and therefore he is not in custody in violation of a law of the United States, as alleged in the petition now presented. Motion denied.

GAMEWELL FIRE-ALARM TEL. CO. et al. v. MUNICIPAL SIGNAL CO. et al.

(Circuit Court of Appeals, First Circuit. January 4, 1894.)

No. 42.

1. EXPIRATION OF PATENT—INTERLOCUTORY INJUNCTION—APPEAL.
   The expiration of a patent dissolves an interlocutory injunction restraining its infringement, and, where an appeal is pending, leaves nothing for the appellate court to act upon, and the appeal will be dismissed.

2. APPEAL FROM INTERLOCUTORY INJUNCTION—DECISION.
   On an appeal from an interlocutory decree granting an injunction restraining the infringement of a patent, the court will not dispose of the entire case, except when the determination of the question whether the injunction was erroneous requires an examination of the whole case on the merits. Richmond v. Atwood, 2 C. C. A. 596, 52 Fed. 10, explained.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

This was a suit by the Municipal Signal Company, licensee, and James F. Oyster, assignee, to restrain the Gamewell Fire-Alarm Telegraph Company and others from infringing letters patent No. 178,750, granted June 13, 1876, to Henry Ennis. The patent was for an improvement in telegraphic fire alarms. The circuit court entered an interlocutory decree granting a perpetual injunction, and referred the cause to a master to take an account of profits. 52 Fed. 464. Defendants appeal.

Charles N. Judson and Richard N. Dyer, for appellants.

Fish, Richardson & Storrow, for appellees.

Before PUTNAM, Circuit Judge, and NELSON and WEBB, District Judges.

PER CURIAM. Pending the appeal, and before argument of the cause in this court, the letters patent in suit expired, and with that expiration the interlocutory injunction appealed from termi-

nated. There is, therefore, nothing remaining for a judgment of this court to act upon. In this condition of the cause the court will no further consider whether the injunction was or was not properly granted, but will dismiss the appeal.

Appeal dismissed; no costs on appeal to either party.

After the foregoing opinion was rendered, a petition for rehearing was filed, but was withdrawn by leave of the court. The court at the same time gave the parties leave to file briefs upon the form of the decree to be entered. Briefs were accordingly submitted, and, after considering the same, the following opinion was rendered:

(March 21, 1894.)

PER CURIAM. It is true that in Richmond v. Atwood, 2 C. C. A. 596, 52 Fed. 10, which came before this court on an appeal from an interlocutory decree granting an injunction, the whole case was examined and was disposed of on its merits. But that injunction, it is to be remembered, was granted by the court below upon a final hearing of the case on the full evidence, and this court, in support of its judgment, said: "We must go to the full merits, as shown by the record, in order to determine whether the interlocutory decree for a perpetual injunction is founded in error." It is only when the determination of the question whether the injunction was erroneous so requires us to look into the whole case on its merits that we shall feel disposed to follow the course pursued in Richmond v. Atwood. Assignments of error ought to be strictly confined to the subject brought before the appellate court, whether on appeal or by writ of error.

In the case now before us everything has been decided except the form of the decree to be entered. Upon that question the brief of the appellants suggests, if it does not contend, that we should pass upon all the matters in the assignment of errors. In the view of the court, the expiration of the patent ipso facto dissolved or terminated the injunction, and left nothing requiring the interposition of this court. The appeal has been accordingly dismissed. It would have been useless labor to consider the questions which would have required examination and determination after the removal of the subject to which they pertained. The dismissal of the appeal without a qualifying order leaves the case to proceed in the circuit court as if no appeal had ever been taken, and it is enough to enter a decree, "Appeal dismissed."

Mandate according to the decree of January 4, 1894, may issue forthwith.

GERARD v. DIEBOLD SAFE & LOCK CO.

(Circuit Court of Appeals, Fifth Circuit. April 10, 1894.)

No. 60.

1. CONSTRUCTION OF PATENTS—BURGLAR-PROOF SAFES.

It is the duty of the inventor to use language sufficiently plain and explicit to denote clearly what he asks for, and a patent which, following the language of the application, is granted for "an improvement in burglar-

proof safes," cannot be construed to cover a locking device used in a jail cage. 4 C. C. A. 644, 54 Fed. 889, and 48 Fed. 380, reaffirmed.

2. SAME.

The Gerard patent No. 246,748, for "an improvement in burglar-proof safes," construed, and *held* not infringed.

This was a suit by Alonzo Gerard against the Diebold Safe & Lock Company for infringement of letters patent No. 246,748, granted September 6, 1881, to complainant for "an improvement in burglar-proof safes." The circuit court dismissed the bill on demurrer (48 Fed. 380), and complainant appealed. On February 20, 1893, this court affirmed the decree (4 C. C. A. 644, 54 Fed. 889), but a rehearing was granted.

Clarence Miller, for appellant.

George F. Ring, for appellee.

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

LOCKE, District Judge, delivered the opinion of the court.

This appeal has been once heard and decided (4 C. C. A. 644, 54 Fed. 889), and a rehearing granted. Upon such rehearing, and a careful consideration of the argument and examination of the authorities cited, we fail to find any reasons for changing our former conclusion. In every patent the language of the claim, specifications, and grant should be so clear, distinct, and positive as to leave no question of what was asked and granted, nor should it require a careful, nice, and labored investigation to ascertain whether one may not have trespassed upon the rights of the patentee. It is the duty of an inventor to use language sufficiently plain and explicit in his application to denote clearly what he asks for, and where he fails to do so, and the language of the grant follows that of the application, and is thereby misleading to the general public, he should gain no profit from such defective statement of that to which he considers he is entitled. When the language of both application and grant is so positively and directly declaratory of what was asked and granted as we find it in this case, we consider that it would be going beyond a safe rule to extend the operation and protection of the patent further. If appellant had originally made application for an "improvement in a locking device for safes, jails, and other similar structures," which he now insists upon claiming that his invention covers, the public would have had notice of his claim, but the language conveyed no such idea. In White v. Dunbar, 119 U. S. 47, 7 Sup. Ct. 72, Mr. Justice Bradley, speaking for the court, says:

"Some persons seem to suppose that a claim in a patent is like a nose of wax, which may be turned and twisted in any direction, by merely referring to the specifications, so as to make it include something more than, or something different from, what its words express. The context may, undoubtedly, be resorted to, and often is resorted to, for the purpose of better understanding the meaning of the claim, but not for the purpose of changing it, and making it different from what it is. The claim is a statutory requirement, prescribed for the very purpose of making the patentee define precisely what his invention is; and it is unjust to the public, as well as evasion of law, to construe it in a manner different from the plain import of its terms."

This we accept as the correct law by which we must be governed, and we consider that, if we should declare that a peculiarity in a locking device for a jail cage was an improvement in a burglar-proof safe, we should be construing the patent in a manner different from the plain import of its terms, and thereby doing an injustice to the public. Keystone Bridge Co. v. Phoenix Iron Co., 95 U. S. 274; Vance v. Campbell, 1 Black, 427; Burns v. Meyer, 100 U. S. 671; Railroad Co. v. Mellon, 104 U. S. 112; McClain v. Ortmayer, 141 U. S. 419, 12 Sup. Ct. 76.

Ordered, that the former judgment of this court and the judgment of the court below be affirmed, with costs.

MARSHALL v. PACKARD et al.

(Circuit Court of Appeals, First Circuit. March 27, 1894.)

No. 45.

PATENTS—NOVELTY AND INVENTION—LAWN-TENNIS SHOES.

The Marshall patent No. 340,135, for an improvement in shoes, more particularly designed for playing lawn tennis, and having an outer sole of rubber with projections thereon, is void for want of novelty and invention. 51 Fed. 755, affirmed.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

This was a bill by Howard T. Marshall against Fred. Packard and others for infringement of letters patent No. 340,135, issued April 20, 1886, to complainant. The invention relates to boots and shoes "more particularly designed for use in playing lawn tennis, although capable of use for other purposes." The court below dismissed the bill (51 Fed. 755), and complainant appealed to this court.

The claims of the patent were as follows:

(1) A boot or shoe having an outer sole permanently secured to the upper and inner sole, and its outer or treading surface made of India rubber, or any of its compounds, and provided with independent projections integral with said rubber, and severally separated from each other, and with the surface of the sole exposed between and around them, substantially as described, and for the purpose specified. (2) A boot or shoe having an outer sole permanently secured to the upper and inner sole, and its outer or treading surface made of India rubber, or any of its compounds, and provided with independent projections integral with said rubber of conoidical, and in planes parallel with said outer surface of circular or substantially circular, form, and severally separated from each other, and with the surface of the sole exposed between and around them, substantially as described, and for the purpose specified.

James E. Maynadier, for appellant.

George R. Blodgett and Edward M. Bentley, for appellees.

Before COLT, Circuit Judge, and WEBB and CARPENTER, District Judges.

WEBB, District Judge. Among the errors assigned is that the circuit court, in disposing of this suit, held the claims of the patent to be for a shoe sole, instead of for a shoe with a peculiarly con-

structed sole. The point is of no importance. All the merit and novelty, if there be any, in the shoe is confined to the outer sole. Whatever the material of the other parts, be it cloth, leather, rubber, or anything else, if it had this peculiar outer sole, the same question of infringement would arise that is presented here. For the determination of that question, attention must be directed and confined to the sole of the patented, and to that of the alleged infringing, shoe. That all the other parts are unimportant is practically admitted by the complainant in the specification of his patent. "The invention consists of a boot or shoe, the outer sole of which is made," etc. "In the drawings, A represents a shoe, and B is its outer sole, all, except as to this invention, made and attached together in any of the usual and well-known ways, and therefore needing no particular description herein."

It is not denied that at the date of the application for this patent, or for a long time before, shoes with outer soles of rubber, on the treading surface of which were protuberances integral with the sole, were common. These various soles showed diversities in the forms of the protuberances, and differed in some other unimportant respects. The argument of the complainant puts much stress on a flexibility inherent in shoes made according to his patent. We do not find any such inherent quality of flexibility. The outer rubber sole will indeed be flexible when separated from the shoe. When it is attached, the character of the inner sole and the material of the rest of the shoe will control the whole in this respect. As before suggested, neither the specification nor the claim of the complainant's patent refers to any particular style of shoe beyond this outer sole. In affording an elastic surface upon which the weight of the wearer rests, this shoe or outer sole is not unlike other rubber soles of boots and shoes. The elasticity is secured by the use of rubber. If this is more or less elastic than others, the difference is only in degree. But it is argued that there are special advantages in having a portion of the outer surface of this outer sole exposed around the base of each projection, and in the particular form of the arrangement of the whole of them. The separation of the bases of the studs or spurs was not new with the complainant. It is shown in many exhibits in the case. The arrangement of the projections in lines corresponding to the outline edge of the outer sole is not claimed as part of the invention nor made a vital part of it. Such arrangement is only mentioned as a preferable one. Similar arrangement of the protuberances on the bottoms of boots and shoes, and their isolation, are shown in British patents No. 3,133 of 1862, to Wagner; No. 2,674 of 1878, to Latapie; No. 2,667 of 1882, to Ellis; and in United States patent No. 47,521, May 2, 1865, to Clarke.

British patent No. 2,015 of 1868 to Taylor is indeed for an inner sole of rubber over which an outer treading sole is to be constructed (presumably of leather), so that elasticity and ease will be obtained by the wearer's weight pressing the rubber projections upon the inner surface of that outer sole, but this inner sole in the form, separation, and arrangement of its studs or protuberances, which are

also integral with it, is exactly the sole of the complainant's patent. The addition of a valve does not destroy the identity in the particulars recited.

We cannot perceive in the patent in suit originality, novelty, or invention.

The judgment of the circuit court is affirmed, and the bill is dismissed, with costs.

THE QUEEN OF THE PACIFIC.

BANCROFT-WHITNEY CO. et al. v. PACIFIC COAST STEAMSHIP CO.

(District Court, N. D. California. April 17, 1894.)

No. 10,301.

1. ADMIRALTY PLEADING—JOINDER OF CLAIMS—MULTIPLICITY OF SUITS.
   Joinder of a number of claims for damages growing out of contracts of affreightment for distinct lots of merchandise is permissible in admiralty for the purpose of avoiding multiplicity of suits.
2. ADMIRALTY—JURISDICTION IN REM—TIME OF SEIZURE.
   The requirement of admiralty rule 23 that a libel in rem must state that the property is in the district does not prevent the court from acquiring jurisdiction in the case of a vessel which, being within the district at the time the libel is verified, departs before it is filed, but, returning after the filing, is then seized on alias monition.
3. SHIPPING—AFFREIGHTMENT—MARITIME CONTRACT—SUIT IN REM.
   The fact that contracts of affreightment are personal contracts between the shipper and shipowner does not prevent them from being maritime contracts on which a libel in rem against the ship may be maintained.
4. ADMIRALTY—STATE STATUTES OF LIMITATION.
   State statutes of limitation do not apply to a libel in rem to enforce a maritime lien for breach of a contract of affreightment.
5. SHIPPING—AFFREIGHTMENT—SUITS IN REM AND PERSONAM.
   Loss or damage accruing from negligent handling of goods by the ship gives the shipper a right, if he so elect, to sue on the contract of affreightment, and he is not restricted to an action of tort.
6. SAME — BILL OF LADING — STIPULATIONS FOR PRESENTING CLAIMS — CONSTRUCTION.
   A provision in the shipping receipts that all claims against the steamship company or any of its stockholders for damage to the goods must be presented within 30 days from the date thereof, as a condition precedent to maintaining a suit against such company or its stockholders, does not cover the right to maintain a suit in rem against the ship.
7. SAME—VALIDITY—PUBLIC POLICY.
   It seems that a provision in a bill of lading requiring all claims for damages to be presented within 30 days from the date thereof makes the period of limitation unreasonably short, and is therefore void, as against public policy.

This is a libel by the Bancroft-Whitney Company and others against the steamship Queen of the Pacific, of which the Pacific Coast Steamship Company is claimant, to recover damages for breach of contracts of affreightment. The claimant excepted to the libel.

Milton Andros, for libelants.
Geo. W. Towle, Jr., for claimant.

MORROW, District Judge. The libel in this case embraces 38 separate claims for damages arising out of breach of contracts of

affreightment in the transportation of distinct lots of merchandise on the Queen of the Pacific. The practice of joining a number of claims in one libel is permissible in a court of admiralty to avoid a multiplicity of suits. Rich v. Lambert, 12 How. 347; Sun Mut. Ins. Co. v. Mississippi Val. Transp. Co., 14 Fed. 701. The action is for the purpose of enforcing the claims in rem against the steamship, which is owned by the Pacific Coast Steamship Company. The alleged breach is a failure to deliver the merchandise described in the several bills of lading or shipping receipts, and for damages for injuries to the same, claimed to have been occasioned by the negligence of the officers and crew of the vessel.

The Queen of the Pacific, at the time the libel was filed, was not within the northern district of California, having departed therefrom some few hours previously. The monition was consequently returned "Not Served." An alias monition was issued and returned "Served," and subsequently a bond was given, and the vessel released. The claimant thereupon excepted to the libel on the grounds—First, that there is no cause of action against the vessel; second, that the cause of action, if any ever existed, is against the Pacific Coast Steamship Company; third, that the causes of action have been waived and abandoned by virtue of a limitation clause of 30 days, contained in the bill of lading or shipper's receipt; fourth, that the demands were stale, neglected, and legally abandoned, and barred by virtue of certain statutes of limitation of this state; fifth, that the court had no jurisdiction.

The objection that the vessel was not within the jurisdiction of the court when the libel was filed is immaterial. Rule 23 of the general admiralty rules prescribed by the supreme court provides that "all libels in instance causes, civil or maritime, shall state the nature of the cause, * * * and if the libel is in rem, that the property is within the district." The libel in this case contains such an allegation, and, for the present purpose, it must be assumed to be true. The explanation is made that, when the libel was verified, the vessel was in the district, but the objection is based upon the fact that she departed soon after, and was not in the district when the libel was filed. The vessel had, however, departed upon one of her regular voyages, and upon her return she was duly served with process. The contracts declared on are contracts of affreightment entered into between the Pacific Coast Steamship Company and the shippers of the goods. It is a maritime contract, cognizable in the admiralty, and this is sufficient. Morewood v. Enequist, 23 How. 491; The Belfast, 7 Wall. 642. The court, having jurisdiction of the subject-matter, obtained jurisdiction over the res, when it was attached by the marshal upon the alias monition. Taylor v. Carryl, 20 How. 599; Cooper v. Reynolds, 10 Wall. 317; The Rio Grande, 23 Wall. 465.

The first and second exceptions are substantially the same. The claimant contends that the Pacific Coast Steamship Company, and not the vessel, should have been proceeded against; in other words, he claims that these contracts of affreightment were personal engagements between the Pacific Coast Steamship Company, as the

owner of the vessel, and the Bancroft-Whitney Company and the other joint libelants. They were personal in so far as the Pacific Coast Steamship Company, as the owner of the Queen of the Pacific, entered into the contracts with the libelants; but that fact does not alter the maritime nature of these contracts. They still remained contracts of affreightment,—an engagement, on the one hand, to transport goods or merchandise, and, on the other, to pay for such transportation. These engagements are maritime, and shippers have a lien on the vessel for breach of contract. The Belfast, supra. They may be enforced in personam or in rem. The libelants have elected to sue in rem. Counsel for claimant mistakes the nature of a maritime contract when he urges that because the contractual relation is of an individual character, therefore it is a personal contract, enforceable only in personam, and not in rem. The mere fact that the lien originates in the personal contract between the shipowner primarily, or by his agents for him, and the shipper, does not, in my opinion, convert the contract into a personal engagement, or operate as an implied waiver of a shipper's right to pursue the rem in a court of admiralty on a contract which otherwise is unquestionably maritime. As was said by Justice Campbell in Taylor v. Carryl, 20 How. 599:

"The district court seems to have considered that a ship was a juridical person, having a status in the courts of admiralty, and that the admiralty was entitled to precedence whenever any question arose which authorized a judicial tribunal to call this legal entity before it. The district court, in describing the source of its authority, says of the contract of bottomry that 'it is made with the thing, and not the owner,' and that the contract of the mariners is similar; that the res 'represents' in that court all persons having a right and privilege, while the rights of the owner are treated there as something incorporeal, separable from the res, and which might be seized by the sheriff, even though the res might be in the admiralty. This representation is not true in matter of fact nor in point of law. Contracts with mariners for service, and other contracts of that kind, are made on behalf of owners, who incur a personal responsibility; and, if lenders on bottomry depend upon the vessel for payment, it is because the liability of the owner is waived in the contract itself. 'In all causes of action,' says the judge of the admiralty of Great Britain, 'which may arise during the ownership of the persons whose ship is proceeded against, I apprehend that no suit could ever be maintained against a ship where the owners were not themselves personally liable, or where the liability had not been given up.' The Druid, 1 W. Rob. Adm. 399. And the opinion of this court in The Freeman v. Buckingham, 18 How. 183, was to the same effect."

In the case last cited the court say:

"We are of opinion that under our admiralty law contracts of affreightment, entered into with the master, in good faith, and within the scope of his apparent authority as master, bind the vessel to the merchandise for the performance of such contracts, wholly irrespective of the ownership of the vessel, and whether the master be the agent of the general or the special owner."

We come now to the exception that the action is barred by the statutes of limitation of this state. It is a well-settled rule that a state statute of limitation does not apply to maritime liens. The H. B. Foster, 3 Ware, 167, Fed. Cas. No. 6,291; The Platina, 3 Ware, 182, Fed. Cas. No. 11,210; The Key City, 14 Wall. 653; Hen. Adm. Jur. 185; Griswold v. The Nevada, 2 Sawy. 145, Fed. Cas. No. 5,839; Willard v. Dorr, 3 Mason, 91, Fed. Cas. No. 17,679; Brown v. Jones,

2 Gall. 480, Fed. Cas. No. 2,017. The libelants do not sue on the liens given by the state statute, but by virtue of the general maritime law. That being so, they are not affected by the limitation of time provided in section 813 of the Code of Civil Procedure, limiting the lien to the period of one year from the time the cause of action accrued. Nor are they barred by virtue of sections 337 and 338 of the above Code, the first of which prescribes a period of four years within which one may sue on a contract in writing executed in this state; and the second, which limits the time to three years, to bring an action for "injuring any goods or chattels." These limitations do not apply to maritime liens. As was said by Judge Ware in The H. B. Foster, 3 Ware, 167, Fed. Cas. No. 6,291:

"There is no statute of limitation raising a bar in the admiralty. Lapse of time, indeed, connected with circumstances, will create an equitable bar. Every man is bound to use reasonable diligence in enforcing his rights. If he does not, and in the free and rapid circulation of property he suffers other persons to acquire an interest in the subject-matter without notice of his rights, the just penalty of such neglect may be the forfeiture of his rights, or postponement of them to the equitable claims of others. Ships, it is well known, are frequently changing owners. Still more frequent are claims and rights against them for wages, repairs, and supplies. All such claims ought to be enforced in due season, and, indeed, promptly, and not be allowed to lie as secret liens and charges, which may operate as a surprise, if not a fraud on others. It is such considerations that have led able and learned admiralty judges to say that they will look narrowly into a lien claim of this kind if it is sought to be enforced at a later time than the termination of the voyage for which the supplies were furnished, and not because the claim then necessarily and legally becomes stale."

In the case of The Key City, 14 Wall. 653, the supreme court, speaking through Mr. Justice Miller, declared the law of the admiralty respecting the defense of laches or delay on the judicial enforcement of a maritime lien as follows:

"We think that the following propositions, as applicable to the case before us, may be fairly stated as the result of these authorities: (1) That, while the courts of admiralty are not governed in such case by any statute of limitations, they adopt the principal that laches or delay in the judicial enforcement of maritime liens will, under proper circumstances, constitute a valid defense. (2) That no arbitrary or fixed period of time has been, or will be, established as an inflexible rule, but that the delay which will defeat such a suit must in every case depend on the peculiar equitable circumstances of that case."

In other words, the deduction from the authorities is that, while there is no such thing as a statute of limitation in the admiralty law, yet courts of admiralty, in the furtherance of justice, will act by analogy, and refuse to entertain any suit where the party seeking to enforce his claim or lien has been guilty of laches. It is in fact the equitable doctrine of laches, depending upon the circumstances of the case. What would be laches in one case might not constitute such in another. The question is one addressed to the sound discretion of the court, depending upon all the facts of the particular case. It is, therefore, a question of evidence, to be determined hereafter upon the facts as they may appear.

The counsel for claimant further contends that the libels should have counted on a tort, and not on a contract. The libelants had the election to sue upon contract or tort. They could stand upon the

contracts of affreightment, or they might waive their right to sue on the contracts, and sue in tort. The contention of counsel for claimant that, as the libelants are suing for damages to the merchandise described in the bills of lading or shipping receipts, alleged to have been occasioned by the negligence of the officers and crew of the Queen of the Pacific, the cause of action is tort, and not contract, is not well founded. It is well settled by adjudications that one may recover on a contract of affreightment, for damages accruing from the negligent handling of goods in the course of transportation, or from other negligence. "Shippers have a lien by the maritime law upon the vessel employed in the transportation of their goods and merchandise from one port to another, as a security for the fulfillment of the contract of the carrier that he will safely keep, duly transport, and rightly deliver the goods and merchandise shipped on board, as stipulated in the bill of lading or other contract of shipment." The Belfast, supra. In The A. M. Bliss, 2 Low. 103, Fed. Cas. No. 274, Judge Lowell says:

"The district court has full jurisdiction of contracts of affreightment, whether evidenced by charter party or bill of lading; and, though the damages may, in any case, be somewhat indirect,—as, for instance, if they arise out of a jettison which requires contribution, or out of a fraudulent payment of salvage by the master,—yet the mode in which the claim for compensation arises will not oust the jurisdiction."

In the case of The M. Vandercook, 24 Fed. 472, decided by Judge Nixon, and quoted by counsel for claimant to the point that this suit should be an action ex delicto, and not ex contractu, the learned judge had to deal with a contract of towage, and not of affreightment, where a different principle has been held to apply. But Judge Benedict, in The Samuel J. Christian, 16 Fed. 796, held that one might sue on a contract of towage for negligence of the tug in towing the vessel. This was likewise held by Judge Brown in The Grapeshot, 22 Fed. 123. Judge Brown says: "By the law of both countries [America and England] negligence in a common carrier is a tort as well as a breach of contract."

The last objection is based upon the following clause in the shipping receipts:

"It is expressly agreed that all claims against the P. C. S. S. Co., or any of the stockholders of said company, for damages to or loss of any of the within merchandise, must be presented to the company within thirty days from the date hereof; and that after thirty days from the date hereof no action, suit, or proceeding in any court of justice shall be brought against said P. C. S. S. Co., or any of the stockholders thereof, for any damage to or loss of said merchandise; and the lapse of said thirty days shall be deemed a conclusive bar and release of all right to recover against said company, or any of the stockholders thereof, for any such damage or loss."

The libelants did not present their claims for damage or loss to the company within 30 days from the date of the bills of lading or shipping receipts, nor was this action brought within that time. Counsel for libelants contends that this stipulation is limited to personal actions against the Pacific Coast Steamship Company and its stockholders, and does not apply to an action against the vessel, —to a suit in rem. The strict letter of this clause certainly justifies such a construction of its terms. That a stipulation of this charac-

ter should be strictly construed against the party for whose benefit it accrues is well established by the authorities. Mr. Chief Justice Gibson, in Atwood v. Transportation Co., 9 Watts, 88, in relation to a restriction in a contract limiting the liability of a carrier, said:

"Though it is perhaps too late to say that a carrier may not accept his charge in special terms, it is not too late to say that the policy which dictated the rule of the common law requires that exceptions to it be strictly interpreted, and that it is his duty to bring his case strictly within them."

In New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. 383, Judge Nelson thus states the law:

"The special agreement in this case under which the goods were shipped, provided that they should be conveyed at the risk of Harnden, and that the respondents were not to be accountable to him or to his employers, in any event, for loss or damage. The language is general and broad, and might very well comprehend every description of risk incident to the shipment. But we think it would be going further than the intent of the parties, upon any fair and reasonable construction of the agreement, were we to regard it as stipulating for willful misconduct, gross negligence, or want of ordinary care, either in the seaworthiness of the vessel, her proper equipments and furniture, or in her management by the master and hands. * * * If it is competent at all for the carrier to stipulate for the gross negligence of himself and his servants or agents in the transportation of the goods, it should be required to be done at least in terms that leave no doubt as to the meaning of the parties."

In the case of Airey v. Merrill, 2 Curt. 8, Fed. Cas. No. 115, Mr. Justice Curtis said:

"The rule of construction as to exceptions is that they are to be taken most strongly against the party for whose benefit they are introduced. * * * These words of exception being introduced by the covenantor for his own benefit, if they are capable of bearing a more or less extended meaning the rule requires that meaning to be allowed to them which is least beneficial to the covenantor."

In Hooper v. Wells, Fargo & Co., 27 Cal. 11, Judge Sawyer used the following language:

"What is the extent of the restriction upon the common-law liabilities of the defendants? The language must be taken most strongly against the defendants. Edw. Bailm. 492. The instrument is executed by them alone. It was drawn up with care, in language selected by themselves, the blank form having been printed in advance, ready to be presented to all persons offering property for transportation by their express. The restrictions were for their benefit. The owners of packages sent by express rarely examine with care, or, indeed, have an opportunity to critically consider, the terms of the receipt presented by them; and general terms, under such circumstances, are apt to mislead. These are some of the reasons given in the books. * * * To justify the conclusion that such exemption is contemplated, the language should be unequivocal, and susceptible of no other reasonable interpretation."

In the above case the language used by Judge Sanderson, who dissented from the opinion of the court on other points, is as follows:

"The instrument was prepared by the defendants without previous consultation with the plaintiff, who had, therefore, no choice in the selection of the terms employed. And it is well settled that the language creating the exceptions from liability in such cases must be strictly construed against the party in whose favor they are made. The language was introduced by the defendants for their benefit; and, if it is susceptible of a more or less extended meaning, the rule of construction in such cases is to adopt that which is the least favorable to the party who is to be benefited thereby."

In Levering v. Insurance Co., 42 Mo. 88, Judge Wagner, speaking of a stipulation limiting the carrier's liability, said:

"As the exception is an innovation on the principles of law, and introduced exclusively for the benefit of the carrier, the construction must be made most strongly against him."

The inequality upon which the parties stand with respect to stipulations limiting the carrier's liability is forcibly stated by Mr. Justice Gray in the case of Liverpool & G. W. Steam Co. v. Phenix Ins. Co., 129 U. S. 441, 9 Sup. Ct. 469, which is as follows:

"The carrier and his customer do not stand upon a footing of equality. The individual customer has no real freedom of choice. He cannot afford to higgle or stand out, and seek redress in the courts. He prefers rather to accept any bill of lading or to sign any paper that the carrier presents; and in most cases he has no alternative but to do this, or to abandon his business."

Subjecting the stipulation in the contracts of affreightment in this case to a strict construction, and it is evident that it in terms applies only to the Pacific Coast Steamship Company and to its stockholders. The vessel is not mentioned in this stipulation, and the court cannot import this qualification into the contracts as one contemplated by both parties.

But, even if the stipulation should be deemed to apply to the vessel, the period of 30 days from the date of the contracts appears unreasonable. The provision is not 30 days from the time of the loss or damage, but 30 days from the date of the contract. In the case of Pacific Exp. Co. v. Darnell, 6 S. W. 765, it was held that 60 days from the date of the contract was unreasonable. The court say:

"Any reasonable limitation contained in the bill of lading would be upheld by the court. But it has been decided by this court that an unreasonable restriction is not valid, even in cases to which our statute does not apply. Railroad Co. v. Harris, 67 Tex. 166, 2 S. W. 574. Is this a reasonable limitation? We think not. If it had been stipulated that a claim should be made in 60 days from the ascertainment of the loss, the case would have been d fferent. But to require a shipper to give notice of his claim within a short period of the date of the bill of lading, without reference to the time when a loss for the breach of the contract accrued, is to impose a restriction which in many cases would deny a right of action, and thereby permit the carrier to contract against his negligence, which is never allowed."

In the case of Express Co. v. Reagan, 29 Ind. 21, a period of 30 days was held to be unreasonable, under the circumstances of that case, and void as against public policy. The limitation of 30 days provided in the contract under consideration appears to be unreasonable. The vessel might be detained at sea by storms or accident, and the shipper would be debarred from presenting any claim by the lapse of the 30 days, or have but a short time in which to ascertain his loss or damage and present his claims for the same to the company. Contingencies might arise which would render a period of that duration, beginning to run from the date of the inception of the contract, useless, and which would practically deprive the shipper of any opportunity for redress.

It follows from these considerations that the exceptions should be overruled, and it is so ordered.

THE COLUMBIA.[1]

UPPER DELAWARE RIVER TRANSP. CO. v. SULLIVAN.

(Circuit Court of Appeals, Third Circuit. April 20, 1894.)

No. 3.

SHIPPING—NEGLIGENCE OF STEAMER IN PASSING TOW.

The fact that a steamer ascending a narrow and shallow channel against the ebbing tide causes so violent a commotion at the time of passing a tow as to produce a collision between a canal barge and lighter therein, is sufficient to show either that she did not slow up at all or as soon as she should have done, and, in the absence of any excuse, renders her, under the circumstances of this case, responsible for the damage. 55 Fed. 766, affirmed.

This was a libel by John J. Sullivan, master of the barge or lighter Ellen Herron, against the steamer Columbia (The Upper Delaware River Transportation Company, claimants), to recover damages for injuries caused by the agitation of the water produced by the steamer in passing up the Delaware river. The district court rendered a decree for libelant. 55 Fed. 766. The claimant appeals.

Alfred Driver and J. Warren Coulston, for appellant.

Henry R. Edmunds, for appellee.

Before ACHESON and DALLAS, Circuit Judges, and GREEN, District Judge.

DALLAS, Circuit Judge. On the morning of September 14, 1891, at about 8 o'clock, the tug John Weir, with a tow astern consisting of three canal barges and the lighter Ellen Herron (the libelant), left Bordentown, N. J., and was proceeding down the Delaware river to Philadelphia, when she met the steamboat Columbia, passing up the river. The disturbance of the water occasioned by the steamboat produced a commotion of the tug and its tow of considerable violence, and caused the Ellen Herron to come in contact with the barge in front of her, and she sank in consequence. Although it was testified that the tow was constructed in the customary way, we are inclined to believe that it would have been better to have placed the lighter in the first tier, instead of in the second. This, however, we do not consider important, because we do not think that the mischief which was done is chargeable to the manner in which the tow was, in fact, made up. From all that appears, there is no reason to doubt it would have arrived at its destination in entire safety but for the agitation of the water which was created by the Columbia. This, and this alone, was the decisive cause of the disaster; and therefore, if negligence—absence of due care under the circumstances—is, in this regard, fairly imputable to those in charge of that vessel, the decree entered against her claimant and his stipulator must be sustained. The testimony of the witnesses on either side was, as is not unusual in cases of this character, in direct conflict upon the principal controverted question,

[1] Rehearing denied.

viz. whether the Columbia slowed down to avoid injury to the tow, and, if so, at what point, relatively to the then position of the latter, she did so. The learned court below has found that the weight of this evidence is to the effect that she did not slow down at all, and we, of course, regard that finding with very great respect. But, apart from this, we have reached the conclusion, upon facts which are admitted or are indisputable, that the Columbia either wholly failed to reduce her speed, or did not do so soon enough, and therefore, under all the circumstances of this case, was in fault.

The Columbia, as well as the John Weir, was entitled to navigate where this accident occurred, and the rule generally applicable to such cases does not subordinate the right of a steamboat to proceed upon its voyage to the requirements of a tow which is extraordinarily "tender" and unfit for navigation. But the present case is not within the general rule. The standard for most cases is not the measure of due care in all, and in this one the clearly established facts are peculiar and controlling. The Columbia was making a trip which, for a considerable period, she had made daily, and the John Weir, in bringing this tow down the river, was engaged in her customary employment. Similar tows had been frequently met by the Columbia in this vicinity. Ordinary prudence demanded that she should slow down in time to avoid endangering their safety, and it was her constant habit to do so. Upon this particular occasion there was no especial reason for omitting that precaution, and those in charge of the tow were justified in assuming that it would be taken as it had previously been. At the place of the accident the channel was narrow, the water was shallow, and the tide was ebbing. With these conditions it is manifest that the steamboat, in passing up, would, if not slowed, produce an unusually violent disturbance of the water, and the evidence is that she did. That there was a duty to slow down, and in time, seems to be admitted, and we think is unquestionable. The contention really made is that this duty was performed, but that position is rendered untenable by the indubitable fact that the commotion which was made by the Columbia, and which actually did cause the injury to the Ellen Herron, could not have occurred if the speed of the Columbia had been properly checked, and in due time. If anything had been shown from which it might justly be inferred that the Columbia did not negligently fail to slow down, but that her omission to do so was occasioned by some excusing circumstance, the case presented would be very different from that which is before us upon this record. But the allegation on behalf of the Columbia being that she did slow down in time, and that allegation being not sustained, she was rightly held responsible for the casualty which, by slowing, she might have prevented. We have mentioned only such of the facts of the case as our method of dealing with it has seemed to directly involve. Those which we have not stated are sufficiently and satisfactorily set out in the opinion of the learned judge of the district court.

The decree of the district court is affirmed, with costs.

THE ENERGIA.

THE WILD PIGEON.

INSURANCE CO. OF NORTH AMERICA et al. v. THE ENERGIA and THE WILD PIGEON.

(District Court, S. D. New York. April 7, 1894.)

COLLISION—DAMAGES—AVERAGE CHARGES AGAINST CARGO IN FOREIGN PORT.

A cargo owner may recover from the ship, as damages for a negligent collision in American waters, average charges by reason of the collision, legally assessed against his cargo in the foreign port of destination, although such charges could not have been allowed, on an adjustment of average under our law, because of the ship's fault.

This was a libel by the Insurance Company of North America and others against the steamship Energia and the schooner Wild Pigeon for damages by collision between the vessels to the cargo of the steamship, of which libelants were insurers. The steamship was held in fault. 56 Fed. 124. The question of libelants' right to recover, as damages, average charges upon the cargo, was submitted upon the pleadings and a stipulation as to the facts.

Butler, Stillman & Hubbard and Mr. Mynderse, for libelants.
Wing, Shoudy & Putnam, for respondents.

BROWN, District Judge. The libelant company was insurer of a shipment of 68,838 cases of oil by Carleton & Moffat on board the steamship Energia, deliverable at Shanghai, China. In going down New York Bay, the steamer met with a collision, by her own fault, which compelled her to return to New York for repairs. The Energia, 56 Fed. 124. Pending such repairs, about 30,000 cases had to be discharged, of which 16,508 were so damaged by the collision that they were ordered to be sold in this port, resulting in a net loss of $8,528.57. The libelants, representing the interest of Moffat & Co., claim to recover not merely the above item of damage, about which there is no controversy, but certain additional charges upon the cargo for general and particular average, resulting from the collision. The question of damages is submitted upon the pleadings, and the written stipulation as to the facts, which, besides those above stated, recites as follows:

"The sound portion of Carleton & Moffat's shipment having been partly discharged pending repairs to the Energia, was reshipped and was carried to and delivered at Shanghai, China, to the consignees under the bills of lading.

"At the time of delivery at Shanghai, and as a condition of delivery, a cash deposit was exacted from the consignees by the ship owners to cover general average and special charges, to be stated under an adjustment to be made in London. This was under a practice prevailing at Shanghai.

"The law of Great Britain was in force in Shanghai under the jurisdiction of consular courts.

"By such adjustment of the expenses incurred in New York following the collision the general average charges upon the sound portion of the shipment are $953.11, and the special charges thereon, consisting of certain stevedore and appraisers' bills, amount to $636.06.

"The above general average and special charges have been paid or will be

retained by the ship owners from the cash deposits made by consignees at Shanghai, upon the ground that they are lawfully collectible notwithstanding any negligence in respect to the collision.

"(In the above stated item of general average and special charges no account is taken of the damage alleged to have been sustained by about 6,000 cases of Carleton & Moffat's shipment, by rain while on lighters at New York, after the collision. The said cases, about 6,000 in number, were not reshipped and were sold in New York.)

"The libelants claim the direct damages to the said 16,508 cases, amounting to $8,528.57, with interest thereon from the 22d day of December, 1892, and the said general average and special charges amounting to $1,589.17, with interest thereon from this date.

"The claimants of the steamer object to any allowances to the libelants in respect to such general average and special charges.

"English authorities may be referred to as showing the law of Great Britain on the point of general average and special charges being collectible."

I do not perceive any sound reason in justice or in common sense, why both the general and the particular average charges, to which the residue of the cargo is legally subject in Shanghai, should not enter into the damages to be recovered for this collision. The rule of damages here is "restitutio in integrum" (The Potomac, 105 U. S. 630); and this rule as plainly demands compensation for a charge or expense lawfully imposed upon the sound part of the cargo, as for a deterioration or physical injury to another part, when both are equally the direct results of the collision. The loss to the cargo owner is alike in both; and both, upon the stipulated facts, are alike the direct and natural consequence of the collision. It is immaterial that the charge or expense in dispute has to be paid at Shanghai, instead of here; or that it is payable to the ship owner who is in fault, so long as the charge is a lawful one where it arises. If the exaction were an illegal one, no claim for it would here arise; for then it would not be the proper and natural result of the collision, but of a new agency, and an independent wrong, for which an independent remedy must be sought. But by our law, as well as by the English law, all average charges for the voyage are to be determined and adjusted by the law of the place of destination, which in this case was Shanghai, governed by English law. See The Mary Thomas [1894] Prob. Div. 108. From the moment of collision, therefore, the sound part of the cargo became liable to these average charges, should it ever reach its destination; and as that destination has been reached, that item of damage has become fixed, and is, therefore, recoverable here as one of the direct and necessary legal results of the collision.

It is urged that the charges referred to arise from the law of average, and not from the collision; and the case of The Marpessa [1891] Prob. Div. 403, is cited as authority for this contention, where the average charge for a jettison was regarded as not the direct result of the collision, but as arising from the peculiar relation of ship and cargo. A case of jettison is to some extent peculiar and exceptional, and not like this, a charge for services rendered to ship and cargo, for which an ordinary right of action at law would arise; though I confess myself not satisfied with the reasoning or the decision in the case of The Marpessa. The loss seems to me as

direct as the loss of an existing charter, or of profits under a fixed contract, which are here constantly allowed. Williamson v. Barrett, 13 How. 110, 112; The Belgenland, 36 Fed. 504; The City of Alexandria 40 Fed. 699.

A charge paid for a salvage service, made necessary by a collision, is strictly analogous to the present claim, so far as respects its directness; and the charge for salvage is always allowed as an item of damage against the ship in fault. The Ackerman, 8 Ben. 496; The Fletcher, 42 Fed. 504; La Champagne, 53 Fed. 398. It might as well be claimed that the law of salvage was in such a case the cause of the salvage charge, as that the law of average is the cause of the average charge against the cargo in a case like this. It is not the law, but the facts and the relations which the law recognizes, that are the causes and the grounds of the average charge.

The grounds of the general average charges in this case were the necessary services and expenses rendered to and for the ship and cargo upon their return to this port, as a port of refuge; the charges were made necessary by the collision, and by nothing else; the particular charges were for the cargo alone. If the adjustment of average could have been made here, those charges would not have been allowed against the cargo, because of the ship's fault (The Ontario, 37 Fed. 220; Snow v. Perkins, 39 Fed. 335; Ralli v. Troop, 37 Fed. 890); but as the adjustment is lawfully made under a foreign law, which does not recognize any liability in the ship under the exceptions of negligence in the bill of lading, and therefore allows her to collect these charges from the cargo in the first instance, our law, which takes note of the foreign law as a fact, and as one of the circumstances of the voyage on which this collision occurred, must, in order to give complete restitution, allow the cargo owner to recover back the charge which the collision, under the foreign law of average adjustment, has imposed upon the cargo, because that charge was the necessary result of the collision according to the law of the destination upon the voyage on which the ship was engaged. This does not at all reverse the foreign law of adjustment; it simply recognizes that law as a fact, and the payment of average as a necessary result of the collision. Our law, as the law of the forum, must govern in the adjustment of damages upon a collision happening here (The Scotland, 105 U. S. 29, 30); and hence full restitution must be given according to our law alone.

Decree for the libelants, including the charges claimed.

FELTON v. ACKERMAN.

(Circuit Court of Appeals, Sixth Circuit. April 3, 1894.)

No. 139.

1. RECEIVER—APPEAL FROM INJUNCTION.
A receiver appealed from an order of the court by which he had been appointed, granted upon intervening petition, and restraining him from obstructing a road which the court found to have been improperly vacated. *Held*, that the appeal was consonant with the relation which ought to exist between the receiver and the court, as the petition and answer were in the nature of an adversary proceeding in which the receiver represented the interest of the owner of the property of which he was temporarily in charge.

2. SAME—INJUNCTION OF PUBLIC NUISANCE.
If, upon intervening petition, it be shown that a receiver has been guilty of a public nuisance, such as the erection of a fence across a highway, it is the duty of the court to order its discontinuance, although the public character of the nuisance would prevent the petitioner from maintaining a suit thereon for injunction.

3. SAME—VACATION OF ROAD.
A receiver has no lawful right to obstruct a road which has been vacated by a road commissioner upon petition of certain persons said to be resident along and in the vicinity of the road, where there has been a failure to comply with the provision of the statute (Act Tenn. 1891, p. 1) in relation to notice, viewers, and waiver of damages.

Appeal from the Circuit Court of the United States for the Southern Division of the Eastern District of Tennessee.

This was an intervening petition by Leo Ackerman against Samuel M. Felton, receiver of the Cincinnati, New Orleans & Texas Pacific Railway Company, seeking to enjoin him from continuing to obstruct a crossing. An injunction was granted by the circuit court, and the receiver appealed.

Harmon, Colston, Goldsmith & Hoadly and Lewis Shepherd, for appellant.

W. G. M. Thomas, for appellee.

Before TAFT and LURTON, Circuit Judges, and RICKS, District Judge.

TAFT, Circuit Judge. Leo Ackerman, the appellee, filed an intervening petition, in a case now pending in the circuit court of the United States for the eastern district of Tennessee, wherein Samuel Felton, the appellant, had been appointed receiver of the Cincinnati, New Orleans & Texas Pacific Railway, the lessee of the railroad known as the Cincinnati Southern Railway, built and owned by the city of Cincinnati, connecting Cincinnati and Chattanooga.

The petition averred that the petitioner was a butcher in Chattanooga, and owned and used in his business 17 acres of land, with a slaughterhouse on it, situate on Shallow Ford road, several miles from Chattanooga; that this road was his only means of reaching Chattanooga from his slaughterhouse; that 1,200 feet from his property, and between it and Chattanooga, the right of way of the Cincinnati Southern Railway crossed the Shallow Ford road; that

ever since the building of the railway, there has been a crossing at the intersection, over which it was necessary for petitioner to drive, in order to reach Chattanooga, but that Felton, as receiver of said railway property, had, within a few days previous to the filing of the petition, unlawfully and without right, built a fence over the Shallow Ford road, and closed the crossing. Petitioner prayed that the receiver might be enjoined from continuing the obstruction. The receiver answered, alleging that the Shallow Ford road had been duly closed, at the railway crossing, by the road commissioner of the district, as provided by law, and that he was not obstructing any highway by continuing his railway fence over what had been, but what was not now, Shallow Ford road. The court below found that the road had not been properly vacated according to law, and granted the order prayed for. This is an appeal from that order by the receiver.

The first question suggested is, whether it is consonant with the relations which ought to exist between a receiver and the court appointing him, that he should be allowed to appeal from an order of the kind made here. We think it is. The learned judge at the circuit allowed the appeal, and we see no reason why he should not have done so. While it is true that the receiver is an arm of the court in the administration of the property, yet, where persons intervene to obtain relief against him, because they cannot obtain full relief in any other forum, the issue raised by his answer to the petition makes the proceeding an adversary one, in which the receiver represents the interests of the owners of the property, of which he is temporarily in charge. If, as such representative, he feels aggrieved by an order of the court made in an adversary proceeding of this character, it is difficult to see why he should not be permitted to have the order of the court reviewed by the appellate tribunal to which any other litigant may resort. Certainly, the owners of the property, if aggrieved by the order against the receiver, might appeal, and there would seem to be no justice in preventing the temporary custodian of their property from doing so. As between parties to the action claiming an interest to the property which he is preserving, of course the receiver can take no part; but where the appeal is in the interest of the property, and therefore in the interest of all who shall thereafter be shown to have any right to the property, it is quite convenient and proper that the receiver should be allowed to conduct the appellate proceeding.

It is first objected to the order granted below that the injury to Ackerman, as shown by the proof, was of the same character as that suffered by the public, and that there was no peculiar damage to him, different from that which the public suffered in the obstruction of the highway, which should enable him to bring suit, on his own account, to recover damages for the obstruction, or to enjoin its continuance. The peculiar damage which he sets up in his petition is the damage to him as a butcher by reason of the fact that he cannot reach Chattanooga by any other road than the Shallow Ford road, closed by the receiver. It is made perfectly plain by reference to the plat and by affidavits on file in the case, that the only effect of

closing the Shallow Ford road upon Ackerman's route from his property on the Shallow Ford road to Chattanooga, is to require that he shall pass down on the east side of the Cincinnati Southern Railway for about 200 yards to Harrison avenue, a road parallel to the Shallow Ford road, and there cross the railroad, instead of crossing the railroad by the Shallow Ford road, and then passing down on the west side of the railroad to Harrison avenue, and thence into Chattanooga. Harrison avenue is the main road into Chattanooga from the vicinity of Ackerman's slaughterhouse. It does not appear that the route on the east side of the railroad is any more circuitous than that on the west, and, even if it did, the authorities are quite clear to the point that such a damage is not one which can be remedied by private action. It is a damage which the public share with the particular complainant. Farrelly v. Cincinnati, 2 Disn. 516; Hubert v. Groves, 1 Esp. 148; Wilkes v. Hungerford Market Co., 2 Bing. (N. C.) 281; Holman v. Inhabitants of Townsend, 13 Metc. (Mass.) 297; Smith v. City of Boston, 7 Cush. 254; Baxter v. Turnpike Co., 22 Vt. 114.

In Lowery v. Petree, 8 Lea, 678, Judge Freeman remarked:

"No person can maintain an action for a common nuisance where the injury or damage is common to all. Some special damage to the plaintiff must be averred and proven, and for this damage alone, he can sue and be compensated."

The reason why one person cannot sue for damages or an injunction to abate the obstruction of a road when the injury is shared by the complainant with the rest of the public is that, otherwise, the courts and the trespasser would be burdened by a multiplicity of suits. The law, therefore, requires that what is a public injury, shall be redressed by some person, entitled to represent the public. One remedy is by indictment of the wrongdoer and abatement of the nuisance. Another remedy is that the public prosecutor shall file a bill on behalf of the public for an injunction. Wood, Nuis. 938.

In the present case, however, we are of the opinion that the principle relied on, cannot aid the appellant. He is the receiver of the federal court; and, while it is true that this is an adversary proceeding, as already stated, he does not lose his character as an officer of the court, with all the consequences as to directness of remedy against him which this relation makes necessary. Section 2 of the act of August 13, 1888, defining the jurisdiction of the circuit courts of the United States, provides that whenever, in any cause pending in any court of the United States, there shall be a receiver or manager in possession of any property, such receiver or manager shall manage and operate such property according to the requirements of the valid laws of the state in which such property shall be situated, in the same manner, that the owner or possessor thereof would be bound to do, if in possession thereof. And then follows a provision for punishment of any receiver who shall violate the foregoing requirement. If Ackerman, by his petition and his proof, shows that the receiver has been guilty of a public nuisance in erecting a fence across the highway in the administration of the trust, it is the duty of the court to make an order

enjoining him from doing so, even though, in an independent action, Ackerman, as an individual, may not be able to obtain such relief. It is of the greatest importance that receivers of the federal courts shall not be violators of the state laws; and wherever a court is made to know, in any proper way, that its receiver is violating the law of the state in which is the property, of which he has charge, the court must sua sponte direct him to cease further violation. We cannot, therefore, on any technical rules of procedure, however well established as between private litigants, sustain this appeal, and reverse the order below, if it appears that the receiver's act, enjoined by the order of the court appealed from, was a violation of public right.

We are thus brought to the question whether the receiver had any lawful right to close the Shallow Ford crossing. Forty-seven persons, said to be residents and owners of property along and in the vicinity of this railway crossing, petitioned the road commissioner of the district in writing that the road be closed and abolished at the crossing. The road commissioner, on this petition, and without further proceeding, made an order that the crossing be closed, and that the railway companies whose rights of way were crossed—that is, the Western & Atlantic Railroad and the Cincinnati Southern Railway—were authorized to close the same. Was the action of the road commissioner authorized by law? This depends on the proper construction of the Tennessee road act of 1891, to be found on the first page of the Acts of Tennessee for that year. It is quite embarrassing for a federal court to attempt to construe a measure, so peculiarly local in its nature as a county-road law, in advance of the supreme court of the state whose act it is. We have been referred to no decision of the supreme court of Tennessee in which this law has been under review, and we derive little light in respect to the construction of this law from the few decisions there are, upon previous laws. The act of 1891 is a compilation, revision, and amendment of all previous road laws of the state. It inaugurates a new system. The power over county roads is transferred from the immediate control of the county court to road commissioners. The second section of the act requires the county court to divide the county into one or more road districts, and provides for the election of one road commissioner for each district, every two years. Section 5 provides that each commissioner shall have control of the highways and bridges in his district, and shall have general supervision of the overseers or contractors thereof, and shall direct the manner of working the roads in his district. Section 6 permits him to make contracts not in excess of the road fund, assigned to his district for the year. Section 10 requires each commissioner to keep, in a book provided for the purpose, a correct record of all his official transactions, and to make a full and complete report of the same to the judge of the county court in December of each year. Section 14 is as follows:

"That all applications to open, change or close a road shall be made by written petition, signed by the applicant, to the commissioner of the district through which the road runs, or is asked to be located, specifying in particular

the changes or action asked, or if the road extends into two or more districts, or is the dividing line between districts, then to the commissioners of said districts; but no road shall be opened, changed or closed without giving at least five days' notice to all parties interested of the time said road or roads are to be opened, changed or closed, and a surveyor or civil engineer may be employed if necessary to locate the same. Land owners and those controlling land touched by the proposed highway shall be deemed interested parties; if any owner of the land so concerned is a nonresident, then notice to his agent or attorney, if any such agent or attorney resides in the county, shall be sufficient. If there be no such agent or attorney, then the notice shall be made by publication for four (4) consecutive weeks in the newspaper having the greatest circulation in the county, the last publication to be at least one (1) week before the hearing. Where the opening, changing or closing of a public highway only affects one commissioner's district, the said commissioner shall associate with himself two other freeholders of said district whom he has never consulted upon the question involved, and who shall be in no way related to the parties affected by such change, closing or opening of said highway, and who shall take and subscribe to an oath before said commissioner to act without favor or partiality in the matter, whose oath thus subscribed shall become part of the record, upon appeal being taken, and the said commissioner and two freeholders shall constitute a jury of view, and said jury shall have the power of condemnation and to assess damages, which shall be paid out of the general funds raised for county purposes, upon the order of the commissioner on the county judge or chairman of the county court, who shall issue his warrant therefor if he approves the same. Any person or persons considering themselves aggrieved by the action of the jury of view may appeal to the next quarterly county court, and from there to the circuit and supreme courts. In case of an appeal the jury of view shall forward all the papers in the case, with their action on the same, to the said quarterly court appealed to. All costs accruing in said suit shall be paid by the appellant, if the action of the jury of view is sustained by the court giving final decision, unless for good reason it should otherwise order. Should such case be decided against the jury of view, then all costs and any additional damages assessed by the court shall be paid out of the general fund raised for the current county purposes. If the action of the jury of view be affirmed the commissioner or commissioners shall then proceed as if no appeal had been taken; if otherwise the order of the court shall be carried out. All persons appealing from the decision of a jury of view to any court having jurisdiction of the matter shall execute a bond for the costs of the suit. In case of an appeal the district attorney general shall attend the case for the county in the circuit court, and shall be paid the sum of five dollars for each case attended and the attorney general for the state shall represent the county in such cases before the supreme court. The jury of view shall receive one dollar per day for their services, which, with other costs and damages accruing upon the opening, closing or changing of roads, shall be paid out of the general county funds upon the order of the commissioner upon the judge or chairman of the county court, upon which he shall issue his warrant, subject always to his approval. Whenever land owners and those controlling land touched by the highway proposed to be changed, closed or opened shall waive in writing any claim for damages sustained hereby then the commissioner or commissioners shall proceed independently of a jury of view, to execute the particular action asked in the petition, if in their discretion they think the public interests shall not be materially injured thereby. The commissioner may without petition or application, proceed to open, close, change, and construct any public highway which he may deem to be necessary for the public interests. Where any two road districts are involved in any question requiring the jury of view the two commissioners and one freeholder shall constitute said jury, and where three or more districts are involved then the commissioners of all the districts interested shall constitute the same and no commissioner shall be required to take an oath before serving on such jury of view."

Section 29 provides that any person or persons who shall obstruct any public highway, or render it inconvenient or hurtful to the

traveling public, or who may encroach upon the same in constructing any fence, wall, or like improvement, shall be guilty of a misdemeanor, and fined as in the case of other misdemeanors.

An examination of section 14 shows the legislative plan for the opening, changing, or closing of roads to be—First, a petition; second, five days' notice to the interested parties as defined by the statute; third, a hearing before the commissioner and two disinterested freeholders, in which the character of the change to be made either by opening, altering, or closing is determined upon, the necessary land for the new part of the road is condemned, and the damages accruing to interested parties for the taking of the new land and the removal or change of the old road are fixed. If all the interested parties waive damages in writing, the road commissioner may proceed without viewers. But until there is such a waiver, it seems to us that the commissioner has not jurisdiction to act without the assistance of viewers. The viewers are called in, not only to estimate damages, but to condemn land, and to act generally upon the petition. They are to assist the commissioner in deciding whether it is to the public interest to expend the money necessary to acquire the land for the new road or to reimburse interested parties for loss, by reason of a removal of the old. They are to protect the taxpayer as well as the interested and injured abutter. It is only when damages are waived in writing that their services are to be dispensed with. Then the public cannot be burdened with damages, and the private landowner needs no tribunal to assess the extent of his injury. The law also provides that a petition is not necessary to invoke the action of the commissioner, or to give him jurisdiction. He may open, change, or close any public highway in his discretion when he deems it for the public interest. But this does not dispense with the necessity for notice to interested parties, or for viewers to make condemnation, and assess the damages. It does not do away with the necessity for a hearing before final action can be taken. We cannot presume, without express words in the law, that, when the commissioner is to act without petition, all the other safeguards to the interested parties and the public, provided when a petition is filed, are to be taken away.

In the case at bar, there was nothing but a petition. Such interested parties as there may have been had neither notice nor hearing. There was no waiver in writing of damages by interested parties. It is unnecessary for us to decide who were interested parties under the law. Conceding that they were limited to those whose property abutted on the changed part of the road, the change here consisted of closing the crossing, and opening the road down to the Harrison avenue crossing. The interested parties were the two railroad companies and the owners of the land taken to make the new connection between the Shallow Ford road and Harrison avenue. There is no waiver of damages in writing by either railroad company or by the landowners along the new connecting road. Until that was filed, no valid change could be effected without viewers. The proclamation and order of the road

commissioner on the simple filing of the petition was unauthorized and void, and the order of the court below to enjoin the appellant from proceeding to act under it, was right. The order of injunction is affirmed.

NORTHERN PAC. R. CO. v. HUSSEY.

(Circuit Court of Appeals, Ninth Circuit. April 2, 1894.)

No. 122.

1. RAILROAD LAND GRANTS—UNSURVEYED LANDS—TENANTS IN COMMON.
   A land-grant railroad company is not a tenant in common with the United States in respect to lands which lie within its grant limits, opposite the completed line, but which have not yet been surveyed, so as to render the odd sections belonging to the company distinguishable from the even sections reserved to the government.
2. SAME—ENJOINING TRESPASSERS.
   The company has, however, such an interest in the lands as will entitle it to maintain alone (the government having refused to join with it) a suit to enjoin trespassers who are cutting timber from the lands in such manner that the denuded portions will fall within the odd, as well as the even, sections when the survey is made.

Appeal from the Circuit Court of the United States for the District of Montana.

This was a suit by the Northern Pacific Railroad Company to enjoin John O. Hussey from cutting timber from certain lands. The circuit court having sustained a demurrer to the bill, and dismissed the cause, complainant appealed.

J. K. Toole and Fred. M. Dudley, for complainant.

Thos. C. Bach (Lewis Penwell, of counsel), for respondent.

Before McKENNA and GILBERT, Circuit Judges, and ROSS, District Judge.

ROSS, District Judge. The bill, to which a demurrer was sustained by the court below, was brought by the Northern Pacific Railroad Company to enjoin the appellee from cutting, felling, and removing timber from unsurveyed lands within 40 miles of the road the company named was authorized to build, and did build, under and pursuant to the provisions of the act of congress approved July 2, 1864 (13 Stat. 365), entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget's sound on the Pacific coast," by which act the Northern Pacific Railroad Company was incorporated, and power conferred upon it to locate, construct, and maintain a continuous railroad and telegraph line from Lake Superior, by the most eligible railroad route, on a line north of the 45th degree of latitude, to a point on Puget sound, with a branch, by way of the valley of the Columbia river, to a point at or near Portland. To aid in the construction of the road the company was, by the third section of the act, granted, subject to certain exceptions not here necessary to be stated—

"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 road 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 preemption 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."

The third section of the act further provided that:

"Whenever prior to said time any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or preempted, 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. * * *"

By the sixth section 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 preemption before or after their survey except by said company, as provided in this act; but the provisions of the act of September, eighteen hundred and forty-one, granting preemption 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 twentieth, 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."

The bill alleges that the complainant accepted the grant, and located and constructed the line of railroad and telegraph it was authorized to build, completing the construction thereof prior to the year 1888; that the portion of the line of the road opposite the lands constituting the basis of this suit was definitely located, and a plat thereof filed in the office of the commissioner of the general land office, July 6, 1882, and its construction completed early in 1883, and accepted by the president on the 8th of May of that year. It is alleged that the lands respecting which the suit is brought have not been surveyed by the government, but are within 40 miles of the complainant's road, and, when surveyed, will fall within township 11 N. of range 6 E. of the principal Montana meridian; that none of these lands are, or ever have been, known mineral lands, but are nonmineral in character; that they are broken and mountainous, not adapted to agricultural pursuits, but are covered with a heavy growth of timber, for which alone they are valuable; that these lands were, on July 2, 1864, and at the time of the definite location of the complainant's road, and of the filing of the map thereof in the office of the commissioner of the general land office, public lands of the United States, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights; that all of the said lands belong either to the complainant or to the United States, complainant's right and title thereto being that conveyed by the aforesaid act of congress; that the United States have neglected to cause the said lands to be surveyed, al-

though requested to do so by complainant, for which reason it is impossible that the lands embraced by the grant to the complainant can be distinguished from those owned by the government; that, notwithstanding these facts, the defendant, in October, 1892, after making application to the land department of the government for permission so to do, and the refusal of his petition, entered, without any right, authority, or permission, upon the said body of unsurveyed lands, including what will be, when surveyed, odd-numbered as well as even-numbered sections, and commenced to cut down the timber thereon, and to manufacture the same into saw logs, lumber, and other merchantable commodities, and to remove the same therefrom, and to sell and dispose thereof for speculation and purposes of merchandise; that he has so cut 850,000 feet of saw logs, and threatens to and will, unless restrained by the court, continue to cut, remove, and dispose of the timber on said lands, to the irreparable damage of the complainant; that the complainant has heretofore requested the United States to join with it in actions to protect the timber upon the said lands, but that the request was refused. Complainant accordingly brought the present suit alone, and insists that it is entitled to the injunction asked—First, upon the ground that complainant and the United States are tenants in common of the unsurveyed lands in question; and, second, that, if this be not so, still complainant has such an interest in the protection of all the unsurveyed lands within the limits of its grant as entitles it to maintain the suit.

Are the complainant and the United States tenants in common of the body of unsurveyed lands within the limits of complainant's grant? That the title of the railroad company attached to the lands embraced within the primary limits of its grant at the time the route of the road was definitely fixed and a plat thereof filed in the office of the commissioner of the general land office, and related back to the date of the grant, is settled by decisions of the supreme court so numerous as to render their citation no longer necessary. True, the grant was upon the condition subsequent that the company build the road, which condition the bill shows complainant complied with. The grant to the Northern Pacific Railroad Company, therefore, attached on July 6, 1882, as of July 2, 1864, to all of the granted lands; and, as it was for 20 alternate sections per mile of the nonmineral public lands, designated by odd numbers, to which the United States had full title, on each side of the road through the territories, and as Montana was at those dates a territory, and the United States then held, according to the averments of the bill, full title to all of the lands in question in this suit, the grant attached at and of the dates mentioned to 20 alternate odd-numbered sections per mile of the public lands in question on each side of the road. The even-numbered sections within the same limits remained the property of the government. The grant was made with reference to the system of surveys established by the United States in respect to its lands, and, as has been seen, the very act making the grant declared that the president should cause the lands to be surveyed for 40 miles in width

on both sides of the entire line of road, after its general route should be fixed, and as fast as required by its construction. Such survey was manifestly essential, for, without it, it could not be known which were odd-numbered sections and which even-numbered.

While it is impossible to distinguish the lands granted to the railroad company from those retained by the government until the survey is made, it needs only a survey in accordance with established statute rules to distinguish those of the railroad company, in which the government has no interest, from those of the government, in which the railroad company has no interest. Tenants in common of a tract of land, although their estates be several, have each an undivided interest in the whole, and we are unable to understand how it can with propriety be said that a grantee of specific parts only has an undivided interest in the whole. The decisions of the supreme court relied on by the appellant to sustain its position in this respect are unlike the present case. The act of congress involved in Railroad Co. v. Litchfield, 23 How. 66, granted to Iowa an undivided half of the whole tract of land lying on each side of the Des Moines river from Raccoon Fork to the Missouri line, at the same time conferring on the executive officers of the government the power to make partition of the land between the government and the grantee. In Doe v. Wilson, 23 How. 457, it appeared that by a treaty made by the government with the Pottawatomie tribe of Indians, by which that tribe ceded to the United States their title and interest in certain lands, certain reservations were made to Indian villagers and to individual Pottawatomies, among others to Pet-chi-co, two sections. The sections so reserved were not otherwise described, but the treaty provided that they should be "selected under the direction of the United States after the land shall have been surveyed, and the boundaries shall correspond with the public surveys," and that patents should be issued by the government to their respective owners. In principle, that case was much like those Mexican grants, of which Frasher v. O'Connor, 115 U. S. 102, 5 Sup. Ct. 1141, was one, where a certain quantity of land was granted to be located by the government within defined boundaries containing a larger quantity. In each of those cases the grantee, being entitled only to the specific quantity named, which might be located on any part of the whole tract, manifestly had an undivided interest in the whole until the quantity to which he was entitled should be set apart to him in severalty. Not so, however, in the case at bar, where, by the grant, the title conferred upon the railroad company was confined to certain specific sections of land, all of which became vested by the grant in the company, and which needed only the government survey to distinguish them from the adjoining sections, of which the government remained the sole owner. But, because it cannot be properly held that the complainant and the United States are, prior to its survey, tenants in common of the entire body of lands within the limits of the grant to the railroad company, does it necessarily follow that a trespasser may, with impunity, go upon the lands, and cut down and destroy or carry away the timber growing upon them? The bill shows that the lands in question are alone

valuable for the timber that grows upon them. To cut down, destroy, or carry away the timber thereon is, therefore, essentially to destroy and take away the very substance of the estate. That an injunction will be awarded, in behalf of one showing the necessary interest in the property, to prevent such waste and destruction, is thoroughly settled. Erhardt v. Boaro, 113 U. S. 537, 5 Sup. Ct. 565.

It is apparent that the complainant has no adequate remedy at law. It cannot maintain an action for damages for the cutting of any tree or trees upon the lands in question, or any other action at law, for the reason that it would be essential to the maintenance of such an action for the plaintiff to show that the particular tree or trees for the cutting of which damages were claimed, or other relief was asked, came from the land of the plaintiff; and this, as has been seen, is impossible to be shown in advance of the government survey. Yet the bill shows that the defendant, without any right or authority whatever,—in other words, as a mere trespasser,—has entered upon the body of unsurveyed lands within the limits of the grant to complainant, and, for purposes of speculation and sale, has commenced to cut down the timber thereon, and to manufacture the same into saw logs, lumber, etc., and has so cut 850,000 feet of saw logs, and will, unless restrained, continue those illegal acts, and thus remove the very thing which constitutes the chief, if not the only, value of the lands. Every tree already felled by the defendant, and every tree intended to be cut by him, in the prosecution of his undertaking, necessarily impairs the value of the complainant's interest in its grant, for the condition of the lands within the grant limits necessarily renders it uncertain and impossible to ascertain how many of such trees have been or will be cut from the lands belonging to complainant. This very uncertainty would seem to vest in such grantee the right to protect the whole as against a mere trespasser and wrongdoer. In the case of Ross v. McJunkin, 14 Serg. & R. 364, land warrants had been issued to John and William Menough,—to John for 300 acres, and to William for 200 acres,—which had been surveyed together, and a general diagram of survey returned, which contained no division line, nor anything to distinguish the one tract from the other. The parties to that action, which was ejectment, derived their titles respectively from John and William Menough, and Gibson, J., speaking for the supreme court of Pennsylvania, said:

"The nature of the interest which the original owners of the warrants held under their joint survey will go far to settle the rights of the parties before us. They were grantees from the state, not of an undivided interest in the whole, but of separate and distinct parts of the whole; consequently, they were not tenants in common. The grant to the one would not have entitled him to possession in common of the whole; nor, if one had been disseized, could he have recovered an undivided portion from the other. The truth is that the survey was imperfect, and, although a valid appropriation of the land as to strangers, it left their rights, as between themselves, suspended till the subject of the grant to each should be specifically designated by the proper officer, or by themselves."

The bill, however, in the present case alleges that the acts complained of are committed by the defendant upon what, when surveyed, will be odd-numbered sections, as well as what will be even-numbered sections, of the lands within the grant limits. The case is a novel one, it must be admitted, but where so great a wrong is being perpetrated, as must be taken to be true for the purposes of the present decision, and the party seeking to prevent the wrong has no adequate remedy at law, equity, we think, will afford the remedy. "Ubi jus, ibi remedium," is the maxim which forms the root of all equitable decisions. And responding to the objection that certain orders issued in the case of Toledo, etc., Ry. Co. v. Pennsylvania Co., 54 Fed. 751, were without precedent, the court said:

"Every just order or rule known to equity courts was born of some emergency, to meet some new conditions, and was, therefore, in its time without precedent. If based on sound principles, and beneficent results follow their enforcement, affording necessary relief to the one party without imposing illegal burdens on the other, new remedies and unprecedented orders are not unwelcome aids to the chancellor to meet the constant and varying demands for equitable relief."

Judgment reversed, and cause remanded to the court below, with directions to overrule the demurrer to the bill, with leave to the defendant to answer.

WOOD v. NEW YORK & N. E. R. CO.

(Circuit Court, D. Massachusetts. April 20, 1894.)

No. 3,219.

EQUITY—PARTIES—PETITION OF RECEIVER.

The receivers of a railroad company filed petitions in the suit in which they were appointed, alleging that a certain other railroad company, which was not a party to the suit, was unjustly discriminating against their company, and praying that such discrimination be restrained. *Held*, that there was no jurisdiction to grant such relief in the original suit, and the petitions should be dismissed.

This was a motion to dismiss the petitions of Thomas C. Platt and Marsden J. Perry, receivers, in the suit of Theodore F. Wood against the New York & New England Railroad Company.

Strout & Coolidge, for receivers.

J. H. Benton, Jr., and Henry C. Robinson, for New York, N. H. & H. R. Co.

COLT, Circuit Judge. The motion to dismiss the petitions of the receivers in the above-entitled cause relates solely to a question of equity procedure, and in no way involves the merits of the controversy between the parties. The only question at present to be determined is whether the New York, New Haven & Hartford Railroad Company can properly be brought in as respondent in this cause upon petition of the receivers, or whether it should be proceeded against by a separate bill. The present bill was brought by Theo-

dore F. Wood against the New York & New England Railroad Company, and the petitioners, Thomas C. Platt and Marsden J. Perry, have been appointed receivers of the railroad by a decree containing the provisions usual in such cases; enjoining all persons from interfering with their possession, control, and management of the railroad. The receivers now bring two petitions against the New Haven Company, in which they allege that said company has, in violation of universal and established custom, the provisions of its charter, the statutes of Massachusetts, and the interstate commerce act, unjustly discriminated against the New England Railroad Company as to the transportation of freight, and praying that said company be ordered to cease such discrimination, and may be enjoined therefrom, and may be ordered to give to the New England Railroad Company equal privileges, in this regard, with other connecting lines, and that a preliminary restraining order may issue. The New Haven Company now move to dismiss these petitions, on the ground that the court has no power to grant the relief prayed for in this suit.

It is clearly within the power of the court to control the administration of the railroad in the hands of its receivers, and, incidentally, to restrain by injunction any act of any person or corporation, whether a party to the suit or not, which interferes with the possession or control by the receivers of any of the property of the railroad, whether actually or constructively in their possession. But these petitions are of a different character, and they do not charge active or constructive interference with property now in the possession of the receivers. They concern, primarily, the question of an obligation on the part of the New Haven Company to transact in a certain way that part of its business with which these receivers are concerned. They raise, therefore, a question of title between the receivers and a third person. They do not relate to the administration of the insolvent estate, but to a disputed claim made on behalf of the estate. I do not think these proceedings come within the jurisdiction invoked by the present bill, and in my opinion it would be contrary to the usual course of equity procedure to make the New Haven Company a party defendant to the bill, for the purpose of determining the questions raised by these petitions. I shall therefore direct that the motion to dismiss the petitions be granted, but without prejudice to the receivers to bring a new bill.

NASHUA & LOWELL R. CORP. v. BOSTON & LOWELL R. CORP.

(Circuit Court of Appeals, First Circuit. February 1, 1894.)

No. 25.

1. DISMISSAL OF APPEAL—DEFECTIVE TRANSCRIPT—CERTIORARI.
   A clerk's certificate, which shows that certain parts of the record were omitted from the transcript by direction of appellant's attorney, is nevertheless sufficient to bar a motion to dismiss the appeal, when it does not

appear that the omitted parts are "necessary to the hearing" (C. C. A. Rule 14, par. 3, 47 Fed. vii.); and in such case the appellee, if he thinks the transcript defective, must resort to a certiorari or other remedy.

2. TRANSCRIPT ON APPEAL—WHAT TO CONTAIN.
On an appeal in equity, in the absence of joint stipulation for simplifying the transcript, the clerk should send up the whole of the record, in the strict sense of the word, made as directed by Rev. St. § 750, except that, when there has been a previous appeal, matters preceding the mandate should ordinarily be omitted; and, if any parts thereof are omitted, even by joint stipulation, their nature should be indicated. But as to the proofs, entries, and papers on file "necessary to the hearing of the appeal" (Rev. St. § 698), the clerk, in the absence of joint stipulation, is to be guided ordinarily by the selections of the appellant's solicitor.

3. PARTIAL APPEALS.
It is no ground of objection that an appeal is expressly limited to a part of the decree below, when this is the only part from which the appellant could appeal; especially in view of the fact that under C. C. A. Rule 11, which requires an assignment of errors to be filed simultaneously with the appeal, the legal effect may be, in any case, a partial appeal.

4. INTEREST—WHEN ALLOWED.
When all the equities of a suit growing out of contract have been settled by an appellate court, and the cause remanded for the taking of an account pursuant to the opinion, the question of interest being left open, it is the duty of the court below to apply the ordinary rule of the American cases, which allows interest from the filing of the bill.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

This was a suit by the Nashua & Lowell Railroad Corporation against the Boston & Lowell Railroad Corporation, upon a contract in writing concerning the business of the two roads. The circuit court dismissed the bill, but complainant appealed to the supreme court, which held that complainant was entitled to an accounting, and accordingly reversed the decree, and remanded the cause. 10 Sup. Ct. 1004. The circuit court then ordered a reference to a master for the purpose of taking the account, and thereafter overruled exceptions filed by both parties to his report, and confirmed the same. 49 Fed. 774. From that decree complainant appealed to this court. Defendant moved to dismiss the appeal, and on September 6, 1892, this motion was denied, in an opinion delivered by Mr. Justice Gray. 2 C. C. A. 542, 51 Fed. 929. The cause has now been heard on the merits of the appeal.

Francis A. Brooks, for appellant.

Josiah H. Benton, Jr., for appellee.

Before PUTNAM, Circuit Judge, and WEBB and ALDRICH, District Judges.

PUTNAM, Circuit Judge. This cause comes into this court on an appeal by the Nashua & Lowell Railroad Corporation, taken April 29, 1892, with a citation returnable May 28, 1892. May 5, 1886, a decree had been entered in the circuit court dismissing the bill, from which an appeal was taken to the supreme court, and was there duly considered on the merits, and an opinion rendered, found in 136 U. S. 356, 10 Sup. Ct. 1004, closing as follows: "The decree

of the court below will be reversed, and the cause remanded for further proceedings in accordance with this opinion." The substance was that a portion of the claim made by the bill was disallowed and a portion allowed; but further details need not here be cited, as they fully appear in the opinion of the supreme court. The mandate of that court was issued May 26, 1890, and received and filed in the circuit court May 29, 1890, and it followed the concluding paragraph of the opinion already cited. Thereafterwards, July 21, 1891, the circuit court sent the case to a master by an order which in its preamble recited the mandate of the supreme court and referred to its opinion, and which directed the master "to take and state the account to which the complainant is entitled, and as set forth in the preamble hereto."

The parties appeared before the master, and the account was duly taken, showing the amount due stated in the final decree in the circuit court, which will be hereafter referred to. At this stage of the case the Nashua & Lowell Railroad Corporation claimed interest—First, from the dates when the various amounts were received by the Boston & Lowell Railroad Corporation; second, from the date of the filing of the bill, April 17, 1880; and, third, from the date of the filing of the amended bill, September 15, 1883; none of which was allowed. Exceptions to the master's report were duly taken, and were disposed of in accordance with an opinion of the circuit court which had been filed February 14, 1891, as follows:

"In view of the nature of the contract between the plaintiff and defendant corporations, and of the decision of the supreme court upon appeal, and of the rules of law governing the allowance of interest, I think it would be inequitable to permit the plaintiff to recover interest upon the basis claimed. I am of the opinion, therefore, that the plaintiff is entitled to a decree for $26,124, with interest from the date of the mandate."

A final decree was entered accordingly, from which appeal was seasonably taken, as already stated.

The bill was filed, not only against the Boston & Lowell Railroad Corporation, but also against Hocum Hosford and Charles E. A. Bartlett. The final decree takes no notice of respondents Hosford and Bartlett, and is technically defective in that respect. They were at the most mere stakeholders. The fund in controversy came into the hands of the Boston & Lowell Railroad Corporation before the filing of the bill. No party has pressed for relief against either Hosford or Bartlett, and the decree of the court below should be at least so far modified as to dismiss the bill as against them, without costs.

The only matter in controversy in this court, or substantially in controversy in the court below after the receipt of the mandate from the supreme court, has been the matter of interest, already referred to.

May 31, 1892, the Boston & Lowell Corporation filed in this court a motion to dismiss the appeal, for reasons therein stated, and which need not be set out here at length. When that motion came on for

hearing, it also filed another motion to dismiss, the substance of which is stated in the opinion filed in this cause September 6, 1892, as follows:

"That the appeal was not from the decree of the circuit court, but from a part only of that decree; and that the transcript transmitted to this court was a copy of but a part of the record below." 2 C. C. A. 542, 51 Fed. 930.

The opinion referred to said, touching that second motion, as follows:

"After one motion to dismiss had been filed and set down for hearing, the appellee had no right to file a second motion to dismiss without leave of the court, and such leave should not be granted upon formal grounds only. If the appeal is wholly insufficient to sustain the jurisdiction of this court, the court may, of its own motion, take notice of the insufficiency at the hearing on the merits. If the transcript of record is imperfect, the appellee might have suggested a diminution of the record, and asked for a certiorari. It would doubtless have been more regular for the appellant to file in this court a complete transcript, if not of the whole record of the circuit court, yet of so much thereof, at least, as set forth the entire opinion and mandate of the supreme court, and all the subsequent proceedings in the court below. But the imperfections of the transcript in this respect were not made a ground of the original motion to dismiss; nor does the supplemental motion point out what, if any, of the omitted parts are material. The whole opinion of the supreme court is published in the official reports, and there is no controversy as to its scope. A copy of an opinion of Colt, J., filed February 24, 1891 (omitted in the transcript), proceeding upon the same ground as his opinion after the return of the master's report, has been supplied by the appellant by direction of this court; and the appeal is from so much of the final decree as the appellant complains of. Under these circumstances, both motions to dismiss the appeal must be denied." 2 C. C. A. 545, 51 Fed. 931.

Thereafterwards the merits of the appeal were fully argued, and certain ad interim and incidental motions and proceedings were had, which need not be recited here at length, but which resulted in elaborate and full rearguments of the various propositions touched on in the foregoing extracts from the opinion filed September 6, 1892. It will be noticed that this required a transcript of only the opinion and mandate of the supreme court, and the proceedings in the court below subsequent to the mandate. It called attention to the fact that the second motion to dismiss did not point out what, if any, of the omitted parts were material. It also stated that, if the transcript was imperfect, the appellee might have suggested a diminution of the record, and asked for a certiorari. Notwithstanding the full reargument of the points covered by these propositions, and the claim pressed on the court that, inasmuch as the interest was disallowed by the court below on the ground that it would be inequitable to permit the original complainant to recover it, this court cannot revise the equities of the case unless it has before it the entire record which was before the court below, a full reconsideration of all these propositions leads to the reaffirmation of the conclusions of the opinion filed September 6, 1892, and also to the additional conclusion that every substantial matter is before this court which was before the court below, with reference to the disposition of the question of interest. Although the opinion in the cir-

cuit court, filed February 24, 1891, disposing of the question of interest, is not strictly a part of the record, yet it is not improper to refer to it in a negative sense, in that it shows that the learned judge of that court took into consideration only the nature of the contract between the parties, the decision of the supreme court, and the rules of law governing the allowance of interest, and that nothing in it suggests to this court that anything of a substantial character bearing on the present controversy is omitted from the record submitted to us. The certificate of the clerk, appended to the record in this court, contains the following:

"That the foregoing is a true copy of the record, * * * except that certain portions thereof are omitted in this copy by direction of complainant's counsel, Mr. Brooks, the omitted portions being indicated by stars; and except, also, that certain other portions are omitted, and in place thereof memoranda are inserted showing where the same are to be found in the printed matter annexed hereto."

It concludes as follows:

"I further certify that I make this certificate at the request of counsel for complainant in said cause."

In Blitz v. Brown, 7 Wall. 693, where there was no certificate by the clerk, the writ of error was dismissed, and leave to cause the certificate to be supplied was denied; but in the later case of Hodges v. Vaughn, 19 Wall. 12, leave was granted the plaintiff in error to withdraw the transcript and supply the certificate. In U. S. v. Gomez, 1 Wall. 690, a certificate from the clerk of the court below that the record was complete "except the transcript sent up," etc., was accepted as sufficient to bar a motion to dismiss, and to put the party appealed against to a suggestion of diminution and a motion for certiorari; and the same conclusion was reached in The Rio Grande, 19 Wall. 178, 182, 183, 188, where the first transcript contained the usual certificate, but an addition to it purported to include only extracts. In view of the pointed way in which the supreme court has condemned sending up unnecessary papers and proceedings, and of the other matters hereinafter referred to, a modified certificate can well be accepted, as was done in the two cases last cited; or the certificate in the usual terms must be construed as covering only what is necessary to a hearing in this court. As the distinction is a mere matter of form, we think the certificate in this case must be accepted as sufficient to bar a motion for dismissal, and throw on the parties the necessity of seeking some other method of relief, if either thinks the record before us essentially defective.

We are considering only cases where the omissions may, for aught which appears, be of such character as the supreme court encourages, and where the clerk's certificate is modified accordingly. What ought to be held where the omissions are, on the face of the transcript, plainly substantial, and the clerk's qualified certificate takes color therefrom, may appear further on.

The rules of the supreme court (No. 8, par. 3, 3 Sup. Ct. vii.) provide as follows: "No cause will hereafter be heard until a complete record, containing, in itself, without references aliunde, all

the papers, exhibits, depositions, and other proceedings which are necessary to the hearing in this court, shall be filed." Paragraph 1 of the same rule requires the clerk of the lower court to transmit, in making return of a writ of error, "a true copy of the record" "and of all proceedings in the cause." The precise phraseology of the paragraph referred to was adopted in this court. Rule 14, pars. 1, 3.[1] The qualification contained in the words already quoted, "which are necessary to the hearing," raises the questions: To what portions of what precedes it does this qualification attach? Who is to determine, in the first place, what are necessary? In the event such determination is erroneous in any case, what is the remedy? We will consider these questions only with reference to appeals in equity causes, as this at bar is of that character, though some of our observations may also apply to writs of error, and even to admiralty appeals.

The filing of the record in the appellate tribunal is a jurisdictional necessity. Hill v. Railroad Co., 129 U. S. 170, 174, 9 Sup. Ct. 269. And it is ordinarily said that it must be filed during the return term, and that, if it is so filed, it is seasonable, notwithstanding the requirements of the rules of the supreme court (No. 9, par. 1), and that of this court (No. 16, par. 1), unless the party appealed against seasonably moves as also provided in each (Sparrow v. Strong, 3 Wall. 97). In U. S. v. Vigil, 10 Wall. 423, the supreme court, under very special circumstances, refused to dismiss an appeal, although the record was not filed until about two years after the end of the next term after the allowance of the appeal. We need not, however, consider the practice touching such matters, except that they all lead to the fact that it is a jurisdictional necessity that the record be filed at some time. The appeal in the case at bar relates to proceedings subsequent to a mandate from the supreme court, which disposed of the merits of the cause, and left open for the court below only the closing of certain matters of detail. In such instances what follows the mandate is all which ordinarily comes up on a subsequent appeal (Supervisors v. Kennicott, 94 U. S. 498; Union Pac. Ry. Co. v. U. S., 116 U. S. 402, 6 Sup. Ct. 631); and therefore, to insert ordinarily in the record matter which preceded the mandate, including especially the proofs taken on the main issues in the cause, would be not only unnecessary, but improper. In the case at bar the order of the supreme court directed subsequent proceedings to be taken in accordance with its opinion; so the opinion was, in effect, a finding of facts, and, in substance, a part of the mandate. It was, therefore, properly incorporated in the record, and we find it here, except some parts, which we may, in the absence of any suggestion otherwise, consider unimportant for our purposes. The master's report is also in the record before us, but, as the only matter in controversy—that of interest—was settled by the court, and not by the master, his report and all proceedings before him might have been omitted; so that, even if the proceedings before the master are imperfectly set out, it is immaterial. On the ques-

[1] 47 Fed. vii.

tion of interest, the bill and answer, besides the opinion of the supreme court, would necessarily be read to the court below; and these we find in the transcript. There is no implication nor suggestion that that court had read to it or had brought to its attention on this branch of the case any other papers, proofs, or proceedings whatever. If any were so read or brought to its attention, the portions so used should be in the record. In that event the appellee, as stated in the opinion filed in this case September 6, 1892, had a remedy by certiorari, and perhaps other remedies, hereafter suggested; but, without first resorting to these, the appellee certainly had no ground for relief by dismissal of the appeal.

There are certain other omissions in that part of the record which follows the mandate, but, so far as the court can perceive, they relate to continuances and other immaterial matters, and no specific suggestion has been made that any one is of a substantial character. Many cases may be suggested where the appellant should bring before this court only portions of the proceedings in the court below. Ordinarily, the whole of the record, as the word is technically used, in suits at common law, and of the corresponding portions of proceedings in equity, the latter as designated by Rev. St. § 750, should be brought here, in order that this court may properly shape its judgments, excepting, of course, what precedes the mandate on a prior appeal or writ of error. But take the instance of a defendant in equity who has pleaded to the whole bill, and whose plea has been overruled as a matter of law, and has been followed by voluminous proofs on the issues of fact raised by the bill and answer. He may be content on his appeal to rest on his plea, and in that event he neither need nor ought to bring here the mass of the proofs following it. This conforms to the ruling in Railway Co. v. Dinsmore, 108 U. S. 30, 2 Sup. Ct. 9, where apparently the case was disposed of on demurrer, and the court held that the evidence on file was not to be brought before it; and it is emphatically enforced in those cases where the supreme court has condemned the bringing up of unnecessary papers and proceedings. Railway Co. v. Stewart, 95 U. S. 279, 284; Craig v. Smith, 100 U. S. 226, 230; The Adriatic, 103 U. S. 730; Ball & Socket Fastener Co. v. Kraetzer, 150 U. S. 111, 118, 14 Sup. Ct. 48.

The act of March 3, 1803 (2 Stat. 244), provided that on appeals to the supreme court in cases of equity, of admiralty and maritime jurisdiction, or of prize or no prize, "a transcript of the libel, bill, answer, depositions, and all other proceedings of what kind soever in the cause" should be transmitted. While this statute was in force, in 1823, the supreme court framed a rule in terms the same as present rule 8, par. 3, already referred to. Craig v. Smith, 100 U. S. 226, 231. This added the qualification, which was not found in the statute, "which are necessary to the hearing in this court," and which, as already stated, appears in the corresponding rule of the court of appeals. This qualification was, however, subsequently adopted by the act of February 26, 1853 (10 Stat. 163), as follows:

"In equity and admiralty causes only the process, pleadings, and decree, and such orders and memorandums as may be necessary to show the juris-

diction of the court and regularity of the proceedings, shall be entered upon the final record; and in case of an appeal, copies of the proofs, and of such entries and papers on file as may be necessary on hearing of the appeal, may be certified up to the appellate court."

In the Revised Statutes this, and what remained of the act of 1803, were distributed as follows:

"Sec. 698. Upon the appeal of any cause in equity, or of admiralty and maritime jurisdiction, or of prize or no prize, a transcript of the record, as directed by law to be made, and copies of the proofs, and of such entries and papers on file as may be necessary on the hearing of the appeal, shall be transmitted to the supreme court."

"Sec. 750. In equity and admiralty causes, only the process, pleadings and decree, and such orders and memorandums as may be necessary to show the jurisdiction of the court and regularity of the proceedings, shall be entered upon the final record."

In view, therefore, of the rules referred to, and the qualification which they contain, also already referred to, and of the statutes enacted subsequent to the origin of the rules, confirming the qualification which has been explained, and in view also of the expressions of the supreme court, it is clear that the transcript on appeal need not always contain all the proofs, entries, papers, and proceedings below, as will be more specially pointed out in answering the second of the three questions proposed. A practical construction of the statute qualification is found in the supreme court rule 8, already referred to (paragraph 6), adopted as the sequel to the act of February 16, 1875, c. 77, § 1 (18 Stat. 315).

Who, then, is to determine, in the first place, what may be omitted? The supreme court, in Railway Co. v. Stewart, 95 U. S. 279, 284, has given an answer:

"We have long suffered from the want of attention of parties or their counsel, and the incapacity, not to say dishonesty, of clerks below, in matters of this kind, and deem this a proper occasion for applying the remedy for such neglect or abuse. We are at a loss to determine whether the complainant or defendant is most to blame for the irrelevant matter which has been introduced into this case, but it is clearly the duty of the party who takes an appeal to see to it that the record is properly presented here. Care should be taken that costs are not unnecessarily increased by incorporating useless papers, and that the case is presented fairly and intelligently."

A briefer and more practical answer is given by the circuit court of appeals for the fifth circuit in Pennsylvania Co. v. American Const. Co., 2 U. S. App. 609, 5 C. C. A. 53, 55 Fed. 131, as follows:

"It may be well to impress on clerks of the trial courts that, in the absence of a controlling stipulation by the parties, or of written instructions from the plaintiff in error or appellant filed in the case, transcripts in cases of writs of error or appeal should meet the requirements of our rule 14, and that their certificates of authentication should follow the language of our rule, and show that the transcript transmitted is 'a true copy of the record, bill of exceptions, assignment of errors, and all proceedings in the case.'"

The supreme court thus says:

"It is clearly the duty of the party who takes an appeal to see to it that the record is properly presented."

The court of appeals makes of equal value a "stipulation of the parties" and "written instructions from the plaintiff in error or appellant," to be in writing, probably, for the protection of the clerk.

Considering the duty which solicitors and attorneys practicing in the federal tribunals owe to the courts and to each other, it is to be expected that ordinarily the clerk will receive joint directions with reference to facilitating and simplifying the transcript on appeal. Without such joint directions, the clerk, as already stated, ought to send up the whole of the record in the strict sense of the word, made as directed by Rev. St. § 750 (Keene v. Whitaker, 13 Pet. 459; Curtis v. Petitpain, 18 How. 109), having, of course, reference to the limitation imposed by the fact of prior appeals, if there have been any; and the nature of any portions omitted, even under a joint stipulation, should be indicated, so that the appellate court, which has its own interests and rights in the condition of the transcript, may be advised concerning them. But as to the proofs, entries, and papers on file necessary on the hearing of the appeal, required by Rev. St. § 698, the decisions cited refer the clerk, in the absence of a joint stipulation, to the selection made by the appellant. The good faith and discretion of his solicitor are necessarily the ordinary and sufficient guide in determining this selection, though, as the clerk is made by the statute the certifying officer, some duty rests on him by implication, and he might well refuse to certify a transcript with such palpable and substantial omissions as, in his opinion, to justify his assuming the responsibility of refusal. In that event the appellant, deeming himself aggrieved, has his remedy by applying to the appellate court for a mandamus, and perhaps by seeking summary instructions to the clerk from the court appealed from. If the party appealed against deems the certificate of the clerk irregular, or the transcript incomplete, his remedy is not by motion to dismiss, unless in extreme cases; but he may have ample relief by other methods, which have been clearly pointed out by the supreme court.

In Woodward v. Brown, 13 Pet. 1, on receipt of a supplemental certificate from the clerk of the court below, the supreme court allowed an amendment of a clerical error on motion of one party. The same was permitted in Chicago v. Bigelow, 131 U. S. Append. xciii. Substantial omissions have been made good by amendments filed with the consent of both parties. Hudgins v. Kemp, 18 How. 530, 534. And this has been done under some circumstances with reference even to defects originating in the proceedings of the court below. U. S. v. Hopewell, 2 C. C. A. 510, 51 Fed. 798, and cases there cited. In Railroad Co. v. Schutte, 100 U. S. 644, the court directed the appellant to bring up proofs claimed to have been omitted, according to a statement thereof to be filed by the appellees, and for failure to do so it imposed the penalty of dismissal of the appeal. Yet it carefully reserved the power to make special orders as to costs, if in this way unnecessary papers were brought up. But the appropriate and ordinary remedy for an appellee in the case of a defective transcript is to suggest diminution, and ask for certiorari, though the court may sometimes order the latter of its own motion. Morgan v. Curtenius, 19 How. 8; Railway Co. v. Dinsmore, 108 U. S. 30, 2 Sup. Ct. 9; Hoskin v. Fisher, 125 U. S. 217, 223, 8 Sup. Ct. 834, and many other cases, of which those cited ex-

emplify particular classes. We therefore, with this full explanation, reaffirm what was said by this court in the extracts given from the former opinion in this case, and also conclude, in the absence of any formal suggestion of diminution, that we have before us all which the court below considered with reference to the question of interest.

It is further objected that the appeal was expressly limited to a part of the decree below; but, as this was the only part from which the Nashua & Lowell Railroad Corporation could appeal, namely, that relating to interest, the expressed limitation was surplusage, and so harmless. Moreover, without considering an appeal independently of the rule of this court (No. 11) requiring an assignment of errors to be filed simultaneously with the appeal, the legal effect under that rule may be in any case a partial appeal; and it is therefore in law an unessential matter that any limitation is expressly duplicated,—that is, that it appears in the appeal proper as well in the assignment of errors.

We come now to the merits of the question raised on this appeal. The subject of this suit was certain definite sums of money. The bill sets out, specifically and by items, with a date for each, various sums claimed, divided into two classes. One class, amounting to $181,962, was disallowed by the supreme court; and one, amounting to $26,024, was allowed. It transpired that in the schedule in the bill items in the latter class for two years were omitted, and they were added by the circuit court after the mandate came down, making the total $29,676.41. No appeal was taken on that account, so it cannot affect our determination here. The bill closes with prayers for an account, and payment of the two classes of items named. There was also a further prayer that one of the respondents, Bartlett, who was the joint financial agent of the two corporations, parties to this cause, should pay over whatever other sums remained in his hands belonging to the complainant. The only other one specified was the sum of $60,000, alleged in the bill to be in his hands, of which $31,000 was alleged to belong to complainant. It was admitted in the answer that this fund existed, but it was also there stated that the respondent corporation was ready to unite in a joint demand on Bartlett therefor. There was no controversy about it, and it did not enter into the litigation. The opinion of the supreme court (136 U. S. 369, 10 Sup. Ct. 1004) shows, moreover, that everything had been adjusted except the two classes of items described. The answer admitted that the sums in dispute had been received, and it also said that the question was not about amounts, but merely as to the right to the sums named.

As stated in the former opinion in this case, September 6, 1892, the supreme court did not pass on any question of interest, but left that to be determined in the court below, as in an ordinary case of granting a new trial. There was no agreement for payment of interest. Therefore, if allowed, it must be in the way of damages for delay, or, as it is frequently described, as moratory interest. It is needless to attempt to follow or analyze the numerous state decisions touching the question of moratory interest, certainly not without tracing out the history of the peculiarities of the rules on

this topic in the particular states the decisions of whose courts may be cited. There has been, in the main, a steady advance of the state of the law from a disposition to allow no interest, through the stages of considering it as a matter of discretion for either the court or the jury, towards a rule of legal right. Any one anxious to pursue this line of investigation will find it elaborately followed out in Sedg. Dam. (8th Ed.) § 282–346. In England the condition of the law has been very fluctuating, so that decisions of English tribunals present no safe guide. These are fully reviewed in Sedgwick on Damages in the sections already referred to. Before the statute 37 Hen. VIII. c. 9, interest on money lent was prohibited by the law of England, and rules have grown up overcoming with varying success the effect of that prohibition. At one time, as stated in Craven v. Tickell (1789), 1 Ves. Jr. 60, interest was allowed at law, and, by consequence, in equity, for every debt detained, either by the contract or in damages. The most convenient history of the later English practice will be found in London, C. & D. Ry. Co. v. Southeastern Ry. Co., [1893] App. Cas. 429. There the English practice was condemned, and more liberal rules approved. The proceeding was in chancery for the settlement between two railroad corporations of disputed traffic-division accounts, in many particulars singularly like these at bar. Interest was disallowed, on the settled construction of Lord Tenterden's Act; but the lord chancellor (Herschell) said (page 437):

"I confess that I have considered this part of the case with every inclination to come to a conclusion in favor of the appellants, to the extent, at all events, if it were possible, of giving them interest from the date of the action; and for this reason: that I think that when money is owing from one party to another, and that other is driven to have recourse to legal proceedings in order to recover the amount due to him, the party who is wrongfully withholding the money from the other ought not in justice to benefit by having that money in his possession and enjoying the use of it, when the money ought to be in the possession of the other party, who is entitled to its use. Therefore, if I could see my way to do so, I should certainly be disposed to give the appellants, or anybody in a similar position, interest upon the amount withheld from the time of action brought, at all events. But I have come to the conclusion, upon a consideration of the authorities, agreeing with the court below, that it is not possible to do so, although, no doubt, in early times the view was expressed that interest might be given under such circumstances by way of damages."

Lord Watson said (page 442):

"I regret that I am unable to differ from your lordships upon the question whether interest could be given in this case by way of damages. I think it clearly cannot, for the reasons which have been sufficiently expressed by the lord chancellor and by the learned judges of the appeal court. To my mind, the state of the law as settled by statutes and decisions is not altogether satisfactory."

Lord Shand said (page 443):

"That being the state of matters, I confess that I have looked with very great anxiety to the possibility under the law of England, as I have heard it argued, of giving interest in this case, for I cannot help thinking that a gross injustice is the result of withholding it. It appears to me that it is a defective state of the law that one party should be entitled to retain a large sum, such as this (it might have been a smaller sum, but the principle would

be the same; it strikes one more forcibly when you come to deal with such sums as this), by simply creating delay in furnishing the requisite accounts and by refusing payment. * * * I shall only add that I regret that the law of this country in regard to the running of interest is not like the law of Scotland, with which I am more familiar. In that country it is the common and ordinary practice, in bringing an action for money which is due, to conclude not only for the payment of that money, but for the payment of interest upon it from the date of citation or service of the summons; and interest is decreed as a matter of course on whatever balance is found to be due. I may even say that it is a rule which has received general effect that, where money is shown to have been due and to have been demanded, interest runs if the demand or request of payment is not acceded to. That is the case even although too large a sum may have been demanded. If it be found that a sum short of what was demanded is due, still the law gives interest, unless the amount really due has been tendered."

These quotations sustain the proposition that generally interest should, in justice, be recoverable, at least from the time of suit commenced, where the amount is in the nature of a money demand, or can be liquidated, and though it may come from an accounting, and more is demanded than is ultimately obtained. They lay down principles broad enough to leave no distinction as between proceedings at law and in equity. While they are not binding in England, they will be found to have been applied by the supreme court of the United States; not as a matter merely of what the rules touching interest ought to be, but of what they are.

In Lincoln v. Claflin, 7 Wall. 132, the supreme court said (page 139):

"Interest is not allowable as a matter of law, except in cases of contract, or the unlawful detention of money. In cases of tort its allowance as damages rests in the discretion of the jury."

Erskine v. Van Arsdale, 15 Wall. 75, was a suit for customs duties illegally enforced. On page 77 the supreme court noted that the circuit court held that, if the jury found for the plaintiff, they might add interest. The court said this was clearly correct; but by this it probably had in view the practical result, because it concluded in terms showing a right to interest, as follows:

"Where an illegal tax has been collected, the citizen who has paid it, and has been obliged to bring suit against the collector, is, we think, entitled to interest, in the event of recovery, from the time of the illegal exaction."

In Redfield v. Iron Co., 110 U. S. 174, 3 Sup. Ct. 570, the last case was referred to as generally applicable to suits for duties illegally enforced, but interest was refused on the ground of laches, the delay having been for 26 years, and such as the court said would have justified a dismissal of the suit. Goddard v. Foster, 17 Wall. 123, was an action at law for services and a share of profits. Although only the former was recovered, the court said (page 143):

"Beyond all question the plaintiff was entitled to interest from the commencement of the suit."

In National Bank of the Commonwealth v. Mechanics' Nat. Bank, 94 U. S. 437, a depositor was held entitled to interest as against the receiver of an insolvent national bank. The court gave a brief historical statement, citing authorities containing various phases of the

law, as all such statements must, but determined the allowance as one of right (page 441), as follows:

"The treasury authority fell into an error. There should have been no discrimination between principal and interest in making the payments. The creditor had the same right with respect to both as if he had been pursuing the defaulting debtor under other circumstances. The comptroller should have done just what the law would have done if the case had not come under his cognizance."

In Holden v. Trust Co., 100 U. S. 72,—a suit on a promissory note,—the court said (page 74):

"Here the agreement of the parties extends no further than to the time fixed for the payment of the principal. As to everything beyond that it is silent. If payment be not made when the money becomes due, there is a breach of the contract, and the creditor is entitled to damages."

In White v. Knox, 111 U. S. 784, 787, 4 Sup. Ct. 686, interest was disallowed in computing a dividend on a debt from an insolvent national bank, but solely in order to preserve equality among creditors. This is plain from National Bank of the Commonwealth v. Mechanics' Nat. Bank, ubi supra, and Richmond v. Irons, 121 U. S. 27, 64, 7 Sup. Ct. 788, where, the fund being sufficient, interest was allowed the creditors from the date of the suspension of the bank; the court saying in the last case as follows:

"In the case of book accounts in favor of depositors, which was the nature of the claims in this case, interest would begin to accrue as against the bank from the date of its suspension. The act of going into liquidation dispenses with the necessity of any demand on the part of the creditors, and it follows that interest should be computed upon the amounts then due as against the shareholders to the time of payment."

Armstrong v. Bank, 133 U. S. 433, 470, 10 Sup. Ct. 450, seems to confirm our view of White v. Knox. In The Scotland, 118 U. S. 507, 6 Sup. Ct. 1174, which was a case of limited liability, interest on the value of the wreck as against the owners of the vessel was not allowed. It may well be said that admiralty has its own rules; but in this case, as appears (page 519, 118 U. S., and page 1174, 6 Sup. Ct.), the disallowance was put upon the general rule applicable everywhere. The owners had offered to pay the value of the wreck into court, and desired to do so; but the court would not permit this, and the libelants resisted. The position was the same as though the Boston & Lowell Railroad Corporation, in this case, had at the outset offered to pay into court the entire amount finally awarded against it, the Nashua & Lowell Railroad Corporation had resisted this offer, and the court had sustained it in its resistance. By the uniform current of decisions and clear principle, interest could not be recovered under such circumstances.

The settled rule in patent causes is that interest is not computed on profits except from the date of the master's report. This is plainly on the ground that such profits are regarded as in the nature of merely unliquidated damages, which, as a general rule, in the absence of special circumstances, do not bear interest as of right until after their amount has been judicially ascertained. But even this rule, as applicable to the subject-

matter of profits in infringement suits, was established at the outset in a case where the court was divided on other matters, and without any written opinion, and by only a majority of the court. Silsby v. Foote, 20 How. 378, 386. Its correctness is evidently questioned in Tilghman v. Proctor, 125 U. S. 136, 160, 8 Sup. Ct. 894.

In U. S. v. Sanborn, 135 U. S. 271, 10 Sup. Ct. 812,—an action at law for money fraudulently obtained,—interest was allowed the United States from the date of the writ, but disallowed prior to that period on the ground of laches. In this case Redfield v. Iron Co., ubi supra, was affirmed. In Redfield v. Bartels, 139 U. S. 694, 11 Sup. Ct. 683,—another suit for duties illegally exacted,—the doctrine of laches was again applied, but interest was allowed from the date of the writ for one item and the date of the amendment for the other item brought in by it. In Dillman v. Hastings, 144 U. S. 136, 12 Sup. Ct. 662, in equity, interest was allowed on the usual presumption that one occupying a trust relation earns it, or should have earned it, and the case is of no importance in this litigation. Thomas v. Car Co., 149 U. S. 95, 13 Sup. Ct. 824, was a case of a claim for rental by a car company entered against a railroad receivership, and resisted by the holders of a mortgage secured on the same railroad. A portion of the claim was disallowed and a portion allowed. Interest was disallowed. Some expressions contained in the opinion of the court might lead to the conclusion that this was because only a part of the claim was allowed; but a careful examination of it (pages 116, 117, 149 U. S., and page 824, 13 Sup. Ct.) shows that the question was disposed of upon the proposition that the claim of the car company was against a fund in the hands of the court, and that the delay in distribution was the act of the law, and the fund fell short of paying the mortgage debt. It will be noticed, also, that the equities of that case are entirely unlike those of the case at bar, because in the latter the Boston & Lowell Railroad Corporation has had the complainant's money in its own hands, which was not the fact in Thomas v. Car Co. The principle of the case was the same as underlaid White v. Knox, ubi supra.

It will therefore appear that in all the cases which we have been able to find in the supreme court, within a period sufficiently late to be supposed to be in harmony with modern views touching the law of interest, interest has been uniformly allowed, with only three exceptions, the nature of which we will hereafter refer to. The latest case is Sturm v. Boker, 150 U. S. 312, 14 Sup. Ct. 99. That suit, in the form in which it came before that court, was in equity for an accounting of the profits of a series of transactions in which the parties were jointly interested. It appears (page 314, 150 U. S., and page 99, 14 Sup. Ct.) that the answer of the defendant to the bill admitted many of the facts charged, and either denied others or set up new matters in avoidance thereof. As in the case at bar, the decree of the circuit court dismissed the bill. It also appears (page 341, 150 U. S., and page 99, 14 Sup. Ct.) that, while the supreme court sustained the bill, it also held that at least a portion of the matters claimed by the complainant could not be allowed on a final accounting. The opinion concluded as follows: "The account will be stated up to

the filing of the bill, and any balance shown in favor of either side will bear interest from that day." The effect of this was that, although it was a bill for an accounting, in which there were fundamental disputes between the parties, involving very large amounts, and although the bill had been dismissed by the circuit court, which dismissal was reversed by the supreme court, and although the latter court expressly noted certain items demanded by complainant which he could not be allowed for, yet it gave complainant interest from the date of the filing of the bill; and even went further, and applied the broad equity that the prevailing party should recover interest from that date on whatever might be found due him. In this particular the supreme court reverted to the fundamental principles of justice stated by it in the equity suit of Curtis v. Innerarity, 6 How. 146, where it said (page 154), as follows:

"It is a dictate of natural justice, and the law of every civilized country, that a man is bound in equity, not only to perform his engagements, but also to repair all the damages that accrue naturally from their breach. Hence every nation, whether governed by the civil or common law, has established a certain common measure of reparation for the detention of money not paid according to contract, which is usually calculated at a certain and legal rate of interest. Every one who contracts to pay money on a certain day knows that if he fails to fulfill his contract he must pay the established rate of interest as damages for his nonperformance. Hence it may correctly be said that such is the implied contract of the parties. See 2 Fonbl. Eq. 423; 1 Domat, bk. 3, tit. 5."

Sedgwick, in his work already referred to (volume 1, § 292), says:

"The American cases look upon the interest as the necessary incident, the natural growth of the money, and therefore incline to give it with the principal, while the English courts treat it as something distinct and independent, and only to be had by virtue of some positive agreement or statute."

Indeed, in the United States the active use of money is so general, the holding of it as a special deposit, so that there is no increment, is so rare, that to refuse a plaintiff or complainant interest on money unjustly detained does ordinarily a double injury,—it deprives him of the increase to which he was justly entitled, and it violates, in behalf of the defendant, a fundamental maxim of equity, by allowing him to take advantage of his own wrong. Undoubtedly many writers and authorities of the highest character regard moratory interest as allowable only ex aequo et bono, and we are not prepared to say that there is positive evidence that this is not the view of the supreme court. There are also exceptional cases, recognized even in jurisdictions where it is given apparently as matter of right, in which some strong equity will stop the running of interest. One of these exceptional cases arises in the event of laches, whether in suing or prosecuting the suit. Others are enumerated by Sedgwick, in his work already referred to (section 340), as tender at common law, an offer by a wrongdoer before trial to pay more than the jury found due, retention of money at a specified place to pay the debt, negligence to enforce a claim against sureties, and restraint of payment by law as in cases of war and garnishment. In the suit at bar, laches is not suggested, unless before demand or suit brought. As to that, the demand, if there was any, was not suffi-

ciently specific to carry interest until the bringing of the suit, on sound principles, which may be recognized everywhere. Goff v. Reheboth, 2 Cush. 475. There was also such laches and acquiescence before the suit was brought as prevented the accruing of interest before the filing of the bill, in the absence of suitable demand; but that laches before suit brought does not ordinarily affect interest from the commencement of an adversary proceeding was settled in U. S. v. Sanborn, 135 U. S. 271, 10 Sup. Ct. 812.

The alleged special equities set up here against allowance of interest in this suit, even after the bill was filed, are that much more was claimed than was finally allowed; that the subject-matter of the suit was nominally an accounting; and that the circuit court, by the decree appealed from to the supreme court, decided fully for the respondents below. These alleged equities are disregarded in Sturm v. Boker, 150 U. S. 312, 14 Sup. Ct. 99, and other decisions of the supreme court already referred to. The claim that the circuit court determined the question of interest on equitable grounds, so that this court cannot reverse unless it has before it all the considerations which appeared to the court below, is met by what we have already said as to the state of the record. We do not discover any other specific reasons urged as the basis of the claim that this case should be excepted from the general rule as to interest.

By the decision of the supreme court in this cause, the question of the equitable rights of these parties had been disposed of, and nothing remained for the circuit court to consider and pass upon except the amount for which judgment, in accordance with that decision, should be entered. The right of equitable recovery has thus been settled by the highest tribunal, and therefore all questions as to the general equities are removed from our consideration. No intimation to the contrary having been made by the supreme court, the ordinary rule, which allows interest from the filing of the bill, must govern us.

We have already referred to the fact that the circuit court allowed the complainant below items for two years, which were omitted in its bill, making the total $29,676.41, instead of $26,024; the latter being the amount specifically claimed. The appellee insists that, if interest is allowed, it should only be upon the smaller sum; but this was a bill for an account of liquidated items. The subject-matter was peculiarly within the knowledge of the respondent corporation, and it could easily have corrected the error which the complainant made, and must have been aware of it. Therefore there seems to be no just ground for refusing allowance of interest on any part of the fund which the supreme court has conclusively decided the respondent corporation inequitably detained.

Decree of the circuit court modified, the Nashua & Lowell Railroad Corporation to have a decree against the Boston & Lowell Railroad Corporation for $29,676.41, with interest from the date of the filing of the bill to the date of the final decree, and costs in that court and this, and the bill to be dismissed as against all respondents except the Boston & Lowell Railroad Corporation, and without costs for or against such respondents in either court.

STEINER et al. v. EPPINGER et al.

(Circuit Court of Appeals, Fifth Circuit. April 10, 1894.)

No. 194.

1. WITNESS—COMPETING—TRANSACTIONS WITH DECEDENT.
   In an action against executors for advances made to their testator on goods consigned to plaintiffs and for charges paid thereon, plaintiff testified as to his efforts to sell the goods, the prices he obtained, and the correctness of the charges made. *Held*, that this was not within the rule (Rev. St. § 858) excluding testimony as to statements by and transactions with a deceased person.
2. APPEAL—REVIEW—HARMLESS ERROR.
   The admission of testimony as to what was the witness' "understanding" of a certain transaction is harmless error where other conclusive evidence in the case shows that this understanding was correct.
3. SAME.
   A judgment will not be reversed for the admission of incompetent testimony on unimportant points, or of irrelevant evidence, unless there is reason to believe that injustice has been caused thereby.

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

This was an action by Eppinger & Russell against J. M. Steiner and others, as executors of Joseph Steiner, in which plaintiffs had judgment, and defendants bring error.

H. C. Tompkins and J. C. Richardson, for plaintiffs in error.

Thos. H. Watts and Roquemore & White, for defendants in error.

Before PARDEE and McCORMICK, Circuit Judges.

McCORMICK, Circuit Judge. On the 18th April, 1890, this action of assumpsit was instituted. It claimed of the defendants, by the common counts of debt, money loaned, account stated, and money paid for and at request, etc., the sum of $4,735.24. This claim is made up of $4,000, advanced defendants' testator August 24, 1886; $715.47, excess of charges over proceeds of sales of cedar realized August 3, 1888; and $425.27, balance of interest account to August 3, 1888,—less $405.50, proceeds sale of cedar due October 12, 1886.

The plaintiffs in error (defendants below) presented 16 elaborate pleas to the action. All the exceptions taken and saved in the circuit court are brought up in a single bill of exceptions. Economy of time and space, by numerous cross references, is exercised in its construction. With these savings it covers 239 pages of the printed record. According to our understanding of these cross references, the plaintiffs in error made and saved 1,269 exceptions to the rulings of the circuit court on the introduction of testimony, and 16 exceptions to the charges given or refused. Much the greater part of these were renewals of 30 grounds of objection early made to the introduction of evidence offered by the plaintiffs below, each of which each time presented challenged consideration and judgment, and, being brought up, is presented to us for review. Their assignment of errors covers 12 pages of the

printed record, and separately sets out and distinctly numbers 71 specifications of error relied on by them to reverse the judgment of the circuit court. If the counsel for the plaintiffs in error reciprocate in any measure the profound respect we entertain for them, they have never suspected that we would deem it our duty to notice in detail these numerous errors assigned, and the almost innumerable exceptions on which the assignment reposes. Waiving all consideration of the justice and policy of imposing on a court of errors the task of grouping an array of tentative and technical exceptions and assignment of errors, we trust our method of grouping the errors assigned in this case will not prove invidious.

The spirited defense in this case appears to have been made and to be continued on the theory that the 1,198 cedar logs last shipped by Joseph Steiner to Eppinger & Russell were sold to them at not less than 90 cents per cubic foot, at which price it would have more than paid the $4,000 advanced thereon after paying all the proper charges. This theory is refuted by the written correspondence between the parties, given in evidence. The construction of this written evidence is matter of law. The duty of construing such evidence cannot be remitted to the jury. The trial judge must construe it. He did construe it in this case.

One of the reserve defenses of the plaintiffs in error was a claim of set-off for damages resulting from the unfaithfulness or unskillfulness of Isaac Eppinger and of Eppinger & Russell in handling various previous shipments of cedar made to them for account of Joseph Steiner. This claim is concluded by the settlement to 24th July, 1886, shown in the letter of Eppinger & Russell of that date, the receipt of which by Joseph Steiner clearly appears from his two letters of 8th August, 1886, and from the tenor of all of their subsequent correspondence. The destruction of these two defenses sweeps from the field of our review the bulk of the exceptions taken on the trial to the introduction of evidence and to the charges of the court. There remain the pleas of recoupment for damages resulting from the alleged wrongful handling of the 1,198 cedar logs last shipped. The temper and tone of the defense below, as shown by the record, strongly imply the suspicion that the defendants in error had substituted, or suffered to be substituted, other inferior cedar for that shipped them by Joseph Steiner, and the further suspicion that the bill of charges on these last consignments is wholly fictitious. There is no proof tending to excite such suspicions. There is proof, clear and uncontradicted, ample to exclude such suspicions from impartial minds. The bill of charges is supported in every particular by the testimony of Cyriax, the bookkeeper and accountant, and by the testimony of Jesse I. Eppinger, the general manager, both of whom show their personal knowledge of the matters to which they testify. The testimony of Isaac Eppinger is largely to the same effect. The dealers to whom they sold the wood, and others to whom they attempted to sell it, the yard master with whom it was stored, and others who had and received charges on it, substantially corroborate the testimony of the three witnesses named. And this mass of testimony is sub-

stantially uncontradicted as to the fact that the prices obtained for the wood were its full value at the time of sale; that, after its arrival in New York and its inspection there, it could not be sold for the price that Joseph Steiner wanted to get for it, or for enough to cover the charges and the advance Eppinger & Russell had made on it. Very naturally, if not unavoidably, the conditions continued to grow worse. After the wood had been held nearly two years, Joseph Steiner visited New York, and had a personal interview with Isaac Eppinger and with Jesse I. Eppinger. J. T. Steiner, one of the plaintiffs in error, was present at these interviews. Joseph Steiner was on his way to Europe. His residence and place of business was Greenville, Ala. In this interview he told the Eppingers, "in case they wanted any more cedar, they should correspond with the Greenville house just the same as if he was there." The next day after this interview he sent his son J. T. Steiner to the yard to see if the cedar was there, and to look at it if it was there. His son went, and immediately on his return reported to his father what he had done and seen. They sailed for Europe without again seeing Eppinger & Russell. This was about the 1st of June, 1888. Very soon thereafter the cedar was sold. On July 19, 1888, Eppinger & Russell did write the Greenville house, and that house replied under date July 22d:

"Our Mr. J. S. wrote us from New York before sailing that you would probably want some shipments. Since then we have decided to sell all of our wood here, and we do not care to ship with uncertainty as to price and time of sale. How soon shall we expect returns for lot now in good hands?"

The jury found that the evidence proved the account. It is difficult for us to see how they could honestly have found otherwise. It is contended that Isaac Eppinger, a party to this suit against executors, should not have been permitted to testify to the matters embraced in certain of his answers which were admitted. He should not have been permitted to testify to any transactions with, or statements made by, the testator. Was he permitted to testify to any such matters? We think he was not. He did not testify as to any statement made by the testator. He testified as to his efforts to sell the cedar, as to the correctness of the bills of particulars of money paid out in New York for charges on the same, and as to the prices obtained for it. What personal or competent knowledge of these things had Joseph Steiner to which he could have deposed had he been living? It seems to us that the trial judge correctly construed the statute on this subject. Rev. St. § 858. He duly limited the admission of this witness' testimony, as required by the sound construction of that statute. Wood v. Brewer, 73 Ala. 262; Miller v. Cannon, 84 Ala. 59, 4 South. 204; Gamble v. Whitehead (Ala.) 11 South. 293; Lewis v. Meginniss (Fla.) 12 South. 19.

It is further contended that the witnesses testified, not from independent memory, or from memoranda made wholly by themselves, but obviously from books kept in the office; that their testimony was not the best evidence; and that it should have been excluded as hearsay. We do not so understand any of the material

parts of their testimony. It is objected that one witness, Cyriax, testifies as to his "understanding" of the way in which—that is, for whose account—Eppinger & Russell held this cedar. Other competent and conclusive proof—the written correspondence of the parties—shows that his understanding was correct, and his testimony on this subject was harmless, however inadmissible. It is objected that another witness, Jesse I. Eppinger, was allowed to testify as to the manner of Joseph Steiner when last interviewed by the witness in New York. The language of the witness to which the objection is made is: "He seemed indifferent about it." Witnesses are often required, in a proper case, to testify as to whether a party was calm or was excited when certain acts were done or words uttered by him, or by others to him or in his presence. In this case, and in reference to the same incident, J. T. Steiner, one of the plaintiffs in error, in giving his evidence on the witness stand, used the language: "Father seemed greatly excited." This plaintiff in error, in reference to another incident, told the jury from the witness stand: "Father was mad about not having received any returns from the cedar, and he did not like the idea of taking forty-five cents for it." It would seem, therefore, that, in the judgment of the plaintiffs in error, this was a proper case in which to show the state of the feelings of one of the parties at certain times punctuated by the proof. Be this as it may, it is clear to us that, if there was error in admitting the testimony in question over objection, it is not such error as requires a reversal of the judgment. "The modern tendency, both of legislation and of decisions of courts, is to give as wide a scope as possible to the investigation of facts. Courts of error are specially unwilling to reverse cases because unimportant and possibly irrelevant testimony may have crept in, unless there is reason to think that practical injustice has thereby been caused." Holmes v. Goldsmith, 147 U. S. 150, 13 Sup. Ct. 288. The judgment of the circuit court is affirmed.

WALTER A. WOOD HARVESTER CO. v. MINNEAPOLIS-ESTERLY HARVESTER CO.

(Circuit Court, D. Minnesota, Fourth Division. January 16, 1894.)

1. PATENTS—FEDERAL JURISDICTION.
   Plaintiff alleged infringement, and defendant set up a right to manufacture and sell under plaintiff's patents, by virtue of a license which it held by assignment from the licensee. Plaintiff claimed that the license was unassignable, and that defendant had no rights thereunder. *Held*, that the matters to be determined arose out of and depended upon the patent laws, and the case was therefore one of federal jurisdiction. Hartell v. Tilghman, 99 U. S. 547, distinguished.

2. SAME—ASSIGNABILITY OF LICENSE.
   A license which contains no words importing assignability, such as "heirs," "successors," "assigns," and the like, is unassignable.

This was a suit by the Walter A. Wood Harvester Company against the Minneapolis-Esterly Harvester Company for infringement of certain patents.

T. D. Merwin (John R. Bennett, of counsel), for complainant.
Paul & Hawley (A. C. Paul, of counsel), for defendant.

NELSON, District Judge. This suit is brought for an alleged infringement of the following described letters patent: No. 208,137, dated September 17, 1878; No. 212,420, dated February 18, 1879; No. 257,837, dated May 16, 1882; No. 266,949, dated October 31, 1882; No. 255,712, dated March 28, 1882. The bill alleges that both parties are citizens of the state of Minnesota; that the exclusive right to manufacture in the state of Minnesota under these patents was acquired by complainant, then under the name of the Minneapolis Harvester Works, by written instrument from the patentee, dated March 17, 1881, and that the following license had been previously issued to George Esterly & Son by the same patentee:

"Articles of agreement entered into this Nov. 7, 1879, by and between Charles H. Parker, Gustavus Stone, L. H. Parker, John F. Appleby, and Edwin D. Bishop, all of Beloit, Wisconsin, parties of the first part, and George Esterly and George W. Esterly, under the firm name of George Esterly & Son, of Whitewater, Wisconsin, parties of the second part, witnesseth: That the said party of the first part hereby licenses the party of the second part to manufacture and to sell to others, during the life of the patents, what is known as the 'Appleby Twine Binder.' And we further agree that the said party of the second part shall have the full benefit of all improvements that may from time to time be made by us to said binder. And we further agree that the said party of the second part shall have the full benefit of a patent we own on the reel of the harvester, known as the 'Beloit Harvester,' and such other patents as are still pending on the harvester and binder. In consideration of the foregoing privileges, the party of the second part hereby agrees to pay to the party of the first part the sum of $5 as a royalty for each and every binder manufactured and sold by the party of the second part; said settlement to be made on or before the 1st of January after such sales have been made. And said party of the second part further agrees to keep their account of sales in such a shape that said account can be examined by the party of the first part at any time. It is hereby mutually agreed that in case the party of the second part uses the patents of the harvester, without the binder, they shall pay to the party of the first part one-half of the royalty agreed upon, as above. And it is further mutually agreed that the party of the first part shall have power to revoke this license in case the party of the second part fails to perform their part of the agreement. The party of the first part agrees that the five-dollar royalty paid for the binder shall include the use of such patents as we have on the harvester, without consideration, where the harvester and binder are sold as one machine.

"[Signed] Charles H. Parker.
"Gustavus Stone.
"L. H. Parker.
"J. F. Appleby.
"E. D. Bishop.
"George Esterly.
"George W. Esterly.

"Witnesses:
"E. P. Burrows.
"J. E. Bassett.
"W. G. Leffingwell."

Complainant insists that this license was personal to George Esterly & Son, and unassignable, and prays a preliminary injunction. Defendant, admitting it is manufacturing in Minnesota under the license of November 7, 1879, issued to George Esterly & Son, claims

the right to do so by assignment duly traceable to that firm; and now asks that the bill be dismissed, on the ground that no question under the patent laws or other federal question is involved, and that this court is without jurisdiction in the case. Both motions are heard together. There are other matters set up in the pleadings by the parties, but, in my view of the case, it is not necessary to consider them.

The relief sought in this suit is not to enforce or set aside a license contract. It is virtually charged in the bill of complaint that the defendant has no right to manufacture in this state under the Appleby and other patents, and is infringing the rights of complainant. All that is to be determined by the court depends upon and arises out of the patent laws. If the license of November 7, 1879, is personal to the licensees therein named, the manufacture by the defendant under the letters patent is unlawful, for it has no authority or right so to do. The existence of the right to manufacture being directly involved, the controversy grows out of the patent laws, and this court has jurisdiction. Defendant cites the case of Hartell v. Tilghman, 99 U. S. 547, in support of its position, but I do not think it is in point. In that case it was conceded that the parties, who were citizens of the same state, entered into a parol license, and defendant operated under it for some months. Complainant then undertook to rescind the license and sue for infringement, because defendant would not sign a written license, which complainant insisted, but defendant denied, was a part of the parol license. The court held that, under the circumstances of the case, the license could not be rescinded in that manner, and that there was still a subsisting license which must govern the rights of the parties, the subject-matter of which was not cognizable in a federal court. The question of infringement was not involved in that case. The question which must control is: Was the license of November 7, 1879, assignable, or was it personal to George Esterly & Son? Upon careful examination I do not find any words that carry power to assign this license; nowhere do the words "heirs," or "successors," or "assigns," or words of similar import, appear. It is well established that a license by a patentee is personal to the licensee, and not transferable to another, unless it contains words which show that it was intended to be assigned. I think the absence of any words of assignability in this license shows an intent to make it run to George Esterly & Son alone, as clearly as if words of nonassignability had been incorporated therein. I am therefore of the opinion that the license of November 7, 1879, was personal to George Esterly & Son, and did not carry with it the power to assign or transmit any rights under the same to this defendant, and the motion to dismiss is denied.

Again, the right of the complainant to an injunction, as the case now stands, would seem clear; but there are some equitable considerations which influence me to relieve the defendant from the strict and rigid application of the rule in granting preliminary injunctions. The suit can be brought to final hearing at the March term at Minneapolis, and the defendant's counsel suggests that to that end

he will expedite the cause. The defendant has as yet adduced no testimony, and may possibly change the status of the case; besides, adequate protection can be afforded by an indemnity bond. I shall therefore enter an order that a preliminary injunction issue, unless the defendant within 10 days gives a bond in the sum of $25,000, with sureties to be approved, to pay all and any costs and damages that may be awarded the complainant for the alleged infringement as charged in the bill of complaint, with leave to the complainant, if bond is filed, to renew the motion for an injunction at the March, 1894, term of the court at Minneapolis, Minn.

TEXAS & P. RY. CO. v. PATTON.

(Circuit Court of Appeals, Fifth Circuit. April 10, 1894.)

No. 204.

1. APPEAL—REVIEW—EVIDENCE—NEGLIGENCE—EXCEPTIONS.
Though, in an action for negligence, defendant's request to charge that plaintiff was guilty of contributory negligence was properly refused, yet where the exception to such charge brings up all the evidence on writ of error, and it appears on the face of the record that there was no evidence of negligence on defendant's part, judgment against him will be reversed, notwithstanding he failed to ask the trial court for a peremptory instruction upon the whole evidence. Toulmin, District Judge, dissenting.

2. MASTER AND SERVANT—NEGLIGENCE—EVIDENCE—MACHINERY.
While a locomotive fireman was descending from a moving locomotive in a careful and proper manner, the step turned, owing to its being loose, and he was thrown to the ground and injured. The locomotive had just come in from a run, during which the step had been safely used several times. The fireman himself had aided in securing it properly two days before, and there was nothing to show that any one had tampered with it, or that it had been accidentally injured or displaced, but immediately after the accident its fastenings were found to be loose. *Held*, that there was nothing to show negligence on the part of the railroad company.

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

Action by E. M. Patton against the Texas & Pacific Railway Company for personal injuries, in which plaintiff had judgment, and defendant brings error.

T. J. Freeman and Edwards & Edwards, for plaintiff in error.
Millard Patterson, for defendant in error.

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

McCORMICK, Circuit Judge. It appears from the bill of exceptions in this case that the following facts were established by the testimony introduced, to wit:

First. The plaintiff, E. M. Patton, was in the employ of the defendant as fireman on a passenger engine at the time; and for some time before the accident his regular work was as a fireman of engine No. 90, which hauls a passenger train from the city of El Paso to Toyah, Tex., a distance of 196 miles, leaving El Paso at about 2:30

p. m., arriving at Toyah about 11:30 p. m., and remaining in Toyah the balance of the night, and all the next day, until about 2 a. m. the morning of the second day, when the engine would return from Toyah to El Paso, hauling a passenger train, arriving in El Paso about 10:30 a. m. on the same day, and again leaving El Paso for Toyah at 2:30 p. m. the next day. The engineer who ran said engine was named A. Steiner.

Second. That it was the duty of the firemen of passenger engines in the employ of defendant to keep the cab of the engine clean, and to clean all that portion of the engine above the running board, to keep the oil cans and lubricators filled with oil, and to generally obey orders of the engineer when the train was running.

Third. That the defendant had at El Paso a roundhouse and repairing shops, and a machinist to inspect and repair the engines, and also had at Toyah a roundhouse, and a machinist to inspect and repair its engines, and that engines coming into each place were inspected and repaired before going out again.

Fourth. When defendant's passenger engines arrived at El Paso, including the engine on which plaintiff worked, the engineer and fireman would get off, and leave the engine attached to the train at the depot, and the engine would then be taken charge of by the yardmen, and an employe called the "hostler" would detach the engine from the train, and take the same down into the yard to coal it, sand it, and do such other things as were necessary, except repair it, and then place the same in the roundhouse, where it would be cleaned by the servants other than the fireman in all its parts beneath the running board, and inspected by the machinist and repaired. The fireman would have ample time after the engine had been placed in the roundhouse to clean out the cab, wipe off his part of the engine and fill his oil cans and lubricators. Then the engine would be taken from the roundhouse, and attached to the train, by the yardman or hostler, where the fireman and engineer would get on the train again to begin their trip. Plaintiff knew all this.

Fifth. There was no rule of the company that prohibited the fireman from getting on the engine for the purpose of filling his oil cans, etc., before it was placed in the roundhouse, nor was there any rule that specified a particular time when he should do this work, the only rule being that he was to have his engine in proper condition to go out when its turn came. There was a rule of the company that the engineer and fireman of a passenger train should not be called for duty within, after they had come in on a trip. That the fireman could select any time that was most convenient for him to clean the cab, fill the oil cans, etc., and that while the engine was hot, and the oil warm, it was more convenient, and could be done in less time than after the engine was cooled off.

Sixth. That passenger engine No. 90 has two steps on the right side. One of these steps is a loop fastened under the tender, and a person getting off the engine backwards would have this step on the left. The other step, which would be on his right, was attached to the rear part of the engine. This latter step, the proof shows,

was loose. The gangway of the engine is where the tender and engine come together, and there is an opening on each side of the engine. These steps were used to get on and off the engine. The step which is claimed in this case to be defective is the step which is attached to the engine. This step consists of a shovel-shaped piece of iron, standing directly out from the engine, firmly fixed to a rod of iron about an inch in diameter, and about 18 inches long, which rod passes up through the iron casting at rear of engine, about 6 or 8 inches thick. A shoulder to this rod fits underneath the casting, and the part passing through above has threads on the upper end, upon which the nut is screwed firmly down on the casting, fastening the rod in the casting so that it will not move. This nut is about 2 inches square, and the thread on the rod extends 5 or 6 inches,—thus making the rod extend above the nut, when the nut is properly screwed down,—and covering this extension above the nut is a tubular piece of brass arranged for ornament, which hides from view that portion of the nut immediately around the threads of the step bar. The step affixed to this bar is about 12 or 14 inches above the track, and the one affixed to the tender is about 6 inches higher.

Seventh. On the 29th of November it was necessary to put a spring on the right side of the engine, and in order to do so this step had to be removed, in order to place a jackscrew under the rear of the engine; and in doing this the rod holding the step was taken out of the casting by unscrewing the nut described in paragraph 6, and the step was replaced on that morning at El Paso, before the engine started on its run to Toyah. In replacing the step the plaintiff assisted the machinist of defendant at El Paso (Rossiter) in tightening up the nut; and the same day the engine left El Paso, taking out a passenger train at the usual hour, 2:30 p. m., and made the run to Toyah. The machinist and plaintiff testified that the nut was properly screwed on at El Paso, and would not have become loose in a trip from El Paso to Toyah and return.

Eighth. That at Toyah some repairs were made to the engine. Alex Mitchell, who was foreman of the shops and yards at Toyah, undertook to make these repairs himself. He had a couple of Chinamen assistants, who placed two jackscrews, one on each side of the front of the engine, and elevated the front. The Chinamen brought another jackscrew and put it down at the rear of the engine, near to this step above described, on the right side of engine. That to put the latter jackscrews in place, to elevate the rear of the engine, it was necessary to remove this step. Plaintiff testified he saw a jackscrew on the ground near this step. Alex Mitchell, the foreman for defendant, testified: That he told the Chinamen to get the jackscrews, and under his direction they placed two jackscrews, one on each side of the front of the engine, but, without any instructions from him, they brought and put another jackscrew on the ground, near the step. That he was out of the roundhouse 5 or 10 minutes while the Chinamen were there, and that this jackscrew near the step was not placed under the engine, in position to elevate it, and that the step was not

moved for the purpose of putting the jackscrew there, and that the nut on the step was not moved while the engine was at Toyah on that trip. That Mr. Young was the machinist at Toyah at that time, and that this was Sunday, the 30th of November, 1892; and he (Mitchell), believing that he was competent to do so, undertook to make the repairs needed on the engine himself, and jacked the front part of the engine up for the purpose of raising the pilot, and, finding that he could not accomplish the task of raising the pilot with the force at hand, by himself, he did not do the work necessary to raise the pilot or cowcatcher. That the report of the engineer in the book at Toyah provided for that purpose, reporting that repairs were necessary on his engine, on the 29th day of November, 1892, was: "Change water. Grind in blower. Put gasket in front joint of blower pipe. Raise the pilot." That "change water" means to let the water that engine came in on out, and put fresh water in. "Grind in blower" is to arrange blower so that the smoke will pass out at the stack, instead of coming out at the cab. Witness did this, which is a very small job. "Put gasket in front joint of blower pipe" was a very light job, and was done by witness. That to "raise the pilot" required witness to jack up the engine, and put gibs under the spring ends of the engine truck. The engine truck is near the front end of the engine. Did not do this, because it was a pretty big job, and he was doing the work by himself, with only the help of two Chinamen; and that the engine was all right to run as well as if it had been done, except the pilot was a little low, but it did not interfere with the safe running of the engine.

Ninth. The engine left Toyah at the usual hour of 2 a. m. on the morning of the 1st of December, 1892, and arrived at the usual hour at El Paso, 10:30 a. m.; and plaintiff and engineer got off the engine several times, while it was standing, on the right side, and neither of them noticed anything the matter with the step. After they arrived in El Paso, they both left the engine attached to the train at the depot, getting off the engine on this right side, using this step, and went to their homes, and neither noticed anything wrong with the step.

Tenth. A short time after the engine arrived in El Paso, the hostler, or a man whose duty it is to take it, coal it, etc., and put it in the roundhouse, took charge of it, detached it from the train, ran it into the yard, and set it on a transfer track, and left it there an hour or so; then took it to the coal cars, and left it there for the coal heavers to coal up, and it remained there an hour or more. The coal is placed in the tender, back of the engine, and piled up pretty high; and some of the pieces are a foot or 18 inches long, and 6 or 8 inches wide, and very heavy, and one of them, falling off the gangway, might strike the step. When the hostler went, later, to get the engine from the coal yards, the plaintiff was on the engine. The hostler ran the engine from where it was coaled, and was moving it to the proper position, near the sandhouse, to have the fire cleaned out. It was something near an hour from the time the hostler started to leave the coal yards before he got

to the sandhouse, as he was detained by switches being closed. The plaintiff was on the engine during this time, cleaning up and filling his cans and lubricators, as the engine was nearing the place where the fire would be cleaned out; and two firemen cleaners were on the engine also,—one of them in the gangway, and the other on the front of the engine. The engine was backing, and the fire cleaner on the engine was in the act of showing the hostler, by making a signal, where to stop the engine, and to clean out the fire. The engine at this time was moving very slowly,—not more than three or four miles an hour,—and the plaintiff had gotten off the gangway, and was standing on the steps, with his face to the engine, and his left foot on the tender, and his right foot on the step which is heretofore described as attached by a rod to the rear of the engine; and the plaintiff, desiring to get out of the way of the fire cleaners as the engine passed the sandhouse, and for the purpose of stopping there, and waiting until the fire was cleaned out, stepped off the engine, in a careful and proper manner,—that is, detaching his left hand and foot, and stepping down with his left foot, which was in the direction the engine was backing. The pressure of his right foot turned the rod to which the step was attached, in such a manner as to throw the step around, close to the rear driving wheel of the engine; and plaintiff's right foot slipped off the step, so that his right foot fell immediately under the driving wheel, and the engine continued to back. The wheel ran over a portion of his foot, and crushed it so that amputation became necessary.

Eleventh. Plaintiff knew that there were servants and employes of the defendant for the purpose of inspecting and repairing his engine, and that the opportunity given to do this was when the engine was placed in the roundhouse at El Paso, and that at the time he fell and was injured the engine was not yet placed in the roundhouse, where it would be inspected and repaired.

Twelfth. The cause of the turning of the step when plaintiff fell was on account of the nut heretofore described, on the top of the casting, not being taut, but it had become loose, leaving the rod to which the step was attached so it could be easily turned. It was the duty of the engineer who operates an engine to inspect and report all defects in repairs necessary on his engine, in a book kept for that purpose at each place, at the end of his run,—in this instance, at El Paso and at Toyah,—and on the day that the plaintiff was injured the engineer entered the following report at El Paso a few minutes after they arrived: "Pilot raising, and wash out engine" (that is, the pilot needed raising, and the engine should be washed out),—and he did not discover or report that the said step was loose, if it was loose at the time.

Thirteenth. The defendant had proper and competent inspectors to inspect and repair engines in the yards at El Paso and Toyah, in addition to the inspections made by the engineers, and that at the time plaintiff was hurt the yard inspectors and mechanics had had no opportunity, under the routine and custom as to handling, coaling, sanding, cleaning, inspecting, and repairing engines

as they arrived in the yards, to inspect or repair the engine upon which he was injured, and this plaintiff well knew.

Fourteenth. Plaintiff's business in November and December, 1892, was fireman of a locomotive engine, and he had been engaged in that business about seven years.

Fifteenth. Plaintiff did not know that said step on the engine was in a loose or defective condition at the time he stepped down on the same and was injured. That the manner in which the plaintiff got off the engine, backwards, was a careful and prudent manner, he alighted in a careful and prudent manner, in the usual manner to alight from an engine, whether in motion or standing still, and that, if said step had been in repair, there was no danger in the manner in which plaintiff alighted from the engine.

Sixteenth. Plaintiff testified that it was the custom of the firemen to go to their engines in the yard before they were put in the roundhouse, and do their work of cleaning such part of the engine as it was their duty to clean, and clean out and fill the lubricators and fill the oil cans; but, on being asked, he could not mention the name of any other fireman employed on defendant's passenger engines who did this, besides himself. He stated that his reason for doing this work on the engine at that time was that the weather was getting cool, and he had to strain his oil, and he would set his cans out in the gangway, near the engine, so that the warmth would make it easier and quicker work to handle the oil properly, whereas, if he had waited until the engine was in the roundhouse, the oil would have been somewhat chilled, and more difficult to handle, and that for some time previous he had been going on the engine and doing this work while the engine was in the yard, and before it had been placed in the roundhouse.

Seventeenth. Mr. Wheeler, who is superintendent of terminal and foreman of the shops in El Paso, for defendant, the hostler Taylor, and the machinist Rossiter, employes in the defendant's yard and shops in El Paso, testified that plaintiff was the only fireman of a passenger engine that went upon his engine in the yard in El Paso to do his work before his engine had been placed in the roundhouse, and that they had known him to do so three or four times before the accident.

Eighteenth. All the witnesses except the witness A. C. Wheeler, superintendent and foreman of defendant, testified that the nut above described, used to tighten the step, would not probably work loose, in making the trip from El Paso to Toyah and back, by the ordinary jar and running of the engine; that it might come loose by the step having struck against something. Wheeler testified that he was a competent machinist, having had experience of 20 years with engines; that the nut might work loose on said trip, but it was impossible to tell whether it would or not. Plaintiff testified that the step struck nothing in running that trip from El Paso to Toyah and return. It was proven that the nut and threads of the step rod were in good condition, and had not worked loose since the accident to plaintiff.

Nineteenth. The above and foregoing being a statement of all facts in evidence, the defendant, before the jury retired under the charge of the court, requested the court to give the jury the following instructions:

"If plaintiff was a fireman upon one of the defendant's engines pulling passenger trains over the track into El Paso, where defendant had repair shops, and competent persons to repair its engines, and plaintiff knew of this, and on the day that he was injured the engine on which he was employed as fireman arrived in El Paso apparently in good condition, and the plaintiff left said engine, and it was taken in charge by servants of the defendant whose duty it was to inspect and repair it, and he knew he would have ample time afforded him after the same was inspected and repaired to perform his duties on said engine, in cleaning the same, and have the appliances and implements pertaining to said engine in his immediate charge in proper condition for his outgoing trip on said engine, it was his duty to give servants of defendant opportunity to inspect and repair the engine and appliances before going on said engine, while it was in motion; and if he did not do this, but went on said engine knowing that the same had not yet been inspected and repaired, for the purpose of performing his duties in cleaning and putting in proper condition the lubricators, oil cans, and other apparatus which it was his duty to clean and prepare, and in doing so attempted to alight from said engine while it was in motion, when such alighting was not necessary in the performance of such duties, and the step of the engine was in such defective condition that it was unsafe for use in getting off the engine while in motion, and in so alighting he was injured by reason of such unsafe step, he would be guilty of contributory negligence, and not entitled to recover any damages from defendant, even if, in alighting, he did so in such a careful manner as a prudent man would exercise if the step were unsafe."

These special instructions the court refused, and thereupon charged the jury as follows:

"The plaintiff brings suit against the defendant to recover damages for personal injuries, claiming, briefly and in effect, that while engaged in the service of the defendant, and in the performance of his usual and ordinary duties, as fireman on passenger engine No. 90, he was seriously injured because of the negligence of defendant in failing to keep the step of the engine in suitable condition and proper repair for use by its employes. Recovery is sought by plaintiff on the ground of alleged negligence on the part of defendant, and, to entitle him to recover, such negligence must be proved as alleged. The general principles of law touching the duties of individuals and corporations in supplying machinery or mechanical appliances for their employes are thus stated by the supreme court: 'Neither individuals nor corporations are bound, as employers, to insure the absolute safety of the machinery or mechanical appliances which they provide for the use of their employes. Nor are they bound to supply the best and safest or newest of those appliances for the purpose of securing the safety of those who are thus employed. They are, however, bound to use all reasonable care and prudence for the safety of those in their service, by providing them with machinery reasonably safe and suitable for the use of the latter. If the employer or master fails in his duty of precaution and care, he is responsible for any injury which may happen through defect of machinery which was, or ought to have been, known to him, and was unknown to the employe or servant. But if the employe knew of the defect in the machinery from which the injury happened, and yet remained in the service, and continued to use the machinery, without giving any notice thereof to the employer, he must be deemed to have assumed the risk of all danger reasonably to be apprehended from such use, and is entitled to no recovery. And, further, if the employe himself has been wanting in such reasonable care and prudence as would have prevented the happening of the accident, he is guilty of contributory negligence, and the employer is thereby absolved from responsibility for the injury, although it was occasioned by the defect of the machinery, through the negligence of the employer.' Railroad

Co. v. McDade, 135 U. S. 570, 10 Sup. Ct. 1044. It is only the duty of a railroad corporation to use all reasonable care and prudence for the safety of employes, by providing them with machinery reasonably safe and suitable; but it is their further duty to use such reasonable care and prudence in seeing that the machinery furnished their employes is kept in good order and repair. It is contended by the defendant in this case that the defendant had in its employment at El Paso and Toyah competent persons to inspect and repair its engines whenever it became necessary to do so, and that in such respect the defendant performed its full duty to all persons in its employment, and that if there was any negligence in the performance of their duties by machinists or mechanics, in inspecting and repairing the engine, it was the negligence of a fellow servant, for which the defendant would not be liable. This contention on the part of defendant is not supported by the best authorities. The duty of keeping in proper repair the machinery and other appliances furnished to servants by the defendant cannot be delegated to another servant, so as to exempt the defendant itself from liability caused by the negligent omission of the servant to whom the duty was delegated. The mere fact that the defendant had in its employ a competent car inspector, mechanic, and machinist would not itself exonerate it from liability if the engine step was defective in construction, or not in proper repair, for he was a representative of the defendant, and not a fellow servant of plaintiff, in the sense contended by defendant's counsel; and if he failed to exercise due and reasonable care in reference to the inspection of the engine, including the step, and keeping the same in proper repair, then for any negligence, or want of reasonable and proper care, on his part, in that respect, from which injury resulted to plaintiff, the defendant would be liable. In this immediate connection, your attention is directed to another principle of law touching the duty of plaintiff: He was bound to exercise reasonable and ordinary care to avoid injuries to himself; and if the engine step, at the time he was hurt, was defective, and he knew—or might have known, by ordinary care and attention—its condition, and then exposed himself to danger; in other words, using the language of the supreme court, 'If he did not use his senses as men generally use theirs, to keep from harm,'—he cannot complain of the injury from which he suffered. But the principle of the law as to the duty of plaintiff under such circumstances is subject to the qualification that he was not required to inspect the engine to ascertain whether or not there were latent or hidden imperfections or defects in or about it, if there were any defects at all, which rendered its use more hazardous. That was a duty of defendant. The general principle of the law being that, 'unless the defects are such as to be obvious—open to common observation—to any one giving attention to the duties of the occasion, the employe has the right to assume that the employer has performed his duty with respect to the implements and machinery furnished. If the defendant performed its duty by using all reasonable care and prudence for the plaintiff's safety, by providing him with machinery reasonably safe and suitable for his use, and if, further, the defendant had in its employment competent inspectors and machinists, whose duty it was to inspect engine No. 90, and make thereon all necessary repairs, and if such inspectors and machinists used reasonable care and diligence in the performance of their duties, and made all such repairs as they could have discovered to be necessary by the exercise of reasonable care and diligence, then for any injuries received by the plaintiff on account of defects in the appliances which had not been observed by the inspectors and machinists the defendant would not be liable, and the plaintiff, in that event, could not recover. Bearing in mind the foregoing directions, you will inquire whether the step of the engine, at the time the plaintiff was hurt, was in good order and repair. If it was, then it would be your duty to return a verdict in favor of the defendant. If, however, the engine step (and I mean, by the use of the word 'step,' to include the rod or shaft, the nut, and the flat piece of metal attached to the lower end of the rod) was defective and unsafe, and the defendant knew of its defective and unsafe condition, or could have discovered it by the exercise of reasonable care and diligence, and the plaintiff was ignorant of the defect, and could not have ascertained it by the exercise of ordinary care and caution, and if the injuries to the plaintiff resulted from such unsafe and defective condition of the step,—that is to say, if, as claimed

by the plaintiff, the step turned when he attempted to descend from the engine. —and if, in consequence thereof, without negligence on his part, he was injured, then you will return a verdict in favor of the plaintiff for such amount of actual damages as will compensate him for the injuries he has sustained. As before stated to you, the law requires the plaintiff to take due and proper care of himself; and if, at the time of the accident, he failed to exercise that degree of care and caution which a person of ordinary prudence would have exercised under similar circumstances of the situation, and his injuries resulted from such want of care and caution, then he would not be entitled to recover; and your verdict, in that event, should be for the defendant. The question of negligence of plaintiff, on the one hand, and of defendant, its agents and servants, on the other, is a question of fact, which is submitted solely to your determination, and one which you will determine for yourselves from a consideration of all the facts and circumstances in evidence."

And to said charge of the court, given the jury, the defendant, in open court, then and there excepted, because said charge failed to instruct the jury that plaintiff would be guilty of contributory negligence in going upon and alighting from said engine, while it was in motion, until after the proper servants of the defendant had had an opportunity to repair the same after it arrived in the yards at El Paso, as in defendant's special charge above requested; and the court then and there overruled said exceptions to the charge.

The only error assigned, and relied on to reverse the judgment, is that the court erred in refusing to give the charge requested by the defendant, as shown above. The request for that charge, in effect, asked the court to direct a verdict for the defendant. The hypothesis as to the proof made in the requested charge only embraced matters of fact, about which there was no dispute, as most clearly appears by the narrative of the proof in the bill of exceptions, above set out. The reason given for this charge in the request is that the plaintiff was guilty of contributory negligence. This may not be technically correct, as contributory negligence is generally defined where a definition is attempted in adjudged cases. In Sullivan v. Mining Co., the trial judge directed a verdict for the plaintiff, giving a reason for so doing which was held to be unsound; but the judgment was affirmed because the direction was right, though technically erroneous, as expressed. 143 U. S. 431, 12 Sup. Ct. 555. In Kirby v. Estill the supreme court of Texas, in reference to a similar question presented to them, say:

"While the court may not have erred in refusing to give the several special charges, in the form they were requested, we think they were sufficient to call the attention of the court to the important matter embraced in them. On the case made by the evidence, we think the court should have instructed the jury to return a verdict for the plaintiff." 75 Tex. 484, 12 S. W. 807.

The charge to the effect that the plaintiff was "not entitled to recover any damages from defendant" may have been a proper charge to give, although the plaintiff was not shown to have been guilty of contributory negligence. Clearly, if there was no proof tending to show negligence on the part of the defendant, the jury should have been instructed that the plaintiff could not recover. In two cases decided by this court, at the present term, (Southern Pac. Co. v. Burke, 60 Fed. 704, and Railroad Co. v. Thomas, Id. 379), we

stated at some length our views as to when the question of negligence is one of law for the court. In the case of Steamship Co. v. Merchant, 133 U. S. 375, 10 Sup. Ct. 397, the supreme court reversed the judgment of the lower court because the trial judge refused to direct a verdict for the defendant when the only negligence the evidence tended to prove was that of a fellow servant. In Armour v. Hahn, 111 U. S. 313, 4 Sup. Ct. 433, the judgment of the circuit court was reversed on the ground that the demurrers to the evidence should have been sustained, as there was no evidence tending to prove any negligence on the part of the master.

In the case now before us, the only defect in the machinery, that contributed to the injury, suggested by the pleadings or by the proof, was that the step on the right-hand side of the engine, which plaintiff used in carefully alighting from the engine while in motion, backing slowly at the rate of not more than three or four miles an hour, was not tightly fastened. The step was of the customary and proper kind, in no other manner defective. It had been taken off the last time the engine was in the El Paso yards, two days before this injury. It had been put on again, and well fastened, before the engine was taken out. The plaintiff assisted Rossiter in tightening up the nut, and both Rossiter and plaintiff testify that the nut was properly screwed on at El Paso, and would not have become loose in a trip from El Paso to Toyah and return. There is direct proof that the nut on the step was not moved while the engine was at Toyah on that trip. Plaintiff testified that the step struck nothing in running that trip from El Paso to Toyah and return. It was proven that the nut and threads of the step rod were in good condition, and had not worked loose since the accident to plaintiff. The day of the accident the engine left Toyah at the usual hour (2 a. m.), and arrived at El Paso at the usual hour (10:30 a. m.); and plaintiff and the engineer got off the engine, on the right side, several times, while it was standing, and neither of them noticed anything the matter with the step. After they arrived in El Paso they both left the engine attached to the train at the depot, getting off the engine, on this right side, using this step; and neither of them noticed anything wrong with the step. There is no evidence tending to prove that up to this instant the step was not all right. On the contrary, all the evidence on that subject tends strongly to prove that up to this instant the stop was all right. It may not have been the duty of the fireman to inspect this step, which he was constantly using, on the run from El Paso to Toyah and return; but it was the duty of his engineer, and they were fellow servants. Railroad Co. v. Baugh, 149 U. S. 368, 13 Sup. Ct. 914. The engineer did not report or discover that the step was out of order. If in fact it was so at this instant, or previously, after the plaintiff had assisted the machinist in fixing it all right in the shop at El Paso, immediately before beginning the run to Toyah, how could the master know it, or have discovered it? The engineer was a competent, skillful, careful servant. The plaintiff had been engaged as fireman of a locomotive engine for seven years; was in the prime of life (34 years of

age); was in good health; had not missed a day's work for two or three years. It is fair to presume that he was as conversant with all the features of the engine as a competent engineer. His attention had been specially directed to this step by his assisting the machinist to fix it, before starting on the last run from El Paso. The fact that he saw a jackscrew on the ground near this step while the engine was at Toyah does not tend to prove that the step was loose at that time, or had been moved, but might have served further to call his attention to the step, as he must have known the jackscrew could not well have been used on that part of the engine without first taking off the step. And yet, though using this step several times in alighting from the engine on the run from Toyah to El Paso, and alighting from the engine by it when he left the engine at the passenger depot in El Paso, he did not discover any defect in it. The engine was to wait at El Paso 28 hours before being called to go out on its next regular run. The fireman was not to be called for duty after coming in on one run until called to go out on the next run. The fireman had certain work to do about the engine before it started on its next trip. There was no specified time within the 28 hours in which this work should be done. He went home. The engine was taken charge of by the hostler, with assistants; detached from the train; run into the yard; set on a transfer track; left there an hour or so; then taken to the coal cars, where it remained an hour or more. Here, the plaintiff mounted the engine again, and was engaged in doing his proper work, preparing it for its next run. After coaling it, the hostler ran the engine from where it was coaled, and was moving it to its proper position, near the sandhouse, to have the fire cleaned out. It was nearly an hour from the time the hostler started to leave the coal yards till he got to this point near the sandhouse, as he was detained by switches being closed. During this time the plaintiff was engaged at his appropriate work, and had nearly completed it as the engine was nearing the place where the fire would be cleaned out. Before the engine came to a standstill, while it was moving slowly,—at a rate of not more than three or four miles an hour,—the plaintiff, in a careful manner, alighted from it, to make more room for firemen who were on it, to clean out the fire. At this instant the step proved to be loose. On that account the plaintiff lost his footing, the engine, backing, passed over his foot, and he was painfully hurt and permanently disabled. If this did not result, proximately, partly from his unnecessarily leaving the engine while in motion, did it not result from the natural hazards of his employment? By what reasonable or practicable degree of care, beyond the care that was used, could the defendant have guarded against this accident? It seems to us that to state the case is sufficient to show that the defendant had not been negligent, and could not justly be held liable. The exception to the charge of the court and to the refusal of the requested charge having served to bring up in the bill of exceptions a full statement of all the evidence given on the trial, it appears from the face of the record that there was no evidence to sustain the judgment of the circuit court. It is thus manifestly erroneous, and must

be reversed. We therefore order that the judgment of the circuit court is reversed, and the case remanded for further proceedings in conformity with this opinion.

TOULMIN, District Judge (dissenting). I am unable to concur in the opinion and judgment of the court in this case, and will state, as briefly as I can, the grounds of my dissent:

The assignments of error presented by the record are that:

"First. The trial court erred in refusing to give the jury defendant's special instructions as follows, to wit: 'If plaintiff was a fireman upon one of defendant's engines, engaged in pulling passenger trains over the track into El Paso, where the defendant had repair shops, and competent persons to repair its engines, and plaintiff knew this, and on that day that he was injured the engine on which he was employed as fireman arrived in El Paso in apparently good condition, and plaintiff left said engine, and it was taken charge by servants of the defendant, whose duty it was to inspect and repair it, and he knew he would have ample opportunity afforded him, after the same was inspected and repaired, to perform his duties upon said engine, in his cleaning the same, and having the appliances and implements pertaining to said engine in his immediate charge, in proper condition for his outgoing trip on said engine, it was his duty to give servants of the defendant opportunity to inspect and repair the engine and appliances before going on said engine while it was in motion; and if he did not do this, but went on the engine, knowing the same had not yet been inspected and repaired, for the purpose of performing his duties in cleaning and putting in proper condition the lubricators, oil cans, and other apparatus which it was his duty to clean and prepare, and in doing so attempted to alight from said engine while it was in motion, when such alighting was not necessary in the performance of such duties, and the step of the engine was in such defective condition that it was unsafe for use in getting off of the engine while in motion, and in so alighting he was injured by reason of unsafe step, he would be guilty of contributory negligence, and not entitled to recover any damages from defendant, even if, in alighting, he did so in such a manner as a prudent man would exercise if the step was safe."

And, second:

"The trial court erred in not granting defendant's motion for a new trial, and setting aside the verdict and granting a new trial, as, under the evidence, the verdict of the jury is greatly excessive."

As to the second assignment of errors, suffice it to say that it is not permitted for this court, sitting as a court of errors, in a case wherein damages have been fixed by the verdict of a jury, to take notice of an assignment of this character. Railroad Co. v. Fraloff, 100 U. S. 31; City of Lincoln v. Power, 14 Sup. Ct. 387, 151 U. S. 436. And in Holder v. U. S., 14 Sup. Ct. 10, the supreme court said, "It has also been settled by a long line of decisions of this court that the denial of a motion for a new trial cannot be assigned for error." The only assignment of error, then, presented for our consideration, and the only error urged or discussed by counsel for plaintiff in error, was the refusal of the trial court to give the charge hereinabove set out. The request for that charge was, in effect, asking the court to direct a verdict for the defendant on the ground that the plaintiff was guilty of contributory negligence. The evidence in reference to which this charge was requested, and on which it must have been based, is found

fully set out in the 5th, 10th, 15th, and 16th paragraphs of the opinion of the court.[1] In view of this evidence, it cannot be seriously contended that the facts recited in the charge constitute, as a matter of law, contributory negligence on the part of the defendant in error (the plaintiff below). It certainly cannot be said that this evidence would warrant no other conclusion than that he was guilty of negligence which contributed directly to his injury; and it cannot be fairly claimed that no uncertainty as to the existence of contributory negligence arises from this evidence, and that all fair-minded men would honestly draw the same conclusion from it. If it cannot, then the question of contributory negligence was one of fact, and should have been submitted to the jury, as was done by the trial court. In Dunlap v. Railroad Co., 130 U. S. 652, 9 Sup. Ct. 647, the supreme court held that it was error not to submit the question of contributory negligence to the jury, when the conclusion did not follow, as a matter of law, that no recovery could be had, upon any view which could be properly taken of the evidence tending to establish such negligence. And in Railroad Co. v. Powers, 149 U. S. 44, 13 Sup. Ct. 748, the supreme court said that where there was uncertainty as to the existence of contributory negligence the question is not one of law, but of fact, to be settled by a jury; and this whether the uncertainty arises from a conflict in the testimony, or because, the facts being undisputed, fair-minded men will honestly draw different conclusions from them. Gardner v. Railroad Co., 14 Sup. Ct. 140, and authorities therein cited. The court, in its opinion, says that "the only error assigned and relied on to reverse the judgment is that the court erred in refusing to give the charge requested by the defendant, as shown above." I do not understand the court to hold that such refusal was error. It intimates that it was not error. But the court finds that the defendant had not been negligent, and could not justly be held liable, and says that, as the bill of exceptions presents a full statement of all the evidence given on trial, it appears therefrom that there was no evidence to sustain the judgment, and it must therefore be reversed. If by this statement the court means to say that the verdict of the jury was not warranted by the evidence, the answer is that the rule is well established that this court, sitting as a court of error, has no authority to set aside the verdict of the jury, even if it does not appear to be justified by the evidence. Railroad Co. v. Fraloff, supra; City of Lincoln v. Power, supra; Shauer v. Alterton, 14 Sup. Ct. 442. If, however, the meaning is that the trial court should have instructed the jury to find for the defendant, then the answer is that the court was not requested to give such instruction. If the defendant wished to test, by writ of error in this court, the sufficiency of the evidence to sustain a verdict for the plaintiff, it should have requested the trial court, at the close of the evidence, to peremptorily instruct the jury to return a verdict for it. Insurance Co. v. Unsell, 144 U. S. 439, 12 Sup. Ct. 671; Village of Alexandria v. Stabler, 1 C. C. A. 616,

[1] See ante, pages 260, 262–264.

50 Fed. 689. It did not do this, and the sufficiency of the evidence cannot be considered here. "In an action at law, brought here by writ of error for review, this is a court for the correction of the errors of the court below, solely. It is not a court for the correction of the mistakes of the jury, or for the retrial of issues of fact which they have determined with the consent of the litigants. In order to obtain a review of any question by writ of error in this court, it must appear that the court below decided that very question, for there can be no review of that which has never been passed upon." "The court below was not requested to decide, and did not determine, whether or not there was sufficient evidence to warrant a verdict before it was rendered; and hence it could not have committed any error in this regard, and there is nothing here for us to consider." City of Lincoln v. Sun Vapor Street-Light Co., 8 C. C. A. 253, 59 Fed. 761; Insurance Co. v. Unsell, supra. In the case last cited it was held that "if, in a case where the evidence warranted a request for a peremptory instruction to find for the defendant, no request for such instruction was made, it cannot be made a ground of reversal that the issues of fact were submitted to the jury." In the opinion the court said: "The defendant assumed that it [the case] would be submitted to the jury, and asked instructions touching the several points on which it relied. It did not ask a peremptory instruction for a verdict in its behalf. It cannot, therefore, be a ground of reversal that the issues of fact were submitted to the jury." So with the case here. The defendant assumed that the case would be submitted to the jury, and asked instructions touching the point—plaintiff's contributory negligence—on which it seemed to rely. It did not ask a peremptory instruction for a verdict in its behalf. It cannot, therefore, be a ground of reversal that the issues of fact were submitted to the jury. If there was no error in the refusal of the court to give the special instruction, on the point of contributory negligence, asked by the defendant, there is, in my opinion, no ground of reversal presented on the record. In the general charge of the court the jury were fully and properly instructed in respect to every aspect of the case. The defendant seems to have been satisfied with the charge given. It took no exception to it, and does not complain here of it. This court falls into an error when, in its opinion, it speaks of the exception to the charge of the court. The record shows no exception to the charge given, but the exception was to the omission of the court to charge that the plaintiff was guilty of contributory negligence. If the exception was to the omission of the court to give the peremptory charge in favor of the defendant, no error could be assigned on it. The rule is that it is not error for the court to omit to charge the jury on a particular point, or in a particular way, unless asked to do so at the trial. A party cannot, in a court of error, avail himself of an omission which he made no effort to have supplied at the time. The not giving an instruction may be excepted to, if it was requested, but not otherwise. This has been the rule in the federal courts since the early case of Smith v. Carrington, 4 Cranch, 62, down to the case of Railway Co. v. Volk (decided Jan. 3, 1894) 14 Sup. Ct. 239. "A

request for instructions, being necessary to entitle the excepting party to avail himself of an omission to instruct, cannot be presumed, but must affirmatively appear in the bill of exceptions." Railway Co. v. Volk, supra, and authorities; Mayer v. Duke, 72 Tex. 445, 10 S. W. 565; Odom v. Woodward (Tex. Sup.) 11 S. W. 925. The only exception shown by the record, and on which error is assigned, is the refusal of the court to give the special charge requested by the defendant, to the effect that the plaintiff was guilty of contributory negligence, and therefore could not recover. There was no error in refusal. For the reasons stated, I dissent.

MURRAY v. AMERICAN SURETY CO. OF NEW YORK.

(Circuit Court, S. D. California. April 23, 1894.)

No. 557.

BANK RECEIVERS—APPOINTMENT—STATE STATUTES.

The California statute creating a board of bank commissioners (St. 1877–78, p. 740, as amended by St. 1887, p. 90), and authorizing (section 11) the attorney general, on their request, to commence suit to enjoin any bank which is violating its charter from transacting further business, and cause its affairs to be wound up under the direction of the commissioners, does not authorize the court, in such a proceeding, to appoint a receiver; and such an appointment is void, and gives the person named no power to maintain a suit to collect the bank's assets. 59 Fed. 345, reaffirmed.

This was an action by Eli H. Murray, as receiver of the California Savings Bank of San Diego, against the American Surety Company of New York, to recover damages for breach of conditions of certain bonds. A demurrer to the original complaint was heretofore sustained. 59 Fed. 345. Plaintiff thereafter filed an amended complaint, to which defendant also demurs.

Luce & McDonald, for plaintiff.
Allen & Flint, for defendant.

ROSS, District Judge. A demurrer to the original complaint having been sustained, on the ground that the appointment of the plaintiff as receiver of the California Savings Bank of San Diego was void, for which reason he could not maintain the suit, an amended complaint has been filed, to which the defendant has also filed a demurrer, again raising, among other questions, the right of the plaintiff to bring the suit. The amended, as well as the original, complaint shows that the plaintiff's right, if any, is grounded in a judgment of the superior court of San Diego county, Cal., rendered in an action brought by the attorney general of California, in the name of the people of the state, against the California Savings Bank of San Diego, a corporation organized and existing under its laws, by virtue of the provisions of section 11 of an act of California, creating a board of bank commissioners, of March 30, 1878, as amended by an act approved March 10, 1887 (St. 1877–78, p. 740; St. 1887, p. 90). As so amended, the section reads:

"Sec. 11. If such commissioners, on examination of the affairs of any corporation mentioned in this act shall find that any such corporation has been guilty

of violating its charter or law or the provisions of this act, or is conducting business in an unsafe manner, they shall, by an order addressed to the corporation so offending, direct discontinuance of such illegal and unsafe practices and a conformity with the requirements of its charter and of law under this act. And if such corporation shall refuse or neglect to comply with such order, or whenever it shall appear to said commissioners that it is unsafe for any such corporation as in this act mentioned to continue to transact business, they shall notify the attorney general of such fact, who, after examination, in his discretion may commence suit in the proper court against such corporation to enjoin and prohibit the transaction of any further business by such corporation, and upon the hearing of the case, if the judge of the court where the case is tried shall be of the opinion that it is unsafe for the parties interested or for such corporation to continue to transact business, and that such corporation or institution is insolvent, he shall issue the injunction applied for by said commissioners and attorney general, who shall cause said injunction to be served according to law. And said judge shall further direct said commissioners to take such proceedings against such corporation as may be decided upon by its creditors. If any corporation mentioned in this act which is now insolvent, or which may hereafter become insolvent or be thrown into liquidation by process of law or by the order or consent of its stockholders, directors, managing officers, managers, or creditors, the affairs of such corporation shall be closed, and the business thereof settled, within four years from the time it shall be declared to be insolvent or be thrown into liquidation, as the case may be, unless at the expiration of such time it shall obtain the consent in writing from a majority of the board of bank commissioners to continue in liquidation for a longer period. The bank commissioners shall, however, have no power to grant a continuance for such purpose for a longer period than one year at each time. Any corporation mentioned herein now in liquidation, or that may be hereafter thrown into liquidation, shall make semi-annual reports of the condition of its affairs to the bank commissioners in the same manner as the solvent banks mentioned in this act, and, in addition thereto, shall state the amount of dividends paid, debts collected, and the amount realized on property sold, if any, since the previous report. The bank commissioners shall have the power, and it is hereby made their duty, to examine the condition of every such corporation in liquidation in the same manner as in the case of solvent banks, and shall have a general supervisory control of any such corporation. They shall have the power to designate the number of officers and employees necessary to close up the business of any such corporation, and to fix the salaries of the same, and shall do all in their power to make such liquidation economical and as expeditious as the interests of the despositors and stockholders will admit. The bank commissioners are hereby empowered to examine into the affairs of all banks in process of liquidation at the time of the passage of this act. When any such bank shall have been for two years next preceding the passage of this act in process of liquidation, or when any such bank shall have been in liquidation for two years from the time it was declared insolvent or thrown into liquidation, the bank commissioners have the power to direct that the business of the bank shall be closed, and may designate a time when such closing shall be effected, and may limit the number of officers and employees, fix their salaries, and make such other orders as are necessary for the economical and expeditious administration of the affairs of the bank. If any officer or employee of any insolvent corporation mentioned in this act shall refuse to comply with the provisions of this section, or disregard or refuse to obey the directions of said bank commissioners given in accordance with the provisions of this act, such officer or employee shall be punished by a fine of not less than five hundred dollars or by imprisonment in the county jail for not less than one year, or by both such fine and imprisonment, as a court of competent jurisdiction may determine."

The amended complaint alleges, as did the original complaint, that on the 12th of November, 1891, the savings bank in question became insolvent, and suspended business, and that thereafter, to wit, on the 4th of March, 1892, an action was commenced in the superior court of the county of San Diego, state of California, by the

attorney general of the state, in the name of the people of the state, against the bank, in which, among other relief demanded by the plaintiff, it was prayed that a temporary receiver be appointed, to take possession of all of the assets of the bank, and to make collection of all claims held by it, and that, upon the final trial of the action, the bank be adjudged insolvent, and a permanent receiver be appointed to take charge of, collect, preserve, and distribute its assets, and that said corporation be closed and liquidated in the manner provided by the aforesaid section 11 of the act creating the board of bank commissioners, and that such proceedings were thereafter duly had in the action that by an order of said superior court, duly made and entered of record, the plaintiff, Murray, was, on the ——— day of March, 1892, appointed temporary receiver of the bank, and authorized and directed to take possession of all of its assets of every kind, and to collect and preserve the same pending the action.

The amended complaint, unlike the original one, alleges that the action brought by the attorney general of the state, in the name of the people of the state, was "upon the complaint of the board of bank commissioners of the state of California," and makes the further allegation, not found in the original complaint:

"That said savings bank was duly served with summons in said action, and appeared therein, and demurred to the complaint of the plaintiff, but that said demurrer was overruled, and said savings bank thereupon failed to answer the complaint, or to further plead in said action, but, so to do, made default; that all of the creditors of said savings bank duly appeared in said action, and by their petition, duly filed therein, requested said court to appoint a receiver to take charge of and close up the business of said savings bank, under the direction of said court and the board of bank commissioners of the state of California."

The amended complaint alleges, as did the original one, that on August 2, 1892, the action came regularly on for trial, and that judgment was duly recovered by the plaintiff therein, and entered; "that the defendant corporation, the said California Savings Bank of San Diego, and all its managers, officers, counselors, attorneys, agents, and others acting in aid or assistance of it or them, be, each and every one of them, and are, each and every one of them, enjoined and prohibited from the transaction of any further business as said corporation;" and that it was thereby further "ordered and adjudged that Eli H. Murray, of the city of San Diego, is hereby appointed receiver of all the assets and properties of the said defendant corporation, and that he is hereby empowered to sue for and prosecute to determination all indebtedness due said defendant, and to collect, adjust, and settle all claims in favor of said defendant; and that he shall have the right to defend all suits instituted against said corporation, and that he shall allow and adjust, under the control of this court, all the claims against said bank, and, when determined, shall pay to the creditors of said bank such dividends as may from time to time be declared by this court; and to do and perform such further acts as may be provided by law or the further order of this court." And it is alleged that thereupon the plaintiff, Murray, duly qualified as such receiver, and entered upon

the discharge of his duties as such, and that said judgment has never been set aside or modified, but still remains in full force and effect, and that said plaintiff ever since has been, and now is, the duly qualified and acting receiver of the bank.

As stated by the court when considering the demurrer to the original complaint, the remedy pursued by the attorney general in the case of the savings bank in question being statutory only, the court that took jurisdiction for its enforcement was limited in its powers by the statute under which it acted. East Tennessee, V. & G. R. Co. v. Southern Tel. Co., 112 U. S. 306, 5 Sup. Ct. 168; Windsor v. McVeigh, 93 U. S. 276. Being satisfied that the demurrer to the original complaint was properly sustained, for reasons given in the opinion then filed, the question now is whether jurisdiction in the superior court to appoint a receiver of the property of the insolvent bank in the action brought by the attorney general of the state, in the name of the people of the state, is shown by the further allegations contained in the amended complaint that such action was brought "upon the complaint of the board of bank commissioners of the state of California," and that all of the creditors of the bank "duly appeared in said action, and by their petition, duly filed therein, requested said court to appoint a receiver to take charge of and close up the business of said savings bank, under the direction of said court and the board of bank commissioners of the state of California."

As will have been noticed, the provision of the statute in question is that in the event the bank commissioners ascertain that any corporation to which the act applies has been guilty of violating its charter, or any other law, or is conducting business in an unsafe manner, they shall notify the attorney general of such fact, "who, after examination, in his discretion may commence suit in the proper court against such corporation to enjoin and prohibit the transaction of any further business by such corporation, and, upon the hearing of the case, if the judge of the court where the case is tried shall be of the opinion that it is unsafe for the parties interested or for such corporation to continue to transact business, and that such corporation or institution is insolvent, he shall issue the injunction applied for by said commissioners and attorney general, who shall cause said injunction to be served according to law. And said judge shall further direct said commissioners to take such proceedings against such corporation as may be decided upon by its creditors." That, as said in the former opinion herein, "is the extent of the judgment authorized by the statute to be entered in the suit authorized by the attorney general. That is to say, the enjoining of any further transaction of business by the insolvent corporation, and an order that the commissioners take such proceedings against such corporation as may be decided upon by its creditors. The embracing of the appointment of a receiver in such a judgment was beyond the power of the court, because beyond the scope of the statute under and by virtue of which alone the court was acting. A receiver is an officer of the court, and, when appointed and his powers put in motion, the property of which he is appointed receiver

passes into the custody of the court; the purpose of such proceeding being to preserve the property pending the litigation, so that the relief awarded by the judgment, if any, may be effective. No such purpose is manifested by the provisions of the bank commissioners' act, under which the attorney general proceeded in the case in question. This is further shown by the very next clause of the statute, which reads: 'If any corporation mentioned in this act which is now insolvent, or which may hereafter become insolvent, or be thrown into liquidation by process of law or by the order or consent of its stockholders, directors, managing officers, managers, or creditors, the affairs of such corporation shall be closed and the business thereof settled within four years from the time it shall be declared to be insolvent or be thrown into liquidation, as the case may be, unless at the expiration of such time it shall obtain the consent in writing from a majority of the board of bank commissioners to continue in liquidation for a longer period. The bank commissioners shall, however, have no power to grant a continuance for such purpose for a longer period than one year at each time.'"

Moreover, while this statute does not in terms declare in whose name the suit the attorney general is by it authorized to bring shall be brought, it would seem to be clear that it should be brought in the name of the bank commissioners, for not only does the statute, when providing for the issuance of the injunction against the further transaction of business by the insolvent corporation, speak of the injunction "applied for by said commissioners and attorney general," but also declares that the judge "shall further direct said commissioners to take such proceedings against such corporation as may be decided upon by its creditors." Manifestly, unless the commissioners are parties to the suit, they would not be bound by any such direction or order of the judge. Like the original, the amended complaint shows that the suit brought by the attorney general in the superior court was brought in the name of the people of the state, and not in that of the commissioners. That action, according to the averments of the complaint as amended, was between the people of the state on the one side and the insolvent bank on the other, to which neither the bank commissioners nor the creditors of the insolvent bank were parties.

Demurrer to the amended complaint sustained, with leave to the plaintiff to further amend, if he shall be so advised.

DAVIS v. ST. VINCENT'S INST. FOR INSANE.

(Circuit Court of Appeals, Ninth Circuit. April 2, 1894.)

No. 127.

HUSBAND ABANDONING INSANE WIFE—ACTION FOR SUPPORT—PLEADING.

An institution which supports and cares for an insane wife, abandoned by her husband, can maintain an action against him, under the common law, to recover the reasonable value of such support and care, without expressly averring that they were furnished upon his credit.

This was an action by St. Vincent's Institution for the Insane, a corporation, against John T. Davis, to recover the value of care and support furnished to his insane wife. The case was tried before the court without a jury, and judgment rendered for plaintiff. Defendant appeals.

The plaintiff in error was defendant in the court below to a suit brought by a Missouri corporation styled St. Vincent's Institution for the Insane, which was the successor in interest of another corporation of that state called the Sisters of Charity of St. Joseph. The allegations of the complaint upon which the case was tried, apart from its jurisdictional averments, are, in substance, that prior to July 16, 1880, the said Sisters of Charity of St. Joseph owned and conducted an institution in the state of Missouri called St. Vincent's Institution, wherein it kept, treated, and cared for insane persons, and on that day, for value received, transferred to the plaintiff the said institution, together with its inmates and all bills, accounts, claims, and choses in action connected with the keeping of the institution and its inmates; that Mary A. Davis, then, and at all of the times mentioned in the complaint, was an insane person, and the wife of the defendant; that defendant, prior to January 1, 1875, placed his said wife in the said institution, and in the care and custody of the then corporation, the Sisters of Charity of St. Joseph, and agreed to pay it for the care, treatment, and keeping of his wife at the rate of $6 per week; that defendant's wife was kept and cared for by that corporation until the 7th day of August, 1877, at which time defendant removed her, and at which time there was a balance of $465.94 due from defendant to the Sisters of Charity of St. Joseph for the keeping and care of his wife, which he has never paid; that, after removing his wife from the institution mentioned, defendant, on the same day, abandoned her in the county of St. Clair, state of Illinois, and has ever since neglected to make adequate or any provision for her support; that on the 16th day of August, 1877, the sheriff of St. Clair county took defendant's said wife to the said institution for the insane, and left her in the custody of the Sisters of Charity of St. Joseph, and that the said sisters thereafter, and until July 16, 1880, did in good faith furnish her with board, lodging, clothing, medicine, and medical and other necessary attendance, all of which was reasonably worth $1,000; that on the day last mentioned the plaintiff below, defendant in error here, took charge of the said institution and its inmates, including the insane wife of the defendant, and has ever since kept and cared for her, and in good faith supplied her with board, lodging, clothing, medicine, and medical and other necessary attendance, which was, from July 16, 1880, to October 20, 1891, reasonably worth $3,877.50; that the defendant has at all times since August 16, 1877, known that his said wife was an inmate of the said institution, and that she was boarded, lodged, and provided for as above stated by the plaintiff and its predecessor, the Sisters of Charity of St. Joseph corporation; that the defendant is, and for more than 10 years last past has been, possessed of property exceeding $50,000 in value, all of which is the community property of himself and his said wife; that the latter has never had any separate property; that since March 20, 1876, defendant has wholly failed and neglected to make adequate or any provision for the support of his wife, and has not paid any portion of any of the sums alleged to be due from him for her support and care.

The defendant, by his answer, put in issue the corporate capacity of the plaintiff and the Sisters of Charity of St. Joseph, and denied that at the time he removed his wife from the care and custody of the latter there was any balance due from him, and denied that he ever agreed to pay anything for the care or maintenance of his wife. He denied that he ever abandoned her, and further denied that at any time since August 16, 1877, he knew that she was an inmate of the institution mentioned, or that she was boarded, lodged, and provided for as alleged in the complaint. Defendant, by his answer, also set up in bar of the action the provisions of subdivision 1 of section 339 of the Code of Civil Procedure of California, prescribing the period of two years for the commencement of "an action upon a contract, obligation, or liability not founded upon an instrument in writing, or founded upon an instrument in

writing executed out of the state." The answer contains no denial of the facts alleged in the complaint respecting the support and maintenance of defendant's wife by the plaintiff and its predecessor, the Sisters of Charity of St. Joseph, but does deny the alleged value thereof.

After trial, the court below found, among other things, "that one of the purposes for which the plaintiff was incorporated was the keeping, treatment, and care of insane persons, and that the plaintiff has, for about two years next preceding the commencement of this action, at the city of St. Louis, in the state of Missouri, in an institution or house by it provided and kept for the care, custody, and treatment of insane persons, kept, lodged, boarded, clothed, and supplied with medicine and medical and other necessary attendance the insane wife of the said defendant; that said keeping, boarding, lodging, and medicine, and medical and other attendance were of the value of $10 per week for all of said two years, and the said clothing was of the value of $50 for each of said two years; that defendant, during all of said two years aforesaid, knew that his said insane wife was kept and cared for and supplied with the necessaries aforesaid by the plaintiff as aforesaid, and the defendant, during all of said two years, failed and neglected to make any provision for the support of his said wife; and the defendant has not, during said two years, or since, or at any time, or at all, paid or provided anything for the keeping or boarding or lodging or clothing, or for medicine or medical attendance, of his said wife; that all claims and demands of the plaintiff against the defendant, and alleged in the complaint, other than the claims and demands aforesaid for the two years next preceding the commencement of this action, are barred by the two-years statute of limitations pleaded by the defendant." And as a conclusion of law from the facts found the court below found the defendant indebted to the plaintiff in the sum of $1,140, for which, with costs, judgment was given against him.

The points made by the plaintiff in error, and upon which he relies for a reversal of the judgment, are: First, that the complaint does not state facts sufficient to constitute a cause of action; and, second, that the facts found by the court below are insufficient to support the judgment in this: that it does not appear therefrom that the necessaries were supplied to the wife of the plaintiff in error in good faith and upon the credit of her husband.

P. Reddy, J. C. Campbell, and W. H. Metson, for plaintiff in error.
T. Z. Blakeman, for defendant in error.

Before GILBERT, Circuit Judge, and ROSS and HANFORD, District Judges.

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

The contract upon which the action is based is an implied one, and arose in the state of Missouri, and was to be performed there. It is therefore to be interpreted in accordance with the law applicable thereto in the state of Missouri, and not in accordance with the statute law of California. Boyle v. Zacharie, 6 Pet. 635, Cook v. Moffat, 5 How. 314. The parties are agreed that the law of that state applicable to the question is the common law; and the plaintiff in error insists that, tested by the rules of the common law, the complaint does not state facts sufficient to constitute a cause of action, because it is not alleged that the services were rendered and the articles furnished defendant's wife upon defendant's credit. It is true the complaint does not so allege in so many words, but facts are alleged from which that result necessarily flows. The husband who turns his wife out of doors, or so maltreats her as to compel her to leave his domicile, gives her, in effect, a letter of credit for whatever her preservation or safety requires. Shepherd v. Mackoul, 3

Camp. 326; Mitchell v. Treanor, 56 Am. Dec. 421; Billing v. Pilcher, 46 Am. Dec. 523; Cunningham v. Irwin, 10 Am. Dec. 458, and cases referred to in notes to those cases. If this is so in ordinary cases, how much more strongly does the reason of the law apply to the case of the unfortunate wife who is rendered by insanity not only incapable of providing for herself, but incapable of making any sort of a request, or any sort of a contract. The charitable institution that gave shelter and protection to the abandoned wife of the defendant, and ministered to her needs, knew that it could not look to her for compensation, and knew that she was legally incompetent to make any contract of any nature. Necessarily, it looked, and had the legal right to look, to the person who was legally responsible for the necessaries furnished her, namely, her husband. The facts which render him liable are alleged in the complaint, and were found to be true by the court below. It is a matter of regret to us, as it doubtless was to the learned judge who decided the case below, that the defendant's plea of the statute of limitations enabled him to escape responsibility for the care and maintenance of his wife except for the two years immediately preceding the commencement of the action.

Judgment affirmed.

EMPIRE STATE PHOSPHATE CO. v. HELLER et al.

(Circuit Court of Appeals, Second Circuit. April 19, 1894.)

No. 79.

1. SALE—INTERPRETATION OF CONTRACT—DESCRIPTION OF GOODS.
   A contract for sale of "high grade kiln-dried" phosphate rock of a quality particularly described, provided that, whenever the seller should accumulate a certain quantity thereof, "of the proper quality to deliver under this contract," the same should be taken by the buyer within a specified time after notice. *Held*, that a tender of such rock not kiln-dried, with an offer to have it kiln-dried before removal, was not a tender of a proper delivery under the contract.

2. PAROL EVIDENCE—CONVERSATIONS PRIOR TO CONTRACT.
   A written contract for sale of kiln-dried phosphate rock provided that, whenever the seller should accumulate a certain quantity thereof of the proper quality to deliver, the same should be taken by the buyer within 30 days after notice of the seller's readiness to make delivery. *Held*, that prior conversations between the parties were not admissible to show that the rock might be kiln-dried after notice of readiness to deliver, or that the buyer was not to have full 30 days to take kiln-dried rock.

In Error to the Circuit Court of the United States for the Southern District of New York.

This was an action by the Empire State Phosphate Company against James E. Heller and Adolph Hirsh for damages for breach of contract. A verdict was directed for defendants, and judgment was entered thereon. Plaintiff brought error.

Henry B. Closson and Edward M. Shepard, for plaintiff in error.

John S. Davenport (Felix Jellenik, on the brief), for defendants in error.

Before LACOMBE and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. This is an action brought by the plaintiff corporation to recover damages sustained by reason of an alleged breach by the defendants of a contract for the purchase from the plaintiff of a quantity of phosphate rock. The contract was in writing, and bears date March 26, 1891. By it the plaintiff sells to the defendants exclusively—

"The entire output of the phosphate mine owned by it, situated in Citrus county, Florida, for the term of one year beginning thirty days after the completion of the S. S. O. & G. R. R. to the Florida Rock Phosphate Co.'s mines, aggregating not to exceed 25,000 tons of their high-grade, kiln-dried land phosphate, at the price of 17½ cents per unit of bone phosphate of lime, on dry basis per ton of 2,240 lbs., f. o. b. cars at mines."

The contract next provides that the rock is to contain 75 per cent. bone phosphate of lime, with elaborate provisions as to testing, analysis, amount of oxides it may contain, etc.,—clauses which it is not material to recite here. Then follows:

"Delivery. Whenever party of the first part has accumulated not less than 1,500 tons of phosphate of the proper quality to deliver under this contract, the same shall be taken by the party of the second part, at the stated price, f. o. b. the cars at seller's mines, within 30 days after party of the first part has notified party of the second part of its readiness to make delivery."

Further provisions cover the contingency of the party of the second part being "unable to remove such lot of 1,500 tons within said 30 days;" but, as the evidence does not show the happening of that contingency, they need not be quoted. The railroad having been completed, the plaintiff proceeded to mine the phosphate, and, having accumulated a sufficient quantity, notified defendants by letter dated May 29, 1891, that they were prepared to make delivery of $1,500 tons under the contract on June 1st. This tender was renewed by letter on July 28, and again on August 11, 1891. In this last-mentioned letter, which is the first one referred to in appellant's brief as a tender of the phosphate, plaintiff says that it had mined in pursuance of the contract—

"Upwards of 1,500 tons of phosphate rock, the same conforming in all respects to the provisions of the said contract; that the said phosphate rock is now ready for delivery, pursuant to the terms of said contract; that the same will be delivered to you, pursuant to such terms, on the 17th instant, and that you are requested, prior to the said 17th instant, to begin removal of said rock phosphate."

This letter concludes as follows:

"The rock phosphate will, as provided by the contract, be kiln-dried, and, as you have requested, and unless you otherwise request, such kiln-drying will freshly take place immediately prior to each removal of the phosphate, so as to prevent, to the utmost, as you have requested, the absorption of moisture from the atmosphere and the consequent damage. If you desire any other course followed, please advise us at once."

Defendants objected to taking the rock by letters dated July 11th and July 30th, questioning whether it had all been mined subsequent to 30 days after the completion of the railroad, and asking for a statement of the daily output of plaintiff's mine since such

completion. These objections they renewed in a letter of August 12th, in answer to plaintiff's letter last above quoted, adding the following:

"We do not agree with you on the other point you mention, namely, that we had made a request of you about drying, such as you state. The nearest approach to it was a mere suggestion from us to the effect that you ought to have the rock under cover after it has been kiln-dried, so that it should not be exposed to rain. You thereupon informed us that you had covers provided for every pile, to protect it against rain."

Further correspondence ensued, which it is not necessary to quote, defendants declining to accept, and questioning whether the rock tendered was of the quality required; plaintiff insisting upon its acceptance, and threatening sale on buyers' account. During all this time it is conceded that the rock mined, accumulated, and tendered was not kiln-dried. Finally, on November 18th, plaintiff notified defendants that they would adjourn the auction sale to December 3d, and "renewed the tender of the 1,500 tons of phosphate rock last tendered you, and notify you that we shall begin delivery of the same according to the terms of the contract on the 23d inst. * * * The rock will be kiln-dried." On November 23d all the rock had been kiln-dried, and defendants were so notified, and requested to begin removal at once; and on December 2d plaintiff notified defendants that the sale of the rock on buyers' account, for failure to accept under the contract, was adjourned until December 10th. By that day defendants had not removed it, and plaintiff sold the same at a considerable loss, and brought this action, averring that by reason of defendants' breach of contract it lost the sale of its output for the year, which it alleges would have amounted to 10,500 tons, and claiming damages for upwards of $90,000.

From the above statement of the facts it will be noted that plaintiff tendered no kiln-dried phosphate to defendants until November 23, 1891, and that, so far from giving the defendants 30 days to remove the kiln-dried rock then tendered, it disposed of it by sale at auction 17 days after its tender. For these reasons defendants insisted upon the trial that breach of contract on their part had not been shown, and the circuit judge, being of that opinion directed a verdict in favor of defendants.

Error is assigned to the refusal of the circuit judge to admit certain proof offered by the plaintiff, which, it is claimed, would have tended to show that it was "a bad thing to have phosphate, after it is kiln-dried, remain in the open air." Also to the refusal to admit proof that at an interview between one of the defendants and a representative of the plaintiff, had prior to the signing of the contract, defendant requested the plaintiff to kiln-dry the phosphate as nearly as was possible simultaneously with the removal of the phosphate by defendant. The rule is well settled that negotiations, suggestions, and discussions between the parties antecedent to the execution of a written contract are merged in the contract, and that evidence is inadmissible to vary the terms which, after

negotiation, the parties have settled upon and adopted as expressing their final agreement. Undoubtedly there are exceptions to this rule where the language of the contract is ambiguous or susceptible of more than one interpretation, or where extrinsic evidence is necessary to enable the court to properly define some particular word or phrase, or where it shows some independent agreement, not covered by the written contract, nor inconsistent with it. In the case at bar, however, the written contract is wholly free from any ambiguity as to the quality of phosphate to be delivered. It must be "high grade, kiln-dried land phosphate" of the character more particularly described therein. That is the quality of phosphate which was sold and bought, and with which alone the contract is concerned. No phosphate which was not kiln-dried would be a proper delivery under the contract. No tender of phosphate not kiln-dried would be a tender of "phosphate of the proper quality to deliver under the contract." Any evidence of prior conversations which would tend to show that the phosphate might be delivered without kiln-drying would contradict the express terms of an unambiguous subsequent written contract. The plaintiff relies upon defendants' alleged failure to take under the delivery clause above quoted, but that clause expressly gave the buyers 30 days to take "phosphate of the proper quality to deliver under the contract." If the evidence of prior conversations tended to show that defendants were not to have full 30 days to take such phosphate, it would contradict another express and unambiguous provision of the subsequent written contract. In either event, it was properly excluded, and, if it did not go to the extent of contradicting the written contract in one or other of those particulars, it was immaterial and inadmissible, the vital points in issue being whether plaintiff had tendered the phosphate it had agreed to deliver, and had given defendants the time stipulated in the contract for its removal.

There was no error in the direction of a verdict for defendant, as the undisputed proof shows that no phosphate was kiln-dried until November 23d, and that it was sold by plaintiff before the 30 days had elapsed to which, under the contract, the defendants were entitled for its removal.

Judgment affirmed.

OPPENHEIMER et al. v. UNITED STATES.

(Circuit Court, S. D. New York. April 26, 1894.)

CUSTOMS DUTIES—CLASSIFICATION—SILK VEILS IN THE PIECE.

Silk veils or veilings in the piece, with borders upon them, and a distinctly marked line between the borders, designating where they were to be cut off, *held* to be dutiable at 60 per centum ad valorem, as "wearing apparel," under paragraph 413 of the tariff act of October 1, 1890, and not at 50 per centum ad valorem, as "manufactures of silk not specially provided for," under paragraph 414 of said act.

Application by Oppenheimer & Levy, importers, for review of a decision of the board of United States general appraisers concern-

ing certain importations of silk veils in the piece made by them. The said board affirmed the decision of the collector. The importers appealed.

The contention of the United States was that the merchandise was in fact veils, although manufactured in the piece; that they were clearly marked and designated by a border, and adapted to no other use than for veils; that the mere cutting by scissors between the borders on a clearly marked line in the goods did not constitute any further process of manufacture, and nothing more was necessary to be done in order to constitute veils ready to be worn, and that veils were wearing apparel for women. Citing Arnold v. U. S., 147 U. S. 494, 13 Sup. Ct. 406; Maillard v. Lawrence, 1 Blatchf. 504, Fed. Cas. No. 8,971. It was urged on behalf of the importers that the goods were "piece goods," and were commercially known as "silk veiling" and not as "silk veils," and that it required a further process before they became veils ready for use.

Benjamin Barker, Jr., for importers.
Henry C. Platt, U. S. Atty.

COXE, District Judge (orally). Of course, if the article in suit is an article of wearing apparel made up wholly or in part, paragraph 413 of the tariff act of October 1, 1890, is more specific than paragraph 414 of the same act which provides for "manufactures of silk." It being admitted that a veil is an article of wearing apparel, and that the importations in question are intended to be cut up into veils, I am inclined to think that they are manufactured articles of wearing apparel, and that the collector has classified them correctly. It will be conceded that if they were made up separately and imported in that form, they would be articles of wearing apparel. The question is whether making them up in the piece and thus requiring the seller or user to cut them through with scissors at the indicated point takes them out of the category of wearing apparel made up wholly or in part. I am inclined to the opinion that it makes no difference that these veils are in the piece when imported. They are wearing apparel made up in part by the manufacturer. The paragraph in question does not refer to completed articles only, because the language is "manufactured wholly or in part * * * by the manufacturer." The goods imported are in fact veils. They are used for no other purpose. The moment they are separated at the border they are ready for use as wearing apparel. The decision of the board is affirmed.

GROTH et al. v. INTERNATIONAL POSTAL SUPPLY CO.

(Circuit Court of Appeals, Second Circuit. April 19, 1894.)

No. 121.

1. INTERPRETATION OF PATENTS—PIONEER INVENTIONS.
   The fact that an invention is of a primary character does not warrant a construction of the patent which does away with restrictions imposed by the language of the claims themselves.
2. SAME—INFRINGEMENT—MAIL-STAMPING APPARATUS.
   The Hey patents, Nos. 341,380 and 388,366, for improvements in mail stamping apparatus, construed, and *held* not infringed. 57 Fed. 658.

Appeal from an interlocutory decree of the circuit court for the southern district of New York, which decreed in favor of the complainant in a bill in equity to restrain the infringement of the second and third claims of letters patent of the United States No. 341,380, dated May 4, 1886, and of the first and third claims of letters patent No. 388,366, dated August 21, 1888. Each patent was for improvements in mail-stamping apparatus, and each was granted to George W. Hey and Emil Laas, assignors to the complainant.

Rowland Cox, for appellants.

George W. Hey, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. The inventions which are the subject of the two patents, and which were made by the same inventors, are machines for automatically postmarking and canceling the stamps upon mail matter. The original specification which accompanied the application for the earlier patent described both electrical and mechanical means for actuating the stamp or marker. At the request of the patent-office examiner, the application was divided, and a new one was filed on June 2, 1884, which was confined to purely mechanical means for releasing the stamp. This application was thrown into interference with the application of M. V. B. Ethridge, and the issuance of the second patent was delayed until August 21, 1888. The 18 claims of No. 341,380 describe a machine of a very ingenious character. Other automatic stamp-canceling machines had existed, but this machine first made the letter, moving upon the supporting bed, to be the means which brought into operation the stamping mechanism, so that the stamp should necessarily descend upon and mark the letter, and should not come in contact with and smear the supporting bed when the presence of a letter was for any reason delayed. In previous machines the letter did not exercise control over the stamp or marker, which was or might be in action, although no letter was present to receive the impression, so that ink was deposited on the face of the supporting bed, and in consequence the letters which subsequently made their appearance were defaced.

The following general description of that portion of the mechanism which is especially referred to in the two claims which are said to have been infringed is condensed from the specification of the patent: The letters, having been introduced into a suitable channel, are carried successively along a bed by means of a belt or suitable rollers. In this movement they encounter an actuating barrier, called in the patent a "rake," and this engagement causes the rake to be drawn along with the movement of the letter. This movement of the rake is utilized to control the action of the marker or stamp, which is accomplished by connecting with the rake a suitable tripping device, which throws into action a temporarily restrained motor, adapted to actuate the marker so that the stamp is forced downward, and caused to mark the letter. The pressure of the stamp, while the rake is lifted by a cam, releases the letter, the

rake is carried back to its normal position, and the electric circuit is broken. The second and fourth claims are as follows:

"(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."

The defendants' machine contains a bed, a stamp, and means to prevent the stamp from striking on the bed, and inking it, when no letter is present. These means are briefly described in the appellants' brief as follows: They consist—

"Of a swinging foot, which is attached to a crank shaft that passes through the shaft of the stamp, and which is actuated by a stationary foot or tripper. In the bed immediately below the stationary foot a slot or hole is cut. When the letter is on the bed, under the stamp, the slot or hole is covered by the letter, and the foot or tripper strikes it, whereby the swinging foot is lifted, thus permitting the stamp to deliver an impression. When no letter is present on the bed, the foot or tripper enters the slot or hole, whereby the swinging foot, occupying a vertical position, strikes the bed, and prevents the stamp from coming in contact with it."

No. 388,366 describes a different method of carrying into effect the principle of No. 341,380. The letter, while it is in transit on and over a supporting bed, comes in contact with what the specification calls "selecting devices," or "mechanical fingers or feelers," which are so shaped as to engage readily with the sealed flaps of the envelopes. Through the medium of pivoted connections, motion is transmitted from the "selecting device" to a lever, and the stamp is released, and comes in contact with the advancing letter. The specification says:

"The operation of the invention will be readily understood from the description of the invention and of the functions of the various parts; and it is only necessary to call attention to the fact that the stamping mechanism is normally at rest in a set position, and that, when the letter is presented, the selecting devices mechanically feel its surfaces, and engage the overlapping or sealed edges thereof. The movement of the letter while the selecting devices are engaged causes the selecting devices to move toward the center of the stamping apparatus, carrying with them the connections which transmit the motion of the selecting devices to the releasing catch of the stamp roller. The stamp roller when released is forced by its depressing springs onto the letter, and the onward advance of the letter revolves the roller stamp, causing it to impress the requisite stamp on the letter, while the restraining mechanism is being raised in position to reset the roller stamp."

The first and third claims are as follows:

"(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 a supporting feed bed, of a stamp normally out of the path of the movement of the mail matter, and a stamp tripper or releaser normally in said path, and opposite the letter bed, substantially as specified."

The question of infringement is the one which principally presents itself for examination in regard to each patent.

No. 341,380. The foundation of the complainant's argument in regard to infringement is the fact that the invention of this patent is a primary one, inasmuch as the idea of making the letter the instrumentality which should bring into action the stamp, and thus compelling the movement of the stamp to depend upon the movement of the letter, was first embodied in the patentees' machine. It is therefore insisted that the claims of the patent should have a liberal construction, and that the special devices described in the specification "are not necessary constituents of the claims." Machine Co. v. Lancaster, 129 U. S. 263, 9 Sup. Ct. 299. This just principle is one that is well recognized; but another principle is, at the present stage of the patent law, of equal force, which is that the construction of the patent must be in conformity with the self-imposed limitations which are contained in the claims, or, in the language adopted in McClain v. Ortmayer, 141 U. S. 419, 12 Sup. Ct. 76, "if the language of the specification and claim shows clearly what he [the patentee] desired to secure as a monopoly, nothing can be held to be an infringement which does not fall within the terms the patentee has himself chosen to express his invention." The specification of No. 341,380 describes a machine in which the letter moving forward meets in its path, and actuates, a finger which communicates motion to tripping mechanism, so that the stamp is released. In the Groth device the moving and descending finger comes in contact with a stationary letter, and the result is that the presence of the letter at rest under the descending finger permits the stamp to be operative. The position of the complainant, as stated by its expert, is that the defendants' machine infringes because the movement of the engaging device upon a stationary letter is merely a reversal of the movement in the patented invention, and the devices are equivalent, inasmuch as in each case the presence of the letter in position to make contact with the engaging device causes the release of the stamp. Mr. Durfee, one of the complainant's experts, is of the opinion that the requirement of the second claim in regard to the letter's transmitting motion is satisfied if the letter controls the motion of the marker, and that the requirement of the fourth claim in regard to the transmission of motion by the finger is satisfied by a finger which determines the motion of the marker. It is manifest that each claim requires that the barrier or finger shall be encountered by, or shall engage with, a moving letter in its passage over the bed, and that in the second claim the letter transmits motion to the marker, while in the fourth claim the finger transmits the motion. The construction which the complainant's experts place upon the limiting words in the claims possesses great elasticity. To "transmit motion" becomes synonymous with "permit motion" or "control the motion of," and in the fourth claim with "determine the motion of." While it is true that by the Groth device an equivalency of result is produced, the difficulty which the complainant encounters upon the question of infringement is that the patentees described, in the second and fourth claims, the devices in the form and peculiarities in which they are described in the specification and pictured in the drawings, and limited themselves

to a barrier or finger which intercepts a moving letter in its onward path, whereby the letter, through the medium of the finger, or the finger itself, transmits motion. By reason of these limitations the Groth device escapes the charge of infringement.

No. 388,366. In view of the fact that No. 341,380 is a primary invention, the combinations described in the first and third claims of the later patent are unduly akin to those contained in the earlier one, unless they are severed by the relation of the tripper in No. 388,346 to the stamp. The distinction is that the finger is not of itself a tripper in the earlier patent, and is in the later patent a tripper which supports and releases the stamp. The earlier patent is for a stamping device in which the moving letter meets and actuates a finger in its path, which transmits motion to a tripper out of the path of the letter, so that the stamp is released. The later patent is for a stamping device in which the moving letter meets in its path, and actuates, a tripper which supports and directly releases the stamp out of the path of the letter. Reading into the two claims the requirement which is necessary to their safety, that the stamp tripper itself supports the stamp, the question is in regard to infringement. The complainant's expert regards it as immaterial that the defendants' tripper moves upon the letter, whereas in No. 388,366 the moving letter is carried against the tripper, "because in each case the presence of the letter and its contact with the tripper result in such a movement as to cause the stamp to be released and brought in contact with the letter." This is virtually saying that any machine which contains a supporting feed bed, a stamp normally out of the path of the letter upon the bed, and a tripper which comes in contact with the letter and opposite the letter, and which enables the stamp, by such contact, to come into position upon the letter, infringes the claims in controversy. Each claim requires that the tripper shall be normally in the path of the letter, and, when this language was used with reference to the machine described in the specification and shown in the drawings, it meant that the moving letter should meet and be intercepted by the tripper. But it is said by the complainant that the language is complied with when the tripper is normally in such a position as to make contact with the letter when it is upon the supporting bed, and that the tripper is normally in the path of the letter when the letter is present so as to encounter it. A tripper normally in the path of the letter does not naturally mean a tripper normally in a position where it can be brought in contact with a letter by another instrumentality than the letter itself. It means a tripper whose natural position, when at rest, is such that it is in the path of the advancing letter. Unless a court is to recede from the rule of construction of claims which the modern decisions of the supreme court have endeavored to impress upon the patent law of this country, the claims are to be construed in accordance with what must be regarded as their obvious meaning.

There is no infringement of No. 388,366, and the decree of the circuit court is, with costs, reversed.

TRIPP GIANT LEVELER CO. v. ROGERS. SAME v. WEEKS. SAME v. NOYES. SAME v. PORTSMOUTH SHOE CO. SAME v. BRESNAHAN et al.

(Circuit Court, D. Massachusetts. March 14, 1894.)

Nos. 3,077, 3,078, 3,079, 3,080, and 3081.

1. PATENTS—DEFINITION OF "AUTOMATIC."
The word "automatic," as used in the mechanical arts and the patent law, means self-acting, or the elimination of human agency or volition, which results in the saving of labor, and increased certainty and uniformity of result; but does not include all contrivances, such as a wheelbarrow, which are operative for the purposes designed, under any applied force, whether muscular or otherwise.

2. SAME—INVENTION—BEATING-OUT MACHINES.
The Cutcheon patent, No. 384,893, for an automatic machine for beating out the soles of boots and shoes covers a patentable invention.

These were five suits for infringement of a patent. They were brought by the Tripp Giant Leveler Company against the following defendants, respectively, viz. Clarence A. Rogers, Perley Weeks, John M. Noyes, the Portsmouth Shoe Company, and Maurice V. Bresnahan and others.

Alexander P. Browne, for complainant.
Thomas W. Porter, for defendants.

COLT, Circuit Judge. By a decision of the circuit court of appeals for this circuit (Herrick v. Cutcheon, 5 C. C. A. 21, 55 Fed. 6), affirming the decision of the circuit court (52 Fed. 147), the Cutcheon patent No. 384,893, dated June 19, 1888, was held to be valid. This patent has been assigned to the complainant, who now brings the present suits against various defendants, charging infringement. In these suits additional evidence of the prior state of the art has been introduced, and the validity of the patent is again contested.

The Cutcheon machine belongs to that type of beating-out machines in which the sole of a shoe is shaped by direct pressure upon all parts of its surface. The last, with the shoe applied to it, is pressed forcibly and directly against a correspondingly shaped mold, and then left standing for a short interval of time so that the sole not only assumes the shape of the last and mold, but its shape becomes, so to speak, set or fixed, and is consequently retained. The improvement of Cutcheon consists in organizing in a machine of this class two jacks and two molds in such a manner that one jack is automatically moved in one direction, while the other jack is being moved in the other direction; the effect being that the sole of the shoe on one jack will be under pressure, while the shoe on the other jack will be in a convenient position for removal. This is clearly described in the first claim of the patent:

"A machine for beating out the soles of boots and shoes, provided with two jacks, two molds, and means, substantially as described, having provision for automatically moving one jack in one direction while the other is being

moved in the opposite direction, whereby the sole of the shoe upon one jack will be under pressure, while the other jack will be in a convenient position for the removal of the shoe therefrom."

There are two patents in the present record not before the court in the prior case, which call for consideration. There was a patent granted to Elias Blaney, in 1871, for a single-section direct-pressure machine, in which the shoe and last traveled inwardly into a line opposite the mold. The mold then moved downward, and pressed upon the shoe, then upward to its former position, and the shoe then moved outward to the point whence it started. This machine was automatic, in the sense that when once set in motion it did all its work without further intervention of the operator; but only one shoe could be placed in the machine at a time, and when the machine stopped the shoe was not under pressure.

The other patent was issued to William A. Perkins, in 1874. This was for a hand-operating machine, which contained two molds, one of which moved down upon one shoe to press it, while the other moved away from the other shoe. While this machine contained two molds and two jacks, it did not have the connecting mechanism of Cutcheon which renders his machine automatic. In the Perkins machine the amount of pressure, and the whole operation of beating out, depended upon the judgment and manual force exerted by the operator. It was not automatic, for the same reason that a hand press is not automatic.

Although the Tripp machine was before the court in the former suit as an anticipation of the Cutcheon patent, it is again strenuously urged as a defense in these suits. Upon this point it is sufficient to observe that the Tripp machine is a machine of another type, known as a "rolling-pressure machine;" and that it differs substantially in construction and mode of operation from the direct-pressure machine of Cutcheon.

There is nothing in the prior art as disclosed in this record which anticipates the invention of Cutcheon. Its merit is found in the conception of a new automatic feature in a direct-pressure machine. This result is accomplished by an arrangement of knuckle joints and connecting mechanism in connection with two jacks and two molds. Jacks, molds, knuckle joints, and all the elements of this machine may have been old, but Cutcheon was the first to so combine them together as to produce the result described. It is a well-settled rule of patent law that a patent for a combination of old elements is not to be held void for want of novelty simply because the separate elements of the combination may be old. Invention often lies in the direction of making a machine more automatic. By automatic is meant self-acting, or the elimination of human agency or volition, which results in the saving of labor, and increased certainty and uniformity of operation. This is the sense in which the term is used in the mechanical arts and in the patent law, and I cannot agree with the position of defendant's expert who seeks to detract from the merits of the Cutcheon invention by maintaining the broad doctrine that all contrivances are automatic which are

operative for the purposes designed under any applied force, whether muscular or otherwise, and which, therefore, include a wheelbarrow and hand press in the category of automatic machines.

A decree may be entered for the complainant in each of the above cases, adjudging the first claim of the Cutcheon patent to be valid, and that the defendants infringe the same, and ordering an injunction and account.

WALL et al. v. LECK.

(Circuit Court, S. D. California. April 9, 1894.)

No. 573.

1. PATENTS—NOVELTY AND INVENTION—PROCESS OF FUMIGATING PLANTS.
   The discovery that the old process of fumigating plants and trees with hydrocyanic-acid gas, after covering them with an oiled tent, is more effective in the absence of the actinic rays of the sun, gives no right to secure a patent for the use of that process at night, or other times when the sun is not shining.
2. SAME.
   The Wall, Jones & Bishop patent, No. 445,342, for a process of fumigating trees, is void for want of novelty and invention.

This was a suit by W. B. Wall and others against Henry Leck for infringement of letters patent No. 445,342, issued January 27, 1891, to W. B. Wall, M. S. Jones, and A. D. Bishop, for a process of fumigating trees and plants. Defendant demurred to the bill.

W. F. Henning and H. T. Hazard, for plaintiffs.

Ray Billingsley, for defendant.

ROSS, District Judge. Complainants sue for an alleged infringement of certain letters patent, for an accounting of profits alleged to have been realized by the defendants thereby, and for an injunction against further infringement. The patent referred to in the bill, and which forms the basis of the suit, is for a process of fumigating trees and other plants. The specification of the application for the patent (Specifications and Drawings of Patents, U. S. Patent Office, Jan. 1891, pt. 2, p. 2179) declares, "It consists in fumigating the plant with hydrocyanic-acid gas in the absence of light." The specification proceeds to declare:

"Hydrocyanic-acid gas has heretofore been employed in fumigating trees, but it has not been considered practicable, for the reason that, if the gas were of sufficient strength to destroy the insects on the plant, it also injured the foliage and fruit. We have discovered that when the light is excluded the action of the gas is more effective in destroying insect life, and at the same time becomes harmless to plant life, unless used excessively. Our process differs from the ordinary process of fumigating with hydrocyanic-acid gas only in that we exclude the light. This may be done by means of the oiled tent or covering ordinarily used for such fumigation, provided the fumigation is done at night. If the work is done in the daytime the covering must be so colored as to exclude the actinic rays of light, but we do not believe it possible to produce satisfactory results with any colored tent in bright daylight. To illustrate our invention, we will explain its use in fumigating an orange or lemon tree of twelve feet in height. The tree is first enveloped with an oiled or painted canvas, in the ordinary way; such

canvas being impervious to the rays of light, and surrounding the tree. We then place in a vessel under the canvas three ounces of cyanide of potassium, then six ounces of water, and then pour into the vessel three ounces of sulphuric acid, and close the covering for a period of about fifteen minutes. The canvas is then removed. The vessel may be covered with a piece of sacking or other textile fabric after the sulphuric acid is poured into it. This will prevent the sprays from the decomposing chemicals from injuring the plant or canvas. It is obvious that hydrocyanic-acid gas may be produced by other chemicals than those mentioned; also, that the time and the amount of gas employed may be varied. We have secured good results by a fumigation lasting only five minutes."

Having thus described what the patentees state as their discovery, they declare that what they claim as new, and desire to secure by letters patent, is "the process set forth of fumigating plants with hydrocyanic-acid gas in the absence, substantially, of the actinic rays of light."

The specification, as has been seen, expressly recites the fact that the process of fumigating trees and plants with hydrocyanic-acid gas by means of an oiled tent or covering is old, and that the process for which they ask a patent differs from the ordinary process only in that the applicants "exclude the light." Yet no method of excluding the light is stated or claimed. On the contrary, they declare that it "may be done by means of the oiled tent or covering ordinarily used for such fumigation, provided the fumigation is done at night." Of course, night excludes the light. Everybody knows that. Nor is the night patentable. The ordinary tent or covering of the old process necessarily excludes to a greater or less degree—depending upon the thickness of the covering, and the extent to which it is colored—the actinic rays of light, which is that power of the sun's rays which changes the chemical nature of the mixture. So, also, will the clouds, to a greater or less degree, exclude such rays, depending upon the density of the clouds. And after the sun sets, and before it rises, they are entirely absent. The process, as described in the specification, in no manner depends upon the time it is used. It consists, as the specification expressly recites, of fumigating trees and plants with hydrocyanic-acid gas, by means of the oiled tent or other covering. Whether used by means of a thin or thick covering, heavily or lightly oiled, or not oiled at all, in bright daylight, or in the twilight, or at night, or in the early morning, it is all the time the same process, which the public is entitled to use, because it was old when the patentees applied for their patent. An old process does not become a new and patentable one by being used at night instead of in the daytime, or at any particular time, or in any particular state of the weather, or because better results are attained by its use at one time than another.

The court being of opinion that the patent is void for want of novelty and invention, and that, in view of its recitals, it is so plainly so that it cannot be aided by evidence, it should be so declared on demurrer, without subjecting the parties to the costs of producing proof. Blessing v. Copper Works, 34 Fed. 753; Engraving Co. v. Hoke, 30 Fed. 444. Demurrer sustained.

NORTON et al. v. EAGLE AUTOMATIC CAN CO.

(Circuit Court, N. D. California. April 9, 1894.)

No. 11,824.

PATENTS—PRELIMINARY INJUNCTION—PRIOR DECISIONS—NEW EVIDENCE.

When a patent has been sustained by the circuit court of appeals, the circuit court of the same circuit may nevertheless refuse a preliminary injunction against a different infringer, not only when the new evidence is such as to warrant the statement that, if it had been before the appellate court, it would necessarily have led to a different result, but also when it is of so clear and positive a character as to justify a well-founded belief that upon the final hearing the full proofs may be such as to warrant a different construction of the patent; but as a condition of refusing the injunction, or dissolving one already granted, the court may require defendant to give a bond, and make periodical statements as to the extent of his manufactures, for the purpose of protecting complainant.

This was a suit by Edwin Norton and Oliver W. Norton against the Eagle Automatic Can Company for infringement of letters patent No. 267,014, granted November 7, 1882, to Edwin Norton, for a can-heading machine. A preliminary injunction was heretofore granted (57 Fed. 929), mainly upon the strength of the decision of the circuit court of appeals, sustaining the patent, in Norton v. Jensen, 1 C. C. A. 452, 49 Fed. 859, and afterwards defendant was adjudged guilty of contempt in violating the same (59 Fed. 137). Defendant now moves to dissolve the injunction on the ground of newly-discovered evidence.

Estee & Miller, for complainants.

John L. Boone, S. C. Denson, and E. S. Pillsbury, for respondent and motion.

HAWLEY, District Judge. The defendant moves the court to dissolve the temporary injunction heretofore granted (57 Fed. 929), upon the ground of newly-discovered evidence material to the issues herein, which it claims is of such a character as, if it had been before the court at the former hearing, would have justified the court in refusing to grant the injunction. The new evidence relied upon is: (1) The affidavits of W. J. Clark and J. S. Hull in relation to letters patent No. 238,351, dated March 1, 1881, to William J. Clark, for a can-heading machine, to the effect that said Clark, in the year 1879, conceived the idea of a can-heading machine which would true the bodies of the cans and place them in the heads, the heads and cans being in alignment, and so make a close fit, substantially as set forth in said letters patent; that in the month of March, 1880, he made a wooden pattern, and had two sets of castings made therefrom, and thereafter, not later than the early part of May, 1880, he fitted up a complete working machine, exactly after the castings and drawings, except that he substituted lugs for the pulley arrangement instead of the wedge, and that this machine was actually used for heading cans before the month of June, 1880, in the same condition and form as described in said letters patent. (2) Letters patent No. 232,535, issued September 21, 1880, to Herman Miller, for

improvements in machines for seaming cans, and the deposition of Herman Miller in support thereof. (3) The German patent No. 6,480, granted to Freidrick Ewers, November 24, 1877, for improvements for the manufacture of metal cans for preserves. And (4) the file wrapper and contents of complainants' letters patent.

The argument on behalf of defendant is that if all this evidence had been presented to the circuit court in Norton v. Jensen, and had been of record in that suit, the circuit court of appeals would not have decided, as it did with the evidence before it, that the Norton patent covered an invention of a primary character, and that its claims are entitled to a broad and liberal construction (1 C. C. A. 452, 49 Fed. 860), and that for these reasons the case must be considered as an exception to the general rule relied upon by complainants. The general rule is undoubtedly well settled, as stated in the former hearing, that where the validity of complainant's patent has been sustained by prior adjudications, after tedious and expensive litigation in the same circuit, and affirmed by the supreme court of the United States, or by the circuit court of appeals for the circuit, the only question open on motion for a preliminary injunction in a subsequent suit against other parties is the question of infringement, the consideration of all other defenses being postponed until final hearing upon the merits, after full proofs have been made by the respective parties; but, after the validity of a patent has been thus established, it may nevertheless be shown in another suit on the same patent against another defendant, in answer to an application for a preliminary injunction, or upon motion to dissolve an injunction previously issued, that the right claimed by complainant in the new suit was not, either in its nature or extent, fairly in controversy in the former suit, or that certain material facts were not known or considered by the court when the former suit was tried, or that there are important and relevant matters presented in the new suit which were not adjudicated in the former suit and which, if they had been presented, might have limited or changed the decree in the former suit. Page v. Telegraph Co., 2 Fed. 337; Lockwood v. Faber, 27 Fed. 63; Hat Pouncing Mach. Co. v. Hedden, 29 Fed. 147; Bailey W. M. Co. v. Adams, 3 Ban. & A. 96, Fed. Cas. No. 752; 3 Rob. Pat. §§ 1179–1182.

And in all such cases the question arises as to what measure of proof should be demanded by the court before granting or refusing the preliminary injunction, or dissolving or refusing to dissolve it after it has been granted. Upon this question there is a difference of opinion among the judges of the various circuits, the decisions of the court always depending, more or less, upon the peculiar facts of each particular case. As the granting or refusing an injunction is, to a certain extent, within the sound legal discretion of the court, it is hardly to be expected that any general or inflexible rule can be so stated as to warrant the assurance that it will be followed by other courts in other cases. At the present time the decided cases upon this subject may be classified under two separate and distinct heads,—one class declaring that, to justify the denial of an injunction, the new evidence must be of such a con-

clusive character as to place the question at issue beyond all reasonable doubt, and that every doubt must be resolved against the defendant (Hussey v. Whitely, 2 Fish. Pat. Cas. 127; Edison Electric Light Co. v. Beacon Vacuum Pump & Electrical Co., 54 Fed. 678; Edison Electric Light Co. v. Electric Manuf'g Co., 57 Fed. 618); the other class contending that such a measure of proof cannot always be satisfactorily obtained, that it is harsh, severe, and unreasonable, and that the correct rule is that complainant, in order to obtain an injunction, must show a clear right in support of the writ, and that any defense which puts the case in doubt should be deemed sufficient to defeat the application (American N. Pave. Co. v. City of Elizabeth, Fed. Cas. No. 312, p. 708, 4 Fish. Pat. Cas. 189; Bailey W. M. Co. v. Adams, 3 Ban. & A. 96, Fed. Cas. No. 752; Cary v. Spring Bed. Co, 26 Fed. 38; Lockwood v. Faber, 27 Fed. 63; Hat Pouncing Mach. Co. v. Hedden, 29 Fed. 147; Edison Electric Light Co. v. Columbia Incandescent Lamp Co., 56 Fed. 496).

The rule last stated would commend itself favorably to my mind if limited to cases where there has been no final decision by the court of last resort; but it is very questionable, to say the least, if it is not too favorable for the defendants in cases where complainant's patent has been construed and declared valid by the circuit court of appeals. There is always a strong presumption in such cases that the defense against the patent was strengthened by all the evidence at that time attainable that was deemed material to the case. Suits upon patents should not be tried by piecemeal, and a different construction given to a patent for the simple reason that additional and new evidence is given which raises in the mind of the court a mere doubt as to whether such evidence, if it had been produced at the former trial, might not have changed the result. On the other hand, it may be that the other rule goes to an extreme upon the other side of the question. Proof beyond a reasonable doubt must in its very nature be positively of a convincing and conclusive character, leaving no room whatever for any controversy upon the subject. This, if strictly adhered to, would result in the granting of injunctions in all cases where the validity of a patent has been sustained in any case in the supreme court of the United States, or the circuit court of appeals for the circuit, although the new evidence might be of such a strong character as to raise a reasonable doubt in the mind of the court as to its validity to the full extent of the construction given to the patent by the appellate court. And this is virtually the contention of complainants herein. The cases of Edison Electric Light Co. v. Philadelphia Trust, Safe-Deposit & Ins. Co. (recently decided in the third circuit) 60 Fed. 397, are cited in support of the view that, where the circuit court of appeals has sustained a patent, its decision will be regarded as conclusive on a motion for a preliminary injunction. While the beaten path of precedent is undoubtedly the safest road for nisi prius courts to follow, a blind adherence thereto, without considering the changed facts, would often lead to great injustice, which it should be the aim of every court to avoid.

A safe, just, and equitable rule would be to require the defendant,

in such cases, to produce new evidence of such a clear and positive character as to justify a well-founded belief that upon the final hearing the full proofs might be such as to warrant a different construction of complainant's patent from that given to it in the circuit court of appeals. This rule is not in opposition to the views expressed by Acheson, J., in the Edison Cases, last cited, for there was no new evidence before him, and all that he said upon this subject was in reply to the suggestion that he should deny the injunction because Hallett, J., in the eighth circuit, had refused to do so upon new evidence that had been presented to him. Neither is it opposed to the cases of American Middlings Purifier Co. v. Christian, 3 Ban. & A. 42, Fed. Cas. No. 307, or American Middlings Purifier Co. v. Atlantic Milling Co., 3 Ban. & A. 168, Fed. Cas. No. 305, cited by complainant, but, on the contrary, is in line therewith. Mr. Justice Miller delivered the opinion in both of these cases, and in the latter case, referring to complainant's patent, said:

"The patents have been found to be valid by the judgment of the supreme court of the United States at its last term, in the case of Cochrane v. Deener [94 U. S. 780], and a copy of the record of that case is produced as evidence in this case; and while it is conceded that the judgment in that suit is not an estoppel as to the defendants in this, because they were not parties to the former, it is not denied that it is conclusive on this court as to the principles which it decides, and raises a prima facie presumption of the validity of those patents, which requires clear and satisfactory proof to the contrary before it can be rebutted."

The merits of this suit will not at present be discussed. It is enough to say that after a full and careful examination of the facts I have arrived at the conclusion that, although the new evidence presented is not of such a conclusive, positive, or satisfactory character as to warrant the statement that, if it had been presented in the former suit, it would necessarily have changed the result as to the construction given to the Norton patent by the circuit court of appeals in Norton v. Jensen, it is deemed sufficient under all the facts and circumstances of this case, and the condition of the litigation respecting the Norton patent, to justify the court in modifying the order heretofore made upon such terms as will, in accordance with the views expressed by Mr. Justice Miller in the Middlings Purifier Cases, fully protect both parties in their respective rights.

The motion for dismissal of the injunction will be denied unless the defendant shall, within five days, give a good and sufficient bond in the sum of $25,000, to be approved by this court, conditioned for the payment of any damages or costs which complainants may finally recover in this suit, and, further, that it will well and truly keep an accurate account of the amount of cans manufactured by it in using can-heading machines which are constructed substantially in accordance with specification and drawings of letters patent No. 460,624, which were granted April 21, 1891, to Charles B. Kendall, and make a full and correct report thereof to this court every three months, or whenever so requested or ordered by the court so to do. If such bond be so given, then the injunction heretofore issued herein will be dissolved; otherwise, to remain in full force.

KNICKERBOCKER CO. v. ROGERS et al.

(Circuit Court, N. D. Illinois. April 30, 1894.)

1. PATENTS—NOVELTY.
   Evidence of want of novelty, to deprive an inventor of the fruit of his genius, must be so definite and cogent as to produce strong belief.
2. SAME.
   Where a machine would naturally be known to more than a few observers, the fact that it is claimed to have been known to but few at a particular time throws doubt upon its existence at that time.
3. SAME.
   Novelty is not negatived by prior structures in another art, which were not designed or used, prior to the new invention, to do its work, though afterwards so modified in form and proportions, in the light of that invention, as to perform its function.
4. SAME—OPERATIVE DEVICE.
   An inventor is not deprived of the fruit of his invention simply because the physical laws upon which it operates are not susceptible of satisfactory exposition.
5. SAME—DUST COLLECTORS.
   Claims 1, 2, and 3 of patent No. 403,362, claims 1 and 2 of patent No. 403,363, claim 4 of patent No. 403,770, and claims 1 and 2 of patent No. 408,987, of Orville M. Morse, for improvements in dust collectors, are all valid.

Suit by the Knickerbocker Company against Ward B. Rogers and others to restrain the infringement of a patent.

Albert H. Walker and Offield & Towle, for complainant.
Winkler, Flanders, Smith, Bottom & Vilas, for defendants.

GROSSCUP, District Judge. The complainant claims under letters patent issued to Orville M. Morse,—Nos. 403,362, 403,363, 403,770, and 408,987. Claim 2 of letters patent 403,363 is as follows:

"A dust collector, consisting of a tapering separating chamber having an imperforate peripheral wall, in which the whirling body of air forms a vortex, and in which the air moves from the periphery towards the axis of the vortex as it becomes freed from the solid matter; said chamber having at its large end a tangential inlet for the dust-laden air, and a discharge aperture for the purified air opening into the atmosphere, and provided with a tubular guard projecting into the separating chamber, and at its small end a discharge opening for the separated dust, substantially as set forth."

There was much diversity of view at the hearing as to the mode of operation of this collector. I cannot accept all of the claims urged by counsel for the complainant; not because they are disproved, but because they are not satisfactorily proved, and are therefore largely speculative. It seems to me, however, that the following mode of operation can fairly, and without abstruse speculation, be attributed to the collector: The current of dust-laden air, being blown through the tangential opening into the collector, is projected round the interior of the large end of the cylinder and cone. By reason of the fact that its specific gravity is greater than that of the air, all particles of dust are thrown, by centrifugal force, to the interior walls of the cone, and, circulating spirally down these walls, emerge from the small opening at the lower end of the cone. The air from which the dust has been more or less precipitated is

itself subjected to the spiral motion and centrifugal force, and also to a degree of condensation greater than the outside air, by reason of the inpouring currents through the tangential opening, and therefore, upon reaching the lower edge of the tubular guard, pours upward, round the exterior walls of the guard, to the air without. The effect of the centrifugal force, however, is such that, at the immediate axis of the whirling air, there is a rarification that causes the outward air to pour in, both through the guard, and through the lower opening. What office this plays in the ultimate operation of the collector, I am not able satisfactorily to determine. The net result of the operation is, however, clearly shown to be, that a large percentage of the dust flows through the lower opening, while the air rising through the tubular guard is almost entirely freed of dust. The evidence established, beyond any substantial doubt, that the machine is highly successful, and that no other device of its form, or substantial mode of operation, was ever before employed in the art to which it has been put.

The defendants deny infringement, and also the novelty and patentability of the Morse invention. It seems clear to me that if claim 2, above quoted, is valid, the defendants' devices are infringements thereof. With the addition of some immaterial and unnecessary features, these devices are almost the exact counterparts of Morse's conception. If the efficient purpose of the Morse invention is to precipitate, by means of the tangential entrance, the dust against the interior wall of the cone, and, by means of the spiral rotation, cause it to emerge from the lower opening, while the freed air, moving towards the axis of the vortex, rises through the tubular guard, there can be little doubt but that the defendants' devices operate according to like tendencies and effects.

I am not satisfied with the testimony that a collector like the Morse invention was in use prior to his invention. Proof of such anticipation, to deprive the inventor of the fruit of his genius, ought to be so definite and cogent as to leave in the mind a strong belief that such machine existed. The proof here falls short of that. It leaves my mind in some doubt respecting that alleged fact, but in view of the indefiniteness of the testimony respecting the date of seeing it, and of the improbability that such machine was in successful operation without coming to the knowledge of more observers, located as it was said to have been, this doubt does not rise to the dignity of a reasonable belief that such machine existed.

The two previous inventions that are urged, with the most emphasis, as anticipations of the Morse invention, are the Pratt Steam Separator and the Stratton Steam Separator. It will be observed that these were in an entirely different field of the art; but if they disclose a method of separating steam from water, which, by mere mechanical adaptation or change, could be applied to the use of separating dust from air, such fact alone would not foreclose them as anticipations. An examination of these separators, however, shows that before they were readapted, for experimental purposes in this suit, to the uses of dust collectors, they had entirely different relative form and openings. As steam separators, they

were practically cylinders, with enough of a cone, at one end, only to act as a hopper for drainage to the precipitated water; as dust collectors, they are practically cones, being only cylindrical where their interior walls first meet the incoming currents. As steam separators, the openings at each end for the escape of steam and water, respectively, are the same; as dust collectors, the opening for the escape of the freed air is many times larger than that for the dust. As steam separators, the action of the spiral currents is not affected by, or adapted to, the influence of immediate contact with the outside atmosphere; as dust collectors, the size of the openings, and the arrangement of the tubular guard, show that such adaptation is one of the essential features of its separation. I have been unable to ascertain definitely why these steam separators, in their original form, and with the original openings, might not be adapted to the purposes of collecting dust; but the fact nevertheless remains that, for some practical reasons, they are not. Otherwise, why should their proportions and openings be disturbed, and essentially rearranged to such close approximation to the Morse invention. It is evident that this readaptation, this decided change of form, was essential to success in their changed use. The reason for the change may be occult, but the effect of the change is unquestioned; and in my judgment an inventor ought not to be deprived of the fruit of his invention, where it has brought a new device into successful operation, simply because the physical laws upon which it operates are not susceptible of satisfactory exposition. The essence of the Morse invention is in so changing the form of all preceding machines and devices that, when used in dust collecting, it successfully precipitates nearly all the dust through the lower opening, and leaves the freed air to rise through the upper. It is not, in that respect, a mere change of form of an old device, such as is usually regarded as mechanical only. The essence of the invention is in the particular form adopted. Neither the form, nor relativity of openings, of former devices, would perform the office required. Other forms, such as the originals of the steam separators, will collect a large portion of the dust from the air; but such is not a successful and accomplished dust collector. A dust collector must approximately collect all the dust, or it is not a dust collector. The evidence in this case shows that Morse was the first who, either through experiment, happy accident, or knowledge of the abstruse force of physical laws, hit upon the right form of cone and tubular guard, and relative size of upper and lower openings, in connection with a tangential inlet, to constitute a successful dust collector of that character.

The complainant claims that claims 1, 2, and 3 of patent No. 403,362, claims 1 and 2 of patent No. 403,363, claim 4 of patent No. 403,770, and claims 1 and 2 of patent No. 408,987, have been infringed by the defendants, and are valid; and the court so finds, but construes all those claims as calling, either expressly or by implication, for a tapering separating chamber. For the foregoing reasons the finding will be for the complainant, and an injunction issue accordingly.

THE GEORGE SHIRAS.

JUTTE et al. v. THE GEORGE SHIRAS.

(Circuit Court of Appeals, Third Circuit. May 4, 1894.)

TOWAGE.

Libelants' barges in tow of respondent's tug were wrecked in a narrow channel in the Ohio river. Proper navigation of this channel required that the tow should be allowed to drift through it with the current, the tug backing, meanwhile, to keep control of it and steer it. Witnesses from the tug testified at the trial that this maneuver was undertaken, but that a severe gale blowing at the time turned the whole tow around so that the tug was helpless, and the current cast the tow on the bank. Witnesses from another boat testified that at the time of the accident the tug was going ahead; and it was shown that immediately after the accident the captain of the tug admitted that it was caused by the tug's going ahead, owing to the engineer's mistaking the signal bells. *Held*, that the accident was due to the negligence of the tug.

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

This was a libel by C. Jutte & Co. against the George Shiras. There was a decree in favor of respondent, and libelants appeal.

Knox & Reed and Edwin D. Smith, for appellants.

D. T. Watson and S. C. McCandless, for appellee.

Before ACHESON and DALLAS, Circuit Judges, and GREEN, District Judge.

GREEN, District Judge. The libel in this case was filed to recover the value of two coal boats and their cargoes, which became a total loss, on their voyage from Pittsburgh, Pa., to Louisville, Ky., at a point on the Ohio river known as "Deadman's Island." The boats and cargoes were the property of the libelants and appellants. As owners, they had made a contract with the owner of the steamer George Shiras for the towage of these boats, and at the time of the loss the Shiras was engaged in performing such contract. The allegation of the libelants is that while "on this voyage down the Ohio river from the port of Pittsburgh to the port of Louisville, under said contract of towage, and at Deadman's island, the said steamboat [the Shiras], through the negligence of its master, pilot, engineer, and crew, or some thereof, ran the said two boats upon the shore bar, and the said two boats and their contents became and were a total loss." It appears from the testimony that the Shiras, having in tow five coal boats and a barge, left Pittsburgh between 9 and 10 o'clock of the morning of February 7, 1890. The tow itself seems to have been properly made up, and the Shiras was in the position usual and customary for towboats on this river, with all of the boats making up the tow in front of her. At the time when the Shiras left Pittsburgh the wind was light, and there was some snow falling. She arrived between 1 and 2 o'clock in the afternoon at Deadman's island. The wind had increased in velocity, and the snow continued falling, but it nowhere appears that the range of vision was seriously affected or diminished

thereby. Deadman's island is about 14 miles below Pittsburgh. It lies at a bend or curve in the river, narrowing the channel in width to about 100 yards, forcing it over toward the northerly side, and causing the current to set over, with some velocity, upon the main shore. It appears that, while this is not especially a dangerous part of the river to navigate, it is not an easy place to run, and it always has to be "run very carefully" by the tows going down. It is considered the better way, for safety, while passing, to "flank," as it is termed. "Flanking" is simply permitting the tow to float down stream with the current along the channel, without any assistance from the towboat, which, in fact, instead of propelling the tow, at this point controls its movement by reversing its engines, and backing with such speed as will give to it the control of the tow, without overcoming entirely the force of the current. At this place on the river, unfortunately, this tow ran upon, or was cast upon, the shore, and the consequent injury and loss to the boats resulted. The libelants allege that the Shiras failed to flank the tow, as she should have done, and that at, or just immediately before, the time the wreck occurred, she was actually and positively propelling the tow ahead, causing the wreck; and this mismanagement is the negligence charged against her. Upon the other hand, the respondent insists that no negligence should or can be alleged truly against the Shiras; that the true explanation of the accident is to be found in the fact that the wind grew stronger as the day advanced; that, when the Shiras arrived at Deadman's island, it was blowing in such gusts, and with such force and velocity, that although she tried to flank, and did put herself and her tow in proper position to do so safely and successfully, yet she was caught by the gale, and blown completely around, so that her stern was down stream, and so great was the power of the wind that she could not overcome its effect, striving as strongly as she could, and so the tow drifted upon the north shore. In other words, she interposes the defense of a vis major, which, she asserts, was the natural and proximate cause of the injury. A loss is said to be caused by vis major when it results immediately from a natural cause, without the intervention of man, and could not have been prevented by the exercise of prudence, diligence, and care, and the use of those appliances which the situation of the party renders it reasonable that he should employ. Story defines "vis major" to be any irresistible, natural cause, which cannot be guarded against by the ordinary exertions of human skill and prudence; and this definition is approved by Chief Justice Cockburn in Nugent v. Smith, 1 C. P. Div. 437. Thus, a storm of unusual and extraordinary violence, a sudden gust of wind, and a tempest, have been held to be examples of vis major. And under such circumstances, if an injury occurs, he who is in the charge of the thing injured is within the rule which gives immunity from the effects of such an "act of God," if he can satisfactorily show that he used all known means to guard against the accident to which prudent and experienced men usually, in like circumstances, have recourse. If, then, it be proved, in this case, that this accident which caused

the loss of the coal boats and cargo was the immediate result of an unusual, extraordinary, and violent gale, amounting in fact to a quasi tempest, and if it be true that experience and prudence could not have guarded against the disastrous consequences, the plea of the respondent must prevail, and the Shiras go free. What, then, was the character of the storm of wind and snow on the day of the accident, at the place in question, and what were the efforts of the master and crew of the Shiras to guard the tow from impending disaster?

As is not unusual, the testimony on these points is not in harmony. However, without repeating in full the statements of the several witnesses, and having regard, at first, to the testimony offered by the respondent only, it seems that from official observations taken at the United States weather bureau at Pittsburgh, the day in question,—February 7, 1890,—was, in the early morning, exceedingly cloudy, doubtless presaging the sleet, snow, and rain which soon commenced falling; the wind blowing from the north, but early in the afternoon veering around to the southwest, from which point it continued to blow on into the evening. The wind was brisk from 11 o'clock in the forenoon until perhaps 2 o'clock in the afternoon, the average velocity for the day being about 8½ miles per hour. Between 1 and 2 o'clock the highest velocity was registered, which was 20 miles per hour; but this, the officer in charge of the bureau, declared was a "gust," which lasted apparently a short time,—only three or four minutes, in fact. Between 12 and 1 o'clock the wind was steady, and its velocity about 14 miles an hour. Down at Deadman's island the same condition of weather and wind seems, apparently, to have been experienced by the Shiras and her tow. That condition is variously described by the witnesses. Thus, one speaks of the day as a "pretty fierce one," but "not too bad to navigate." He declares that the "weather was worse at Deadman's than anywhere else;" that it was "blowing very hard, and snowing;" that "it kept getting stronger, and blew the hardest three-quarters of a mile above Deadman's." Another says "it approached a storm;" and another illustrates the force of the wind by describing the "whitecaps" on the river; and characterizes the weather, generally, by calling it "a pretty blustery night." And still another says the wind got higher, as the day opened, and blustery, and blew harder at some times than at others. It may be remarked, in passing, that while the snow storm is generally alluded to in their description of the weather by the witnesses for the respondent, it may be eliminated wholly from this case, as of no importance whatever. There is not a scintilla of evidence, direct or inferential, that the falling snow in any wise contributed to the accident, or formed in the slightest degree a component part of the asserted vis major. The statements quoted above comprise all the material testimony offered by the respondent to sustain this defense. It is admitted that the burden is upon him to satisfy the court affirmatively of the sufficiency of the explanatory excuse. Has this been done? If this evidence be given the most liberal effect, it simply tends to prove that a high wind was blowing at Dead-

man's island about the time the Shiras arrived there. A wind which was perhaps averaging 14 miles per hour; or, to put it a little more favorable to the respondent, a wind which, for three or four minutes, blew at 20 miles per hour. Can it be seriously argued that the witnesses have described a storm of unusual and extraordinary violence, or a tempest? It is true that several of the witnesses declare that the wind blew so strongly that it forced the Shiras around so that her stern was down stream. But the difficulty with the whole defense, as made by the respondent, is that this impending danger was clearly foreseen—the velocity of the wind plainly noticeable—some time before the tow reached the place of danger, and while it was under complete control of the Shiras; and yet no alarm is expressed, no special or extraordinary maneuver performed, no precaution taken by the master of the tug to guard against the peril which now seems to loom up so threateningly as the pregnant cause of this disaster. On the contrary, the customary preparations, only, for flanking are calmly made, and the tow put in position to drift down the channel, as if the wind was but a balmy spring breeze. The engineer, indeed, is notified to increase, if possible, the "head of steam," but at what time is not made clear. No call to the lookout that danger was near, and extra watchfulness required. The regular pilot goes off quietly from his post to his dinner, and a substitute, who does not wholly escape some sharp personal criticism, takes the wheel. And all this in the face of a vis major. One or two explanations may be given: Either the master and crew were clearly guilty of gross negligence, if the danger was as apparent as the respondent's witnesses have testified, or the danger did not exist in so threatening or effective a form that it became a vis major. A careful study of all the evidence in the cause leads to the latter as the true explanation. 'Just as the Shiras was approaching Deadman's island, another steamboat—the Pierpont—happened to be coming up the river, and was near the same place. The boats were distant from each other about four or five hundred yards when the Shiras was first noticed by the persons on the Pierpont. From the time when the Shiras was first seen, until the accident, she was in plain view. In the pilot house of the Pierpont were Capt. McDonald, Capt. Hamilton, of the Pierpont, and Mr. Douds, the pilot, at the wheel. Capt. McDonald was not on duty, but simply riding as a passenger. He says he saw the Shiras when she was more than half a mile away; that it was about 1 o'clock, after dinner, and the view not obstructed by fog, or anything of that kind. The wind was "blowing very light, at that time. There was no wind to interfere with any person in navigating the river." Capt. Hamilton, who is an experienced steamboat captain or pilot, in describing the weather, says "that the day had been very windy in the morning, but was not windy at the time of the accident; that the wind then was not blowing violently, or in gusts; and that in his judgment the wind had nothing whatever to do with the accident in question." Mr. Douds, the third occupant of the Pierpont's pilot house, testifies that the wind came down the river in a little gale; that the storm had been heaviest in the forenoon; that it was blow-

ing in the afternoon, but not storming; and that the wind was not strong enough to interfere particularly with navigation. Now these are statements of witnesses as thoroughly disinterested as the witnesses for the respondent; and it would be difficult, in comparing this testimony with the testimony of the other witnesses,—supposing no other fact to intervene,—to say decisively upon which side was to be found the greatest weight. The statements pro and con lie very evenly in the balance; but this equality in weight, this lack of preponderance on one side or on the other, is fatal to the defense. The burden is upon the respondent. Preponderance of testimony must be affirmatively apparent on his side of the scale. Failing to appear, the burden cast upon him by the law is not successfully borne,—its demands are not complied with. But there is an independent and intervening fact which does turn the scale. It is this. Shortly after the wreck occurred the captain and the engineer of the Shiras gave their account of how and why it happened; and yet, strange as it now seems, in view of their later statements, neither charged the weather or the wind as the cause. Other, and totally different, reasons were then assigned by both of these officers as fully accounting for the result. If the wind, by its gusts and force, drove this tow ashore, what could be more truthful, not to say natural, than to put the blame upon it. Would not these officers have described, in the terse but graphic language of the rivermen, the overwhelming gale which paralyzed all their efforts to save their tow from destruction? Vis major successfully conceals many acts which might be regarded, otherwise, as careless or negligent. It relieves from all criticism or complaint. It condones, if it does not justify, the failure to avert the disaster. Surely, such a cause, if it existed, would be confidently and clearly brought forward to account for the loss by those who, for lack of such excuse, might be condemned. But these officers of the Shiras, when asked to explain how the accident happened, never hint, even, that it was the wind or storm which forced the tow ashore. Can it, in the face of such silence, be believed now that such was indeed the cause? But the testimony does not leave this matter wrapped in difficulty, to be solved only by inferential deduction. Facts are testified to, which, unless the grossest perjury has been committed, thoroughly explain the accident. It has already been stated that as the Shiras was making her way down the river, at Deadman's island, another steamboat, the Pierpont was coming up. Separated, when first observed, by perhaps half a mile, these boats gradually approached each other, and were quickly in clear view. When the accident occurred they were not more than 75 yards apart. The peculiar movements of the Shiras attracted the attention of those upon the Pierpont, and first that of the captain, McDonald, who was, as has been stated, in the Pierpont's pilot house. He immediately called the attention of Mr. Douds, the pilot, to them. He said to him, "That man [referring to the captain of the Shiras] is going ahead in the steamboat, and he will kill her, if he don't stop," and, as the Shiras continued to go ahead, he suggested to Mr. Douds that he had better stop the Pierpont, and sound his whistle, to call the attention of

the other pilot to what he was doing on the Shiras. He then testified that Mr. Douds did stop the Pierpont, and sounded several short whistles, to call attention of those on the Shiras to their position; but the Shiras did not stop, and never did stop until her head struck the rock. Capt. Hamilton, also in the pilot house of the Pierpont, testified as follows:

"Q. Tell us what occurred after you saw the Shiras. A. Well, what made us notice her was, when they were coming out at the head of the island, they started ahead on her, and Captain McDonald made the remark, something about her going ahead, and I think I said to him, 'I suppose they have flanked too much, and maybe they are going ahead to counteract their flanking.' Captain McDonald remarked something about them going ahead, and going to kill her. Q. Well, what happened? A. Well, we came on, and stopped our boat, or ran slow, to see where she would go, so that we would know where to go to get out of the road. The Shiras kept on going ahead, and McDonald told the pilot to toot his whistle, to call his attention to what he was doing. He did so, but the Shiras kept on going ahead until about the time she struck. Could not say positively whether she stopped before she struck, but stopped about that time. I think she was backing before the tow went out on the bank."

And again, on cross-examination:

"Q. She was going ahead? A. Yes, sir. Q. At any considerable head of speed, or slowly? A. Going ahead as hard as she could."

And Mr. Douds, the pilot of the Pierpont, gave the following evidence:

"I first noticed the Shiras. I was on watch, and, as I have stated,—about it being a narrow place in the river,—I wanted to pass the Shiras, and for that reason was watching her movements. She was stopped, and then started ahead; and I thought perhaps she had stopped her headway too much, and was perhaps drifting on the bar. But she continued to go ahead. The boat did not stop; boat did not stop; boat going ahead, and the boat was crossways of the river. Then she came ahead stronger, and full head; and then I seen something was wrong, and began to sound the whistle,—sounded the whistle two different times, to draw their attention, as I thought they were likely mistaken, and that the boat was going into the bank. She continued to go ahead until the coal boat struck the bank, without stopping."

And again:

"Q. When you first noticed the Shiras, what was her position in the river? A. Well, she was what we would say 'crosswise.' Q. Quartering? A. Yes, sir. Coming down such a current, you come with the current, straight in, with your head right towards the shore,—coming right in, straight, of course, with the current, but the turn to make; and that requires that a tow should be flanked, because we cannot steer around fast enough to make the turn, as a general thing. We do, on some occasions, steer; but it is much safer to flank. Q. State whether or not the Shiras did flank. A. She commenced to flank, in the first place, but, instead of continuing on to back, they came ahead on the boats. Q. Could you tell what bell they were under when they struck the bank? A. No, sir; was not in hearing distance of the bells. Q. And why did you give those whistles that you spoke of? A. Because I thought that it was a mistake. We talked of it in the pilot house,—Captain McDonald, and the captain on the boat,—and seen that it could not be anything else but a mistake, and that they thought they were backing."

The statements of these witnesses are more or less corroborated by certain of the deck hands of the Shiras; but, as their evidence was given under objection, it will be disregarded. A much stronger (and, as it seems, conclusive) corroboration is to be found in the un-

contradicted and, in fact, admitted statements of the captain of the Shiras, made immediately after the accident. This is testified to by Mr. Theis, who is a member of the firm of C. Jutte & Co. He says:

"Q. Did you have any telephonic communication with Captain Morris after this contract or agreement was made? A. I did. Q. On what day? A. On the 7th of February, 1890. Q. And where were you? A. In C. Jutte & Co.'s office. Q. And where was Captain Morris? A. Mr. Morris told me he was at Economy when I talked to him. Q. Did you talk to him through the telephone? A. Yes, sir. Q. Did you recognize Mr. Morris? A. Yes, sir. Q. What was said? A. The conversation was: He asked if Bill or August were in the office, and I told they were, and he asked me to tell one of them to go down as soon as possible; that he had struck his tow. I inquired from him how it came about, and he said the engineer had made a mistake in the bells, and went ahead, instead of back."

A similar account of the cause of the accident was given by Capt. Morris to James Slade, the pilot of the steamboat Dave Woods, which was immediately sent down to the scene of the accident, to render such assistance as she could. Mr. Slade testified as follows:

"Q. Did you ever talk with Captain Morris about the accident while you were there? A. Why, down on the barge, after we landed alongside the stuff, I asked Mr. Morris how it happened; and he made the statement that, if the boat had been backing, it would not have happened."

And again, when Mr. C. Jutte inquired of Capt. Morris the cause of the accident, Capt. Morris gave the same reason. Mr. Jutte testified as follows:

"Q. Did you have any conversation with Mr. Morris? A. Yes, sir. Q. Just tell us where it was, and when. A. It was after I got down to the boat on the Dave Wood. Mr. Morris told me that he noticed the boat going through the water, ahead, and he went downstairs, and asked the engineer why he didn't give him steam sooner. The engineer told him he had given him steam as soon as the bell rang, and he went forward, and noticed the boat going ahead, and he went back, and looked at the wheel, and he was satisfied that the boat was a-going ahead, and he ran downstairs, and went to the engineer."

And finally, to Mr. W. C. Jutte, Capt. Morris reiterates the same explanation. Mr. Jutte testified as follows:

"Q. Did you have any conversation with Captain Morris? A. Yes, sir. Q. When? A. The evening, right there, on the boat. Q. Tell us, in detail, what it was. A. I asked Mr. Morris how they come to sink the boats, and Mr. Morris said that it occurred through a mistake of the engineer,—going ahead, instead of backing the boat; that when the backing bell rang the boat went ahead. He said there was nobody more careful than he was. He said he felt the loss as much as we did. He said the boat could not have been in a nicer shape for going through Deadman's; if they had let her alone, she would have floated through herself; but he thought he would flank her a little more, and they rang backing bell, and the boat didn't answer as she ought to, and he went back downstairs to see why it was not answered more promptly. And he said he went back into the engine room, and saw the machinery working, but did not notice which way it was working, and he said he asked the engineer why he did not answer sooner. He did not notice which way it was answered until he went upstairs. He went upstairs, and looked around, and the boat was closer to the shore than it was when he went down to the engine room,—to the right-hand shore,—and it occurred to him then that the boat was going ahead, instead of backing; that he run back to the engine room, and just about that time she was hitting the bank. Q. Did

you have any other conversation? A. I don't know. We had other conversations with him. He asked me if we would give him enough tow to go down. Q. Did you have conversations with the engineer about the accident? A. Yes, sir; I had a conversation with him the same evening, and I got him to repeat the same thing the next day. Q. What was it? A. I asked Mr. Lozier how they come to make the mistake to cause them to sink the boats at Deadman's, and here is what Mr. Lozier told me; I took it down in pencil. Q. Look over it, and tell us what he did tell you, taking that as a memorandum. A. I saw Mr. Lozier, and asked him how he came to make the mistake that caused him to sink the boat; and Mr. Lozier said the engines were reversed for backing, and he said the going-ahead bell rang, and he said he reversed the engines, and set them in motion for going ahead. And he said the engines had been going ahead for about a minute, when Mr. Morris went into the engine room, and asked him what he was doing, and he said the boat was going ahead until she hit the bank. Q. Did you make a memorandum of this conversation? A. Yes, sir. Q. When? A. On the 8th,—the day of the accident. I asked him the same day of the accident the same thing, when we were there, and I asked him the next day, to get him to repeat it again. Then I made a memorandum of it again, and repeated it, right in his presence. Q. Did you refresh your recollection of this conversation from this memorandum you made at this time? A. Yes, sir. Q. Did you see the pilot, George W. Moore, there? A. Yes, sir; I saw Mr. Moore the evening of the accident, and asked him the same thing; and Mr. Moore told me that, if the engineer hadn't made a mistake, they would not have sunk the coal."

That these statements were made by the men upon the Shiras is not contradicted. Capt. Morris alone seeks to explain his admission by asserting it was simply based upon his opinion, and he had become satisfied at the time he testified that he had made a mistake. No explanation is offered at all by the others. In their testimony, it is true, they now deny that the Shiras was going ahead, and insist that she was backing as strongly as she could continuously from the time she should have commenced to flank. But clearly they are mistaken, for Capt. Morris, noticing that the engine was not backing when the tow was in a critical position ran down from the pilot house to the engine room (to quote his own words) "to see what was the matter. I wanted to know why he was not backing. There we was, in a very critical position." So it was evident that for some space of time, when the situation was very critical, the engine was not backing, notwithstanding the confident assertions of the pilot and engineer to the contrary. It is very significant that the revised explanations of the accident are given fully two years after it occurred. The damaging admissions were made on the very day it happened, when all the incidents were fresh, and the causes which operated to produce it would have been perfectly well known and understood. It is impossible to resist the conclusion that this accident must be laid to the mistake or negligence of the Shiras. The attempt to show a vis major has failed to convince, while the preponderance of testimony is that the Shiras was not backing as she should have been at the critical point of her flanking maneuver, but that her engines were going ahead.

In reviewing the testimony in this cause, the fact has not been overlooked that shortly before the Shiras arrived at Deadman's island the steamboat Hornet, which preceded her about an hour, in flanking this part of the river, had the misfortune to lose a part of her tow by having it cast upon the shore by the force of the storm

then prevailing. This fact was strongly pressed upon this court at the argument, as it seems to have been upon the court below. But it has failed to impress. It is quite certain that the Hornet was in her difficulty fully an hour, if not a longer period, previous to the arrival of the Shiras. The wind storm which affected her came from Sewickley side of the river. Sewickley is on the right bank of the Ohio. The wind which is claimed to have cast the Shiras on the bar came up and from and through Stoop's hollow. Stoop's hollow is upon the left side of the river. If the cause of the accident to the Hornet is to be relied upon in the attempt to establish a vis major in the case of the Shiras, it must be the same cause, operating at the same time, in the same way, and with the same effect; otherwise, it is wholly unimportant and irrelevant. There is no evidence whatever that the gale which wrecked the Hornet continued for an hour thereafter, or that its power for injury remained constant. On the contrary, such evidence as bore upon this matter tended to prove that after 1 o'clock, when the Hornet was wrecked, the storm lessened. There can be, therefore, no analogy between the cases, and no logical deduction as to the similarity of the cause which produced the accident in the respective cases. The result reached is that the decree below must be reversed, and the cause remitted to the lower court to be proceeded with in accordance with this opinion.

THE ELIZA LINES (four cases).

CARGO ex THE ELIZA LINES.

ANDREASEN v. TWO HUNDRED AND NINETY-FIVE THOUSAND FEET OF LUMBER et al.

(Circuit Court, D. Massachusetts. April 3, 1894.)

Nos. 3,545–3,550.

1. ADMIRALTY PRACTICE—CONSOLIDATION.
   Proceedings on separate libels relating to the distribution of the proceeds of a vessel, her cargo and freight, none of which can be wholly disposed of without regard to one or more of the others, may be consolidated and tried together, evidence previously given being applied only to issues with reference to which it was taken.

2. SAME—SUBSTITUTION OF CLAIMANT.
   The allowance of an amendment of a claim by substituting a new party as claimant is ineffectual, if such party fails to submit to the jurisdiction.

3. SAME—SUBSTITUTED SERVICE—CROSS LIBELS.
   In a suit for salvage against a derelict vessel, her cargo and freight, the master claimed the vessel and cargo, and prayed for delivery of both, on stipulation. The owners of the cargo intervened, and prayed for delivery of the cargo to them without payment of freight, and also filed their libel for delivery thereof, in response to which the master filed a claim to the cargo, and an answer. He afterwards filed a libel against the cargo and its owners for payment of freight and general average, setting out the proceedings on the previous libels. *Held* that, as this libel was a cross libel to each of the prior suits, the court had power to order the monition thereon served on the proctors of the owners of the cargo, they being nonresidents, and on such service to proceed to judgment against them per-

sonally in all matters covered by the cross libel; and a subsequent dismissal of their own libel, on their motion, did not affect the jurisdiction so obtained.

4. SAME—APPEAL—OBJECTIONS NOT RAISED BELOW.
On a libel for freight against cargo and its owners, no exception to the joinder was made in the court below, and no warrant was issued against the cargo. *Held* that, on appeal, the objection must be considered as waived.

5. SHIPPING—BOTTOMRY—COMMUNICATION WITH OWNERS.
Owners of a vessel having failed to supply money which they knew would be needed for ordinary disbursements at her port of loading under a charter, made by their agent, although they had ample time to do so, her master, a part owner, having no funds of his own, obtained, on bottomry, at a fair rate of maritime interest, money covering only ordinary port disbursements, to which the other owners, when informed thereof, made no objection. *Held*, that they could not afterwards object to the transaction for failure of the master to communicate with them in advance.

6. SAME—HYPOTHECATION OF VESSEL AND FREIGHT.
The documents on which advances were made to a master consisted of an application for a loan on freight to be earned on a proposed voyage; a note signed by him, promising payment "fifteen days after arrival at the port of destination, or other intermediate port at which shall end the voyage," and containing a hypothecation of the ship and freight, and an assignment of enough of the freight to cover; and "rules for loans on freight," also signed by the master, which provided that the freight and vessel should be liable for payment of the loan. *Held*, that the loan was on bottomry of ship and freight, not on the general credit of ship.

7. SAME—FORM OF BOTTOMRY BOND.
Provisions of the law of the flag, prescribing minute particulars for the form of bottomry bonds, even if they could affect transactions in a foreign port, are waived by the execution in such a port of a bottomry bond in a different form by the master and part owner without objection by the other owners.

8. SAME—LIEN OF BOTTOMRY.
After bottomry of a ship and freight, she became derelict, and was taken by salvors into a port distant from her destination. The cargo was unloaded and sold, by order of court, on application of its owners; and the vessel was repaired by her owners, and proceeded on another voyage. *Held*, that the bottomry became a lien on the net salvage of vessel and freight, but was not entitled to the benefit of the repairs.

9. SHIPPING—FREIGHT—DERELICT BROUGHT IN BY SALVORS.
A vessel abandoned by her officers and crew was brought by salvors into a port distant from the port of discharge under her charter. In a suit for salvage against the vessel, cargo, and freight, her master promptly claimed the vessel and cargo, praying for delivery of both on stipulation, and obtained delivery thereon of the vessel, which he proceeded with great diligence to repair for the purpose of completing the voyage; but the cargo was claimed by the charterers, as its owners, and sold on their application. *Held*, that the master was entitled to delivery of the cargo, on giving proper stipulation, and that the abandonment, followed by the possession of the salvors and of the court, did not deprive the vessel of freight, if prepared to earn it. The Kathleen, L. R. 4 Adm. & Ecc. 269, 2 Asp. 367, disapproved.

10. SAME.
The right to freight, under such circumstances, did not depend on a quantum meruit, nor on diligence of the master and of the owners of cargo in applying for its possession; nor was it affected by the ordinary cesser clause in the charter, which does not extend beyond the liability of the charterer as such.

11. SAME—FREIGHT AND AVERAGE—SALE OF CARGO FOR INTEREST OF OWNERS.
The sale of the cargo was made under an interlocutory order on application of its owners, not for necessity, but for their interest alone. *Held*, that it subjected them to the same liability as though they had obtained a

delivery of the cargo, and, the voyage not having been wholly broken up otherwise, they were liable for the cargo's proportion of either pro rata or net freight, and of all just average charges.

12. GENERAL AVERAGE.
Directions for determining general average and net freight under the circumstances of this case.

Appeals from the District Court of the United States for the District of Massachusetts.

These were four libels in admiralty,—the first, by William W. Black and others, for salvage, against the bark Eliza Lines, her cargo and freight, on which the vessel and cargo were claimed by Hans Andreasen, as master, and the cargo by Bradford Darrach, on behalf of James E. Ward and others, as its owners, whereupon there was a decree awarding salvage, from which both the salvors and Andreasen appealed (Nos. 3545, 3546); the second, by said Ward and others, for possession of the cargo, on which Andreasen filed a claim to the cargo and an answer, whereupon the libel was dismissed, on motion of libelants, and Andreasen appealed from the decree of dismissal (No. 3547); the third, by Andreasen against the cargo, and against Darrach and Ward and others, for freight and general average, whereupon there was a decree for freight only, to the extent only of the proceeds of cargo after payment of salvage and moneys due on bottomry, and Andreasen appealed from this decree also (No. 3548); and the fourth, by the Banque de Genes against the bark and her freight, on a bottomry bond or lien, whereupon there was a decree for libelant for a proportion only of the balance of the appraised value of the bark and freight, after deducting salvage and costs, and both parties appealed therefrom (Nos. 3549, 3550). The six appeals were consolidated, and decided as a single cause.

Edward S. Dodge, for Wm. W. Black and Hans Andreasen.

John Lowell, for Hans Andreasen.

Lewis S. Dabney and Frederic Cunningham, for Bradford Darrach and James E. Ward and others.

C. T. & T. H. Russell, for Banque de Genes.

PUTNAM, Circuit Judge. All the various proceedings with which this opinion is entitled constitute, in substance, but one case. They relate to the distribution of the proceeds of one vessel, her cargo and freight. None of them can be wholly disposed of without having regard to one or more of the others. The court has the power to consolidate them, and will do so. All the proceedings will be carried along, disposed of, and recorded in this court as a single cause, under the title of "The Eliza Lines, her Cargo and Freight." Rev. St. § 921; The North Star, 106 U. S. 17, 26, 1 Sup. Ct. 41; The Burke v. Hurney, 4 Cliff. 582, 590, Fed. Cas. No. 2,159; Williams & B. Adm. Jur. (2d Ed.) 386. Cases consolidated may be tried together, or separately, as the court may determine. The Dove, 91 U. S. 381, 383. But, if tried together, the court must be careful not to apply evidence taken before the consolidation to any issue with reference to which it was not taken.

The Demetrius, L. R. 3 Adm. & Ecc. 523. The court thinks there is no difficulty of that character in the matter at bar, inasmuch as it believes that it will be able to proceed upon facts which are not disputed, or which are supported with reference to each issue by evidence made pertinent thereto by stipulation.

This vessel was a Norwegian bark. Hans Andreasen, of Farsund, Norway, was master and owner of one-third. The other owners were numerous, living in and about Farsund; and the managing owner was Davidsen, also residing at Farsund. There was telegraphic communication between Farsund and Pensacola, where we find the bark when her immediate history commences. She arrived there July 1, 1889, under a charter to James E. Ward & Co., of New York, to carry lumber from Pensacola to Montevideo, for orders to discharge there, or at Buenos Ayres. Freight, as usual, was payable on delivery of the cargo at the port of discharge. The vessel was laden at Pensacola with hard-pine lumber, and sailed August 13, 1889. She soon afterwards encountered heavy gales, and was finally abandoned by her officers and crew, who were taken off by another vessel, and carried to Port Maitland, Nova Scotia. At the time of her abandonment, she was in the neighborhood of George's banks. There she was found derelict by the original libelant, William W. Black, and his associates, and brought into Boston, September 19, 1889, in the exclusive possession of the salvors.

Immediately on being advised that the bark had been brought into Boston, Capt. Andreasen came there from Port Maitland; bringing with him his two mates and steward, but not the crew, and arriving the evening of Saturday, September 21st. Finding her in condition to pursue her voyage after repairs, Andreasen prepared himself to release the cargo and vessel. But each remained in the actual possession of the salvors until they filed their libel for salvage against the bark, her cargo and freight, September 26, 1889; this case now being No. 3,545, and, by cross appeal, No. 3,456, and hereafter, in some instances, styled the "original cause."

Thereafterwards, the vessel was released to Andreasen, on stipulation, and she was ready for sea at least as early as December. Meanwhile, Andreasen acted in behalf of the vessel with all the promptness which the law could require. He made his formal claim for the vessel and cargo September 27th, and therein prayed for delivery of both to him on giving such stipulation as the court should direct; and he gave the stipulation for the vessel October 5th at the agreed valuation of $2,800, afterwards reduced to $2,250.

September 27th, Bradford Darrach filed a consolidated claim and application for possession of the cargo, setting out that James E. Ward, Henry P. Booth, and William H. T. Hughes, doing business in New York, as copartners, under the style of James E. Ward & Co., were the owners of the cargo, and that Darrach was authorized by them to make claim in their behalf, and closing as follows:

"And whereas said cargo was totally abandoned at sea by the master and crew of said bark, and the contract of carriage and lien for freight thereby abandoned, broken, and waived, the said Darrach, in behalf of said owners

of cargo, prays that this honorable court will order said cargo to be delivered to him, upon his giving such stipulations therefor as the court may order, without the payment of any freight."

This claim being made by an agent, it was sworn to as required by rules of practice in admiralty, No. 26.

October 18, 1889, Ward, Booth, and Hughes, as such copartners, filed in the same court a formal libel, now No. 3,547, setting out, in substance, that they were the owners of the cargo; that the vessel had been left derelict with her cargo; that they were brought into Boston by the salvors, and libeled for salvage; that the cargo was then in the custody of the court, and had been unladen; that the libelants were ready to pay, and offered to pay, whatever should be awarded as salvage, and wished to take possession of it at Boston; and that the master of the vessel claimed that he was entitled to the possession of the cargo for the purpose of carrying it to Montevideo. Thereupon, the libel prayed process against the cargo, and that it might be delivered to the libelants, and for such other and further relief as law and justice might require.

As Andreasen had already, September 27th, in the original cause, filed his application for possession of the cargo, and the cross application of Darrach had been filed on the same day, and there had been the cross proceedings of October 18th, elsewhere described, whatever might have been the proceedings on the libel filed by James E. Ward & Co., the respective position of each party in interest was seasonably known to the other, and in form to be disposed of.

November 27th, Andreasen filed, in response to the libel of James E. Ward & Co., a claim to the cargo. This was followed by an answer, November 29, 1889, setting out substantially the same matters alleged by him in his petition filed in the original cause October 18th, hereafter explained. He concluded his answer with a prayer that the libel be dismissed, and that the cargo be delivered to him, as prayed in his claim filed in the other suit.

February 27, 1890, the proctors of James E. Ward & Co. filed a motion to dismiss their libel, for that the court had already ordered the cargo to be sold. January 16, 1891, the motion was allowed, and it was decreed that the libel be dismissed as of November 19, 1889, the date of the warrant for the sale of the cargo hereafter explained. January 24, 1891, Andreasen appealed from the last-named decree.

October 18, 1889, Andreasen filed an application in the original cause, setting out, among other things, the substantial history of the case; that he was making repairs, and was about to complete his voyage to Montevideo; that he had a lien on the cargo for the carriage thereof, and desired to carry the same, and earn the freight; and that he was ready to pay the salvage on the cargo, and carry it to its destination, and demanded the right to do so. And he closed by praying that the court would order the cargo delivered to him, on his giving a proper stipulation therefor. On the same day, James E. Ward & Co., not having, to that time, apparently, pursued their application for delivery of the cargo made September 27th, filed in the original cause an application setting

out that the value of the cargo was being rapidly diminished by reason of the charges of custody, and other costs and expenses, and praying for an interlocutory sale. There was no allegation that the cargo was perishable, or liable to deterioration, decay, or injury, as provided in rules of practice in admiralty, No. 10. Neither did the salvors apply for a sale. On the 16th of November the formal petition of Andreasen to bond the cargo, filed on the 18th of October, was denied; and its sale was ordered, and accomplished on the 29th of November.

The sale of the cargo was not a sale for necessity under the rules, No. 10, already referred to, nor as a matter of right or necessity for the purpose of ascertaining how the salvors' services were to be computed, if the salvors had such right. The Nathaniel Hooper, 3 Sumn. 542, 552, 563, Fed. Cas. No. 10,032. If a sale had been made for any such reason, the voyage would clearly have closed, as the result of a physical or legal necessity; and all averages, general and particular, would necessarily have been adjusted at the port of Boston. But the cargo was not perishable. The sale was made on the application of James E. Ward & Co., by virtue of the general authority of an admiralty court, which adjusts itself to all contingencies of maritime affairs, and which, looking only at the interests of one of the parties involved, and to prevent them from being sacrificed by a peculiar combination of circumstances, may, perhaps, in an extreme case, decree a sale on his request. The sale in this case can be justified on that principle only. It must be held to have been made on the application of the owner of the cargo, not for the common interest, but for his own alone. Under such circumstances, and, indeed, under any circumstances where a sale has been made on the application of either party, the court on appeal, in the absence of any proceedings for prohibition, can grant no direct relief, even if it finds the sale was unauthorized. It can only assume that it was made in the interests of the party applying for it, and that under some circumstances he subjects himself to the equitable consequences thereof. On a sale to obtain funds of any part of a cargo in a foreign port by authority of the admiralty, if it transpires that the owner ought to have had funds in that port, or was otherwise in fault, then, notwithstanding the sale was by an order of the court, the master, by applying for and securing it, subjects his vessel to a liability on the bill of lading. The Tilton, 5 Mason, 465, 474.[1] Unless the proposition is maintained that the voyage was wholly broken up by the derelict, did not James E. Ward & Co., by preventing the master from obtaining possession of the cargo, and by applying for and securing the sale, subject themselves to a liability for payment of the cargo's proportion of all just averages, and of either pro rata or net freight? This question we find it convenient to dispose of here, although, by so doing, we interrupt the narrative of proceedings.

The general powers of the admiralty courts in making sales of property, independently of the physical necessity arising from its

[1] Fed. Cas. No. 14,054.

perishable character, are stated in Parsons on Shipping and Admiralty (volume 1, p. 74); The Fanny and Elmira, Edw. Adm. 117; The Tilton, ubi supra; The Gettysburg, 5 Asp. 347; and Ben. Adm. (3d Ed.) § 299. The court does not say that these authorities, or any other, justified the sale of the cargo of the Eliza Lines, under the circumstances of the case. It does not find it necessary to determine that question. On the other hand, the court is clearly of the opinion that by reason of the principles stated, and by authority, this sale, made on a summary order, and without plea or proof, or judicial decree on an issue solemnly made, cannot prejudice the interests of any party not assenting to it. A full report of The Kathleen, which will be referred to more at length hereafter, will be found in 2 Asp. 367. The vessel had been abandoned, and brought in by salvors, and the owners of the cargo applied for its sale. It was ultimately determined that the cargo was discharged from all further liability to the ship, but on the preliminary application for the sale this point was left open. In the report in 2 Asp. 368, the learned judge, Sir Robert Phillimore, who disposed of the case through all its stages, inquired as follows: "What is the legal consequence of obtaining from the court an order for the sale of the cargo? Does it not oblige the owners to pay either full or pro rata freight?" This question indicated that, as his mind was then shaped, the granting of the order for the sale did not dispose of the question of liability for freight; and, indeed, that both the learned judge and all the counsel so viewed the law necessarily follows from the fact that afterwards, in the same case, on a subsequent application in behalf of the owners of the vessel, he considered this question, and settled it on the merits.

Can it be possible that an interlocutory order of this character, summarily made without proper plea and proof, only for relieving the court of the custody of property, or for securing a fund in the registry to represent it, or for some other incidental purpose, and from which no appeal could be taken effectual to give complete remedy if the order was erroneous, and which is occasionally made before all parties are in court, can be held to determine the ultimate rights of the parties on the questions which we are now considering? According to the necessary principles of justice, and the fundamental rules of orderly proceedings in courts of law, we must hold that it does not.

When the cargo is of a perishable character, and would be endangered by some unexpected delay resulting from maritime disaster, or from some other cause, it may become the duty of the master to land it and sell it, although it might have arrived at the port of destination in specie. Jordan v. Insurance Co., 1 Story, 342, Fed. Cas. No. 7,524; The Isabella Jacobina, 4 C. Rob. Adm. 77; The Industrie (1894) P. 58, 75. Under these circumstances, if the master refuses to sell, the admiralty courts might perhaps sell or deliver the cargo to the owner without charging the owner with liability for freight. But, on the whole, we think the owner who obtains delivery of the cargo, or, what is equivalent, the possession of the proceeds after a sale made solely in his own interest,

cannot avoid any liability merely because he has accomplished this throught the medium of an interlocutory, and perhaps ex parte, order, from which there is no appeal which can afford a substantial remedy if the order proves erroneous. In this event, he must stand the same consequences as though he had accomplished immediately by his own act what he succeeds in accomplishing mediately by himself setting the court in motion.

On the 26th day of November, Darrach again applied to the court, in the original cause, and prayed that the claim filed by him on the 18th day of October might be amended by substituting the Atlantic Mutual Insurance Company for James E. Ward & Co., as the claimant of the cargo, and that it might stand as the claim of said corporation. This was allowed on the 27th day of November; but this allowance was ineffectual, because the Atlantic Mutual Insurance Company has never submitted itself to the jurisdiction of the court. Until that should be done, James E. Ward & Co. stood for all for which they would be holden to stand independently of this last application. No court can permit one suitor to withdraw on substitution, to the detriment of the other parties to the cause, until it can put its hands on the person to be substituted. By their prior intervention and claim, they declared themselves owners of the cargo, and estopped themselves from denying that they were. If thereby they subjected themselves to a liability to other parties, they could not transfer this liability without the latter's consent. The court therefore strikes this application from the record, as unimportant.

On the 27th day of November, 1889, Black filed a petition on his original cause, against James E. Ward & Co., praying that they might be required to pay the gross freight into court, the details and history of which are not now important.

On the 16th day of January, 1891, by leave of the court, Black filed, as of November 27, 1889, a renewed application that James E. Ward & Co. should pay the freight money into court, or file a stipulation therefor. On the same day this motion was disallowed, as of said 27th day of November.

On the same 27th day of November, Andreasen filed a libel against the cargo, Darrach, and James E. Ward & Co., now No. 3,548, setting out many of the facts which have already been recited, and especially the efforts made by Andreasen to secure the cargo; that Black had filed the libel in the original cause; that Darrach, in behalf of James E. Ward & Co., had filed in that cause a claim to the cargo; and that James E. Ward & Co. had filed their libel already referred to. He prayed for process against the cargo, a monition to Darrach and James E. Ward & Co., and for a decree for payment of freight and general average. On this libel a warrant and monition issued on the same day, and was ordered to be served, and was served, on the proctors who had already appeared for James E. Ward & Co. in the original cause, and one of whom appeared for them on the libel instituted by them. On the 6th of December the same proctors moved that this libel be dismissed, on the ground that none of the persons against whom it was filed

were residents of the district, and that no sufficient service had been made. On the 16th day of January a decree was entered dismissing it, as against Darrach and James E. Ward & Co., but allowing $1,450 pro rata freight, to be paid only from the proceeds of the cargo in the registry, and referring all questions of general average to an assessor. The report of the assessor was made and filed, and a decree entered, on the 14th day of May, 1891, reaffirming the dismissal, as against Darrach and James E. Ward & Co., and determining that the proceeds of the cargo had been diminished by several decrees awarding salvage and moneys due upon the bottomry bond, to be hereafter referred to, so that there remained thereof only the sum of $157.23; directing that this last sum should be paid the vessel, and disallowing all claims for general average. Whether the dismissal, as against Darrach and James E. Ward & Co., was on the merits, or for supposed want of jurisdiction over them, does not appear. From this an appeal was duly taken by Andreasen.

Turning again to the original libel of Black for salvage, an answer was filed by Andreasen on the same 27th day of November, admitting that salvage was due, and submitting the amount thereof to the court. The result of this was a final decree, entered on the 13th day of May, 1891, to the effect that the $910.74, net proceeds of the cargo in the registry, must be wholly applied to the satisfaction of the pro rata freight, subject to the lien for the salvage; awarding Black $1,755 for salvage services and expenses, and $310.06 for costs of court, and apportioning the two pro rata between the bark, at a valuation of $2,250, and the $910.74. The disposition of the remainder of the $910.74 will be hereafter explained. Both the salvors and Andreasen seasonably appealed, each expressly coupling an appeal from all interlocutory orders and decrees. These appeals are now Nos. 3,545 and 3,546.

Another libel was filed by the Banque de Genes on the 7th day of December, 1889, against the bark and her freight, based upon an alleged bottomry bond or lien for moneys advanced, the circumstances of which will be stated in connection with the consideration of that claim. This resulted in a decree, entered on the 13th of May, 1891, to the effect that the libelant was entitled to recover against the bark and freight $1,458, with interest from the date of the libel, amounting in all to $1,582, and costs of suit; that the same should be paid out of the appraised value of the bark and net freight, after deducting salvage and costs, but giving the libelant only a proportion of the balance. In other words, it compelled the libelant to contribute with the owners of the vessel and freight. Both parties seasonably appealed from this decree, and these appeals now make Nos. 3,549 and 3,550.

The issues with the Banque de Genes relate to a bottomry placed on both freight and vessel at Pensacola on the 24th of July, 1889. The district court maintained the validity and payability of the claim; but, as already stated, it allowed the holder of the bond only a proportion of the net salvage. Andreasen, in behalf of the bark, contests the entire claim on every ground that can be suggested.

His answer is not creditable to him, in that it raises so many issues inconsistent with his own conduct at Pensacola and his testimony.

The vessel arrived at Pensacola on the 1st day of July. The charter party, which required her to take up her cargo at Pensacola, and furnished her with no advance freight, was made in New York, not by Andreasen, but by the agents of the owners, on the 5th day of the previous February. It described the vessel as then on a voyage to Buenos Ayres; and, in view of the length of time which elapsed before the vessel could arrive at Pensacola, the owners, including the managing owner at Farsund, must be assumed to have known that it would be several months before she would load under the charter party, and that there was ample time to supply the needed funds to pay her outward bills. In fact, Andreasen admits in his testimony that he received one or two letters from his owners while he was at Pensacola; and, though he arrived there on the 1st day of the month, he did not take up this bottomry until the 29th. He also testified that the vessel arrived from Buenos Ayres in ballast; that his owners knew that he would collect no freight on arrival, and also knew that it would be necessary for the vessel to borrow money in Pensacola. He also testified that he had no funds of his own, and that he used the money in part for provisioning the bark, and for her other disbursements, and in a small part for his own cash and the crew. The amount taken up, £300, netting the master $1,353.60, would necessarily appear to any court of admiralty a reasonable amount for inward and outward disbursements for a vessel of the size of the Eliza Lines. There is not a syllable in the record impeaching the transaction, except it is the testimony of Andreasen that he failed to communicate with his owners in advance. In this case this omission was immaterial. The amount taken up was moderate, at a fair rate of maritime interest, and covered only the ordinary port disbursements. The transaction was touching the ordinary course of the management of the vessel, with reference to particulars which the owners foresaw, and could easily have provided for otherwise, if they had so desired. The cases familiar in the decisions arose from unforeseen disasters, involving large amounts at remote points, where the lenders of money were few, and could make their own terms, and all under circumstances which the owners could not anticipate or provide for. It is this class which the courts have considered, when laying down so strictly the rules requiring prior communication with owners.

In the case at bar, independently of any questions concerning the peculiar law of Norway or of the United States touching bottomry, and of any questions whether the law of the flag, or that of the place of making the loan, governs, the fundamental rule applies which exists under all laws,—that when an agent has been selected to perform a duty at a remote place, if then the principal has not provided what must have been foreseen as requisite to its full performance, the principal impliedly authorizes the exercise of such powers as are incidental to supplying the deficiency. Therefore, the circumstances of this case, by implication, devolved on the master the power to obtain funds, and to exercise his discretion within

reasonable limits as to the most suitable way of obtaining them. It is well said in Abbott's Law of Merchant Shipping (13th Ed. p. 169) that it is obvious that to a ship owner who knows that his ship is in distress, and has no funds, notice of the distress may often be notice of the necessity of hypothecation. Moreover, in this case, the master was part owner; and he admits in his testimony that after he had drawn the money he informed the other owners that he had done so, and advised them of the amount. Andreasen was estopped, and the other owners do not appear to have objected after having been informed. Aside from the implication arising from this negative fact, there is enough in the case to justify the inference that they were very glad not to object, because Andreasen himself was bound for the amount obtained, if the bottomry was invalid, deducting, perhaps, the premium in excess of the customary rates of interest; and for his liability he would have had, according to the Norwegian Code, printed in the case, a pro rata reclamation against the other owners in personam. Assuming the bottomry to be valid, the owners are relieved from personal liability, which, according to all the aspects of the case, is to their advantage. No one objected to the bottomry until the litigation commenced. It was authorized by the circumstances of the case, without any prior communication with the owners, and has been ratified by their silence; and, as it is in their interest, it may also be presumed to have had their approval.

A question was raised whether or not the advance was on bottomry, or only on the general credit of ship and freight. The libel makes the written agreement, on the strength of which the loan was made, a part of it, and also alleges that the money was furnished on the credit of the bark and freight. As the libel sets out all the facts, and no exceptions have been taken, it is immaterial whether it construes the transaction correctly or not. The court can determine from what is alleged whether there was a proper bottomry, or only an obtaining of money on the credit of the ship and freight. It is clearly of the opinion that the former represents the state of the case. The court will not set out the documents at length, but they contain, first, an application for a loan on the freight to be earned on the then voyage from Pensacola to Buenos Ayres. This is followed by a note, signed by Andreasen, as master, promising to pay "fifteen days after arrival at the port of destination, or other intermediate port at which shall end the voyage." It also contains an hypothecation of the ship and freight, and an express assignment of enough of the present freight to cover. Connected with these papers is what is entitled "Rules for Loans on Freight," also signed by Andreasen, which, among other things, provides that the freight and vessel shall be liable for the payment of the loan. This sums up all the essentials of a bottomry loan, the most important of which are that the owners are discharged, and the loan is not payable, unless the vessel arrives; but, of course, with the necessary implication that if the vessel does not arrive the bottomry is entitled to the salvage which comes into the owner's hands. Such was the result of the present case, happening through the vessel

being arrested at Boston, bonded by the owners, and subsequently sent by them on another voyage. There is no doubt, according to well-settled rules applicable to bottomry bonds, that the district court was right in holding that this bond was of that class, nor that, in view of the deviation after her arrival at Boston, it became a lien on the net salvage of the vessel and her freight.

We are referred to the decision of the circuit court of appeals for the second circuit in The Sophie Wilhelmine, 7 C. C. A. 569, 58 Fed. 890, to the effect that on papers constituting a bottomry loan, substantially of the form before the court here, the lien did not extend beyond the salvage of the freight, and did not hold the vessel. There were some expressions in the instrument before the court of appeals in the second circuit which perhaps might distinguish it from the one at bar, but we are not disposed to look for minute differences of that character. Twice over, in the papers before this court, the borrower pledged both vessel and freight; and, in our view, we would not be justified in annulling this express stipulation of the parties. There is no doubt that the loans in that case and in the case at bar were, commonly speaking, loans on freight, such as is customary, especially on the short voyages in the Atlantic commerce. Such loans are more desirable for the lenders than loans on the hull, because the freight is ordinarily collected with great promptness and certainty. But, however this may be, neither the lender nor the borrower is prohibited by any principle of law from taking or furnishing additional security, by pledging the hull, or in any other like way. 1 Pars. Mar. Law, 420. That was what was expressly done in this case; and though, no doubt, if the freight was sufficient, and there were conflicting interests between the freight and the hull, or the underwriters on each, the freight would be holden to exonerate the hull, yet until the amount of bottomry was made good the parties had expressly bound both.

In connection with this branch of the case, the court must not overlook the point taken by Andreasen, that the Norwegian Code prescribes various minute particulars for the form of bottomry bonds,—among the rest, that the premium agreed on must be stated,—which the case at bar does not meet. But there is a wide distinction between provisions which are fundamental, relating to the powers of the master, and those which are merely directory as to minute details of form. It would also be going very far to suppose that the latter were more than municipal regulations touching transactions within the kingdom of Norway itself. Moreover, all such details were expressly waived by Andreasen, so far as his interest was concerned, by his executing the bottomry, and impliedly waived by the other owners, through their silence after being advised of the transaction. It is for the interest of commerce that bottomry bonds given under circumstances like these at bar should be liberally protected, and courts are not inclined to the class of inequitable defenses thereto set up in this case. Insurance Co. v. Gossler, 96 U. S. 645, 651.

As already said, the district court apportioned the net salvage between the bottomry bond, the vessel, and freight. The court

understands that under the French law, at one time, and perhaps even now, bottomry contributed and shared in general average, and in some other particulars; but elsewhere, and in this country, so far as the court is advised, the practice is, without exception, that bottomry does not contribute, except to the expenditures of the owners from their own funds for bringing the wreck into port, or providing for its preservation, and towards these it contributes the entire amount, so far as necessary to reimburse the owners, and so far as the salvage was benefited by them. The principle is stated in Parsons on Shipping and Admiralty (volume 1, p. 151), to the effect that no salvage or average rests upon a bottomry bond unless there is an express stipulation to that effect; and the court understands the same to be held in The Great Pacific, L. R. 2 P. C. 516, and in Abb. Shipp. (13th Ed.) p. 176. To the same effect is Insurance Co. v. Gossler, 96 U. S. 645, 652, 655. As the result of these rules, and for other more fundamental reasons, the bottomry cannot have the benefit of the repairs made to the bark at the port of Boston, because, if it did, the benefit would at once be offset by the liability of the bond to contribute to the owners the cost of those repairs, and the law does not require computations which are vain, and neutralize each other. The court does not consider what the condition of the law on this point would be if the deviation at Boston had been voluntary on the part of the owners.

The result is that the holders of the bottomry bond must have a decree against the whole of the existing net salvage of vessel and freight, and against such further sums as may be received from James E. Ward & Co., as we will explain hereafter.

The circumstances are not such as to justify the court in reviewing and modifying the findings of the court below with reference to the amount of salvage awarded, which Black claims is insufficient; except, if additional freight be secured from James E. Ward & Co., the salvors should receive their due proportion thereof.

Inasmuch as Darrach clearly set up no interest on his own behalf, but throughout appeared only as the agent of James E. Ward & Co., the court will order that Darrach be dismissed from the consolidated case.

The next difficulty with which the court has to deal relates to the question of jurisdiction in personam against James E. Ward & Co., and, incidental to that, the objections that the libel filed by Andreasen in No. 3,548, against the cargo and them, cannot be maintained, because, as it is claimed, in a libel of that character the cargo and the owners of the cargo cannot be joined.

There can be no doubt that the paper filed by James E. Ward & Co., September 27, 1889, in the original cause, in which they alleged title to the cargo, and prayed for delivery of it to them without payment of freight, was an intervention, and propounded allegations within rules of practice in admiralty, No. 34; and thereupon, in accordance therewith, they might have been required to give a stipulation, with sureties, to abide the final decree. So, also, on the filing, November 27, 1889, of the cross libel by Andreasen, James E. Ward & Co., as respondents in the cross libel, if the service was

sufficient, might have been required to give security for the sum claimed in the cross libel, as provided in the same rules, No. 53. The record does not show any such stipulation in either cause. A motion that a stipulation be given by them in the original cause was filed on the 16th day of January, 1891, and, by leave of court, as of November 27, 1889; and on the same day the motion was disallowed,—on what precise ground does not appear, nor is it necessary to consider. Notwithstanding this, by their intervention, and by filing their libel, James E. Ward & Co. became personally bound to abide the decrees in the original cause and on the cross libel, to the same extent as they and their sureties would have been bound if the stipulations had been given. With reference to the original cause, however, it must be said that no intervener, merely by intervening, would become subject to perform a positive obligation, or liable in that cause to a counterclaim or other claim against him. If any such is to be enforced, it must be by a cross libel, or at least by a further intervening petition, having all its merits. Ward v. Chamberlain, 21 How. 572, 574. The cross libel is found in that filed by Andreasen, November 27th, and the further intervening petition is that of Black, filed in the original cause on the same day. The difficulty touching this petition is that it was filed by Black only in behalf of himself and his associates, and not in behalf of the master or owners of the vessel, and therefore the latter can now claim no interest under it. We are compelled, therefore, to look to the cross libel filed by Andreasen in No. 3,548. As this related to the subject-matter of the original suit, and involved the disposition of a part thereof, it may properly be regarded as a cross libel consequent on it; so that service on the proctors of James E. Ward & Co., who had appeared therein, was sufficient to give jurisdiction, both on general principles applicable in all tribunals touching cross libels, and also on account of the obligations to which James E. Ward & Co. subjected themselves personally by intervening in the original cause, and by filing their own libel, as already explained.

But the matter may be pursued somewhat further. We have already referred to the libel filed October 18, 1889, by James E. Ward & Co., against the cargo, and to Andreasen's answer to it, in which he prayed that the libel might be dismissed. We have also referred to the motion to dismiss that libel, and to its final disposition by dismissal. From that, as already said, Andreasen entered an appeal, now No. 3,547. It is claimed that this appeal cannot be sustained, because in dismissing the libel the court complied with the prayer of the answer. This may be true. Nevertheless, the proceedings in this case remain as the basis for jurisdiction in the cross libel of Andreasen. This, as already said, was filed November 27, 1889, and was made, not only in substance, but in terms, a cross libel as to each of the prior suits, by setting out the original cause, and also the libel of James E. Ward & Co. against the cargo. On this no process issued against the cargo or its proceeds; but a warrant and monition issued on the 27th day of November against all persons concerned, with a special di-

rection that it be served on the proctors for James E. Ward & Co. named in the monition, one of whom appeared for them to prosecute their libel, and both in their intervention in the original cause. Service was duly made on the proctors named. On the 6th day of December, they moved to dismiss, as already stated; and on the 16th day of January, simultaneously with the decree dismissing the libel of James E. Ward & Co., an interlocutory decree was entered on the libel of Andreasen, dismissing it as against them, but retaining it as against the net freight. It should be remarked at this point that the decree dismissing the libel of James E. Ward & Co. did not carry with it the libel of Andreasen, whether it is to be regarded as a cross libel to the original cause and to that of James E. Ward & Co., or only to the latter. Andreasen, in his libel, as already explained, set up a counterclaim against James E. Ward & Co., which, although it grew out of the subject-matter involved in the prior proceedings, and was capable of being properly consolidated with them, and so was properly the basis of a cross libel, yet was far from being in the nature of a mere defense. The distinction is well stated by Judge Caldwell in Lowenstein v. Glidewell, 5 Dill. 325, 329, Fed. Cas. No. 8,575. Therefore the libel of James E. Ward & Co. having enabled the libelant in the cross libel to obtain jurisdiction by service on their proctors, its result was not of importance, as affecting the standing of the cross libel. Indeed, the decree dismissing the original libel or bill may itself be the very foundation, and a part, of the decree sustaining the cross bill or cross libel, as was the case in Holgate v. Eaton, 116 U. S. 33, 42, 6 Sup. Ct. 224. The rule on this point in admiralty must be even more liberal than in equity, as the former regards mere matters of form even less than the latter, and is even more disposed than the latter to adjudicate whatever rights come before it, when jurisdiction has once attached, so far as they can be justly adjudicated.

James E. Ward & Co. refer to the fact that Black's petition and Andreasen's libel were each filed November 27th, and that this was the same day that they moved to substitute the Atlantic Mutual Insurance Company; but in no event was this of any consequence, as their motion to dismiss their own libel was not filed until February 27, 1890. As already said, the appearance of one of their proctors stood in the latter case, at least until the latter date.

Therefore, the only question on this branch of the case is whether, under the circumstances, the service on the proctors of James E. Ward & Co. gave jurisdiction over the latter on the libel of Andreasen. Until the issue was made in this case, the court had supposed there was no doubt on this question. Whenever a libel in admiralty or a bill in equity is filed by a nonresident, so far as the court is advised, the practice has been uniform to direct and permit service of a cross libel or cross bill on the solicitors or proctors of the nonresident. In no other way can jurisdiction be obtained to adjudicate all the rights which the court ought to adjudicate touching the subject-matter of the proceeding. The original promoter of the litigation, by coming into court, submits him-

self, by implied agreement, to service made in that manner, and, by consequent implication, vests his solicitors or proctors with authority to receive the service of the precept issued on the cross demand. Indeed, the rule goes so far that in many jurisdictions in the United States, if not in all of them, a like service may, according to the modern practice, be made of a counter suit on a mere counter demand, not connected with the subject-matter of the original suit, and although the only purpose is to obtain a set-off, either of the judgments or executions.

The court has carefully examined all the cases cited on this point on either side, and finds none of them pertinent, except so far as some of them may be hereafter referred to. If there are remarks contained in any of them which bear on the present question, they have been overlooked by the court because they were not necessary to the issues in the case, were mere dicta, and have not been brought carefully to the court's attention. In Nichols v. Tremlett, 1 Spr. 361, Fed. Cas. No. 10,247, cited in behalf of James E. Ward & Co., a substituted service of a so-called "cross libel" on the proctor of the original libelant was refused; and the court resorted to the power vested in the admiralty courts, recognized by rules of practice in admiralty, No. 53, and stayed the original cause until an appearance was entered in the so-called "cross libel." The matter does not seem to have been thoroughly discussed, and is not very fully stated. The learned judge admitted the analogy to proceedings in equity. Whatever may have been the extent of the discretion practiced by equity courts at the time of this decision, in 1857, under the present practice it embraces all cross bills, properly so called. There was no suggestion in Nichols v. Tremlett that the authority given by the rules, No. 53, to stay the original libel until a stipulation is given in the cross libel, was regarded as excluding the power of the court to order substituted service. That this is only cumulative is supported by Williams & B. Adm. Jur. (2d Ed.) 370, note t. The admiralty court act of 1861 vested by express law the same power to stay proceedings as is recognized by the rules, No. 53; and yet, in the note referred to, the learned authors say, touching the decisions since this statute, that service of a citation in a cross cause on the solicitor of the party suing in the original cause would be sufficient. The power to stay is not one to administer justice, but to deny it; and such a power should not be deemed exclusive of others, unless impossible to come to some other conclusion. Many authorities on this general question will be found in Daniell, Ch. Pr. (5th Ed.) *446, *449. As the practice stood at the date of this edition, service on a solicitor in an original cause was not allowed on a cross bill, but only on a bill filed to restrain an action at law. The notes, however, cite cases showing great fluctuations in the practice of the equity courts, which can only be accounted for on the distinction between the discretion of the court and its powers. In Hobhouse v. Courtney, 12 Sim. 140, appears a group of instances of substituted service, which demonstrates that, in the view of many chancellors, the power of the court was far beyond anything in the practice stated in Daniell.

The most striking example of this is Hope v. Hope, 4 De Gex, M. & G. 328, referred to by Daniell as extending the practice. In this case, Mrs. Hope, who was then residing in France, had commenced, through her solicitors, in the ecclesiastical court, proceedings against her husband, to obtain a divorce. It appeared that by the French practice, which was the law of her residence, questions as to the custody of the children were dependent upon, or, at all events, connected with, divorce proceedings. Thereupon, the children having filed a bill in chancery to secure their removal from the custody of their mother to that of their father, the master of the rolls ordered service to be made upon her solicitors in the divorce proceedings, which Lord Cranworth (the lord chancellor) sustained. It is very noticeable that on page 341 the chancellor said that the statute which gave the court power to order substituted service in such manner and in such cases as it might think fit, made no alteration in the law. That in this country the power extends to cross bills is sufficiently established by referring to Ward v. Seabring, 4 Wash. C. C. 472, Fed. Cas. No. 17,160; Johnson Railroad Signal Co. v. Union Switch & Signal Co., 43 Fed. 331; and Lowenstein v. Glidewell, 5 Dill. 325, Fed. Cas. No. 8,575, already referred to. To be sure, in the latter case, it is stated that the reason of the rule is limited to a cross bill either wholly or partially defensive. That this is the nature of Andreasen's cross libel, we have already shown. We need not pursue this subject-matter further, but may close it by citing from the case last named:

"It would be in the highest degree unjust and oppressive to permit a nonresident plaintiff to invoke the jurisdiction of the court in his favor, and obtain and retain, as the fruits of that jurisdiction, a judgment or decree to which he was not in equity entitled, by remaining beyond the jurisdiction of the court whose jurisdiction on the very subject-matter, and against the very party, he had himself first invoked."

On the whole, we are of the opinion that it was within the power of the district court to order the monition served on the proctors of James E. Ward & Co., and that such service was sufficient to enable this court to proceed to a judgment against them personally in all the matters covered by Andreasen's libel.

It is claimed, however, that Andreasen's libel must be held ineffectual because it joined a proceeding in rem with one in personam in an action for freight. No exceptions were taken below to the libel on this account, the only ground of the motion to dismiss being lack of jurisdiction over the individuals proceeded against. Moreover, that part of the libel which asked for process against the cargo was entirely ineffectual. No warrant in fact issued against it, and the part of the libel directed against the cargo stands, on appeal, for all practical purposes, as though it never had existed. As, under these circumstances, it is demonstrated that there could have been no objection to striking out that part, if exception had been taken on account of the joinder, this court, on appeal, must consider this technical question of pleading as waived in the court below, and of no practical value. If it

was necessary to consider the fundamental question involved, the court would probably come to the same result.

We reach now the principal question in the case, but some preliminary matters need to be cleared from the path. It is claimed in behalf of James E. Ward & Co. that in this case the right to freight can proceed only on a quantum meruit. A fundamental principle of maritime law is that a marine disaster shall not rest, unless by necessary force of peculiar circumstances, on the vessel alone, or the cargo alone. Each is compelled to bear its own portion of the loss. This rule is a recognition of the mutual obligations existing between those who embark in a common adventure. If the cargo is destroyed, even though immediately prior to the close of a long voyage, and even though the ship may remain in condition to complete her voyage, yet her owner shares the loss, to the extent of his freight, and relieves the cargo owner accordingly. On the other hand, if the ship is disabled in part, and the cargo remains intact, the cargo must ordinarily wait for the repair of the ship, although, by the delay, it may lose a seasonable market. Quantum meruit has no place in transactions like those at bar, unless a pro rata freight is to be computed, and then only as an incidental element. It cannot be claimed that the repairs of the Eliza Lines involved such delay as to break up the voyage. The general rule was laid down in Clark v. Insurance Co., 2 Pick. 104; Cargo ex Galam, Brown. & L. 167; and The Soblomsten, L. R. 1 Adm. & Ecc. 293. In the case at bar the detention was but a few days in excess of two months, shown by many cases not to be sufficient to break up the voyage; and the repairs, and all the proceedings of the master and vessel, were conducted with great diligence.

A portion of the arguments proceeded on the theory that the main question involved a race of diligence in making applications to the court for the release and possession of the cargo. In our opinion an important question of this character cannot turn on the mere speed of foot of one party or the other. The court must continue of this opinion, notwithstanding one of the leading cases hereafter referred to is claimed to turn largely on a different view of the law. There must be reasonable diligence, alike on the part of the owner of the vessel and of that of the cargo. The owner of the vessel is bound to diligence to overcome the delay caused by the disaster; and, in addition, his failure to make, within a reasonable time, efforts to release the cargo, might well be accepted by its owner as an indication of an intention not to complete the voyage, on which the latter would be justified in acting. But this is fundamentally different from a rule that rights of the character at bar are to be determined by the mere fact of priority of an hour, a day, or a week.

James E. Ward & Co. also rely on what is usually known as the "cesser clause" in the charter. It was said in Francesco v. Massey, L. R. 8 Exch. 101, that this clause was probably at first introduced in cases where it appeared in the charter party that the charterer was only an agent. But it was as much needed for the benefit of charterers who were in fact agents, whether they so

appeared in the charter party or not. However that may have been, the clause is a standard one, used without reference to the particular circumstances of each case; and therefore it may well be construed to have full effect in the protection alike of parties who are really agents, and of those whose interests may cease after the cargo is laden. By the established principles of maritime law, there is a triple liability—First, on the charter party; second, arising from the bill of lading; and, third, from the implied obligation growing out of the acceptance of the cargo at the port of delivery. There is no occasion, arising from the purpose of this clause, to extend it beyond the liability of the charterer as charterer, and certainly none such arising from its letter, as found in this case. The proposition is so clear that we have examined only such decisions as have been brought to our attention, with some cursory labors beyond. The clause had its origin in England, apparently about 1851. Hall v. Barker, 64 Me. 339, illustrates the class of hardships which it was intended to meet. There the defendants executed a charter party, the real charterers being the United States. The United States delayed the discharge of the cargo, and seven years later the nominal charterers were compelled to pay demurrage. Abbott's Law of Merchant Shipping (13th Ed. p. 226) says the reason of these clauses is obvious; and it gives as an illustration a merchant dealing in commodities commonly sold in entire cargoes while afloat, and who finds it worth while to take a small profit, if he can limit his responsibility to such part of the transaction as he can control personally, which is generally the loading. There is nothing, therefore, in the hardships these clauses were intended to remedy, which calls for relief of a holder of the bill of lading who accepts the cargo from the ship, and thus substitutes his personal obligation in exchange for the lien which, until unlading, the ship had on the cargo. The only case which the court has found bearing precisely on this question is Gullischen v. Stewart (1883) 11 Q. B. Div. 186, affirmed on appeal in 13 Q. B. Div. 317. There the same conclusion was reached which we have reached. The last editions of Carver's Carriage at Sea (1891) p. 673, Maclachlan on the Law of Merchant Shipping (1892) p. 412, and Abbott's Law of Merchant Shipping (1892) p. 238, recognize this case as still the law of England.

In addition to the charter party, there was the customary bill of lading, running to Thomas Drysdale & Co. The cargo was, however, at all times, the property of James E. Ward & Co., and was shipped on their account. Drysdale & Co. were only their agents. Moreover, by their claim, filed on the 27th of September, 1889, they declared themselves to be its owners, and afterwards maintained persistently that proposition. Whether they held the bill of lading or not would be, therefore, of no consequence, because they estopped themselves from denying ownership. By the sale of the cargo, which they secured on their petition as owners, they displaced the lien of the vessel protecting her right to carry on the cargo, assumed liability for what was thus displaced, and subjected themselves, as we have already shown, to the same obligations to

the vessel and salvors as though they had obtained a delivery of the cargo, instead of a sale of it.

There remains now the question whether the proposition of the salvors and Andreasen that the vessel was entitled to receive delivery of the cargo, on giving proper stipulation, for the purpose of completing her voyage, or that of James E. Ward & Co. to the contrary, is sustainable. The former rely to some extent on numerous authorities in cases of capture, but the court cannot; because capture is not, under ordinary circumstances, the equivalent of derelict. In capture there is no such abandonment as that which, according to the authorities cited by James E. Ward & Co., forms the basis of a dissolution of the contract of affreightment. If the vessel and cargo are restored after being captured, it is by virtue of the jus postliminii, which it may be said is not analogous to the rights of the owners in a derelict brought in by salvors.

The rule propounded by James E. Ward & Co. finds no support in any expressions in the second edition of Maclachlan on Shipping, which was published in 1875, and does not cite The Kathleen, decided the latter part of 1874. Neither does it find any in the sixth American edition of Abbott on Shipping, which was the last published before The Kathleen. Yet each work treats at various points of the circumstances which dissolve the contract of affreightment. We note these facts because they go to sustain the proposition which we will explain hereafter,—that the cases relied on by James E. Ward & Co. did not declare a recognized and settled rule of law, but were stating for the first time the opinions of the learned judges how the law ought to be held. The first decision on which James E. Ward & Co. rely is The Kathleen (1874), found in L. R. 4 Adm. & Ecc. 269, and in 2 Asp. 367. This was followed by The Cito [1881] 7 Prob. Div. 5. There was an allusion to these cases, and a partial restatement of the doctrine, in The Leptir (1885), 5 Asp. 411. The rule has also been stated, in one form or another, in the following authorities: The Argonaut, decided in the court of appeals by Brett, M. R., and Lindley, L. J., and cited in Kennedy's Civil Salvage, p. 195; Macl. Shipp. (4th Ed.) 498, 613; Carv. Carr. by Sea (2d Ed.) 562; Williams & B. Adm. Jur. (2d Ed.) 165; Abb. Shipp. (13th Ed.) 429, 455. And it is recognized in Kennedy's Civil Salvage, already referred to (page 195). No late English authorities are found contravening it. These make a great weight of authority. But as they constitute only a modern declaration how the rule ought to be laid down, they are subject to examination in the federal courts.

Returning now to The Kathleen, there seems to be some doubt whether her cargo was regarded as perishable. It also appeared that there was no intention of carrying forward the cargo in the same ship. No distinction, however, was made for either of these reasons; but the learned judge held that no freight was due, not even pro rata freight, and put the case squarely on the grounds that "the master had abandoned all possession of the ship, and at the time of the abandonment had certainly lost all rights to the freight or to carry on the cargo;" that, although the salvors had

only a lien, yet they were "in lawful possession," and could not "be displaced by the owners;" that when a salvage suit begins "the property is placed in the custody of the court, which is bound to do what is best for it;" the ship owners "receive the remainder of their abandoned property, after the legal charges on it have been satisfied;" and that in fact "the possession of the cargo abandoned by the ship owner vested first in the salvors, and afterwards in this court, before it could be restored to the owners." The theory seems to be that by derelict the property passes out of the possession of the owners of the vessel into that of the salvors, coming then into the court, and that this forms a continuous dispossession; so that whatever new possession follows vests under the judgment of the court, and not by any jus postliminii, as in the case of capture. Applying the rule in this way, it is universal, reaching all cases of derelict which are followed by subsequent proceedings in behalf of the salvors in the admiralty court, and whether the vessel was brought by the salvors into the port of destination or some other. The result has the advantage of consistency throughout. It has, also, the further advantage of certainty, so desirable in cases of disaster, as it enables the numerous parties concerned to assume at once a positive position, and ascertain promptly their various rights. It is not an improper criticism to suggest that this latter fact had some weight with the learned judge in inducing his conclusions in The Kathleen. We are unable to see any other advantage flowing from them. Sir Robert Phillimore overlooks the rights of the cargo owner under many circumstances which might be suggested, although in The Cito, which we will next consider, there was an effort to supply this gap. It would seem to follow that, on the theory of Sir Robert Phillimore, both parties are released,—the cargo from the vessel, and the vessel from the cargo. The mischief of such a proposition was hardly apparent in the circumstances of The Kathleen; but assuming the derelict to have been at some remote port, where the owners could be represented only with difficulty and delay, the mischief of absolutely discharging the vessel from the cargo in consequence of a derelict must be appreciated. We do not mean to raise the question whether ordinarily, in case the ship itself is disabled from carrying forward the cargo, the duty of the master to transship it rests upon him as representing the vessel, or upon him as representing the cargo; but we allude to the general rule that where the master can repair in a foreign port without unreasonable delay, or disproportionate expenditure, it is his duty to do it, and carry on the cargo. The authorities on this point need hardly be cited, and we refer only to Carv. Carr. by Sea (2d Ed.) 308, and to the latest statement of the rule, as found in England, in Assicurazioni Generali v. SS. Bessie Morris Co. (1892) 2 Q. B. Div. 652. The rule of The Kathleen is calculated to work great injustice, as it might in the case at bar, and certainly would in the supposed case of a long voyage, nearly completed, and the vessel brought by salvors into the port of destination, or into a neighboring port quite as desirable for the cargo owners, with the cargo

intact, and a valuable freight lost to the ship and saved to the cargo, without any equivalent or consideration thereof. Numerous cases can be imagined where the injustice of the rule of The Kathleen would shock common sense. The result, therefore, so far as The Kathleen is concerned, is that on the one side we have a theory plausible in its form, but not apparently sustained by authority, coupled with the minor advantage which comes from a rule of certainty in this particular, and on the other side the fundamental maritime rules of universal operation, based on a deep sense of the obligations towards each other, in the case of a maritime disaster, of all parties interested in the same adventure. Further than this, we shall find on examining subsequent English cases that, while the result in The Kathleen has been practically sustained under certain circumstances, its theory is apparently not accepted.

No appeal was taken from the judgment of Sir Robert Phillimore in The Kathleen; but in The Cito [1881] 7 Prob. D. 5, the same question came before the court of appeal. The circumstances of that case were more close to the case at bar than those of The Kathleen; in fact, hardly distinguishable. The grounds of the judgment were not the same as in The Kathleen. The only proposition actually decided in The Cito is contained in the following language from the opinion of Lord Justice Brett:

"It is sufficient, I think, for the determination of the present case, to say that, by the abandonment of a ship without any intention to retake possession of it, the ship owner has, so far as he can, abandoned the contract so as to allow the other party to it—the cargo owner—to treat it as abandoned."

This is essentially different from the propositions of Sir Robert Phillimore, in that the latter finds the contract expressly dissolved, as an incident of the derelict, while the former merely holds that the cargo owner has the option of dissolving. This distinction would obviate one objection arising from the position of Sir Robert Phillimore, inasmuch as it would compel the master of the vessel to carry on the cargo, under proper circumstances. But to that extent it increases the injustice of the position, by relieving, through a maritime disaster, one party to the contract, while holding the other. The Cito also leaves out the element of certainty found in The Kathleen, as we have already explained. The Cito seems, on the whole, to depart even further than The Kathleen from the fundamental rules binding the ship and cargo together in cases of maritime disaster.

We have already referred to the fact that the conclusion of the court of appeal was reaffirmed in The Argonaut. The last decision on this topic brought to the attention of the court is The Leptir, 5 Asp. 411. It was there held that the rule would not apply where the abandonment was improper, because in that case, it was said, the contract of affreightment would not be put an end to by the abandonment. If this had been a decision of the court of appeal, it would have brought the rule, as laid down in England, to the absurdly unjust conclusion that the meritorious master, who succumbs to the inevitable results of a maritime disaster, must lose his freight, while the unmeritorious master may secure it.

The rule is given in Williams & Bruce's Admiralty Practice (2d Ed. p. 165) as follows:

"Where a vessel laden with cargo is abandoned at sea by her master and crew, and is afterwards salved, and brought by the salvors into a port other than the port of discharge, the contract of affreightment is dissolved; and the owners of the cargo are entitled to obtain its release without payment of any freight at all, and the ship owners are consequently not liable for salvage on the freight."

This adds a new qualification. It is not, however, consistent with the rule in The Kathleen, that the abandonment dissolves the contract; and it adds the further fundamentally objectionable feature that it makes the right to freight depend on the convenience, or even the caprice, of the salvors, in determining whether they will bring the vessel into the port of destination, or into some other port. The rule, as repeated in the fourth edition of Maclachlan on Merchant Shipping (pages 498 and 613), is stated more nearly as laid down by Sir Robert Phillimore, to the effect that the abandonment of the ship has the effect of dissolving the contract of affreightment. In Abbott's Law of Merchant Shipping (13th Ed.) it is given (page 429) as follows:

"The right of the owner of goods to their return before the ship has reached its destination, without payment of the agreed freight, seems to depend on his being able to show that the ship owner has abandoned the contract of carriage."

Except for the reference in the note to The Cito, this expression would hardly be construed to apply to a case of derelict. Where the rule is given on page 455, it is only a statement of it as held in The Cito, except that it is again limited by the qualification that the ship is brought by the salvors into a "port of refuge;" meaning, of course, some port other than that of destination. What is there said touching The Cito closes as follows:

"At first sight the reason for this decision is not clear, but it will probably work substantial justice."

None of these citations from English text works assume to be more than a repetition of the conclusions in The Kathleen or The Cito. None of them contain any illustration of the rule, or any statement of any reasons on which it is based. The last expresses the doubt touching its propriety which we have cited; and taking the whole line, beginning with The Kathleen, and ending with Abbott's Merchant Shipping, the result is inharmonious and unsettled. In view of the fact, also, that in many cases it must do substantial injustice, as we have already shown, we do not feel authorized to adopt it for the first time in any of the courts of the United States, as against the fundamental rule of maritime law that the ship is bound to the cargo, and the cargo to the ship. We feel compelled to hold that the circumstance of derelict, followed by the further circumstance that the derelict comes into the hands of salvors, and from their hands into the admiralty court, is only a particular phase, not differing in essentials from other phases, of the incidents of the perils of navigation, from which the ship is bound to relieve the cargo, so far as circumstances will permit, and

which will not deprive the vessel of its freight, if prepared to earn it. Whether or not the master is compelled to surrender his vessel and cargo into the exclusive possession of the salvors, to be followed afterwards by the possession of the court, or whether or not, before legal proceedings are taken, he succeeds in securing possession of both on an adjustment, is of no apparent importance with reference to the fundamental interests of either the owners of the one or the other. In either case, complications may arise which will render it impracticable for the master to secure again possession of the cargo, or which may relieve him from the duty of attempting to do so. But, if overcome, or if they can be easily overcome, especially in remote ports, where the cargo cannot be promptly represented, the substantial duties and rights of the master ought to remain the same under any of the contingencies stated.

We have said that we are without any direct decision of this question in the United States; and, so far as we have been able to discover, there have only been two cases in which it has come under discussion. Each arose in this circuit. The general question involved was in each largely considered, but in the first without evidence that the practical applications and limitations rendered necessary in the case at bar were considered, and in the second with an apparent acceptance of the principles which we have adopted. In The Elizabeth and Jane (decided in 1823) Ware, 40, Fed. Cas. No. 4,356, it appeared that the vessel was derelict, was rescued with her cargo by salvors, and brought into the district of Maine, and there libeled and sold for salvage. The case before the court arose on a petition against the proceeds for seamen's wages. The opinion, which is of great merit, in its discussion of the rights of the mariners, considers whether any freight was earned, out of which wages might arise, and holds that there was none. It lays down in general terms, but quite positively, the same rule as that given in The Kathleen. The case was tried very soon after Judge Ware came on the bench, and involved directly the important question which that learned judge contributed so much to settle, namely, the right of mariners to wages, as against salvage, when there was no correct delivery of the cargo. It was on this proposition that the attention of the learned judge was fixed. This court has examined the papers on file, and ascertained that the terminus ad quem of the voyage of the Elizabeth and Jane, with her cargo, was Boston; that she was brought into Harpswell, in the district of Marine; and that no effort or attempt was made to earn her freight. Therefore, the precise question in the case at bar was not brought to the attention of the court; and we are unable to say how far the expressions found in the opinion would in that event have been limited, or how far the learned judge intended to discriminate between cases where the voyage was broken up by derelict, or by wreck under other circumstances.

Whatever weight might otherwise be given The Elizabeth and Jane, and however embarrassing its expressions might be with reference to our reaching the conclusions which we have reached, if it stood alone, it is overborne by The Nathaniel Hooper, 3

Sumn. 542, Fed. Cas. No. 10,032 (decided by Judge Story, in the circuit court for the district of Massachusetts, in 1839). It is true that this later case cannot be relied on as authoritatively determining the law in favor of the appellants in the case at bar, because the result of it was that under the circumstances the court held no freight was earned; but we have here an important case, presented by such distinguished counsel as Rufus Choate, on the one side, and Benjamin R. Curtis, on the other, with an elaborate opinion, covering 18 printed pages, of which only a small part would have been necessary if the same rule as that of The Cito had had any lodgment in the mind of the eminent jurist who heard and disposed of it. It is not necessary to cite precise expressions showing that no such rule had any lodgment in his mind, of which there are several, because the entire opinion is constructed on that theory. So far as clear expressions and a general line of reasoning, found in an opinion which does not directly determine the precise question involved in a subsequent case, can be binding authority for the latter, this opinion of Judge Story, given in this court, concludes us to find for the vessel, as against the cargo and its owners, in the case at bar.

The same result which condemns James E. Ward & Co. for freight also condemns them for general average on account of the cutting away of the masts to right the vessel, and for other charges.

We have not received from counsel any special suggestions touching the adjustment to be made in accordance with the principles of this opinion. Therefore, while we nevertheless prefer, at the present time, to indicate the rules on which we think that adjustment should be made, we would be glad to receive from either party suggestions touching any error into which we have fallen with reference to the details thereof. It simplifies the adjustment to adopt, so far as practicable, the work done in that direction by the district court. It will be especially convenient, for the purpose of making distribution, so far as it can be made in advance of the delay which may result in realizing from James E. Ward & Co., if a realization ever takes place, to adopt that feature of the adjustment in the district court which, without objection from any party, applied the proceeds of the cargo in the registry in part payment of the freight. The adjustment necessarily involves different valuations of freight,—one with reference to its value for contributing to general average; another, the net value for which James E. Ward & Co. are chargeable; and another, the value on which additional salvage shall be awarded. So far as the last is concerned, the district court awarded approximately 45 per centum of the net values of the vessel and cargo. The ultimate amount which the salvors will receive is the essential thing to be had in mind; and, looking at this, it is not important whether the court takes the gross value of the freight, or the net value, estimated by one rule or another, and thereupon modifies accordingly the percentage at which the salvage is to be computed. The court will reach a conclusion which it regards as just, and as following in this particular the analogy of that of the learned judge of the district court, by award-

ing the salvors 45 per centum of the net freight, to be estimated for that purpose as will be hereafter pointed out, in addition to the amounts awarded by the district court against the proceeds of vessel and cargo.

In making up the judgment and decree rendered necessary by this opinion, the first step will be to determine the amounts the freight and cargo contribute to general average. For this purpose the commissioner will accept as general average charges the masts which were cut away to right the vessel. The value of the vessel on arrival at Boston will be taken at $2,250. In other respects, general average will be adjusted on the same principles as though the voyage had been subsequently completed, and according to the customs prevailing at the port of Boston. The next step will be to determine the net amount due on account of freight and general average from James E. Ward & Co. In connection with this, the court has considered the expressions in The Norma, Lush. 124; The James Armstrong, 3 Asp. 46; and the comments on each in Kennedy's Law of Civil Salvage (page 193 and sequence); and it notes especially that, as said by Sir Robert Phillimore in The Norma, the judgment of the court must be a rusticum judicium, and that while, in those cases, the value of the freight was nominally made on the principle of pro rata itineris peracti, yet the practical rule was one of net freight,—a practical and substantially just method of determining freight pro rata. In the same connection, it has examined The Nathaniel Hooper, 3 Sumn. 542, Fed. Cas. No. 10,032, already cited, where like expressions are used. These, however, all related particularly to the determination of the contributory value of freight at various ports and periods. In The Dorothy Foster, 6 C. Rob. Adm. 88, the gross freight was apparently required to contribute to the salvage, although the voyage was partly performed. There are expressions in various text-books and decisions leading to the impression that where the voyage has been broken up by the cargo owner after it has commenced, as we find to be the fact in the case at bar, the owner of the ship is entitled to gross freight. We do not understand, however, that this has been so expressly determined; and to give him gross freight would ordinarily more than indemnify him, and would impose a penalty on the owner of the cargo, instead of compelling him to pay just damage. This the admiralty courts are not prone to do. Therefore, for this matter, we direct the commissioner to deduct from the gross freight such actual and theoretical charges as would be necessary to ascertain the net freight in case the cargo had been reladen, and the voyage completed. This involves the deduction of contribution to general average, inward charges at Montevideo or Buenos Ayres, marine insurance on vessel and freight from Boston to the port of discharge, and statutory interest on the value of the vessel during the probable period of that voyage, and perhaps other charges. General directions will be found in Williams & Bruce's Admiralty Practice (2d Ed. pp. 101, 102), and in some of the cases there cited, and in other well-known authorities. Having ascertained this amount, the commissioner will add to it what James E. Ward & Co. are bound

to contribute to the vessel and freight on account of general average, as representing the cargo, and deduct the net value of the cargo, namely, $910.74 plus $787.65 (total, $1,708.39), which, without objection, was applied by the district court towards the payment of freight and general average, as a credit to which they are entitled. The commissioner will then ascertain what freight was in fact earned by the Eliza Lines on her voyage out of Boston, and, on the principles herein laid down, its net value. He will then ascertain the actual date at which she completed the earning of it. If these cannot be ascertained as matters of fact, he will estimate them. He will then estimate approximately the date at which the Eliza Lines would have earned her freight under the charter in the case at bar, if she had been allowed to reload her cargo, and complete her voyage. If the latter date is subsequent to the former, or if, prior to the latter date, the Eliza Lines earned any other freight in addition to that earned on her voyage out of Boston, he will deduct the whole of the net freights so earned from the amount apparently due from James E. Ward & Co., as last stated. If, however, the latter date anticipates the prior date, he will compute pro rata the net freight so earned, based on periods computed from November 16, 1889,—the date when the application of Andreasen for possession of the cargo was finally refused,—and deduct the result, as already directed. In either case the net sum thus obtained will be the amount for which the decree will go against James E. Ward & Co. The next step for the commissioner will be to state the amount of the net freight of the voyage to Montevideo and Buenos Ayres, as if the same had been completed, estimated in all respects as already directed, with the deduction of the share of general average chargeable against freight, but without any addition of any sums due from James E. Ward & Co. to general average on account of the cargo, and without any deduction of any part of the $1,708.39, and also without any deduction of any net freight actually earned by the Eliza Lines on her voyage out of Boston, or any subsequent voyage. He will compute 45 per centum of the result, for which there will be a decree in full for salvage services and expenses touching freight.

On the coming in of the report of the commissioner, there will be a joint decree: First. In favor of Black, in behalf of himself and his associate salvors, and of the owners, officers, and crew of the schooner Edward E. Barrett, for the same amounts, including expenses and costs, decreed by the district court, and apportioned as decreed by it, except that the amount stated to be apportioned against freight will be stated to be apportioned against cargo, the same presently payable as therein provided; and for the additional amount of 45 per centum of freight, to be found by the commissioner as directed in this opinion, with interest on said per centum of freight from the date of the commissioner's report, said per centum of freight, and interest thereon, to be payable only from sums realized from James E. Ward & Co., as the same are realized; and also for further costs in favor of Black, against James E. Ward & Co., for his actual taxable disbursements on this appeal. Second. Subject

to the priority of the salvors, in favor of the Banque de Genes, against the vessel and freight, including average payable by the cargo to each, for $1,458, and interest from the date of its libel, of which $1,092.68 will be payable presently, $777.83 thereof by the stipulators for the vessel for so much as remains, and $314.85 thereof from the net proceeds of the cargo in the registry, accepted as already said, by all parties, as freight, for so much as remains, and the balance payable only from any sums realized from James E. Ward & Co., as the same are realized, after payment of the portion thereof awarded to the salvors; and further, against Andreasen, for its costs in this court and the court below. Third. In favor of Andreasen, in behalf of himself and the owners of the bark, for whatever balance may remain after payment of the salvors and the Banque de Genes, and payable from the amounts realized from James E. Ward & Co. as the same may be realized; and further, for costs in this court and the court below, against James E. Ward & Co., except so far as such costs are herein awarded to Black. Fourth. That Bernard Darrach be dismissed from the cause, with costs of appeal in his favor; one-half against Andreasen, and one-half against Black. Fifth. Against James E. Ward & Co., in favor of Black, the Banque de Genes, and Andreasen, for the net balance of freight and general average to be decreed against James E. Ward & Co., as already pointed out; the decree to state the same priorities between Black, the Banque de Genes, and Andreasen, as already set out, and to provide that it may be enforced outside of this district, and, so far as thus enforced, distributed among the parties in interest, without being paid into the registry of this court. Sixth, directing all matters and things as decreed by the district court, except as herein provided for or modified.

It will be noted that, in accordance with the principles of this opinion, the freight, if there is sufficient of it, should exonerate the vessel from any liability on the bottomry held by the Banque de Genes; but in view of the fact that the court is not cognizant of any separate interests which require the application of this equity of exoneration, the court contemplates no decree in that direction. The parties will be at liberty, on further consideration, to ask for such order or decree, if the circumstances require it; also like application may be made, if it is hereafter found necessary, to adjust accurately the net freight and averages holden for the bottomry.

Ordered: In each of Nos. 3,546, 3,547, 3,548, 3,549, and 3,550 be entered an order that the cause is consolidated with The Eliza Lines, No. 3,545, according to the terms of the order this day entered in said last-named case.

Ordered: In No. 3,545 be entered an order that The Eliza Lines, No. 3,546; Cargo ex The Eliza Lines, No. 3,547; Andreasen v. 295,000 Feet of Lumber and Darrach et al., No. 3,548; The Eliza Lines, No. 3,549; The Eliza Lines, No. 3,550,—are consolidated with this case, and this case will be re-entitled "The Eliza Lines, her Cargo and Freight," and, with the other cases named, will hereafter proceed, be disposed of, and recorded as one cause only; and that the cause, No. 3,545, as consolidated, is referred to ————————, commis-

sioner, who shall hear the parties, and make the adjustments and findings required in the opinion filed this day, and on the principles therein set out, and make report thereof, and the said commissioner shall receive, for his only commission, a certified copy of this order and of said opinion; and, on the coming in and confirmation of such report, a final decree shall be entered in accordance with such opinion and this order.

FAHY v. MAYOR, ETC., OF CITY OF NEW YORK.

(Circuit Court of Appeals, Second Circuit. February 20, 1893.)
No. 32.

Appeal from the District Court of the United States for the Southern District of New York.

In admiralty. The libel was filed by Michael Fahy against the mayor, aldermen, and commonalty of the city of New York to recover for loss of a canal boat sunk at respondents' wharf. From a decree for the libelant (49 Fed. 389) for one-half the amount of his damage, both parties appeal.

J. A. Hyland, for Fahy.

James M. Ward, for the mayor, etc.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. We agree with the opinion of the court below in this cause (49 Fed. 389), and affirm the decree, with interest, and without costs in this court to either party.

THE RICHARD PECK.

MYERS EXCURSION & NAV. CO. v. THE RICHARD PECK.

(District Court, E. D. New York. April 26, 1894.)

COLLISION—STEAM VESSELS CROSSING—ATTEMPT TO CROSS BOWS.

Two tugs, towing a bark, came down the East river, bound west, and in the neighborhood of Corlaer's Hook began to pull towards the New York shore. The steamboat R. P., having the tow in full view, attempted to cross its bow, despite opposing signals from the tugs, with which she thereafter collided. *Held*, that such attempt to cross the bows of the tugs was at the risk of the steamboat, and if, as she contended, the length of the tow made it impossible for her to go under its stern, then it was her duty to have stopped, instead of keeping on; and that the steamboat was solely liable for the collision.

Libel by the Myers Excursion & Navigation Company for damages for collision between the steamboat Richard Peck and two tugboats, Charles Allen and Robert Haddon, owned by the libelant.

Wing, Shoudy & Putnam, for libelant.

William J. Kelly, for claimant.

BENEDICT, District Judge. This is an action to recover damages sustained by the libelant in a collision which occurred in the

East river on January 10, 1893, wherein the tugboat Charles Allen, owned by the libelant, was cut in two by the steamboat Richard Peck, and the bow of the tugboat Robert Haddon, also owned by the libelant, was taken off by the Peck's guards. The collision occurred at about 3 o'clock in the afternoon, in broad daylight and clear weather, at a point below Corlaer's Hook in the East river. The Peck was bound to the eastward; the Allen was bound to the westward, having behind the tugboat Robert Haddon, both towing at the time the bark Hannah Blanchard. The Richard Peck (with this tandem tow in full view, which, at the time, by an exchange of single blasts with the tug Jamestown, going up the river ahead of the Peck, was committed to a course crossing the channel to the New York shore) undertook to cross the bows of the Allen, intending to pass ahead of the tow, in order to round the Hook on the New York side of the river. While the tug Allen was so crossing the river, in accordance with the whistles exchanged between the Allen and the Jamestown, the Peck blew a signal of two whistles to the Allen, "to give her plenty of time," as the captain says; and, although no reply was received to this whistle, the Peck kept on, and gave a second signal of two blasts, to which a signal of one whistle was received in reply, notwithstanding which the Peck persisted in her attempt to cross the Allen's bows, sheering all the time still further to the west, until the vessels came in collision. The fact that the tow had taken a course to cross the river in plain view of the Peck, and before any signals were given by the Peck, is made plain by the testimony of the master of the Jamestown, who was ahead of the Peck, and who says that he blew one whistle to the Allen, and she replied with one whistle, and at that time began to haul towards the New York shore, at which time, as he says, the Peck was coming out of her slip, sounding her alarm whistle.

In my opinion, it was a fault on the part of the Peck to attempt to gain the New York shore by passing ahead of the tow. The tow had the right to take a course to cross the river so as to come down on the New York shore below the Hook, and, when the Peck attempted to cross the bows of the tow while on that course, it was at her own risk. If, as she contends, the length of the tow made it impossible for her to go under the stern of the tow, then it was her duty to stop, instead of which she kept on in a vain and dangerous effort to cross ahead of the tow. I find no fault on the part of the Charles Allen. There must be a decree in favor of the libelant, with an order of reference to ascertain the damages.

THE OCEANIC.

SMITH et al. v. OCCIDENTAL & ORIENTAL STEAMSHIP CO. et al. (two cases).

(District Court, N. D. California. April 10, 1894.)

Nos. 10,732 and 10,733.

1 COLLISION—STEAMERS—FOG—CURRENTS.

The steamship O., entering the Bay of San Francisco, about mid-channel, in a thick fog, heard, about 2½ or 3 points on her starboard bow, the fog signals of the steamer C., coming out. The bearing of the signals continued the same until the C. was seen in that direction, heading directly towards the O., and about half a mile distant. Two blasts were then blown, to indicate an intention to go to port, which was assented to, and the helm immediately put hard a-starboard. It was seen, however, that the C., instead of going to port, was moving to starboard (influenced, doubtless, by the tide rip, which she was just entering); and, after waiting about two minutes, two blasts were again given, and assented to. Almost immediately afterwards, but not until collision appeared inevitable, both ships reversed full speed. In something less than two minutes, however, the O. struck the C. on the port bow, penetrating 10 feet, and causing her to sink in a short time. The officers of the O. testified that she had been running "dead slow," which, going with the flood tide, would give, at most, 7 knots; but the court found, from the distances traversed, and especially the force of the blow, that the speed must have been over 10 knots. *Held*, on a libel for causing the death of certain passengers of the C., that the O. was in fault, for not reversing as soon as it was perceived that the C. was not answering her helm so as to go to port, and that the failure of the O.'s officers to take into consideration the influence of the tide rip, which they knew to exist, in preventing the C. from doing as she had agreed, precluded them from throwing the entire fault upon her.

2. SAME—STEAMERS CROSSING—APPLICATION OF RULE 16.

Article 16 of the rules of navigation (Act March 3, 1885), which provides that, if two ships under steam are crossing, the ship having the other on the starboard hand shall keep out of the way, applies even when the ship approaching the starboard side of the other would not actually cross, but would strike her amidships.

3. DEATH BY WRONGFUL ACT—DAMAGES—ANNUITY TABLES.

The annuity tables should not, alone, control the amount of damages, even in a state where no limit is fixed to the recovery, as in California; and the fact that many other states have fixed a limit may be considered by the court. Therefore, $10,000 are allowed in the case of a man 32 years old, in good health, and earning $1,500 a year, although the sum necessary to purchase an annuity of that amount is $24,882.

4. SAME—DEATH OF CHILD.

One thousand dollars allowed to a mother for the death of a daughter 4½ years old, in good health at the time.

These suits were commenced as actions at law to recover damages for loss of life under the California statutes (Code Civ. Proc. §§ 376, 377). The first one was brought by Henry F. Smith and George C. Smith, infants, by Eliza A. Smith, their guardian, and Eliza A. Smith for herself, and as administratrix of the estate of Henry Smith, deceased, against the Occidental & Oriental Steamship Company and the Pacific Coast Steamship Company, to recover for the death of the husband and father, Henry Smith. The second was by Eliza A. Smith, individually, against the same defendants, to recover for the death of her daughter, Myrta Smith. Afterwards, by stipula-

tion, the causes were agreed to be admiralty suits, in personam, and were transferred to the admiralty side of the court.

Clinton L. White and William H. Cobb, for libelants.

W. H. L. Barnes and Frank Shay, for respondent Occidental & Oriental Steamship Co.

MORROW, District Judge. On the morning of August 22, 1888, between 9 and 10 o'clock, a collision took place in the entrance of the Bay of San Francisco between the steamships Oceanic and City of Chester. The latter vessel was sunk and became a total loss, and several passengers on board of her lost their lives. Among those were Henry Smith and his daughter, Myrta Smith. Two actions were instituted in this court against the Occidental & Oriental Steamship Company and the Pacific Coast Steamship Company, owners, pro hac vice, of the Oceanic and City of Chester, respectively, as codefendants, to recover damages for the death of these two persons; one of the suits being brought under section 377 of the Code of Civil Procedure of the State of California by Eliza A. Smith, as administratrix of the estate of the deceased, Henry Smith, for herself, and on behalf of Henry F. and George C. Smith, infants, and children of the deceased, as their guardian, praying judgment for the sum of $75,275; the other suit being brought under section 376 of the same Code, also by Eliza A. Smith, to recover damages for the death of Myrta Smith, an infant daughter of the plaintiff, in the sum of $20,000. These actions were brought originally with a view to the plaintiffs availing themselves of such common-law remedy as this court could afford by virtue of the judiciary act; but by a stipulation entered into between the parties, and filed September 7, 1893, it was agreed that these two actions were admiralty causes, in personam, and should be treated as such. The causes were thereupon transferred from the common-law to the admiralty side of the court; all objections and exceptions to the form of such proceeding, or of any proceeding prior thereto, as not being in accordance with the admiralty rules and practice of this court, being expressly waived. It was further stipulated in open court that the two causes should be consolidated for the purposes of trial, and that separate judgments might be awarded in the cases.

On the 1st of September, 1890, the Pacific Coast Steamship Company, as charterer and lessee of the City of Chester, filed a petition in this court for a limitation of its liability under sections 4282–4289, Rev. St. U. S. Thereafter, such proceedings were had that a decree was entered, giving the Pacific Coast Steamship Company the benefit of a limitation of its liability, and fixing the extent of such liability at $75,—the appraised value of a small boat saved from the wreck of the City of Chester. In view of this fact, the libelants, on November 9, 1892, dismissed their actions as to the Pacific Coast Steamship Company, and thereupon the liability of the City of Chester was eliminated from the case; but her conduct at and prior to the catastrophe remains for the consideration of the court, in determining

whether or not the libelants are entitled to a judgment as against the Occidental & Oriental Steamship Company, the only remaining respondent.

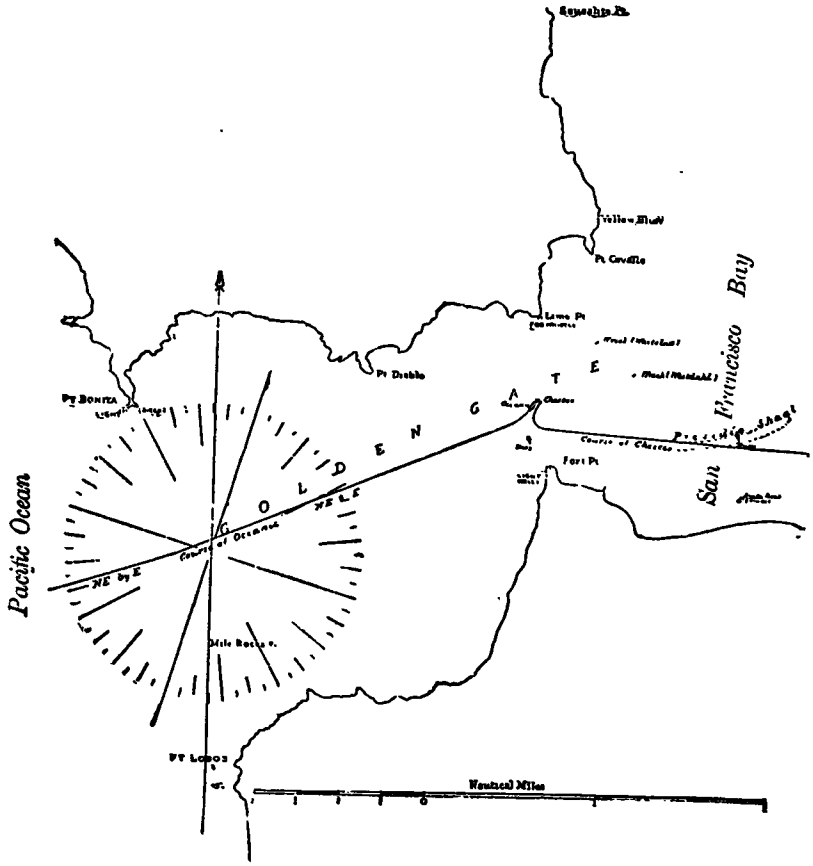
The Oceanic is a four-masted steamer, of 3,808 tons register, with a length of 438 feet, a beam of 40¾ feet, and a draught of 25 feet. She had been engaged in making voyages between the port of San Francisco and the ports of Hong Kong and Yokohama. She was thoroughly equipped and appareled, completely officered and manned, and in every respect a stanch and seaworthy vessel. On the morning of the collision, she was entering the harbor of San Francisco, having just returned from one of her periodical trips to China and Japan. She carried, in addition to her cargo, about 1,000 passengers. She was leased by the White Star Company to the Occidental & Oriental Steamship Company. The City of Chester was a steamship leased to and operated by the Pacific Coast Steamship Company. She was used in the coasting trade, and at the time was running between this port and that of Eureka, in this state. She had a gross tonnage of about 1,100 tons, and a net tonnage of about 860 tons; was about 205 feet in length, 32 feet in beam, and 16 feet in depth. On the morning of the collision, she was just proceeding on one of her regular trips, laden with freight and passengers, and was making her way out of this port.

For the purpose of a better understanding of the testimony in the case, it may be well to notice at the outset that the collision involved four possible situations: (1) The collision may have been the result of inevitable accident, in which event the respondent would not be held liable for the consequences. (2) The City of Chester may have been wholly at fault, and the Oceanic blameless, and the respondent therefore not liable. (3) The City of Chester may have been blameless, and the Oceanic at fault, and the respondent therefore liable. (4) Both the City of Chester and Oceanic may have been at fault, and the respondent, therefore, liable. Ward v. The Ogdensburgh, 5 McLean, 622, Fed. Cas. No. 17,158.

The first situation is not pleaded as a defense, or relied upon, by the respondent. It remains, therefore, for the libelants to establish either the third or fourth situation. The respondent claims that the proofs show that the collision took place notwithstanding the Oceanic endeavored, by every means in its power, with due care and caution, and a proper display of nautical skill, to prevent the disaster. Reducing the controversy to its simplest terms, for the present purpose, it may be stated, briefly, that the libelants claim that both the City of Chester and Oceanic were at fault, as indicated in the fourth situation; and the respondent contends that it is excused because the Oceanic was not at fault, as indicated in the second situation.

The collision took place between half-past 9 and a quarter of 10 on the morning of August 22, 1888, at the inner entrance to San Francisco bay, known as "Golden Gate Channel." It occurred at some point between Fort Point and the land opposite, known as "Lime Point." The precise locality, owing to the fog then prevailing, and the conflicting testimony on that point, is somewhat in-

volved in doubt, and can only be determined approximately. For a better understanding of the locality, and the movements of the two vessels, reference may be had to the accompanying map:



The width of the channel, where the collision took place, is stated to be about seven-eighths of a nautical mile, or, by chart measurement, about 5,200 feet. It is the narrowest point in the channel, and the whole body of water is navigable almost from shore to shore. The sea, on that morning, was calm. The tide was flood. The pilot on the Oceanic fixes low water at 6:15 in the morning. Ferdinand Westdahl, of the coast and geodetic survey, fixes low water, by the tide tables, a little earlier,—at 5:53. The difference is immaterial. At the time of the collision the flood tide had been running in for about three hours and a half, or nearly four hours. The testimony shows that in entering the channel the young flood tide makes in along the south shore, striking the land just outside of Fort Point, and from there deflects, and sheers off across the channel, nearly due north, towards Lime Point, until it reaches about

mid-channel,—sometimes beyond it, depending upon the force of the current,—where it resumes the same course as the true tide coming in mid-channel. The evidence shows that there is a tide rip of considerable force from Fort Point to mid-channel, deflecting the courses of vessels entering it, and making it necessary that in crossing the current, outward, they should starboard their helms, to make the rip and preserve their courses.

The testimony presents an irreconcilable conflict as to the place of collision. The evidence introduced by the libelants in relation to the outward course of the City of Chester along the south shore of the bay, the distance and bearings of objects on the shore, and the location and effect of the crossing tidal current near Fort Point, would fix the place of collision at a point considerably south of mid-channel. On the other hand, the evidence introduced by the respondent in relation to the inward course of the Oceanic along the north shore to the entrance of the harbor, and the distance and bearings of points on shore, would fix the place of collision some distance north of mid-channel. These two points would be about 3,000 feet apart. It is manifest, therefore, that, if these two vessels were pursuing the courses indicated by the testimony relating to each, a collision was impossible; but a collision did occur, and, for the purpose of understanding the movements of the two vessels at and prior to the collision, it becomes necessary to determine as nearly as possible the place of its occurrence.

The course claimed by the pilot and captain of the Oceanic is, briefly, as follows: The Oceanic had arrived off the entrance to San Francisco bay early on the morning of August 22, 1888. She made for the whistling buoy, where the pilot grounds are situate, near which she took up the pilot, Louis Myer, about 8 o'clock. The pilot steered the vessel in for the whistling buoy, which was picked up and passed on the north side, according to the testimony of the pilot, about 1½ miles off, and, according to that of the captain, about a half a mile away. It was there that the course of the Oceanic was first shaped northeast by east for the entrance. The weather, as stated above, was foggy; densely so at times, and less so at others. The sea was calm. The pilot and captain consulted together as to the advisability of entering the harbor under the conditions then prevailing. They deemed it safe to make the attempt, taking adequate precautions, in proceeding at a very slow rate of speed, blowing the fog whistle, and keeping a sharp lookout. About midway between the whistling buoy and Point Bonita, they passed the ship Lord Wolseley, which was lying at anchor somewhat north of mid-channel. A tug had just come up, and was preparing to tow her in. The pilot states that he "steered a little towards her," and asked the master of the tow boat the kind of weather there was inside, but the answer, on account of the distance between them, could not be understood. The master of the tug fixes the distance at which the Oceanic hailed him as, approximately, a quarter of a mile. Proceeding on, Point Bonita, or, as it is sometimes called, North Head, was passed about a half a mile off. According to the testimony of the pilot and captain, its form was just perceptible to the naked

eye, although Tillston, the first officer, who was on the lookout, states that he did not see it. At this point the engines were put "dead slow," which meant a speed of about four knots an hour,—just enough to give her steerage way. At the same time the course of the vessel which hitherto had been N. E. by E., was altered one-half a point to the N., making it N. E. ½ E. Point Bonita, as testified by Pilot Myer, was made about 9:19 o'clock. It was then that the two orders just referred to were given,—one to the engineer, to go "dead slow," and the other to the wheel, to port half a point. Point Diablo was passed eight minutes later, as fixed by the pilot. The same rate of speed, "dead slow," was maintained all this time. Point Diablo could be more plainly discerned than Point Bonita. The witnesses state that it was all the way from a quarter to a half a mile. It was between these two points—in the neighborhood of Point Bonita—that the pilot and officers of the Oceanic first detected the fog whistle of an outcoming steamer. The direction from which the sound of the whistles proceeded indicated that the approaching vessel was some three points on their starboard bow; that she was on the inside of the harbor, and had not reached the channel; and, furthermore, that her course with relation to that of the Oceanic did not seem to change materially. After passing Point Diablo, as the fog signals of the approaching vessel grew more pronounced, a sharp lookout was kept off the starboard bow. Presently, the captain of the Oceanic discovered the dark mass of a hull looming up in the fog, about 2½ to 3 points on his starboard bow. Tillston, the first officer, who was stationed at the bow, on the lookout, had also discovered the presence of the vessel, which proved to be the City of Chester, and had communicated that fact to the bridge. The first officer fixes the distance between the two vessels when he first discovered the City of Chester as between 600 to 800 yards (1,800 to 2,400 feet); the pilot, at about a half a mile; the captain, at about a half a mile. Bridgett, the second officer, who was on the bridge, estimates the distance as, also, about half a mile. Swan, the third officer, who was at the helm, places the distance when he first saw her at, also, about a half a mile. The position of the City of Chester with reference to the Oceanic was 2½ to 3 points on the starboard bow of the latter, the former vessel's bow pointing directly amidships of the Oceanic. Capt. Metcalfe testifies: "She was heading right for us, straight; all masts and funnel in line. If anything, we could see probably a little more on the starboard bow." "I should say she was on our starboard bow. She was end on to us. We were never at any time end on to her." "She was so nearly end on that you might call it end on." "Heading right for our bridge, apparently." Immediately upon seeing the form of the City of Chester emerging through the fog, the order was given by the pilot to blow two whistles, indicating that the Oceanic would go to the left. At the same time the helm was put hard a-starboard. Tillston heard the order given. Bridgett did, also. Capt. Metcalfe testifies that the helm was put hard a-starboard at the same time that the first signal was given, and he says further, "The ship, not having much way on her, turned gradually and slowly to port."

Again, he says: "The ship was going at very slow speed, and naturally she took a long time to move. She did move to the left, but how much I cannot say,—not sufficient to endanger the ship going onto the shore." The question being asked, "Is that a factor in it,—the fact of her going dead slow?" he answered: "She would take very much longer to do it. That is all. Q. But not any more water? A. I don't know that she would. It is only an assumption on my part. As I have told you, we never experimented." He says further: "The helm having been starboarded, the ship altered her course probably a point or a point and a half to the north." The City of Chester answered these two whistles of the Oceanic almost immediately after. She blew two whistles, as indicating that she acquiesced in the proposed maneuver, and would do the same. But it appears, as we will discover later on, that the City of Chester had not yet caught sight of the Oceanic, nor did she do so until a collision was unavoidable. The Oceanic, as stated above, answered her helm but slowly. The course of the City of Chester did not seem to change to the left to any appreciable degree, as it should have done. On the contrary, as the vessels approached she seemed to swing to the right. She was watched closely by the pilot and captain of the Oceanic. A short time expired, fixed at about two minutes by the witnesses, during which the vessels were approaching each other all the time; and it was observed by those on the Oceanic that the City of Chester was going gradually to the right, instead of to the left. In view of this fact, the pilot gave a second order to blow two whistles, which was immediately acknowledged by the City of Chester with two, also. The pilot and captain of the Oceanic finding that, after the second signal had been assented to by the City of Chester, she still failed to respond to her starboard helm, and to alter her course, as she had promised to do, gave the order to go full speed astern. Then the collision was a foregone conclusion. The engines went full speed astern for a very brief time,—about 2 or 2½ minutes,—overcoming in some degree the forward speed of the Oceanic, which was about four knots, exclusive of the flood tide, when that vessel crashed into the City of Chester, on the latter's port side, some 20 feet abaft her bow; penetrating to a distance of about 10 feet, or about one-half the beam. The engines of both vessels were stopped, and the Oceanic was kept impaled in the breach she had made in the City of Chester, so as to keep the latter vessel, which was filling fast with water, afloat. The boats of the Oceanic were immediately lowered, and every effort was made by the officers and crew of the Oceanic to save life. Both vessels, while thus impaled, drifted with the tide towards the inside of the entrance. They drifted for some five or six minutes, when, finding that the City of Chester could no longer be kept afloat, the Oceanic backed a little, and the City of Chester sank.

The course and maneuvers of the City of Chester, as testified to by her captain, officers, and passengers, were substantially as follows: She left Broadway wharf about 9 o'clock on one of her periodical

trips to Eureka, and was put under full speed, which was about 10 knots. On account of the fog which prevailed to the north, Capt. Wallace followed rather closely the south shore of the bay, passing, as he says, about 150 feet on the inside of Presidio Shoal buoy. About here he commenced to enter the fog,—hitherto he had been running on the edge of it,—and, as the vessel penetrated further, "it got very thick." He states that he ran into the fog about half-way between the Presidio Shoal buoy and the Fort. He testifies that he steered the usual course to clear the Fort. Upon entering, or just after having entered, the thick fog, the steamer was slowed down to half speed. Either before, or almost immediately after, this order had been communicated to the engineer in charge, two whistles of an approaching steamer were heard off the starboard bow. The captain responded with two, signifying that he would go to port, thus acceding to the proposed maneuver. The helm of the City of Chester was then placed hard a-starboard, to conform to the signal. At this time he had not seen anything of the Oceanic, but he had heard her fog signals for some time previously. In fact, he did not obtain sight of the Oceanic until after the second signal had been answered by him. He testifies that a good lookout was being kept. Lundine, the second officer, was on the lookout, and supplements the captain's testimony that the Oceanic was not seen until after the second signal to go to port had been answered by the City of Chester. The time is approximated at less than a minute after the second signal. The reason assigned by the captain for not seeing the Oceanic before was the thickness of the fog: "It was so foggy we couldn't see her." After the first interchange of signals, the City of Chester proceeded a little further on, her speed not being checked, when the captain heard the approaching vessel blow two more whistles,—a repetition of the signal to go to port. He answered these, also, with two, indicating his assent. Almost immediately after, certainly less than a minute, as fixed by the captain, he caught sight, for the first time, of the Oceanic. She loomed up out of the fog 1½ or 2 points now on his port bow. He immediately saw that a collision was inevitable, and rang the indicator, full speed astern, and let the flood tide take her bow, her stern being still in the eddy, and let her swing right around. In less than two minutes from the order to go full speed astern, the Oceanic ran into the City of Chester, on the latter's port side, about 20 feet from her bow, penetrating a distance of about 10 feet, as before stated. As soon as the concussion took place, the engines were stopped. The vessel filled rapidly, and, after drifting for some five or six minutes, sank at some distance from the place of collision.

It will be noticed that these two sets of narratives agree substantially with each other as to what took place at, and just previous to, the collision. In fact, on most points, excepting, notably, the place of collision, they are corroborative of each other. There is no conflict as to which vessel first became apprised of the other's presence,—that the Oceanic first sighted the City of Chester, while the latter did not see the former until after the second signal had been exchanged, and the collision was inevitable. There is no real

conflict as to the relative positions of each vessel when they first became aware of each other's proximity,—that the City of Chester was on the Oceanic's starboard bow from 2½ to 3 points. There is no contradiction as to the signals exchanged, and the measures adopted by both in pursuance of such signals,—that the Oceanic, having first caught sight of the City of Chester, with that vessel on her starboard bow, took the initiative, and elected to starboard her helm, and go to port; that she gave the required signal, of two whistles, to communicate such election, which was assented to by the City of Chester with two whistles; that both vessels thereupon placed their helms hard a-starboard; that the Oceanic answered her helm but slowly, while the City of Chester did not respond to hers at all, but, on the contrary, went to starboard instead of to port; that the Oceanic, perceiving that the City of Chester did not take the course agreed upon, gave a second signal, of two whistles, to go to port, which the City of Chester likewise answered with two whistles, indicating that she would do so; that almost immediately after the second signal the City of Chester, for the first time, caught sight of the Oceanic, and that then that vessel was 1½ or 2 points on the former's port bow; that then, both seeing that a collision was inevitable, went full speed astern for 1½ or 2 minutes; that the effect of full speed astern with the helm hard a-starboard was to throw the bows of both vessels to the right, particularly the City of Chester, which had the flood tide against her port bow; that when the order to reverse was given the City of Chester was either in the tide rip, or was just entering it; that the vessels came together nearly at right angles, the City of Chester heading northerly, and the Oceanic easterly; that the Oceanic ran into the City of Chester on the port bow of the latter, some 20 feet abaft the port bow, and penetrated about 10 feet, or about one-half of the beam of that vessel; that both vessels, thus impaled, drifted towards the inside of the entrance, with the flood tide, for about 5 or 6 minutes, when the City of Chester could no longer be kept afloat, and sank. About all these facts there is no dispute. What may seem apparent contradictions are readily explained. But, as before stated, there is an irreconcilable conflict as to the place of collision. The respondent claims that the collision took place nearer to the north than to the south shore, and fixes the distance as about a quarter of a mile from Lime Point, in a southerly direction, while the captain, officers, and passengers of the City of Chester fix the collision as having occurred near Fort Point,—the point opposite Lime Point,—the captain estimating that the collision took place from 600 to 650 feet from Fort Point, nearly due north from that point about one-eighth of a mile. The courses pursued by both vessels anterior to the collision would be important factors in determining the locality of the collision. But the testimony on this point, instead of assisting the court, only involves the question with more perplexity; for, according to the testimony of the pilot and officers of the Oceanic, the course pursued, or intended to be followed, by this vessel in entering the harbor, would have been along the north shore of the channel, and would bring the vessel to the

point of collision as fixed by them, viz. about one-quarter of a mile from Lime Point; while, on the other hand, according to the testimony of the captain of the City of Chester, the latter vessel hugged the south shore on account of the fog. The captain of the City of Chester states that he steered the usual course to clear Fort Point, and fixes the place of collision, as above stated, at about 600 to 650 feet off Fort Point,—north, or nearly so. Had both vessels pursued, up to the time of the collision, the course said to have been followed by each, they would certainly have cleared each other by at least a half a mile. But the fact remains that a collision did take place, and it is certain that either or both accounts of the courses steered, with reference to the place of collision, must be incorrect.

The pilot, captain, and officers of the Oceanic testify to a course steered by that vessel, tracing it from the time when the pilot headed the vessel N. E. by E. for the entrance until the time of the collision, the object of which is to show that they brought the vessel in north of mid-channel, and that their line of progress, as delineated on the map introduced by counsel for respondent, is directly in line with the place of collision as fixed by them. They seek to do this by describing a course pursued by the Oceanic from the whistling buoy, and by estimating the distances at which that vessel was when off to the northward of the whistling buoy, and the distances at which Points Bonita and Diablo were passed. This method of ascertaining the place of collision would be of value, if the distances were accurately estimated. The difficulty is that the witnesses themselves do not agree as to the distance of the Oceanic from the whistling buoy when her course was first shaped for the entrance, nor do they agree as to the distances at which Point Bonita and Point Diablo were passed. Pilot Myer testifies that, when he first shaped the course of the Oceanic N. E. by E. for the entrance, he was about 1½ miles northeast of the whistling buoy, while Capt. Metcalfe fixes the same distance as about a half a mile. Both witnesses had equal powers of observation, so far as the evidence shows. Making due allowance for the fact that both estimates were approximations, under somewhat difficult conditions in view of the prevailing fog, yet the discrepancy is not reconcilable. The same infirmity exists as to the estimates of the distance at which the witnesses claim that they passed Points Bonita and Diablo. The pilot and Capt. Metcalfe swear that Point Bonita was passed about one-half of a mile off; that they could just see the loom of it through the fog; while Tillston, the first officer, who was on the lookout, states that he did not see Point Bonita. As to the distance at which one could see, he testifies: "Before we got to Point Bonita, I should say we could see fully a quarter of a mile, as we passed a big sailing ship lying at anchor. As we got inside from Point Bonita, it cleared away, and I imagine I could see half a mile; and so it continued up to the time of collision." It was on passing this point that the course of the Oceanic was altered one-half a point to the north, and the pilot says, "With that course, we made Point Diablo very plain,—not more than from ¼ to ½ a mile." Capt. Metcalfe says they could see Point Diablo pretty well. On the other hand, First Officer Tillston, who was all this time

on the lookout, says he could just see the loom of Point Diablo, and, being asked to fix the distance, says, "I should imagine, from the state of the fog, that it would be one-quarter of a mile." These inconsistencies do not commend to the court the accuracy of the course claimed by counsel for respondent as the true one, and as going to show that the collision must have occurred where they claim it did, viz. about one-quarter of a mile south from the north shore, or Lime Point. This contention is not only flatly contradicted by Capt. Wallace, and opposed to the testimony of the officers and passengers on board the City of Chester, who agree in fixing the place of collision as at some point near Fort Point, and certainly south of mid-channel, but, by the testimony of the pilot of the Oceanic, himself, it is very questionable whether the collision occurred as far north of mid-channel as the testimony of Capt. Metcalfe and of the second officer, Bridgett, would have it. He (the pilot) testifies as follows:

"Q. As near as you understand the position of the Oceanic, you were north of mid-channel? A. Yes, sir. Q. This is the position that you put the Oceanic in at the time of the collision? A. Yes, sir. Q. About how far would that place be, where the collision occurred, from mid-channel? A. It must have been very near. Q. Very near mid-channel? A. She must have been very near mid-channel. Q. Then you were coming in very near mid-channel? A. No, sir; the Chester. I was on the north side. Q. We will agree on this: That the Oceanic was here when the collision occurred (pointing). A. Yes, sir. Q. Now, I want to know how far this point of collision is from mid-channel? A. Pretty close."

The witness subsequently states that they were a quarter of a mile from the north shore. But this testimony is plainly inconsistent with the statements cited above. It is to be observed, further, that Capt. Metcalfe testifies that when he first sighted the City of Chester she was about one-half a mile off, and the Oceanic was then about one-quarter of a mile from Lime point. He was asked how it was that, having his helm hard a-starboard, he avoided running into the north shore, when he was only a quarter of a mile away from it, and the City of Chester was a half a mile distant; and he answered by saying that the Oceanic was going at a very slow rate of speed, and naturally took a long time to move. She did move to the left, but how much he could not say,—not sufficient to endanger the ship going onto the shore. This reply is susceptible of one of two constructions: Either he was much further towards mid-channel, or to the Fort Point side of mid-channel, than he himself was willing to admit, or else the Oceanic was so slow in answering her helm as to be unwieldy. The captain says that he could see the white fog signal on Lime Point landing plainly, and Second Officer Bridgett fixes Lime Point, when the collision took place, at less than one-fourth of a mile away. But, on the other hand, Capt. Wallace, of the City of Chester, is equally positive in his statements, and estimates the distance of the collision from Fort Point at 600 to 650 feet nearly north of that place. He testifies as follows:

"Q. How far off from the south shore did this collision occur? From Fort Point, do you mean? Q. Yes, from Fort Point,—from the south shore. A.

Well, there is 150 feet off the buoy. Probably, about from 600 to 650 feet off Fort Point. Q. In what direction? A. North; nearly north. Q. Had you, or hadn't you, passed the buoy? A. No, sir; we hadn't passed the buoy."

Subsequently Capt. Wallace states that, although the fog was very thick around Fort Point, he saw this buoy just when the Oceanic loomed up. He states that it was 100 or 150 feet on his port bow.

The other witnesses who testify that the collision took place south of mid-channel, or near Fort Point, do not pretend to fix, with any degree of accuracy, the place of collision. The passengers who testified,—those who are disinterested, as well as those who might be supposed to have an interest, in the result of the case, agree that it was south of mid-channel, but exactly where does not appear. Furthermore, it is to be observed that their estimates of distances are subject to the same objection pointed out in commenting on the testimony of the pilot, captain, and officers of the Oceanic. They are all approximations, given under the difficult conditions attending observations in a thick, drifting fog.

Charles McCullom, the first officer of the City of Chester, testified that it was clear until they got opposite to the Presidio; that then he went below. On hearing two whistles, and those followed by two more, he came up on deck, and then the Oceanic was about 50 feet away. As to the place of collision, the witness says that when he came up he could not see land on either side. He guesses that both of the vessels were nearer Fort Point than Lime Point.

John Lundine, the second officer of the City of Chester, who was stationed at the bow of this vessel, states that upon hearing the whistles, which was some few minutes previous to the collision, they were not quite up to Fort Point, but pretty close to it. He does not know the position of the City of Chester exactly. He says that he didn't notice how far from the south shore they were. He could see the south shore, but whether he saw it directly south, he does not say. But he testifies that if they had gone along their old course they would have been within a ship's length of the buoy. This witness does not seem to have taken particular notice of the place of collision.

Rufus Comstock, the second engineer, states that the first land he noticed after getting into one of the Oceanic's small boats was Fort Point. As to the distance, he says:

"I didn't notice exactly, but I know that we were not very far. I shouldn't think it could have been a quarter of a mile. I don't think it was over a quarter of a mile. I know that we were pretty close into Fort Point buoy—must have been—at the time of the collision."

This fact he noticed about five or six minutes after the collision.

James Rankin, the keeper of the Fort Point lighthouse, at the time of the collision, was about 200 feet from the extreme point of the Fort; 200 feet due south; up on the high ground; on the bluff. He states that he did not see the collision (he could not, on account of the fog), but gives his impression as to the respective courses of each vessel by means of the whistles; first, their fog signals, and then their double whistles to go to port. From the sound of these, he judged that they were coming

close to Fort Point, and, apprehensive that something serious would result, he paid close attention. He says he heard the crash. The weather, at the time of the collision, was very thick. He could not see the flagstaff on the fort,—not even the fort itself. He does not pretend to be able to fix exactly, or at all, except in a general way, the place of collision. He testifies. "I would judge, drawing a line from Fort Point to Lime Point, it to be one-third of the distance across, and about one-quarter of that distance towards the city."

Clitus Barbour, a passenger on board of the City of Chester, says that he could not tell exactly where the collision occurred, but he thinks they were nearly off Fort Point. He says they drifted some distance down the harbor in a small boat. He refers to the fact that in passing the Presidio he could see the buildings, wharf, etc., and says that, if there was any fog, it was out beyond. As to the relative distances between the two shores, where the City of Chester went down after having drifted for five or six minutes, he says, "My own notion was— It is somewhat confused in my mind, but it appeared to me further to the Saucelito shore than it was to this shore."

The effect of the flood tide appears to have some bearing in determining the place of collision. The tide rip near Fort Point is caused by the cross current of the flood tide. That the City of Chester was in this tide rip, or was just entering it, is almost certain. This is attested by two facts: First, the fact that that vessel failed to answer her starboard helm, and went to starboard, instead of to port. The testimony shows that the tide was running at about a five-knot speed at this point, and that it sets so strongly across the entrance towards mid-channel that vessels, in order to make the rip, starboard their helms. In other words, the natural sheer of the tide would be to carry a vessel to the right, or towards mid-channel. Capt. Metcalfe thus states the influence which the flood tide has on vessels about to cross it in that locality: "If her helm had been starboarded then, which is usually done by every steamer going out of the port on flood tide, in order to make that rip, she would have recovered herself very quickly, and gone on about her business." Therefore, the fact that the City of Chester failed to respond to her starboard helm, in view of the positive testimony of her captain that he placed her helm hard a-starboard, and kept it there, from the very first signal, is accounted for or explained by the force and action of this tide rip upon vessels crossing it. Again, the rapidity with which the City of Chester was turned to the right when her engines were placed full speed astern is also explained by the action of the tide rip. The very fact that the vessels collided almost at right angles,—the Oceanic running into the port side of the City of Chester, some 20 feet abaft her bow,—when, some two minutes before the collision, the Oceanic had the City of Chester on her starboard bow, indicates that the force of the current must have been an efficient cause in thus radically changing the positions of the vessels. The additional fact that the

Oceanic, in going full speed astern with her helm hard a-starboard, the result of which combination would be to send her to the right, while the fact was that she did not turn very much in that direction, as compared with the turn which the City of Chester made, action on the part of the Oceanic attributable to the force of the current she had to contend against, indicating that she was also in or near the tide rip or cross current.

Considerable stress is laid by both sides upon the testimony of T. P. H. Whitelaw, called for the respondent, and F. Westdahl, called for the libelants, as both of these witnesses undertake to fix exactly the place where the wreck of the Chester was found. T. P. H. Whitelaw, engaged in the business of wrecking, testifies that on the day of the collision he went to ascertain where the Chester lay. He states that he found where she was by oil coming up to the surface of the water, and made a mental note of the bearings of the wreck. Some two years after, he went out, accompanied by Bridgett, the second officer of the Oceanic, to ascertain again the position of the wreck. He says that the only bearings he had to go by were those which his memory afforded him from his investigations on the day of the collision. Using these, he states that he struck the wreck at the first sounding She was then situated about three-fifths of the distance towards Lime point, somewhat towards the inside of the harbor; that is, two-fifths of the distance from the north shore and three-fifths from the south shore, or Fort point.

Ferdinand Westdahl, a master mariner connected with the United States coast and geodetic survey, made investigations to ascertain the position of the wreck. He experimented by drifting with a tug on a flood tide, to fix upon the approximate place of the wreck. He made three drifts, starting approximately from where Capt. Wallace fixed the place of collision. Each drift brought him close to mid-channel, and considerably inside of the harbor. With this data, he searched for the wreck. He says:

"We swept along the bottom with a line weighted with great bars and window weights until we finally caught on to what we supposed was the City of Chester,—the wreck of her. I determined where she was then, or what we supposed was the City of Chester,—where it lies."

He located the wreck very nearly in mid-channel, while Whitelaw fixes the location of the wreck further to the north, but not quite so far inward. Respondent claims that Whitelaw's location must be correct, because it is more in the line of progress of the course of the Oceanic up to the time of the collision than that of Westdahl. It is not denied that the Oceanic and City of Chester, while impaled, drifted for some distance inward, on the flood tide, in the short space of five or six minutes. There were several forces which undoubtedly operated to finally deposit the wreck of the City of Chester at a point to the northward and eastward of the place of the collision. The City of Chester was, at the time of the collision, going nearly straight across the channel, and the Oceanic was coming in on a course N. E. ½ E., with her helm hard a-starboard. The point of collision was at the bow of the Oceanic, and near the bow,

and on the port side, of the City of Chester. The force of the collision was such that the bow of the Oceanic cut into the City of Chester about 10 feet, or about halfway through the vessel. This propelling force was therefore inward and northward. The flood tide off Fort Point sheers across the entrance towards mid-channel, and then flows inward on nearly a straight course. This force was first northward, and then inward. In view of these conditions, we should expect to find the wreck of the City of Chester to the north and inward of the place of collision, and hence it is that we infer that the collision took place near mid-channel; but, since we cannot hope to fix the place of collision with absolute certainty, it does not seem necessary to determine which of these two wrecks shall now be considered the remains of the City of Chester.

After a careful examination of all the evidence, aided by the inferences arising out of the natural probabilities attending the situation, I have reached the conclusion that the collision took place somewhere near mid-channel, but nearer Fort Point than Lime Point. This determination necessarily places the inward course of the Oceanic a little to the south of that delineated on the chart or map introduced by the respondent; but it is a course that accounts for the collision in accordance with what appears to me to be the established facts in the case, and particularly the actions of the two vessels.

The point of collision having been established as nearly as possible, we proceed now to consider the conduct of the two vessels, and the law of the road applicable to their movements. Section 2360 of the Political Code of this state provides the following rule of navigation:

"When steamers meet each must turn to the right, so as to pass without interference."

Section 970 of the Civil Code provides as follows:

"(1) Whenever any ship, whether a steamer or sailing ship, proceeding in one direction, meets another ship, whether a steamer or sailing ship, proceeding in another direction, so that if both ships were to continue their respective courses they would pass so near as to involve risk of collision, the helms of both ships must be put to port so as to pass on the port side of each other. (2) * * * (3) A steamer navigating a narrow channel must, whenever it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of the steamer. (4) A steamer when passing another steamer in such channel, must always leave the other upon the larboard side. (5) When steamers must inevitably or necessarily cross so near that, by continuing their respective courses, there would be a risk of collision, each vessel must put her helm to port, so as always to pass on the larboard side of each other."

Both vessels elected to violate these rules, and attempted to pass each other starboard to starboard, and a collision was the result. As the Oceanic was the first to depart from the rules, she took the risk of passing in safety; and, failing in the movement, the law holds her in fault. The Columbia, 29 Fed. 716; The Rockaway, 38 Fed. 856, affirmed 43 Fed. 544; The Garden City, 38 Fed. 860; The Titan, 44 Fed. 510, affirmed 49 Fed. 479, 1 C. C. A. 324; The Clara, 49 Fed. 768. But the argument of counsel having been directed more particu-

larly to the rules provided in the act of congress of March 3, 1885, prescribing "Revised International Rules and Regulations for Preventing Collisions at Sea," we will proceed to consider the movements of the vessels with respect to these rules. Article 16 of these rules provides as follows:

"If two ships under steam are crossing so as to involve risk of collision, the ship which has the other on her own starboard side shall keep out of the way of the other."

Article 18 provides:

"Every steamship, when approaching another ship so as to involve risk of collision shall slacken her speed, or stop and reverse, if necessary."

Article 19 provides:

"In taking any course authorized or required by these regulations, a steamship under way may indicate that course to any other ship which she has in sight by the following signals on her steam-whistle, namely: One short blast to mean 'I am directing my course to starboard.' Two short blasts to mean 'I am directing my course to port.' Three short blasts to mean 'I am going full speed astern.' The use of these signals is optional, but if they are used the course of the ship must be in accordance with the signal made."

Article 21 provides:

"In narrow channels every steamship shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such ship."

Article 22 provides:

"Where by the above rules one of two ships is to keep out of the way, the other shall keep her course."

Article 23 provides:

"In obeying and construing these rules due regard shall be had to all dangers of navigation, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger."

When the Oceanic discovered the City of Chester coming out of the harbor, the former had the latter on her starboard bow; and under article 16 the Oceanic was bound to adopt such a course as would enable her to keep out of the way of the City of Chester, while the latter was entitled to keep her course. The Oceanic had ample opportunities to "keep out of the way" of the approaching City of Chester, had she acted in due season. There were no impediments to any maneuvers she might have seen fit to make, if these had been carried out at the proper time. The testimony shows that the whistles—the fog blasts—of the City of Chester, when first heard, indicated that she was some three points off the starboard bow of the Oceanic. As the vessels approached, the repeated fog blasts from the City of Chester confirmed that vessel's position and bearing with respect to that of the Oceanic, and, furthermore, indicated that the City of Chester seemed to maintain about the same course, and continued to head in the direction of a point amidships of the Oceanic. Such is the testimony of the pilot, captain, and officers of the Oceanic; and it is an undisputed fact that when the City of Chester was first sighted her position with relation to the Oceanic

was exactly what these witnesses, guided solely by the sound of the fog blasts of the City of Chester, had determined it to be, viz. 2½ to 3 points off the Oceanic's starboard bow, heading for amidships. The signals were first heard off Point Bonita, perhaps shortly after that point had been passed. They continued to be heard, increasing in distinctness as the vessels approached each other. These fog signals from the City of Chester were timely notice to the Oceanic to be on guard against the danger of a collision. The situation certainly called for the utmost caution; and while it may be said that the Oceanic, proceeding "dead slow," was not required, under the circumstances, to do anything more until the City of Chester should come into view, and her course ascertained, nevertheless the Oceanic should have been prepared by these warnings for immediate action as soon as the dangerous proximity of the City of Chester had been discovered. But was the Oceanic proceeding dead slow? Pilot Myer says they were abeam of Point Bonita at 9:19, when the order to go dead slow was given. Eight minutes later, he says, they were a quarter of a mile off Point Diablo. These two points are about 1½ miles apart. To traverse this distance in 8 minutes requires a speed of more than 10 knots an hour, and yet the pilot tells us that, in going dead slow, he was making 3 to 4 knots through the water without regard to the effect of the tide, and that the tide was running 2 or 3 knots. The greatest possible speed, he admits, is therefore not more than 7 knots over the ground. That the Oceanic was proceeding at a higher rate of speed than this is confirmed by the testimony of Allen, the chief engineer of the Oceanic. He says that at 9:14 they were going dead slow, and 11 minutes later they went full speed astern. Capt. Metcalfe testifies that when the City of Chester was sighted by the Oceanic the latter vessel was about a quarter of a mile from Lime Point, —probably then to the southwest of that point; but, from other testimony, it appears that it was not until the vessel was directly off Lime Point that the order was given to go full speed astern. The distance between Point Bonita and Lime Point is more than 2 miles. To traverse this distance in 11 minutes would require a speed of more than 13 knots an hour. But allowing for possible errors in bearings, and reducing the distance to 2 miles from Point Bonita to the place where the order was given to go full speed astern, and we still have a speed of more than 10¾ knots per hour. Had this vessel been going over the ground at the rate of 7 knots per hour,—her highest possible speed at that time, according to the pilot,—she would have required 12 minutes to pass from a point directly abeam of Point Bonita to a point directly abeam of Point Diablo, and more than 17 minutes to pass from Point Bonita to the place where the order was given to go full speed astern. It is plain, therefore, that either the Oceanic was going at a higher rate of speed than has been admitted by her officers, or the interval of time between the orders to go dead slow and to reverse was greater than that stated by the witnesses. The Oceanic was, in my opinion, proceeding along the

mid-channel, aided by its strong current. That she was going at a higher rate of speed than dead slow is established by the fact that, although she reversed a few minutes before the collision, she drove her bow into the City of Chester some 10 feet, or about one-half the latter's beam. That this force was not all the effect of the flood tide is proven by the fact that both vessels were practically in the same current, and the City of Chester was also acting under an order of reverse.

Article 13 of the act of March 3, 1885, providing: Revised International Rules and Regulations for Preventing Collisions at Sea,"—is as follows: "Every ship, whether a sailing-ship or a steamship, shall in a fog, mist, or falling snow go at a moderate speed." In the case of The Normandie, 43 Fed. 156, Judge Brown, of the southern district of New York, says that:

"What is 'moderate speed' is largely a question of circumstances, having reference to the density of the fog; the place of navigation; the probable presence of other vessels likely to be met; the state of the weather, as affecting the ability to hear the fog signals of other vessels at a reasonable distance; the full speed of the ship herself, her appliances for rapid maneuvering, and the amount of steam-power kept in reserve, as affecting her ability to stop quickly after hearing fog signals."

A great many cases have been before the courts, involving the question of what is a moderate speed for a vessel in a fog; but it will not be necessary to review these cases, since, for the present purpose, the rule applicable to the situation under consideration may be briefly stated in the words of Judge Wallace in the case of Fabre v. Steamship Co. (decided in the circuit court of appeals for the second circuit) 3 C. C. A. 534, 53 Fed. 290. He says:

"Prudent seamanship requires a steam vessel navigating in a fog, hearing, apparently forward of her beam, the fog signal of another vessel, the position of which is not ascertained, if the circumstances of the case admit, to stop her engines, and then navigate with caution until danger of collision is over."

This rule, as Judge Wallace states, had been incorporated into the "Regulations for Preventing Collisions at Sea" adopted by the international marine conference of 1889, where it appears as article 16; but it is found there because nautical experience had determined that it was necessary to observe such a rule, and the courts have often declared it obligatory. In the case of The City of New York, 147 U. S. 84, 13 Sup. Ct. 211, the supreme court said:

"There is no such certainty of the exact position of a horn blown in a fog as will justify a steamer in speculating upon the probability of avoiding it by a change of the helm, without taking the additional precaution of stopping until its location is definitely ascertained."

Applying this rule to the present case, we find that the Oceanic, being warned by fog signals, apparently forward of her beam, that another vessel was approaching through the channel, instead of keeping on in the direction of danger, should have stopped her engines, and then navigated with caution until the danger of collision was over. The claim that is made that she reduced her speed to dead slow off Point Bonita, when the fog signals were first heard, did not meet the requirement of the situation, even if her speed was

only at the rate of 7 knots per hour; but, if we conclude that she was steaming and drifting in the tide at the rate of 10 knots per hour, then, clearly, she was proceeding in gross violation of the rule, and must be held responsible for the consequences.

The question now is, was the Oceanic, having an unknown vessel on her starboard side, required to act on the fog signals of the latter, and keep out of her way, as provided in article 16 of the rules and regulations of 1885, or was the Oceanic at liberty to go on until the approaching vessel should come into view, and then regulate her conduct in accordance with the situation as it should then appear? Would the mere fact that fog prevented the officers of the Oceanic from getting sight of the City of Chester sooner excuse or relieve them from acting upon the signal of danger which her fog blasts indicated? To admit that they were justified in pursuing such a course would, in my judgment, avoid this important rule of navigation, and remove one of the most effective safeguards against collision in foggy weather. This examination into the conduct of the Oceanic with respect to the fog signals of the City of Chester has not been made, however, for the purpose of determining whether she was at fault during this stage of her progress. It has been rather for the purpose of better understanding her later movements, which are the subject of controversy.

We come now to consider the conduct of the Oceanic after the City of Chester came into view. The latter vessel was discovered looming up through the fog about a half a mile distant on the starboard bow of the Oceanic, precisely as the fog signals had previously indicated. It was certainly then the duty of the Oceanic to adopt prompt measures to keep out of the way of the City of Chester. The Aurania, 29 Fed. 124; The Ogemaw, 32 Fed. 922. What did she do? She signaled to the City of Chester, with two blasts of the whistle, that she would direct her course to port, and for the City of Chester to do the same, and accordingly the helm of the Oceanic was put hard a-starboard. The City of Chester responded to the signals of the Oceanic with two blasts of her whistle, indicating that she would direct her course to port; that is to say, she would pass on the starboard side of the Oceanic. It was, however, soon discovered that the City of Chester was not carrying out the agreement, but, on the contrary, was acting as though under the influence of a port helm, and was directing her course to starboard. Two minutes after the first signal, the Oceanic gave the second signal of two blasts; adhering to her previous determination to direct her course to port, and indicating that the City of Chester should do the same. The City of Chester answered as before, but kept on the contrary course. Almost immediately after, the order was given on the Oceanic to go full speed astern; but this order came too late, for in two minutes the vessels were in collision.

Counsel for respondent claim that the rule which requires that a vessel which has another on her starboard side shall keep out of the way of the other does not apply in this case, because the steamers, as is claimed, were not on crossing courses. The contention is based upon the ground that if the line of the course of the Oceanic had been

produced, when that vessel first caught sight of the City of Chester, it would never have touched the City of Chester, while, if the line of the course of the City of Chester had been produced, it would have crossed the Oceanic somewhere about the funnel or bridge. These, they claim, do not constitute crossing courses. It is admitted that the vessels were not end on to each other, and they were not on parallel courses, but they were approaching each other from opposite directions, obliquely. The City of Chester was so headed, and both vessels were so advancing and approaching each other, that, unless they changed their courses radically, the bow of the City of Chester would eventually strike the Oceanic amidships. This was the very thing which the rule was designed to prevent. If this was not a crossing course by one vessel, involving a risk of collision, it is difficult to understand how the course could be designated, or what rule of navigation could apply. If their contention be true, then, as the vessels were confessedly not end on, nor on crossing courses, none of the rules would be applicable. But I think there can be no question that the vessels were on crossing courses, within the meaning of article 16. The language used is very broad, and apparently refers to any crossing of courses involving risk of collision. The very fact that it does not specify any particular course or courses indicates, to my mind, the general character of the rule. One vessel may be crossing the path of another, or both may be approaching on converging lines, so as to meet at a given point, or, as in the case at bar, one may so bear upon another that eventually, if no change is made in the course of one or both, a collision is rendered imminent. In any of the above instances the risk of collision, all things being equal, is as great in the one case as in the other. The vessels, in my opinion, were on crossing courses, within the meaning of the rule; and the Oceanic, having the City of Chester on her starboard bow, and being apprised of that fact, or chargeable with notice of that fact, from the direction of the repeated fog signals, for some 10 or 12 minutes before the collision, should have kept out of the way, and should have taken steps to do so much sooner than she did. The Lepanto, 1 C. C. A. 503, 50 Fed. 234; The Georgia, 1 C. C. A. 489, 50 Fed. 129.

We have now reached the important question in the case: Was the Oceanic at fault in failing to reverse sooner than she did? The testimony indicates that when the first signal was given, and answered by the City of Chester, the helm of the Oceanic was put hard a-starboard. There is, however, a discrepancy in the testimony of Pilot Myer on this point. He first says that the helm was put hard a-starboard at this time, and again his statements would seem to indicate that the helm was not put hard a-starboard until the second signal was given; but the captain and officers agree that the helm was placed hard a-starboard immediately after the first signal. This order, it will be remembered, was given as soon as the City of Chester had been discovered through the fog. The distance at which the City of Chester was first seen was about half a mile. Although this vessel answered the two whistles of the Oceanic with two, thus agreeing to go to port, yet she did not, at any time before the collision, act in accordance with her signal. All the wit-

nesses on the Oceanic agree that the City of Chester failed absolutely to comply with her promise. Upon answering the first signal, she seemed to respond to her starboard helm just a trifle; but this was only momentary, for she seemed to be under the influence of a port helm,—going to the right, instead of to the left. Her course to the right was not a sudden or radical change from left to right, but it was a steady and gradual change, becoming more apparent all the time, until, when under full speed astern, with her helm hard a-starboard, she went to starboard so rapidly that she got across the bows of the Oceanic, that vessel running into her on her port side some 20 feet abaft the bow. But at no time, the witnesses on the Oceanic all swear, did the City of Chester appreciably answer her starboard helm, by going to the left, as she had agreed to do. This fact was observed by the pilot, captain, and officers; and yet no steps were taken by either the pilot or the captain to ascertain whether the signal had been misunderstood, or incorrectly answered. Fully two minutes were allowed to pass by, the vessels meanwhile continuing to approach each other, when the pilot, becoming alarmed at the aspect affairs were assuming, ordered two more whistles,—to go to port,—which the City of Chester answered also with two. About half a minute or thereabouts expired after this second signal had been given and answered, when, for the first time, the order to reverse was given by the captain of the Oceanic. It appears that it was about this time that the City of Chester first obtained a view of the Oceanic; and her captain, seeing that a collision was absolutely unavoidable, also gave the order of full speed astern. Both sides agree—that is, the witnesses on the Oceanic and the City of Chester concur—that, when the order to reverse was given by each, the collision was inevitable. It is plain that this order came too late to be of any utility, even to materially mitigate the disastrous effects of the collision, for the City of Chester was penetrated by the Oceanic fully 10 feet, or about half her beam, and could only be kept afloat by keeping the Oceanic impinged in the breach, and even then she was kept afloat for only five or six minutes. In this the Oceanic was clearly at fault. She should have gone full speed astern much sooner, particularly in view of the warning conveyed to her in the fog signals of the City of Chester. In my judgment the Oceanic should have been reversed the instant it was discovered that the City of Chester did not respond to her helm as she had agreed to. The situation was a critical one at that time, and called for immediate action, as further developments conclusively showed. It was absolutely necessary to reverse then, to avoid, not a mere risk of collision, but a collision itself. The risk of collision, to my mind, existed for some time prior. It was certainly present when they first sighted the City of Chester. The very object of the maneuver which the pilot of the Oceanic elected to adopt, and acceded to by the City of Chester, was made with the view of avoiding a collision. The pilot says:

"I said: 'Now, it is time to give him two distinct whistles, to tell him we will starboard; he is now on our starboard bow; he is going this way,—so that he may put his wheel starboard, and clear us.' "

The testimony of this witness as to when the danger of collision arose is significant:

"Q. Do you mean to tell us that there was but one thing that would have saved the ship from colliding with you, after you first saw her, and that was that she should go to starboard; that she should obey her starboard helm? A. Certainly. Q. That was the only thing that would prevent a collision, from the time you first saw her? A. Yes, sir. Q. Then, from the time you first caught sight of the Chester, you felt that there would be a collision unless she went to port? A. Yes, sir. Q. Unless she obeyed her starboard helm? A. Yes, sir. Q. Is that right? A. Yes, sir. Q. If that is the condition of affairs, why did you sound the second signal? A. Because she did not go that way. Q. You sounded the second signal to get her to go that way? A. Yes, sir."

Again:

"Q. As I understand, you say, when you saw the City of Chester a half a mile away, and some three points on her starboard bow, that nothing could avert the collision or disaster except her turning to starboard. A. That is what it is."

This testimony is substantiated by that of Capt. Metcalfe, and the other officers of the Oceanic.

Now, if it was necessary, when the City of Chester came into view, for both vessels to act, in order to clear each other, it is too plain to need comment that there was a serious risk of collision. That being true, the instant that the officers of the Oceanic saw that the City of Chester did not do as she ought to have done, with all the means at their command, their skill and experience, and in view of the significant symptoms of danger already adverted to, they should certainly have stopped and reversed. The language of Judge Simonton in delivering the opinion of the circuit court of appeals for the fourth circuit in the case of The Louise, 3 C. C. A. 330, 52 Fed. 885, is applicable to the case at bar. He says:

"These [the rules of navigation] leave but little room for mere conjecture in controlling the action of the master and pilot. Each of them has in his power the means of ascertaining with approximate certainty the intention and course of an approaching steamer. He must use them. Notwithstanding this, errors committed by one of two vessels approaching each other from opposite directions do not excuse the other from adopting every proper precaution required by the special circumstances of the case to prevent a collision. Rule 24; The Maria Martin, 12 Wall. 47; The Scotia, 14 Wall. 181. If there be any uncertainty as to the intentions of the approaching vessel, this, of itself, calls for the closest watch, and the highest degree of diligence, on the part of the other vessel, with reference to her movements; and it behooves those in charge to be prompt in availing themselves of every resource to avoid, not only a collision, but the risk of such a catastrophe. The Manitoba, 122 U. S. 108, 7 Sup. Ct. 1158."

In The America, 92 U. S. 432, Mr. Justice Clifford, speaking for the supreme court, said:

"Sailing rules were ordained to prevent collisions between ships employed in navigation, and to preserve life and property embarked in that perilous pursuit, and not to enable those whose duty it is to adopt, if possible, the necessary precautions to avoid such a disaster, to determine how little they can do in that direction without becoming responsible for its consequences, in case it occurs."

Again:

"Rules of navigation are ordained to preserve life and property, and not to promote or authorize collision. Even flagrant fault committed by one of two

vessels approaching each other from opposite directions will not excuse the other from adopting every precaution to prevent a collision. The Maria Martin, 12 Wall. 47."

The case of The Khedive (decided by the house of lords in 1880), 5 App. Cas. 876, is in point. The facts of that case were not as strong against the vessel failing to reverse in a seasonable time as in the case at bar. There the collision had been precipitated by another vessel—the Voorwaarts—suddenly altering her course. The master of the Khedive, thus taken unawares, gave the order to place the helm hard a-starboard, and for the engineers to stand by the engines, ready for any emergency. About a minute and a half later, he gave the order "Full speed astern." But, after an elaborate consideration of the case, the house of lords held that he gave the order to reverse too late; that he should have done so when he directed the engineers to stand by their engines; that the rule of navigation that "every steamship, when approaching another ship, so as to involve risk of collision, shall slacken her speed, or, if necessary, stop and reverse"—which is the same as our rule (article 18 of the act of March 3, 1885) —gave the master no discretion when risk of collision was present; that he was bound to stop and reverse at the first moment of danger; and that, as he had not done so, the Khedive was in part to blame. Lord Blackburn observes:

"We are advised, and are of opinion, that under the circumstances, and in the position of those two ships, it was quite right that the helm of the Khedive should be put hard a-starboard. But then comes the question whether the captain ought not, at the time he gave the order to put the helm hard a-starboard, to have ordered the engines to be stopped and reversed. It was obvious that at that moment there were two steamships approaching each other in great danger of collision. It is obvious, therefore, that the rule of navigation applied, unless there were something which made it necessary, for the safety of the navigation, that the rule as to stopping and reversing should not be acted upon."

Speaking of the conduct of the master of the Khedive, he says:

"He at once took in the situation, and was aware that there was risk of collision, and that it was imminent, if not inevitable; and he acted with great promptitude and skill, so as greatly to alleviate the violence of that inevitable condition. But he did not stop and reverse, nor even slacken his speed; and there he departed from the course prescribed by regulation 16. Nor was there anything in the circumstances rendering a departure from this rule necessary, in order to avoid immediate danger. Even if it would, in the absence of such a positive rule, be better seamanship to keep way on the ship, in order to make her more manageable (which is not clear), the legislature has thought it better to prescribe the course which must be followed."

In the case at bar, fully 2½ minutes, at least, were allowed to pass by, after the dangerous proximity of the City of Chester had been discovered, before the order to reverse was given, and then the risk of collision cannot be said to have been an imminent one. It was a foregone conclusion. The order to reverse was delayed in the face of the fact that, during all this time, it was seen that the City of Chester was not answering her helm, and was not going to port, but, on the contrary, was going to starboard. The City of Chester was not, in fact, executing the maneuver relied on to avoid a collision. This was observed from the first. The pilot and captain of the Oceanic should therefore have appreciated the imminent risk of collision the instant

they saw that the City of Chester did not respond to her helm, and should have acted promptly. They neither stopped, nor did they reverse. They now seek to justify their tardy action upon the ground that, as the master of the City of Chester had signaled that he would go to port, they were justified in relying upon that signal, and this in the face of, and with positive and convincing evidence of, facts which showed that the City of Chester was not doing as she had agreed to do, but was doing just the opposite. If they did not observe these facts, they should have done so, and their failure to do so cannot be excused.

In the case of The Beryl (decided by the court of appeals) 9 Prob. Div. 137 (1884) Brett, M. R., held that although the Beryl had the right of way, and had slackened her speed from a quarter to a half a mile distant from the Abeona, and had stopped and reversed some 300 yards distant, she was still in fault, for failing to reverse soon enough, and she was held mutually liable with the Abeona. The learned judge observed:

"I am sorry, in this case, to have to come to the conclusion to which I feel bound to come. I take it that the basis of the regulations for preventing collisions at sea is that they are instructions to those in charge of ships, as to their conduct; and the legislature has not thought it enough to say, 'We will give you rules which shall prevent a collision.' They have gone further, and said that, 'For the safety of navigation, we will give you rules which shall prevent risk of collision. It is not enough if you do only that which will apparently prevent a collision. We will give you rules which shall regulate your conduct, not merely for the purpose of preventing even a risk of collision.' * * * Another rule of interpretation of these regulations is (the object of them being to avoid risk of collision) that they are all applicable at a time when the risk of collision can be avoided,—not that they are applicable when the risk of collision is already fixed and determined. We have always said that the right moment of time to be considered is that which exists at the moment before the risk of collision is constituted. The words are not, 'If two ships under steam are crossing with a risk of collision,' but 'are crossing so as to involve risk of collision;' that is, the moment before there was a risk of collision."

And again he observes:

"That rule [to slacken speed, or to stop and reverse], in my opinion, like all the others, applies particularly to the moment before the risk of collision is constituted and exists. It is at a time when the action of both steamers is such as to involve risk of collision. At that moment of time, if what they are doing involves a risk of collision, they are both to slacken their speed. It applies to each of them. But it may be that the condition of things just before the moment when the risk of collision is to be constituted is such that slackening will not avoid that risk of collision, and that it requires another maneuver, namely, that of stopping and reversing, and then they must stop and reverse, either one of the other, or both. That, again, is an instruction as to the conduct of men, and it cannot be that they are to do that thing merely because it is proved afterwards that there was a risk of collision, or if there was risk of collision about to be constituted. It must apply if the circumstances are such that an officer of ordinary skill and care would be bound to come to the conclusion that if the ships continue to approach each other there will be risk of collision."

The case of Fabre v. Steamship Co., supra, involved the question of responsibility for a collision between the steamship Umbria and Iberia near the entrance to New York harbor. The district court held that the Umbria, alone, was in fault. The circuit court of ap-

peals found that both vessels were to blame, and, in commenting on the conduct of the Iberia, said:

"During the interval of probably eight minutes, the whistles of the Umbria apparently continued to bear steadily at about the same place, on the Iberia's port hand. This should have made it clear to the master of the Iberia that the vessels were approaching, so as to involve the risk of collision. Under such circumstances, it was his imperative duty to stop his vessel until he could come to a clear understanding of the course of the Umbria. The event proved that she would have escaped, if her engines had been put at full speed; but it could not be foretold that she could do so, and the only proper course was to observe the rule which requires steam vessels, when approaching one another, so as to involve risk of collision, to slacken speed, or, if necessary, stop and reverse. It is the imperative rule, when two steamers are approaching each other in a fog, and the signals of each of them indicate that they are drawing together upon opposite or crossing courses, for each to stop until a clear understanding is reached with regard to their respective positions and courses; and, if there be any confusion of signals, or any other apparent risk of collision, not only to stop, but to reverse their engines."

The court cites a number of cases in support of this doctrine; among others, that of The Beryl, supra. There are also many other cases to the same effect; and while it may appear that the situations in these several cases differ in some particulars from the one at bar, nevertheless the rule of safety, as declared by the courts, is applicable here, and determines that the Oceanic, under the circumstances of her situation, was at fault, in not stopping and reversing her engines in time to prevent the collision. In this connection, the conduct of the captain and pilot with respect to the probable effect of the tidal current upon the City of Chester should not be overlooked. They both admit that they did not take into consideration the probable effect which the tide rip or cross current, which they knew the City of Chester had to cross, would have on her starboard helm. They claim that this was a matter solely for the captain of the City of Chester to have taken into consideration when he assented to their signal to go to port. They claim, further, that they did not know, as a matter of fact, the position of the City of Chester with respect to the tide rip. But they admit that they knew where the tide rip was, and they admit that they knew the position of the City of Chester, for they had sight of her when she was a half a mile off,—so they claim,—and kept her in view continuously up to the collision. Putting all this information together, it could not have been such a difficult task to determine—approximately, of course—the fact whether or not the City of Chester had or had not crossed the tide rip. But they confess that they did not give "the matter of the Chester being caught in that tide any consideration whatever." And yet the captain admits that a vessel going from slack water into a cross current would be carried off her course, to some extent, and that such was the effect of this tide rip upon vessels crossing it, going out of the harbor; and he also states it as his opinion that, when he first caught sight of the City of Chester, she had not yet crossed that rip. He says:

"Assuming the position of the Chester to be half a mile from me, on my starboard bow, when the first signal was given, she was not within the influence of that tide rip, in the neighborhood of Fort point."

He therefore knew, or should have known, that the City of Chester had to cross that current, and yet he confesses that he gave the matter no consideration whatever; in other words, he ignored this factor completely, and the order to go to port was given by the pilot, and insisted on, regardless of the probable effect of the flood tide on the helm of the City of Chester.

In the case of The John H. May, 52 Fed. 882, Judge Butler said:

"He [the captain] says that he was unaware of the state of the tide, which tended to carry the barge upward. This was inexcusable ignorance, for which, also, his vessel must answer."

In the case of The Ogemaw, 32 Fed. 919, the same doctrine is affirmed:

"A steamer bound to keep out of the way must, at her own peril, shape her course for a safe margin against the contingencies of navigation and the effect of tide currents."

In view of these established rules of navigation, the conclusion is reached that the Oceanic was at fault in her movements, and, failing to use ordinary care in attempting to pass the City of Chester, she is mutually responsible with the City of Chester for the damages resulting from the collision.

As to the amount of damages: The deceased, Henry Smith, was 32 years of age, and in first-class health. He had been married for some five years and a half, and was the father of three children, one of whom, Myrta Smith, also lost her life in the disaster. He had been engaged, just previous to his death, in the dairy business, in Sacramento, Cal. His widow testifies that he owned some property in connection with the dairy business, 160 acres of land, about 45 cows, 10 or 15 head of horses and mules; that he supported himself and family, including his father and sister-in-law; that the family expenses were from $75 to $100 per month, and that he made from $50 to $75 over that sum a month. His yearly earnings would therefore, at that rate, amount to from $1,500 to $2,100. He had $500 on his person when drowned, which was missing when his body was found. Testimony was introduced to show that, to purchase an annuity of $1,500, on a male person 32 years of age, and in good health, would require $24,882 in cash. There are, however, considerations involved in determining the value of a life not embraced within the rules of the annuity tables. Morgan v. Southern Pac. Co., 95 Cal. 521, 30 Pac. 601; Cheatham v. Red River Line, 56 Fed. 248; In re Humboldt Lumber Manuf'rs' Ass'n, 60 Fed. 428. In 14 states, these considerations have found expression in statutes limiting the amount that may be recovered for the death of a person to $5,000, and in two states and one territory the law limits the amount to $10,000. There is no limitation in this state. Section 377 of the Code of Civil Procedure provides that "such damages may be given as under all the circumstances of the case may be just." The statutes of those states which fix a limit have been noticed by the courts in other states, and have had weight in fixing the amount of damages. In view of all the circumstances of this case, I will assess the damages caused by the death of Henry Smith at $10,000.

Myrta Smith was over 4½ years of age, and in good health. The supreme court of this state, in Morgan v. Southern Pac. Co., 95 Cal. 510, 30 Pac. 603, held that in an action by a parent to recover damages for the death of a minor child, caused by negligence, the main element of damage is the probable value of the services of the deceased during minority. Manifestly, there is no rule that will enable the court to estimate, with any degree of accuracy, the probable value of the services of a child. But as the statute gives the right of action for the benefit of the parent, without regard to circumstances, I must determine that there is some injury, which I fix in the sum of $1,000.

THE TRANSFER NO. 4 and THE CAR FLOAT NO. 16.

McCULLOUGH v. NEW YORK, N. H. & H. R. CO. et al.

NEW YORK & N. STEAMBOAT CO. v. THE TRANSFER NO. 4 et al.

(Circuit Court of Appeals, Second Circuit, April 19, 1894.)

Nos. 61 and 92.

1. COLLISION BETWEEN STEAMERS—SIGNALS—MUTUAL FAULT.
On a dark night, a steamboat coming with an ebb tide down East river, having rounded Hallett's point, intending to go down the channel westerly of Blackwell's Island, and a tug with a car float alongside coming up the easterly channel, intending as she cleared the island to cross to the New York shore and go into the Harlem river, each mistook the intention of the other, and the steamboat and car float collided just above the island. No signals were given, except a single blast by the steamboat just before the collision. *Held*, that the mutual misunderstanding which caused the collision would not have happened had the vessels given the signals required by the inspectors' rules, and both steamboat and tug were therefore in fault. 55 Fed. 98, affirmed.

2. ADMIRALTY JURISDICTION—DAMAGES FOR LOSS OF LIFE—STATE STATUTE.
Under a state statute giving the administrator of a person killed by negligence of another a right to damages therefor for the benefit of the next of kin, a libel in personam may be maintained for such damages for death caused by a negligent collision on navigable waters within the state. 55 Fed. 98, affirmed.

3. MASTER AND SERVANT—NEGLIGENCE—VICE PRINCIPAL OR FELLOW SERVANT.
The master of a steamboat, while in command and directing her movements, is a vice principal of the owner, and not a fellow servant of the engineer, so as to prevent recovery of damages from the owner for the death of the engineer by a collision due in part to the master's negligence. Railway Co. v. Ross, 5 Sup. Ct. 184, 112 U. S. 394, followed. 55 Fed. 98, reversed on this point.

Appeal from the District Court of the United States for the Southern District of New York.

These were two libels, one in personam, by Mary McCullough, as administratrix of Patrick McCullough, deceased, against the New York & Norwalk Steamboat Company, owner of the steamboat City of Norwalk, and the New York, New Haven & Hartford Railroad Company, owner of the steamtug Transfer No. 4 and of Car float No. 16, for damages for the death of said Patrick McCullough by a collision between the steamboat and the car float while in tow of the tug; the other a libel in rem, by the steamboat company

against the tug and car float, for damages to the steamboat by the same collision. The district court found both steamboat and tug in fault, and divided the damages to the steamboat between them, and awarded half damages for the death of McCullough against the railroad company, only, as owner of the tug. The administratrix and the railroad company appealed.

Josiah A. Hyland, for appellant McCullough.
Wheeler H. Peckham, for appellant New York, N. H. & H. R. Co.
Frank D. Sturges, for appellee New York & N. Steamboat Co.

Before WALLACE and LACOMBE, Circuit Judges.

LACOMBE, Circuit Judge. About 3:30 a. m. of March 30, 1893, the City of Norwalk, a steamboat belonging to the New York & Norwalk Steamboat Company, came into collision with car float No. 16, in tow of the tug Transfer No. 4, both belonging to the New York, New Haven & Hartford Railroad Company in the East river, just above Blackwell's Island. The Norwalk sustained damages, and Patrick McCullough, her engineer, lost his life. The owners of the Norwalk libeled the tug and car float. The district judge held both tug and steamboat in fault, and divided the damages. From such decree the railroad company appealed. 55 Fed. 98. McCullough's administratrix sued the owners of both boats, alleging a joint wrong. The court below found both boats in fault, and the deceased free from contributory negligence; it assessed the damages at the statutory amount ($5,000), and condemned the owners of the tug to pay one-half, absolving the owners of the City of Norwalk from payment, on the ground that the intestate was an employe, and could not recover for negligence of a fellow servant. The railroad company and the administratrix (libelant) both appealed.

The case between the owners of the two boats may be first considered. At the time of the collision the weather was fair; the night starlight, but dark; the tide was ebb, and the current about four knots. The City of Norwalk came down the river at a speed of about 8 knots (making about 12 by land), and rounded Hallett's point, where there is a sharp bend. She was bound for New York, and from Hallett's point could have proceeded either down the westerly channel, between Blackwell's Island and the New York shore, or down the easterly channel, between that island and the Long Island shore. It was her intention to pursue the former course, which was her usual one, although sometimes, when she had freight for points on the east shore, she took the easterly channel. The tug, with the car float lashed to her starboard side, came slowly against the tide, through the channel to the east of Blackwell's Island, bound for the New Haven docks in the Harlem river. From the island she might either have proceeded in an eddy along the Astoria shore, passing between Hallett's point and Flood Rock, and thence northerly of Flood Rock and Mill Rock, or, as she cleared the island, she might have struck across to the New York shore, keeping to the southerly of the two rocks above mentioned, and so

on, between Mill Rock and the New York shore, into Harlem river. Sometimes she took one of these courses, sometimes the other, it being her intention on the night of the collision to take the latter. All lights were properly set and burning. The story of the City of Norwalk is as follows: Her master was at the wheel; the mate in the pilot house on lookout. She rounded Hallett's point on a course to pass within 100 feet of Flood Rock on its south side, and, when about "on the upper end of Flood Rock," saw the red light and range lights on the tug and the bow light of the float bearing on the steamboat's port bow, and about a quarter of a mile distant. The master of the City of Norwalk supposed the tug was on a course towards the eddy on the Astoria shore, to take advantage of that eddy. The steamboat proceeded on at the same speed in order to keep her under control, and when past Flood Rock, and heading to go down the channel between Blackwell's Island and New York, the green light of the tug suddenly came into view, she having starboarded her helm; and the tide, as she swung to port, shot her rapidly towards the steamboat. Immediately upon the green light of the tug coming into view, a signal of one whistle was given by the steamboat, her helm was put hard a-port, and she continued on in the hope of crossing the tug's bow, it being impossible to stop her, and thus prevent a collision. No answer was given to this signal by the tug, and she also apparently continued on, so that the vessels came together with great force, the port corner of the float (which projected beyond the tug) striking the port side of the steamboat a little aft her stem. The claim of the Transfer is as follows: When near Gibb's point, which is in the channel east of Blackwell's Island, she starboarded her helm so as to stem the true tide and pass close to the point of the island, within 100 feet of the shore, and from there to the Harlem river; that when near Blackwell's Island light she for the first time saw the Norwalk near Flood Rock, showing a green light; that the boats were then green to green, and that suddenly, when almost abreast of the Transfer to the east, the Norwalk showed her red light, and tried to cross the bow of the Transfer; hence, the collision. These stories are direct contradictions. If the Norwalk navigated as she says she did, it was impossible for her to show her green light to the tug, and, if the tug's story is correct, it must have been her green, and not her red, light, which she showed to the steamboat. Without undertaking to determine the precise movements of the vessels, and their successive and respective positions in the channel, the district judge held both in fault for failure to give the signals required by the inspectors' rules. In the conclusion thus reached by the district judge we concur.

Manifestly this collision happened because the master of each vessel inferred from such indications as he noted that the other was about to take a particular one of two known courses, when, in fact, that other's intention was to take the other course. It is the very object of the law providing for the giving of signals to increase the number of indications which may be noted and reasoned from, thus promoting the accuracy of the inferences drawn from them. That both vessels failed to conform to the inspectors' rules is hardly

disputed. Counsel for the tug admits that, "in not sounding the whistle when he first discovered the Norwalk, Capt. Harper omitted a precaution enjoined upon him by the statute," that it was "a technical violation of the rule," though he seeks to excuse it, either as not contributing to the catastrophe or as overshadowed by some subsequent fault of the other vessel, which was, as he contends, the more immediate cause. That the Norwalk flatly violated rule 5, requiring a steamer nearing a short bend or curve in the channel to give a prescribed signal, is indisputable; she gave no signal whatever before rounding Hallett's point, and none after, save only the single blast in the jaws of the collision. When violation by each vessel of an express rule of navigation is plainly apparent, each must be held to blame, unless it is clearly shown that the technical fault did not contribute to the collision. The evidence, however, does not warrant any such excuse. The Transfer had no stationed lookout, the master acting as pilot and lookout both. He did not see the Norwalk's lights, when they first came within his field of vision from around Hallett's point, nor until she had got across to Flood Rock. How can it be said that if the Norwalk had blown the alarm whistle, which the law required of her, before she rounded the bend, he would not have heard it, or that, hearing it, he would not have regulated the tug's movements so as to avoid collision, especially if, immediately upon sighting the Transfer, the Norwalk had blown the single blast which would have indicated her intention to pass to the starboard? The master and mate of the Norwalk failed to see the Transfer as soon as she came within their field of vision. If the latter had sounded two blasts, as the rule required her to, indicating her intention to go to port, how can it be said that such notice of her presence and intended course would not have prevented the misunderstanding on the part of the Norwalk which brought that vessel across the Transfer's bow? We agree, therefore, with the district judge in the conclusion that the mutual misunderstanding which caused the collision would not have happened had the vessels given the signals required by the inspectors' rules. Both were therefore in fault.

The case of the administratrix against the owners of the two vessels presents some further questions. It is contended that a libel in personam for damages for loss of life under the state statute cannot be maintained in admiralty. This objection has been most exhaustively discussed by the learned district judge, and all the authorities bearing upon it stated and analyzed. There is nothing to add to his disposition of the question in the subdivision of his opinion which deals with it, except to say that we fully concur therein. The damages were the result of a tort committed on navigable waters of the United States,—the tort by place and circumstance a maritime one; the locality was within the waters of a state which by its statute gave to the administrator of the person killed a right to receive, for the benefit of the next of kin, a sum of money by way of damages for the death of the intestate. The supreme court has expressly held that such statutes are valid, even when the tort was committed on navigable waters, in the absence of any regulation

of the subject by congress. Steamboat Co. v. Chase, 16 Wall. 522; Sherlock v. Alling, 93 U. S. 99. There is no question here of an attempt to create a maritime lien by state law; that law simply gives in certain cases a legal right to damages for a tort, which survives the person injured, and passes as do other rights of property, to the legal successor to his estate. The admiralty courts, before the passage of the statute, exercised jurisdiction over precisely such claims for damages, when brought in his lifetime by the person injured, and there seems no sound reason why they should not exercise like jurisdiction when the tort is committed in a locality where the municipal law preserves the right to redress beyond the life of the injured person. It is not logically an enlargement of jurisdiction so as to cover a general subject not cognizable before, but a mere increase of the varieties of cases embraced within that subject.

The only question left for consideration is whether the fact that the collision which caused the damage was due in part to the negligence of the master of the City of Norwalk will prevent any recovery by the administratrix against the owner of that vessel, on the theory that the master and the deceased were fellow servants. On this point we disagree with the district judge, being of the opinion that the case is entirely within the principle laid down in Railway Co. v. Ross, 112 U. S. 394, 5 Sup. Ct. 184. There the conductor of a railway train was held not to be a fellow servant with the engineer, because the conductor had its entire control and management, commanded its movements, directed when it should start, at what stations it should stop, at what speed it should run, and exercised control over the persons employed upon it. We are unable to distinguish such a conductor from the master of a ship, who, certainly while he is on deck and in command, directs its movements, regulates its speed, and controls the ship's company. If the conductor represents the owner, as a vice principal, most certainly the master does. The distinction drawn in Quinn v. Lighterage Co., 23 Fed. 363, is not applicable, for the master was in charge of the steamer and acting as master. He was exercising command, not simply assisting in the discharge of some minor duty entirely outside of a master's functions; and, while thus in command, directing the steamer's movements, he so negligently directed them as to cause collision.

The decree of the district court in the libel of the steamboat company against the Transfer is affirmed, with interest and costs. In the other case the decree in favor of the libelant against the railway company is affirmed, with interest; the decree dismissing the libel against the Norwalk Steamboat Company is reversed, and cause remanded, with instructions to decree against that company for half the statutory damages, with interest, and costs of both courts.

FINANCE CO. OF PENNSYLVANIA et al. v. CHARLESTON, C. & C. R. CO. et al.

Ex parte HUDSON.

(Circuit Court, D. South Carolina. May 2, 1894.)

CORPORATIONS—FORECLOSURE—JUDGMENT FOR TORT.

Upon foreclosure of a railroad mortgage, a judgment for personal injuries will take precedence of the mortgage, in the distribution of the proceeds of sale (Code N. C. §§ 635, 1255), although the action on which the judgment was founded was not brought within 60 days of the registration of the mortgage.

This was a petition filed by H. T. Hudson, Jr., in the case of the Finance Company of Pennsylvania and others against the Charleston, Cincinnati & Chicago Railroad Company and others, asking payment of a judgment, rendered in his favor for personal injuries, out of the proceeds of a foreclosure sale, prior to the payment of the mortgage debt.

R. W. Memminger, Jr., and Mitchell & Smith, for petitioner.
Smythe & Lee and P. D. Walker, for receiver.

Before SIMONTON, Circuit Judge, and BRAWLEY, District Judge.

SIMONTON, Circuit Judge. This petition seeks payment of a judgment against the Charleston, Cincinnati & Chicago Railroad Company from the proceeds of sale, in priority to the mortgage debt. The petitioner was injured in his person by a train of the Charleston, Cincinnati & Chicago Railroad Company at Blacksburg, S. C., on April 9, 1887. On 13th October of the same year he brought his action against the railroad company in the state court of Cleveland county, N. C. In this action he was nonsuited in invitum. Thereupon, in a very short time afterwards (2d October, 1888), he brought a second action in the same court. The cause was removed into the circuit court of the United States for the western district of North Carolina, and resulted in a verdict for the plaintiff. Judgment was entered in the sum of $1,500 and costs, 17th January, 1893.

On 8th October, 1887, a mortgage was recorded in Cleveland county, N. C., executed by the Charleston, Cincinnati & Chicago Railroad Company on 9th August, 1887, covering all the property of the said company, and operating as security for all the first mortgage bonds of the said company, in all nearly $7,000,000. On 10th day of December, 1890, proceedings for the foreclosure of this mortgage were instituted in the circuit court of the United States for the district of South Carolina, under which proceedings D. H. Chamberlain was appointed receiver. Ancillary proceedings were filed in the circuit court for the western district of North Carolina, and the same receiver recognized and appointed. The proceedings resulted in a sale of all the property of this railroad company for a sum greatly less than the amount due on the first mortgage bonds; the property sold consisting in part of property in the western dis-

trict of North Carolina. The scope and prayer of this petition is to obtain payment of this judgment out of the proceeds of sale in priority to and preference over the mortgage bonds. A petition of the same purport was filed in the circuit court of the United States for the western district of North Carolina. The district judge holding said court, following the practice now fixed, did not entertain the petition, but referred it to this court, in which the original proceedings were had. Clyde v. Railroad Co., 56 Fed. 539; Central Trust Co. v. East Tennessee, V. & G. R. Co., 30 Fed. 896.

The question, then, is, can this judgment take priority in the disbursement of the proceeds of sale over the mortgage which was foreclosed? And this question it is admitted must be determined by the law of North Carolina. The statute law of North Carolina bearing upon this question is found in the Code of North Carolina. This Code was enacted 2d March, 1883, and has force and effect as a whole, as if it were one statute enacted on the same day, without regard to the actual date of the ratification of the Code, and of the acts made a part thereof. Code N. C. § 3876. In section 685, p. 269, under the head "How Corporations May Convey by Deed; Void as to Existing Creditors," we find, after a sentence which authorizes corporations to convey lands and all other property by deed sealed with the common seal and signed by the presiding officer of the corporation and two other members in the presence of witnesses, this provision is made:

"But any conveyance of its property, whether absolutely or upon condition, in trust, or by way of mortgage executed by any corporation, shall be void and of no effect as to the creditors of said corporation, existing prior to, or at the time of the execution of said deed, and as to torts committed by such corporation, its agents or employees prior to, or at the time of the execution of said deed: provided, said creditors, or persons injured, or their representatives shall commence proceedings or actions to enforce their claims against said corporation within sixty days after their registration of said deed, as required by law."

Were this the only provision of the Code, the question would not present much difficulty. The injury was inflicted the 9th April, 1887. The mortgage was recorded 8th October, 1887. The action in which the judgment was recovered began October 2, 1888. This action, it is true, was brought after nonsuit, but it is entirely independent of, and cannot be connected with, the first action, which is as if it never existed. Wilson v. Insurance Co., 27 Vt. 99; Riddlesbarger v. Insurance Co., 7 Wall. 386; Harris v. Dennis, 1 Serg. & R. 236; Busw. Lim. & Adv. Poss. § 362; State v. Hankins, 6 Ired. 428; Barino v. McGee, 3 McCord. 452; Best v. Town of Kinston, 106 N. C. 205, 10 S. E. 997.

But in the same Code, and enacted at the same time as part thereof, is section 1255, p. 499, which declares:

"Mortgages of incorporate companies upon the property or earnings, whether on bonds or otherwise, hereafter issued, shall not have power to exempt the property or earnings of such incorporations from execution for the satisfaction of any judgment obtained in courts of the state against such incorporation for labor performed, nor for material furnished such incorporation, nor for torts committed by such incorporation, its agents or employees, whereby

any person is killed or any person or property injured, any clause or clauses in such mortgage to the contrary notwithstanding."

Clearly, these two sections have the same sanction, and are of equal authority. They must be reconciled, else both provisions must fail. Both became law at the same moment of time, and the positions occupied by them cannot control the validity of either. Code N. C. § 3876. Do they really conflict? There are some differences between them. Section 685 relates entirely to claims, choses in action, creditors of every description by contract or tort of all kinds. Section 1255 is confined wholly to executions upon judgments obtained in the courts of North Carolina, without qualification,—"any judgment."

Section 685 applies to every class of creditors and every class of torts, provided that the creditors are in existence, or the torts be committed prior to or at the time of the registration of the deed. Section 1255 applies only to certain classes of creditors,—those for labor performed and for material furnished such corporation; and to a limited class of torts,—those whereby any person is killed, or any person or property injured. Section 685 applies to deeds and conveyances of every description, and gives the artificial being—the corporation—the right to execute them. Section 1255 is confined to mortgages. Section 685 invalidates and annuls all deeds of every kind as to those classes protected by it who fulfill the conditions of the statute; and, if they act, the deed becomes a nullity. Section 1255 does not impair the validity of the mortgage, or affect it, save and except that certain creditors and certain persons suffering from its acts may look to its earnings and its property for relief, notwithstanding the mortgage. The provisions of section 685 manifestly are designed to prevent a fraudulent conveyance by a corporation contemplating insolvency to the detriment of its existing creditors. It recognizes the principle that the property of an insolvent corporation is a trust fund for the benefit of its creditors. Giving to this creature of the law the rights of property of a natural person, the statute in express terms protects its existing creditors from fraud in disposition of this property.

The provisions of section 1255 manifestly recognize that equity which, in the decisions of the supreme court, underlies Fosdick v. Schall, 99 U. S. 235, and the cases following it. Whoever contributes to keep a corporation a going concern by materials or labor must be provided for before mortgage creditors can claim out of the earnings; and so also all expenses incident to the keeping it a going concern, including in these expenses all damages for injuries done to life, person, or property in keeping up this life of the company, enjoy the same preference. The original act, which has been incorporated and re-enacted in the Code as section 685, was passed in 1798. At that time corporations were comparatively in their infancy. The act which came into the Code as section 1255 was passed originally in 1879. Between 1798 and 1879 corporations had largely increased in number and importance. They are used in every department of business. They control almost the entire

operation of manufacture, and they have engrossed the carrying trade. They now employ vast bodies of laborers. They create a constant demand for materials. They make use of plant and machinery dangerous to human life, persons, and property. They incur large debts, and the practice is almost universal of adding to their working capital by the issue of bonds secured by mortgage. The act was passed to meet this changed condition. The very life of corporations, their usefulness to their stockholders, and to their mortgage bondholders, who are almost as much interested in their well-being as the stockholders, require and demand the ready procurement of labor, facility in the purchase of materials, and the employment of plant and machinery involving the dangers to which allusion has been made. This last-named statute was passed to secure labor and materials, and to give ample protection against the necessary consequences of the use of plant and machinery. It has been earnestly urged that these two sections should be read in pari materia; that the limitations, or perhaps we should say the condition precedent of the replacing section 685, should also be read in connection with section 1255. But such a construction would seem to defeat the intent of this section. Its beneficial provisions would be limited to the period of 60 days from the registration of the mortgage, and thenceforward all debts for labor and material, and all claims for injury to life, person, and property would be subjected to the prior lien of the mortgage debt, and in many, if not in all, cases would be barred of relief.

It appears to us that this judgment and the execution thereon are protected by section 1255, and that the amount therein set out should be paid in preference to the mortgage debt. There have been no earnings. The property has been sold, and provision has been made for the payment of claims of this character. Let the claim be paid out of the proceeds of sale if these be sufficient for this purpose.

BRAWLEY, District Judge, concurs.

109 Fed. 529

MERCANTILE TRUST CO. v. CHICAGO, P. & ST. L. RY. CO. et al.

(Circuit Court, S. D. Illinois. December 4, 1893.)

RIGHT TO FORECLOSE TRUST DEED.

A railroad mortgage provided that, until default, the mortgagor should be permitted to remain in possession. It also provided that in case of default in the payment of interest, and such default should continue for six months, it should be the duty of the trustee to take appropriate proceedings at law or in equity to enforce the rights of the holders of bonds upon a requisition of holders of at least one-third in amount of the bonds. *Held* that, whatever right a bondholder has, he has the right to have the trustee enforce for his benefit, and that therefore the trustee could file a bill to foreclose, upon default in the payment of interest, although such default had not continued for six months.

This was a suit by the Mercantile Trust Company for foreclosure of a mortgage given by the defendant the Chicago, Peoria &

St. Louis Railway Company and others, upon default in the payment of interest. Defendant demurred.

Article 2 of the mortgage provided that "until default shall be made by said party of the first part, its successors or assigns, in the payment of interest or principal of said bonds, or in the due observance of the covenants or agreements hereinafter contained on the part and behalf of the said party of the first part, the said party of the first part, its successors and assigns, shall be suffered and permitted to remain in the actual possession of said railway and premises, and to exercise the franchises and rights relating thereto, and to collect, receive, and use revenues and profits thereof in any manner which will not impair the lien created by these presents." Article 3 of the mortgage provided that in case default should be made in any semiannual installment of interest, when such interest should become due and be demanded, and such interest, or any part thereof, should remain unpaid and in arrears for the period of six months, or in case default should be made in the due observance and performance of the covenant of further assurance in said mortgage, or in the payment of any taxes, assessments, or other governmental charges, and either of said defaults should continue for the period of six months, or, in case default should be made in the payment of the principal of said bonds, or of any one of them, it should be lawful for the trustee to enter into and upon the railway and premises thereby granted, and the same, and all and singular the rights and franchises thereby granted, to have, hold, and enjoy, operating the same, making repairs, replacements, useful alterations and improvements, and to collect and receive the revenues and profits, and, after deducting expenses, to apply the revenues and profits in payment of overdue interest. Article 5 of the mortgage provided that in case default should be made in payment of any semiannual installment of interest, and said interest should remain unpaid and in arrears for six months, the principal of all the bonds might be declared, by the trustee or by a majority in interest of the holders of the bonds outstanding and unpaid, to be, and thereupon the same should become, due. Article 6 of said mortgage should be as follows: "Article 6. It is hereby expressly declared and agreed that in case default shall be made in payment of interest upon any of the said bonds, when such interest shall become due and be demanded, and such default shall continue for the space of six months, or in case default shall be made in the payment of the principal of any of the said bonds when the same shall become due, then, and in either and every such case of default, it shall be the duty of the trustee for the time being, under these presents, to take appropriate proceedings at law or in equity to enforce the rights of the holders of said bonds upon a requisition to that effect being made upon the said trustee, signed by holders of at least one-third in amount of the said bonds then outstanding." The bill alleged that on September 1, 1893, there became due and payable the semiannual installment of interest, amounting to the sum of $37,500; that default was made in payment thereof; that the coupons evidencing such interest were presented for payment at the place where the same were payable, and payment thereof was demanded and refused; that default was made in payment of such interest; and that such default and failure to pay the same still continues. The bill also alleged that the holders of a large amount in value of said bonds outstanding have in writing requested complainant to enforce the remedies provided in said mortgage; and that said railway company is insolvent, and unable to pay its floating debt and current and presently accruing indebtedness; that the mortgaged property is insufficient and inadequate security for the payment of the outstanding bonds secured by the said mortgage; and that there is danger that the said property may be sold under judgments; and that the property and lines of said company may be separated and broken up, and the earning capacity destroyed or impaired, by the contests of creditors for conflicting claims, and the mortgaged premises wasted and depleted.

C. B. Alexander and Peck, Miller & Starr, for complainant.

C. M. Osborne and I. L. Morrison, for defendant Chicago, P. & St. L. Ry. Co.

Bluford Wilson, for certain intervening petitioners.

Before WOODS, Circuit Judge, and ALLEN, District Judge.

WOODS, Circuit Judge (orally, after stating the facts). The sharp question presented by the demurrer is whether the sixth clause of the mortgage is a limitation on the right of the trustee to foreclose for interest which is not six months overdue. It is conceded that the mortgage is a security for that interest, and may be enforced by the beneficiaries of the trust, the bondholders; but it is insisted that the trustee has no right to sue until there has been a lapse of six months since the interest became due. That, I think, is the controlling question of the case. I do not think there is any right secured to the mortgagee which is not represented by the trustee. Whatever right a bondholder has under the mortgage, he has a right to have the trustee enforce for his benefit. It is for that purpose a trustee is chosen. It being conceded, therefore, that there is a right of foreclosure, my view is that the right is one which may be exercised by the trustee. This is therefore a good bill for foreclosure. A reference to particular provisions of the mortgage would fortify this conclusion, but it is unnecessary to go much into details. I have already, during the hearing, indicated the main thought. The second article of the mortgage, which limits the right of the mortgagor to continue in possession until default in some of the conditions named, would be made meaningless by the construction proposed; and it will not do, as has been suggested, to say that the entire article was inserted carelessly, and should be regarded as having no force, unless, indeed, the other provisions of the instrument are such as to make it necessary to disregard this one. If there can be a reasonable interpretation put upon the whole mortgage which will give this clause significance, and otherwise it would be without meaning, that interpretation ought to be adopted. The language of the article is: "Until default shall be made," and so forth, "the mortgagor shall be entitled to remain in possession;" and, if under that provision a bondholder may terminate that possession by foreclosing the mortgage, the trustee, as already stated, may do it for him. It is claimed, and I think correctly, that the trustee's right to take possession under the third article is limited to cases where interest has been overdue for six months; and it is insisted that his right to foreclose and to procure a receiver to take possession under the order of the court is likewise limited. If that were so, then the possession of the mortgagor could not be disturbed for any default until after the lapse of six months, and the second article would be entirely nugatory; and, without the consent of the holders of two-thirds of the bonds, there could be no foreclosure,—a proposition by which the minority might nullify the rights of the majority.

Now, I have not examined the cases which have been cited critically enough to undertake to say with certainty what the line of discrimination is, but I have the impression it is about here. A mortgage is a security for a debt. A failure to pay the debt, in whole or in part, when it is due, is necessarily a breach. That is an inherent or essential feature of a mortgage, and the right to enforce

the security in court is not to be construed away, or regarded as limited, except by clear expression. In the case of Guaranty Trust, etc., Co. v. Green Cove, etc., R. Co., 139 U. S. 137, 11 Sup. Ct. 512, it is held that it cannot be absolutely abrogated. That is authoritatively settled; whether upon good reason need not be considered. The cases cited wherein the right of the trustee was declared to be restricted have reference to special powers to be exercised by the trustee without the aid or order of a court,—powers not necessarily inherent in or essential to the very definition of a mortgage. The right of a trustee to take possession is not essential. It may or may not exist, and when it is given in connection with clauses that limit the exercise of it, even though the terms used be permissive, they will be regarded as exclusive. And so, too, a right to sell at public auction without foreclosure, and like special powers, will be considered as controlled by such limitations as the mortgagor chooses to impose. Counsel has insisted upon the significance of the case of Railroad Co. v. Fosdick, 106 U. S. 47, 1 Sup. Ct. 10, where the court says that if, as a matter of fact, the principal debt had been declared due, still the trustee would not have been entitled to sue for a foreclosure of that part of the debt without averring the request of the bondholders provided for in the clause of the mortgage then under consideration. Counsel asked: "How is that to be distinguished from a suit to foreclose for the interest which has become due?" If the trustee has it within his power to declare, and declares, the principal debt due, that is then as much due as the interest, and therefore the rule with reference to them must be the same. That is the argument, and it is certainly not without a good deal of force; but in the same case we find the court saying that either the trustee or the bondholders might have a foreclosure for default in the payment of the interest; and the reason for the distinction is given at length in the opinion. I think this is a good bill for foreclosure of the mortgage. The averments of insolvency make it a good bill for the appointment of a receiver, and the demurrer will be overruled.

BLOUNT v. GRAND TRUNK RY. CO.

(Circuit Court of Appeals, Sixth Circuit. April 3, 1894.)

No. 121.

CONTRIBUTORY NEGLIGENCE—GATES UP AT CROSSING—QUESTION FOR COURT.

The question whether a pedestrian was guilty of contributory negligence in not looking and listening at a railroad crossing for an approaching train, where the gates had not been lowered, is not a question for the jury, where the evidence leaves no doubt that, if such pedestrian had made any use of his senses, he could have both seen and heard, in due season, an approaching train, and thereby have avoided the accident which resulted in his death.

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

Edwin C. Bolton (Moore & Moore, of counsel), for plaintiff in error.

L. C. Stanley and E. W. Meddaugh, for defendant in error.

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

TAFT, Circuit Judge. This is a writ of error to reverse a judgment of the circuit court of United States for the eastern district of Michigan. The action below was by Bessie Blount, as the administratrix of her husband, George W. Blount, against the Grand Trunk Railway Company, to recover damages for his death. He was killed by a train of the railway company on the night of August 10, 1891. After all the evidence on both sides had been submitted, the trial judge directed the jury to return a verdict for the defendant on the ground that the plaintiff's intestate was conclusively shown to have been guilty of contributory negligence. The sole question for our consideration is whether, on the evidence in the case, this was a proper instruction.

The accident occurred at Second avenue, in the city of Detroit. Second avenue runs north and south, and was crossed at right angles by the tracks of three different railways at the same place. The north track was that of the Grand Trunk Railway, the middle track that of the Lake Shore Railway, and the southern track that of the Michigan Central Railway. These three companies, as required by the law of Michigan, jointly maintained at the crossing gates on the north and south side of the tracks, and employed a man to raise and lower them as the passing of trains might require. The deceased was a watchman in a factory situate within a few hundred feet of the crossing, and was well acquainted with it. About 9 o'clock in the evening on the date before mentioned, he left his factory to visit one Hoy, who lived on the north side of the railway crossing, and on the west side of Second avenue, in a house distant about 60 feet from the north gate. He found Hoy sitting on the south porch of his house, and, after a talk of some 10 or 15 minutes' duration, Blount started back to his factory to resume his duties. He walked from Hoy's gate to the middle of the Grand Trunk track without stopping. He was there struck by a regular transfer and suburban passenger train of the Grand Trunk Company, drawn by an engine running with its tender in front. He was instantly killed. There was evidence to show that the bell of the engine did not ring and that there was no headlight upon the engine, and that the train was running at a speed of 15 or 20 miles an hour,—very much faster than was permitted by the ordinances of the city of Detroit. The night was a starlit, clear night. From Hoy's porch and front gate, and from every point between the gate and the crossing, the track of the Grand Trunk Railway was visible for upwards of 2 blocks, or 800 feet. There were no obstructions of any kind. On the south side of the railway crossing, and to the east of it, stood a large ice house, which, by reason of an electric-light tower some 2 blocks away, cast a shadow over the crossing, and for perhaps 75 or 100 feet to the east of the crossing. Blount's sight and hearing were neither of them defective. The only person who saw Blount at the time of the accident was a witness named Snelling, introduced by the plaintiff. He was walking on the same

side of the street as Blount, and in the same direction, but about 75 feet behind him. Snelling testified on cross-examination as follows:

"Q. This man [i. e. Blount] walked straight from the gate to the railroad tracks? A. Yes, sir. Q. And the train hit him right there in the middle of the track? A. Yes, sir. Q. Was he looking down the sidewalk most of the time? A. He was looking ahead of him, I expect. Q. He didn't look up to see either way if the train was coming? A. It was rather dark, and I could not say whether he turned his head or not. I didn't watch him close enough. * * * Q. This man didn't see the train until it actually struck him; is that the way it was? A. Yes, sir. Q. You saw him make no move to get out of the way? A. He didn't have time. Q. Did you think he was in danger before he was struck? A. I didn't think he was; no. Q. Did you think he was going to get over ahead of the train? A. I expected he would. I thought probably he noticed the train himself. Q. What made you think he noticed the train? A. Because I noticed it. It wasn't off very far, and I thought he noticed it too. Q. You thought he ought to have noticed it? A. I should think he ought to. Q. You didn't see him stop anywhere? A. No, sir. Q. Until he was struck? A. No, sir. Q. And you didn't see him look in either direction? A. He was going ahead. Q. Did he seem to be in a hurry? Was he running? A. No, he was not running. Q. What did you see of the train. How did you come to see it? A. I was coming along, it was right close by, and I looked that way, and I seen it. Q. You saw the lights? A. I saw them on the train. Q. Didn't you see the other lights? A. I saw the lights in the coach. Q. The coach was lighted? A. Yes, sir; it had a light. Q. Did you hear the train coming? A. I didn't hear it until it was right near there. Q. You could have seen it way beyond there, if you happened to look? A. Not a great ways. Q. There is nothing to prevent that view, however? A. Not in the daytime. In the dark you could not see. Q. You could see those coach lights up to Cass Ave.? [a block away from Second Ave.] A. Oh, yes; might there. Q. From where you were? A. Yes, sir."

Direct Examination: "Q. When did you first see the train that struck him? A. It was just across the road."

The witness testified that the gate was not lowered at the time the train passed, and that the red lantern which was suspended on the gate was up, and not down, when Blount stepped upon the track. The witness was contradicted as to the position of the gates by five other witnesses, who had much better opportunities for knowing, and two of them were wholly disinterested. For the purpose of this discussion, however, Snelling's statement that the gates were up must be accepted as true.

On these facts, can reasonable men differ as to the negligence of Blount? We think not. If we may assume that Blount was walking at the rate of 3 miles an hour, and the train was running at the rate of 15 miles an hour,—an assumption decidedly in favor of the plaintiff,—the train was moving at a rate of speed five times that of Blount. Therefore, when Blount was at Hoy's gate, 60 feet away from the track, the train was 300 feet away from him; when he was 30 feet from the track the train was 150 feet away from him, and when he was 15 feet away from the track the train was but 75 feet away from him, and all the time in full view.

Snelling saw and heard the train when he was 75 feet from the track, and the train was on the other side of Second avenue. Assuming Second avenue to be 75 feet wide, the train was visible to him (Snelling) at a distance of over 100 feet, and he admits that, if he had looked, he could have seen the train at Cass avenue, 400

feet away. The night was a clear, starlit night, and, while there may have been some shadow cast by the ice house from the electric light just at the crossing, it did not interfere with Snelling's seeing the train more than 100 feet away while the train was in this shadow. The train was visible from Hoy's gate, however, before it entered the shadow, and Hoy, another witness for the plaintiff, said that he could hear the rattle of the train as it came down from Cass avenue. We think the evidence leaves no doubt that, if Blount had used his senses in any way from the time he came out of Hoy's gate until he reached the track, he would have seen the train, and but for the fact that he was absorbed, and failed to give heed to the warnings which his senses, if on the alert, would have conveyed to him, the accident would not have occurred. If there had been no gate at the crossing, there could be no doubt that this conclusion must be reached. Railroad Co. v. Houston, 95 U. S. 697; Schofield v. Railroad Co., 114 U. S. 615, 5 Sup. Ct. 1125; Elliott v. Railway Co., 150 U. S. 245, 14 Sup. Ct. 85. But it is pressed upon us that the case at bar differs from the cases cited, in that here were gates established by law for the purpose of warning and keeping travelers off the crossing. Therefore, it is said the fact that the gates were up when Blount reached them was an invitation to him to cross, upon which he had a right to rely. It is undoubtedly true that the failure to lower the gates modifies the otherwise imperative duty of travelers, when they reach a railway crossing, to look and listen, and the presence of such a fact in the case generally makes the question of contributory negligence one for the jury, when otherwise the court would be required to give a peremptory instruction for the defendant. Burns v. Rolling-Mill Co., 65 Wis. 312, 315, 27 N. W. 43; Stapley v. Railway Co., L. R. 1 Exch. 21; Glushing v. Sharp, 96 N. Y. 676; Railway Co. v. Schneider, 45 Ohio St. 678, 17 N. E. 321. The fact is much more important where the traveler is driving a horse and vehicle than where he is walking, because in the former case his attention is necessarily divided between the control of the horse and observation of the track, and his reliance upon the gates and the flagman must, in the nature of things, be greater than in the case of a pedestrian. There is no reason why the latter should not look and listen as he approaches the railway crossing, before he reaches the gates, and before it may be time to lower them. The right to rely on the action of the railway company's employe in lowering the gate is not absolute. State v. Boston & M. R. Co., 80 Me. 430–444, 15 Atl. 36. If it were, then a man would be justified in walking up to and over a railway crossing with closed eyes and stopped ears whenever the gate is not down to obstruct his passage. The weight to be given to such an implied invitation depends on circumstances. In this case, Blount had stood at Hoy's porch, where he could see the track for 800 feet. From Hoy's gate for 60 feet he walked towards the track, while the train was in full view, but 300 feet away, and was getting nearer and nearer each second. As the train passed the ice house at a speed of 15 miles an hour, its roar must have been heard by any one giving the slightest attention, who was not 100 feet away. When he was 6 feet from the track,

the train was only 30 feet from him, and in full sight, and yet he did not halt or hesitate, but rashly stepped in front of it. It was a quiet night. There was no confusion at the crossing. There were no other trains in sight. There was nothing to distract Blount's attention from the oncoming train except a self-absorption which in approaching a railway crossing is gross negligence. On these facts can reasonable men fairly reach any other conclusion than that Blount was wanting in due care in not observing his danger?

We have no wish, in expressing this conclusion, to weaken at all the obligation upon the railway company to lower its gates when trains pass, and we freely concede that such a failure is to be regarded as an invitation to the traveler to cross the track in safety. Railway Co. v. Wanless, L. R. 7 H. L. 12–15. The extent to which the traveler may rely on such an invitation, and omit the ordinary precautions of looking and listening, is usually a question for the jury. This case, however, we think to be exceptional in its facts, which permit only one inference.

As the evidence of the plaintiff's contributory negligence was of such a conclusive character that the court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict returned in opposition to it, it was the duty of the court to direct a verdict for the defendant. Railway Co. v. McDonald (decided by the supreme court of the United States, March 5, 1894) 14 Sup. Ct. 619; Railroad Co. v. Converse, 139 U. S. 469, 472, 11 Sup. Ct. 569, and cases there cited; Elliott v. Railway Co., 150 U. S. 246, 14 Sup. Ct. 85.

The judgment of the circuit court is therefore affirmed.

HAMILTON et al. v. PHOENIX INS. CO. OF HARTFORD.

(Circuit Court of Appeals, Sixth Circuit. April 3, 1894.)

No. 140.

1. INSURANCE—PROOF OF LOSS—APPRAISEMENT.
   Several insurance companies having made a joint demand for a joint appraisal, upon proof of loss by the insured, finally notified the insured in a joint letter that, if the form of "submission to appraisers" which they had submitted contained any provision or condition limiting or defining the duties of the appraisers not prescribed by the several policies, each company would submit its own form, as they desired and demanded a submission free from any condition imposed by either party. *Held*, in a suit against one of said companies, where the policy stipulated for a separate appraisal, that, under the terms of the joint letter, the company thereby waived the appraisal, unless it thereafter submitted a form of appraisal within a reasonable time. Insurance Co. v. Hamilton, 8 C. C. A. 114, 59 Fed. 258, approved.

2. SAME—REASONABLE TIME—QUESTION FOR JURY.
   The company demanded a separate appraisal in 17 days after the joint letter was written, and within 60 days after proof of loss by the insured. *Held*, that the question whether the demand for a separate appraisal was made in a reasonable time was a question for the jury.

3. SAME.
   The policy provided that the loss was to be paid 60 days after due notice and satisfactory proof of such loss. *Held*, that the stipulated 60 days was

the period between the reception of the satisfactory proof and the time of payment, and not the period between the tendering of any proof and the acceptance of it as satisfactory.

4. REASONABLE TIME—QUESTION OF LAW FOR THE COURT.
The question of reasonable time is a question of law for the court in two classes of cases, viz.: (1) Commercial transactions which happen in the same way, day after day, and present the question of reasonable time on the same data in continually recurring instances, so that, by a series of decisions of the courts, the reasonable time has been rendered certain. (2) Where the time taken is so clearly reasonable or unreasonable that there can be no room for doubt as to the proper answer to the question.

5. SAME—QUESTION OF FACT FOR THE JURY.
Where the answer to the question is one dependent on many different circumstances, which do not constantly recur in other cases of like character, and with respect to which no certain rule of law has theretofore been laid down, or could be laid down, the question is one of fact for the jury.

In Error to the Circuit Court of the United States for the Western Division of the Southern District of Ohio.

This was an action by Robert Hamilton (for whom his executors, Cora B. Hamilton and John W. Bryant, have been substituted) against the Phoenix Insurance Company on a policy of fire insurance. The circuit court directed a verdict for defendant, and rendered judgment accordingly. Plaintiffs sued out this writ of error.

Robert Hamilton, the testator of the plaintiffs in error, filed his petition against the defendant in error, the Phoenix Insurance Company of Hartford, Conn., seeking to recover a judgment for the loss under a fire insurance policy in the sum of $2,500. At the close of the evidence the court directed the jury to return a verdict for the defendant. This was a writ of error to reverse the judgment entered upon the verdict. The policy sued on was dated April 21, 1885, and provided that in consideration of $25.78 the Phoenix Insurance Company insured Robert Hamilton to the amount of $2,500 on his stock of tobacco, manufactured, unmanufactured, and in process of manufacture, and the materials for making same, in his tobacco factory, situated at No. 413 and No. 415 Madison avenue, Covington, Ky. The policy further provided that the amount of loss or damage was to be estimated according to the actual cash value of the insured property at the time of the fire, and was to be paid to the insured, or to the insured's legal representatives, 60 days after due notice and satisfactory proof of the same should have been received at the office of the company, in accordance with the terms of the policy thereinafter mentioned. The policy provided, further, that "no suit or action of any kind against this company for the recovery of a claim under this policy shall be sustainable in any court of law or chancery, unless commenced within the term of one year from the date of fire; such lapse of time to be deemed conclusive evidence against the validity of such claim."

The proceedings to be taken in case of loss were noted in the policy as follows: "When a fire has occurred damaging the property hereby insured, the insured shall give immediate notice, and render a particular account of such loss, signed and sworn to by them; if there is other insurance (whether valid or not), shall give a detailed account of same, with copies of the written portion of all policies; shall also give the actual cash value of the property; their interest therein; the interest of all other parties therein (if any), giving their names; the amount of loss or damage; for what purpose and by whom the building insured, or containing the property insured, and the several parts thereof, were used; when and how the fire originated; shall also produce a certificate, under the hand and seal of a magistrate, notary public, or commissioner of deeds, nearest to the place of the fire, not concerned in the loss as a creditor or otherwise, nor related to the insured, stating that he has examined the circumstances attending the loss, knows the character and condition of the insured, and verily believes that the insured has, without fraud,

sustained loss on the property insured to the amount which he shall so certify." Further provisions were as follows: "This company may examine the books of account and vouchers of the insured, make extracts from same, and, if required, the insured shall submit to one or more examinations under oath, and sign same when reduced to writing; shall exhibit to the company or its representative all that remains of the property covered by this policy, and, if desired, certified copies of all bills and invoices where originals have been destroyed; and until sixty days after the proofs, examinations, declarations, and certificates herein called for are rendered, including an award by appraisers, when an appraisal has been required, the loss shall not become payable. Proofs of loss in all cases shall be made and signed by the party insured. There can be no abandonment to the company of the property insured, but the company reserves the right to take the whole or any part thereof, at its appraised value." "Differences to be submitted to appraisers: If differences of opinion arise between the parties hereto, as to the amount of loss or damage, that question shall be referred to two disinterested men, each party to select one (and, in case of disagreement, they to select a third), who shall ascertain, estimate, and appraise the loss or damage, and the award of any two in writing shall be binding on the parties hereto as to the amount of such loss or damage, and each party shall pay one-half the expense of reference. When personal property is damaged, the insured shall put it in the best order possible, and make an inventory thereof, naming the quality and cost of each article, and the amount claimed on each, and upon each article the damage shall be separately appraised in the manner above provided. Detailed reports of the appraisers in writing, under oath, shall form a part of the proofs hereby required."

The petition of the plaintiff, after setting out the terms of the policy as above, averred that the property insured was worth $47,172.77; that on the 16th day of April, 1886, this property was partially destroyed by fire, with a loss of $30,000; that on the 24th day of April, of the same year, the plaintiff gave notice of the loss to the defendant, and delivered to the defendant due proofs of said loss, as provided by said policy; that the plaintiff had done and performed all the conditions in the policy contained on his part to be kept and performed; that, in pursuance of the privilege in said policy contained, he (plaintiff) had further insurance on the property, amounting altogether, with the insurance provided by this policy, to the aggregate sum of $40.000; that, by the terms of said policy, he became and was entitled to recover of the defendant the proportion of the loss so sustained which the sum insured by the said defendant's policy bore to the whole amount insured as aforesaid, to wit, the sum of $1,875, with interest thereon from April 16, 1886.

In the answer the defendant company admitted the execution of the policy, and that there had been a loss, but denied the value set upon the property insured and the amount of the loss as averred. The answer further admitted receiving due notice of the loss, but denied that proper proofs of loss had been filed, as required by the policy, and denied the performance of other conditions thereof as averred. The answer further averred "that serious difference as to the amount of loss or damage, irreconcilable by the parties, did occur; the plaintiff claiming that damage amounting to $40.000 arose, $2,500 of which was payable by the defendants, whereas the defendants claimed and believed that the loss was very slight, and but a small part of the amount so claimed by the plaintiff, and of an uncertain character, requiring a careful examination of disinterested arbitrators; that the damage and loss should be ascertained by such appraisal and award, and that the same should be submitted as a part of the proof, and it insisted upon the same as a means of determining said loss and of such proof; that the plaintiff neglected and refused to permit any such appraisal and award, and, against the protest of defendants, sold at public auction all the said property, and thereby put it out of the power of the parties to have the appraisal, arbitration, or award, or to take the property in whole or in part at such appraisal, or to have such proof of loss, and therefore the defendant says the plaintiff cannot recover in this action."

Plaintiff, in reply, denied that the defendant requested the plaintiff, in writing, that the amount of said loss be left to competent and impartial persons,

as provided in the policy; denied that he did not permit an appraisement to be made in accordance with the provisions of the policy; and averred, on the contrary, that the plaintiff demanded in writing that the amount of the loss sustained by the plaintiff should be submitted to arbitration, as provided in the policy, and that defendant refused so to submit same. The reply further denied that the plaintiff prevented an appraisal of the damaged stock, and deprived the defendant of the right to have an appraisal thereof made or to take the same at such appraisal, and averred that the only demand for a submission of such differences or any matter connected with said policy of insurance that was made by defendant upon plaintiff was made by defendant upon plaintiff in connection with and as part of a joint demand of divers other insurance companies having policies of insurance upon said property in favor of plaintiff, and covering the same loss; and that such demand was for the submission to arbitrators, whose award should be binding on the parties as to the amount of such loss or damage; and that it was not true that the defendant ever made any demand of plaintiff for a submission of such differences to appraisers and for appraisal. The third paragraph of the reply was as follows: "And plaintiff further says that he, on or about the 26th day of April, 1886, made and delivered to the defendant due proofs of his loss under said policy, as averred in the petition, with the request accompanying said proofs of loss that any defects in their substance or their form might be pointed out, and the proofs returned to plaintiff, so that he might perfect the same to the defendant's satisfaction; that said proofs and request were then and there received by said defendant; but said defendant did not then, nor did it afterwards, object to or point out any defect or omission in the form or sufficiency of said proofs of loss, nor did it return the same to the plaintiff; that thereby, and by defendant's further acts and silence in the premises, the defendant has waived its rights to now object in any manner to the form or sufficiency of said proofs of loss, and has waived its right to ask or require of the plaintiff any other or different proofs of loss than were heretofore made and delivered to the defendant by plaintiff as alleged in his petition."

On the trial, counsel for the plaintiff, after offering the policy of insurance sued on, also offered the arbitration and appraisement clause in the policies of the London & Liverpool & Globe Insurance Company and the Home Insurance Company issued to plaintiff, to show that the arbitration clauses in them were very different from that in the defendant company's policy, and that there could not be a joint submission to arbitrators or appraisers conforming to the policies of all the insuring companies. Plaintiff introduced the following letter:

"Covington, Ky., April 26, 1886.

"Dear Sirs: I inclose proof of loss under policy of your company, with invoice attached, in compliance with the requirements of the policy. If there is any defect in the substance or form of the above proof, please advise me thereof at once, that I may perfect the same to your satisfaction, and return the proof to me in such case for that purpose. The property described and damaged has been invoiced and arranged, and is ready for examination by your company. Such examination must be made at once, for the reason that I am obliged to occupy the premises in the prosecution of my business, and each day of delay involves considerable loss and expense to me. As before advised, I propose to send the entire stock to be sold at public auction in a few days, whereof I will give you notice. It can be readily inspected in a short time where it now lies. Please acknowledge receipt of above proofs by return mail.

"Very truly yours, Robert Hamilton."

The proofs of loss were also introduced. They contained an inventory of the property injured and an estimate that the amount of the loss on the property was $40,000, which the insured claimed as the loss on the whole property, and against this Phoenix Company the sum of $2,500. The parties stipulated that the amount of plaintiff's recovery, if anything, should be fixed at $1,588, with interest from June 16, 1886. There was also introduced a letter from the agents of the Phoenix Insurance Company ac-

knowledging receipt of proofs of loss, dated April 27, 1886, and stating that the same would be forwarded to the company, and that the plaintiff would hear from it. The plaintiff thereupon rested his case, and the defendant offered a letter of April 28th, signed by all the 12 insuring companies, and sent to plaintiff:

"Cincinnati, O., April 28, 1886.

"Robert Hamilton, Esq., Covington, Ky.—Dear Sir: The undersigned, representing the several insurance companies against which you have made claim for loss under their respective policies of insurance upon stock in your tobacco factory, Nos. 413 and 415 Madison street, Covington, Kentucky, claimed to have been damaged by fire of April 16, 1886, beg leave, jointly, to take exception to the amount of claim made, and to demand that the question of the value of and the loss upon the stock be submitted to competent and disinterested persons, chosen as provided for in the several policies of insurance under which claim is made; and we hereby announce our readiness to proceed at once with this appraisement, so soon as your agreement to the demand is declared. We further desire, jointly, to protest against the removal, sale, or other disposition of the property until such an appraisement has been had, and to notify you that the insuring companies will in no way be bound by such ex parte action. You may address your reply to the joint demand made above in care of the London & Liverpool & Globe Insurance Company, Third and Main streets, Cincinnati. Waiving none of the rights of the several companies under the terms of their respective policies, we are

"Very respectfully yours."

There followed, in answer to this, a lengthy correspondence, which is known as "the joint correspondence" in this controversy. It is set out in full in the case of Hamilton v. Insurance Co., 136 U. S., 242, beginning on page 247, and ending at the top of page 252, 10 Sup. Ct. 945, with the letter of May 7, 1886, which is as follows:

"Cincinnati, O., May 7, 1886.

"E. W. Kittredge, Esq., City—Dear Sir: Referring to your letter of the 4th, setting forth your understanding of the position taken by the two parties, permit me, on behalf of the companies, to take exceptions to your first statement, to wit: 'I understand the companies demand that appraisers be selected by the companies and the assured, who shall estimate the loss by their own judgment, and without hearing the testimony of witnesses who may be called by either party, and that the parties shall be bound by their report or award as to the amount of the loss thus made.' This does not correctly state our position, which remains now as stated in our communication of the 3d, to wit: 'The appraisers may, at their discretion, seek any evidence they deem necessary for their own full information.' What we object to and protest against is the sale of the goods, or the consideration by the appraisers of evidence founded on that fact or result. If the form of 'submission to appraisers' we submitted contains any provision or condition limiting or defining the duties of the appraisers, and not prescribed by the several policies, each company will submit its own form, as we desire and demand a submission free from any conditions imposed by either party.

"Very truly, J. M. De Camp, General Agent."

The same joint correspondence is referred to and commented on in the case of Insurance Co. v. Hamilton, 8 C. C. A. 114, 59 Fed. 258, in the opinions of Judges Severens and Swan. There was no letter after May 7, 1886, between Hamilton and the defendant company, until May 20, 1886, when the following was written by Mr. Kittredge, as attorney for Robert Hamilton:

"Cincinnati, O., May 20th, 1886.

"The Phoenix Insurance Company of Hartford—Dear Sirs: I beg leave to inclose a notice from yesterday's Covington Daily Commonwealth of the sale of the tobacco and articles in said notice named of Robert Hamilton, by you insured.

"Very truly yours, E. W. Kittredge.

"By E. K. Stallo."

Upon May 24th the following answer was received from the general agent of the Phoenix Insurance Company:

"E. W. Kittredge, Attorney on Behalf of Robert Hamilton, Cincinnati, Ohio: Your favor of the 20th inst. is at hand, in which you inclose notice of sale of stock of Robert Hamilton, of Covington, Kentucky, the same being in part insured by this company, under policy No. 5,044. Our reply to this notice is a respectful reference to the conditions of the policy named, and a reiteration of our demand for arbitration in accordance with the provisions therein expressly defined. The proposed sale of the property insured by this company is against our protest, it being in direct conflict with the spirit and intention of the contract, as affecting the rights and privileges of the insured and insurer, and your client's action in defiance thereof must be considered at his own risk and peril, and as barring him from maintaining any claim for loss or damage should he persist in so doing. We are still ready to arbitrate as the policy provides (see extract below), and beg to say that none of the conditions of said instrument have by us, or by any one in our behalf, been waived, or are intended to be waived, by anything said in this communication.

"Respectfully, H. M. Magill, General Agent."

—To which this reply was sent by Mr. Kittredge, for Robert Hamilton, under date of June 3d:

"H. M. Magill, General Agent—Dear Sir: Your favor of the 24th ult. is received in respect to the matter of the insurance by your company of Robert Hamilton, of Covington, Kentucky, under policy No. 5,044. I regret to differ with your company in respect to the right of Robert Hamilton to make sale of the damaged property insured, but, inasmuch as Mr. Hamilton has already sold all the property in question in accordance with the notice sent to your company, it does not seem necessary to me to discuss this point further. If your company really desires to submit the question of the amount of the loss sustained by Mr. Hamilton to arbitration, notwithstanding all that has transpired, Mr. Hamilton is quite ready now to submit that question to competent and impartial arbitrators. He simply demands, the arbitrators being selected, that in the agreement for submission it be provided that the company and the insured shall be notified of the time of the hearing by the arbitrators, and that the arbitrators shall hear all competent legal testimony that may be offered by either party, and that a reasonable time be prescribed within which the award shall be made. If your company desire or will consent to a submission to arbitrators to fix the amount of loss as above proposed, and will select an arbitrator for that purpose, Mr. Hamilton will do the like, and the submission should be had forthwith. I will prepare an agreement for submission upon the above terms at once upon being notified by you of your willingness to make it. I beg to call your attention to the fact that your policy limits the time within which Mr. Hamilton must commence his action under it, and prescribes the time when a suit may be brought, and he cannot contemplate a postponement of this question of arbitration to any time inconsistent with his right to bring his action and to prosecute his right in a court of law.

"Yours very respectfully, E. W. Kittredge,
"For Robert Hamilton."

—To which the insurance company answered as follows:

"June 5th, 1886.

"E. W. Kittredge, Esq., Cincinnati, Ohio—Dear Sir: We have carefully read and fully considered your valued favor of the 3d instant, relative to the Hamilton claim at Covington, Ky., under policy No. 5,044 of the company. For reply we deem proper to say that, in our judgment, at least, the aim and object of the arbitration having been defeated by the action of your client in disposing of the property on which a loss or damage is claimed, contrary to our written protest, and in defiance of our stipulated rights under the contract, we do not see how it is possible now to arbitrate or to estimate the amount of such loss or damage, if any. The goods have been disposed of, and are beyond the reach of the claimant, and, this being the case, there is nothing further that we can possibly do under the contract. We must,

therefore, be permitted to stand squarely upon the conditions of the insurance contract, which are fully set forth in the policy, and to respectfully refer you again to our letter of the 24th ultimo, and to previous letters sent jointly with other companies interested in the claim. Referring to the closing paragraph of your communication, permit us to say that the following is the clause in the condition of our policy alluded to by you, which limits the time in which the claimant may commence an action under a policy against this company: 'No suit or action of any kind against this company for the recovery of a claim under this policy shall be sustainable in any court of law or chancery unless commenced within the term of one year from the date of fire. Such lapse of time shall be deemed conclusive evidence against the validity of such claim.' From this you will observe that your client has ample time in which to 'commence this action,' should he desire to test the validity of the various clauses in our policy touching 'proceedings in case of loss' to ascertain, estimate, and appraise the same. In conclusion, for your personal convenience, permit us to inclose you herewith a copy of the Phoenix policy, and remain, with much respect,

"Yours very truly, H. M. Magill, Gen'l Agt."

Kittredge, Wilby & Simmons, for plaintiffs in error.

Stephens, Lincoln & Smith, Thompson, Richards & Park, and Paxton, Warrington & Boutet (Charles H. Stephens, Channing Richards, and T. B. Paxton, of counsel), for defendant in error.

Before TAFT and LURTON, Circuit Judges, and RICKS, District Judge.

TAFT, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

In the case of Insurance Co. v. Hamilton, reported in 8 C. C. A. 114, 59 Fed. 258, it was held by this court, all the judges concurring, that the joint demand for a joint appraisal by the 12 insurance companies contained in the joint correspondence was not within the terms of the policy of the Connecticut Fire Insurance Company providing for an appraisal, for the reason that such a policy stipulated for a separate appraisal. This holding is equally applicable to the case at bar, for the appraisal clauses in the Connecticut and Phoenix policies are substantially similar. In the Connecticut case, Judge Severens, referring to the demand for an appraisal in the joint correspondence, said:

"This was not a demand for an appraisal by the insurance company such as its policy gave it a right to make. It did not acquire its rights in any respect from the policies of other companies, and it had no legal concern with their disputes or the mode to be adopted for their settlement, and had no obligation to champion their cause or mix its controversy with theirs; and the insured was not bound to accept such proposition for determining the value and damage as was demanded by the companies, this among them. If he had done so, it would have been an arbitration aside and independent of the policy, standing on the general ground of common-law arbitration."

Judge Severens was of the opinion, however, that the joint correspondence did contain a notice that the loss fixed in the proofs was not satisfactory to the insurer, and that, therefore, an appraisal became a condition precedent to the payment of any money under the policy, and that, by the sale of the property before the expiration of the 60 days, Hamilton had rendered such an appraisal impossible, had prevented the performance of the condition precedent, and had therefore deprived himself of any right of recovery under the policy.

Judge Swan was of the opinion that the appraisal was not a condition precedent, and that the failure to make a demand for such appraisement within the terms of the policy was a waiver of it, and that the proof of loss having been filed, and not objected to otherwise than in the joint demand for an appraisement, the insurance company was estopped to deny that the proofs of loss were sufficient under the policy. I was of the opinion that, while the joint demand for the joint appraisal was not within the terms of the policy, that there was enough in the correspondence to notify Hamilton that the Connecticut Insurance Company did not agree with his valuation of the loss, and that this notice made proofs of loss with an appraisal a condition precedent to recovery of the loss under the policy. But it seemed to me that by the last letter from all the companies under date of May 7, 1886, each company assumed an obligation to take the initiative in the matter of appraisal, and submit a form of appraisal to Hamilton, failing which the Connecticut company waived the defect in the proofs of loss made by the absence of the appraisal. If an appraisal was waived, the right to take the goods at an appraised value went with it, and it was therefore immaterial what had been done with the stock by the insured. To quote the language used in the opinion:

"By this letter the defendant company assumed an obligation to submit a form of appraisal to Hamilton. Whatever duty under the policy there might have been upon Hamilton to take the initial step towards an appraisement after receiving notice of a disagreement as to valuation so as to fulfill the condition precedent to his recovery, this communication was a clear waiver of that duty by the defendant company. It was a clear invitation to Hamilton to do nothing until the company had acted. The company never did act. It cannot now be heard to say that Hamilton lost all his rights under the policy by delay which the company itself occasioned. The appraisement was, under this policy, a part of the proof of loss. The conduct of the company was as much as to say: 'We have your proof of loss; we object to it; and we will hereafter point out to you the method by which it can be remedied.' Subsequent failure to point out the method of remedying it estops the company from asserting that the proof of loss does not comply with the requirements of the policy."

I am authorized to say that the court, as at present constituted, concurs in the view just stated of the effect of the letter of May 7th upon the mutual relations and obligations of the parties to the policy involved in the Connecticut Fire Insurance Company Case; and, as that policy is in all substantial respects the same as the one in suit at bar, we are of the opinion that if the Phoenix Insurance Company had failed, as the Connecticut Insurance Company did fail, to take any action after the letter of May 7th, it could not now be heard to claim that the proofs of loss already filed were not a sufficient compliance with every condition precedent to a recovery of the actual loss. In this case, however, the Phoenix Insurance Company did, on May 24th, make a demand for arbitration in accordance with the provisions of their policy, and protested against the proposed sale of the property insured, as in direct conflict with the right of the insurer. We are of the opinion that if this letter was written within a reasonable time after the letter of May 7, 1886, closing the joint correspondence, it did properly and unquestionably demand an appraisement, and that a failure to comply therewith was a failure of

the condition precedent to the recovery under this policy, which must defeat the plaintiff's right of action. In other words, we think the sole question in the case, as now presented, is whether the demand for a separate appraisal, in accordance with the terms of the policy of the Phoenix Insurance Company, was made within a reasonable time after the close of the joint correspondence.

The court below treated the question of reasonable time as one of law, and told the jury that a sufficient demand for a separate appraisal within due time had been made, and thereupon directed a verdict for defendant. It is contended on behalf of plaintiff in error that, under the circumstances of this case, the question of what was reasonable time was a mixed question of law and fact, to be left with the jury with proper instructions. The delay between the close of the joint correspondence and the letter demanding a separate appraisement from the Phoenix Insurance Company was 17 days. The provision of the policy was that the loss was to be paid 60 days after due notice and satisfactory proof of the same had been received at the office in accordance with the terms of the policy. The learned trial judge seems to have thought the effect of this clause to be that the company had 60 days within which to object to the proofs of loss. Was this a proper inference? Could the company wait until the fifty-ninth day after receiving proof, and then object to it, and postpone the time of payment for 60 days more? It seems to us clear that the company would have no right to do so. The 60 days is the period between the reception of the satisfactory proof and the time of payment, and not the period between the tendering of any proof and the acceptance of it as satisfactory. It is true that a delay of 60 days before rejecting a proof of loss would certainly be unreasonable, but it by no means follows that any time short of 60 days would be reasonable. The reasonableness of time depends on all the surrounding circumstances. In the opening of the negotiations, Hamilton had informed all the companies, including the defendant, that delay in the settlement so much interfered with his business as to cost him $500 a day. The negotiations for a joint appraisal occupied from April 26th until May 7th, during which Hamilton was constantly pressing for an early settlement. When, then, on the 7th of May, the Phoenix Insurance Company assumed to submit a form of appraisal, it was certainly under an obligation to act with greater celerity than at the beginning of the negotiation in April. If the company had the right to delay submission of an appraisal for 17 days from May 7th, then it had the right to delay for a longer time the sale of the stock of goods, because appraisal and notice of sale must take place thereafter. These and many other circumstances might be relevant in considering the question of reasonable time. A case just like this has probably never occurred before. It is not quite clear what the delay was for. It might have been to investigate further the amount of the loss, or to secure the services of a proper appraiser. At all events, the circumstances are numerous enough to render the inference as to reasonable time from them not so certain as to make it a question of law.

We are met in this view, however, by the vigorous contention on the part of counsel for the company that the question of reasonable time is always a question of law to be decided by the court. If it were so, we then should feel compelled to go on and consider the question whether, as a matter of law, 17 days was not an unreasonable time for the company to delay its demand for an appraisement; but, as we view the authorities, the contention by counsel for the company cannot be sustained. In Tindal v. Brown, 1 Term R. 168, Lord Mansfield said:

"What is reasonable notice is partly a question of fact and partly a question of law, and, wherever a rule can be laid down with respect to this reasonableness, that should be decided by the court and adhered to by every one, for the sake of certainty."

In Insurance Co. v. Stark, 6 Cranch, 268, the suit was on a policy of marine insurance, and one question was whether the assured had made an abandonment of the captured vessel within a reasonable time. Chief Justice Marshall said:

"The law is settled that an abandonment, to be effectual, must be made in reasonable time; but what time is reasonable is a question, compounded of fact and law, which has not yet been reduced to such certainty as to enable the court to pronounce upon it without the aid of a jury. Certainly the delay may be so great as to enable every man to declare, without hesitation, that all will admit it to have been made in reasonable time; but there may be such a medium between these extremes as to render it doubtful whether the delay has been reasonable or otherwise. If it was a mere question of law, which the court might decide, then the law would determine, to a day and an hour, on the time left for deliberation, after receiving notice of the loss. But the law has not so determined, and it therefore remains a question, compounded of fact and law, which must be found by a jury, under the direction of the court."

In Cocker v. Manufacturing Co., 3 Sumn. 530, Fed. Cas. No. 2,932, the question whether goods that had been ordered from England had been delivered within a reasonable time was submitted to the jury. Mr. Justice Story said to the jury:

"The whole question now before the jury is, whether these articles were manufactured and offered to be delivered within a reasonable time. That reasonable time must be judged of by all the circumstances, and, of course, with all the natural calculations, which might fairly arise from the distance of the countries, the season of the year, the state of the markets, and orders, the pressure of business, and the common disappointments and retardations incident to the manufacture of any new article."

In Facey v. Hurdom, 3 Barn. & C. 213, the question was whether the crop out of which the tithe was to be collected had been left on the ground a reasonable time for the tithe owner to compare the tenth set out for him with the residue. The court said:

"There are certainly cases where it is for the judge to say what is a reasonable time, but in this instance the question depended on a variety of circumstances, such as the residence of the respective parties, the time when notice was given that the corn would be tithed, the state of the weather, and other things most proper for the consideration of the jury; and I think the question was properly left to them."

In Donahue v. Insurance Co., 56 Vt. 374, the suit was upon an insurance policy, which required that the person claiming remuneration for loss should forthwith give notice thereof to the office of the

company. This was held by the court to mean that he should give notice with due diligence, and within a reasonable time, without unnecessary delay, under all the circumstances of the case; and so it was further held that where the facts and circumstances were many, and the question of reasonableness depended on the general inference from those facts, the inference became a question of fact to be submitted to the jury. To sustain this, the language of the supreme court of Connecticut in Lockwood v. Assurance Co., 47 Conn. 553, is quoted, as follows:

"Extreme cases offered here may be easily determined. Between them there is a wide belt of debatable ground, and cases falling within it are governed so much by the peculiar circumstances of each case that it is much better to determine the matter as a question of fact."

In Haskins v. Insurance Co., 5 Gray, 432, the question was whether repairs made by insurers under the right reserved in the policy were made within a reasonable time. This depended on the dates of various notices given by the parties, the delay occasioned by the sickness and death of workmen employed, and the peculiar nature of the property. It was held that, although the particular circumstances were not disputed, the question was one of fact to be submitted to the jury.

The case of Davis v. Insurance Co., 8 R. I. 277, was quite like the present case in its facts. There the suit was upon a policy of fire insurance on the plaintiffs' stock of dry goods in their store in Providence. The goods were burned on the 22d of April, 1862. Preliminary proofs of loss were filed on the 31st day of May, 1862. The defendants made no reply to the claim of proofs until the 19th of June following. The court left it to the jury to say whether the written objection of the defendants to the preliminary proofs of loss of plaintiffs was furnished within a reasonable time. And the supreme court of Rhode Island held this course proper. The court said:

"The question of reasonable time is in many and perhaps most cases a question for the court. It was said by Lord Mansfield, in Tindal v. Brown, 1 Term R. 167: 'Whenever a rule can be laid down with respect to reasonableness, it should be decided by the court, and adhered to by every one for the sake of certainty.' The courts have accordingly in many cases, as in the case of notice of dishonor of a promissory note or bill of exchange, or of notice to quit between landlord and tenant, adopted fixed rules; and there are numerous cases depending on particular facts and circumstances in which a court cannot dispense with the aid of a jury. 1 Starkie, Ev. 455; Howe v. Huntington, 15 Me. 350. The case before us was not a case where, in the language of Lord Mansfield, a rule could be laid down in respect to reasonableness. It belongs to a class of cases in which the circumstances affecting the reasonableness of notice would seldom be the same, and therefore we think the court did not err in leaving the question of reasonableness to the jury."

See, also, Cochran v. Toher, 14 Minn. 385 (Gil. 293); Luckhart v. Ogden, 30 Cal. 548; Magee v. Carmack, 13 Ill. 289; 1 Starkie, Ev. 514, 516, and note 1 on 517.

The rule is sometimes stated to be that, where the facts are not in dispute, the question of reasonable time is always for the court; but in the foregoing cases the facts were not in dispute. The facts, though undisputed, were so numerous that the inferences from them

as to reasonableness of the time taken were disputable as inferences of fact.

The number of authorities on this subject is myriad; and there are many in which the rule is stated without qualification that the question of reasonable time is a question of law for the court, but we think it will be found that such cases may be divided into two classes. The first class embraces commercial transactions which happen in the same way, day after day, and present the question of reasonable time on the same data in continually recurring instances, so that, by a series of decisions of the courts, the reasonable time has been rendered certain. The second class of cases is where the time taken is so clearly reasonable or unreasonable that there can be no room for doubt as to the proper answer to the question. Where, however, the answer to the question is one dependent on many different circumstances which do not constantly recur in other cases of like character, and with respect to which no certain rule of law has heretofore been laid down, or could be laid down, the question is one of fact for the jury.

In Wiggins v. Burkham, 10 Wall. 129, the question was whether an account rendered had been objected to within a reasonable time, so that it could not be introduced as prima facie evidence of its correctness. It was held that the question of reasonable time, in such a case, was a question of law; that between merchants at home an account which has been presented, and no objection made thereto after the lapse of several posts, must be treated, under ordinary circumstances, as being, by acquiescence, a stated account. Now, it is obvious that in such a case the data upon which a reasonable time can be fixed are few and simple. It is also obvious that it is of the class of cases constantly recurring with similar circumstances in dealings between merchants, so that for years it has been settled law that, if a merchant allows several posts to go by without objecting to an account sent to him, it is to be regarded as stated. Mr. Justice Swayne used this language in delivering the opinion of the court:

"The proposition that what is reasonable time in such cases is a question for the jury, as laid down by the court below, cannot be sustained. Where the facts are clear, it is always a question exclusively for the court. The point was so ruled by this court in Toland v. Sprague, 12 Pet. 336. Where the proofs are conflicting, the question is a mixed one of law and of fact. In such cases the court should instruct the jury as to the law upon the several hypotheses of fact insisted upon by the parties."

He was dealing with accounts, and it was to "such cases" that the rule, as he states it, applies. Toland v. Sprague, referred to, was also a case of a stated account.

In Nunez v. Dautel, 19 Wall. 560, the question was when money under the following contract became due:

"Columbus, Ga., September 1st, 1865.

"Due Joseph Dautel, or order, $1,619.66, being balance of principal and interest for four years and six months' services. This we will pay as soon as the crop can be sold, or the money raised from any other source, payable with interest.

"I. M. Nunez & Co."

Suit was brought more than five years after the date of the instrument. The court held that the stipulation secured to the defendants a reasonable amount of time within which to procure, in one mode or other, the amounts necessary to meet the liability, and that five years was more than a reasonable time, so that the obligation was due at the time suit was brought. In this case there could be no doubt that five years was ample time within which payment should have been made. The case comes under the head of the second class of cases mentioned above, because, in the absence of all circumstances, except the instrument itself, every one would say that five years was an unreasonable delay in paying the debt. In neither of these decisions by the supreme court of the United States is the rule as laid down by Chief Justice Marshall in the case in 6 Cranch, already quoted, criticised or overruled. Indeed, in the very volume (10 Wall.) which contains the case of Wiggins v. Burkham, is the case of Feild v. Farrington, at page 141, in which the question was whether factors had held cotton too long in view of a falling market. They held it 10 months, during which time cotton fell from 43 cents to 20 cents. Said Justice Strong, delivering the opinion of the supreme court:

"Whether this long delay, in view of a falling market, was in the exercise of a sound discretion, good faith, and reasonable diligence, was a question that should have been submitted to the jury. If the delay was unreasonable, if it was in violation of the plaintiffs' duty as factors, they, rather than the defendant, should bear the loss that resulted from it."

In the case of Brewing Co. v. Bullock, 8 C. C. A. 14, 59 Fed. 83, we held that a question of reasonable time was a question of law, citing as authority Wiggins v. Burkham, 10 Wall. 129; but that was a case where the time was so long that no fair-minded man could have any doubt that the delay was unreasonable. There a dealer in rice at New York shipped to a brewing company in Cincinnati two car loads of rice, without any order for the same. The brewing company, by mistake, paid the freight, and took the rice into its warehouse. Its officers discovered the mistake within a week after the receipt of the rice, and for more than 30 days, when rice was a commodity of fluctuating market value, with no excuse of any kind for the delay, they failed to notify the shippers that the company would refuse to take the rice. It was held that, from such delay in rejection, acceptance must be conclusively presumed, and that the trial court had the right to treat the matter as one of law. We think that because the case at bar presents so many facts which may more or less affect the question of reasonable time, and because it is not a case, parallels to which, by constantly recurring in courts of justice, have led to the establishment of any certain rule, the question of reasonable time was for the jury. The court erred, therefore, is not submitting it to that tribunal.

For this reason, the judgment of the court below is reversed, and a new trial ordered.

SPOKANE FALLS & N. RY. Co. v. ZIEGLER.

(Circuit Court of Appeals, Ninth Circuit. April 12, 1894.)

No. 81.

1. PUBLIC LANDS—RIGHT OF WAY OF RAILROADS.
Act Cong. March 3, 1875, which provides that "the right of way through the public lands of the United States is hereby granted" to any duly-organized railway company which shall perform the conditions prescribed by the act, does not entitle such company to a right of way over lands which are in the possession of a qualified pre-emptor who has made final proof, tendered the purchase money, and demanded his final receipt.

2. EMINENT DOMAIN—COMPENSATION.
Under the laws of the territory of Washington which provide that where land is taken for the right of way of a railroad compensation shall be made to the owner "irrespective of any increased value thereof by reason of the proposed improvement," any question as to the value of the land before and after the road was built is irrelevant.

In Error to the Circuit Court of the United States for the District of Washington, Eastern Division.

This was an action by Ziegler against the Spokane Falls & Northern Railway Company, in which plaintiff had judgment and defendant brings error.

Jay H. Adams and McBride & Allen, for plaintiff in error.
George Turner, for defendant in error.

Before McKENNA and GILBERT, Circuit Judges, and HAWLEY, District Judge.

McKENNA, Circuit Judge. This case comes on writ of error from the circuit court, for the district of Washington, eastern division. Defendant in error recovered judgment, after a verdict by jury, against plaintiff in error, for damages for an appropriation of a strip of land, part of the E. ½ of S. E. ¼, section 4, township 25, range 43 E., W. M. The defendant in error was, on the 1st day of May, 1889, in possession of said land as a pre-emptor, having the legal qualifications of such, and had made final proofs, and had tendered the purchase money, and demanded his final receipt. The money was not received, on account of a contest in the land office. The plaintiff in error, defendant in the court below, is a corporation under the laws of Washington, for the purpose of constructing and operating a railroad from the city of Spokane Falls, in a northerly direction, through the counties of Spokane and Stevens, to the Columbia river. The evidence also shows that plaintiff in error filed in the office of the secretary of the interior a copy of the articles of incorporation, and afterwards, in 1889, commenced the construction of its road, and surveyed and marked the line of its road, which line ran over the lands of the defendant in error, and, within 12 months after locating said line, filed a profile map thereof with the register of the land office of the district in which the land is situated, which map was approved by the secretary of the interior, and afterwards constructed its road; and the plaintiff in error therefore contends that under said acts, and under the act of congress ap-

proved March 3, 1875, entitled "An act granting to railroads the right of way through the public lands of the United States," it became the owner of a right of way across the land of the defendant in error, and that the circuit court erred in admitting proof of his entry of the land, and tender of payment therefor, and patent from the United States. The act of congress referred to above is as follows:

"That the right of way through the public lands of the United States is hereby granted to any railway company duly organized under the laws of any state or territory, except the District of Columbia, or by the congress of the United States, which shall have filed with the secretary of the interior a copy of its articles of incorporation, and due proof of its organization under the same, to the extent of one hundred feet on each side of the central line of said road. Also the right to take from the public lands adjacent to the line of said road, material, earth, stone, and timber necessary for the construction of said railroad. Also ground adjacent to such right of way, for station-buildings, depots, machine-shops, side-tracks, turn-outs, and water stations, not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of its road. * * * Sec. 3. That the legislature of the proper territory may provide for the manner in which private lands and possessory claims on the public lands may be condemned; and where such provision shall not have been made, such condemnation may be made in accordance with section 3 of the act entitled, 'An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the government the use of the same for postal, military, and other purposes, approved July first, eighteen hundred and sixty-two,' approved July second, eighteen hundred and sixty-four. Sec. 4. That any railroad company desiring to secure the benefits of this act, shall, within twelve months after the location of any section of twenty miles of its road, if the same be upon surveyed lands, and, if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located, a profile of its road; and upon approval thereof by the secretary of the interior, the same shall be noted upon the plats in said office; and thereafter all such lands over which such right of way shall pass, shall be disposed of subject to such right of way. Provided, That if any section of said road shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any such uncompleted section of said road. Sec. 5. That this act shall not apply to any lands within the limits of any military, park, or Indian reservation, or other lands especially reserved from sale."

The act did not operate as a present grant. Its words are: "That the right of way through the public lands is hereby granted to any railroad company." The opening words of section 4 of the Oregon donation act are: "That there shall be, and hereby is granted to every white settler, or occupant of the public land." In neither act is there a grantee, and the supreme court said, in construing the latter act, in Hall v. Russell, 101 U. S. 509: "There cannot be a grant unless there is a grantee, and consequently there cannot be a present grant unless there is a present grantee." And the court further said that, in all cases where a grant was given a present effect, a state, or some corporation having all of the qualifications specified in the act, had been designated as a grantee. In other words, when an immediate grant was intended, an immediate grantee, having all the requisite qualifications, was named. The act, therefore, did not give a right of way presently, but entitled any company to obtain the right of way upon performing certain condi-

tions, and its right attached upon filing a profile map of its road, as provided in section 4. It will be observed that the provision of section 4 is that, after filing the profile of the road, all lands over which the right of way shall pass shall be disposed of subject to such right of way. Lands, therefore, which had been disposed of theretofore, were exempt. The pre-exemption laws are certainly a means of disposing of the public lands, and an entry of record under them, valid on its face, is such an appropriation of the tract entered as segregates it from the public domain, and precludes it from subsequent grant. Railroad Co. v. Whitney, 132 U. S. 357, 10 Sup. Ct. 112; Sturr v. Beck, 133 U. S. 541, 10 Sup. Ct. 350. An express reservation is not necessary. Wilcox v. Jackson, 13 Pet. 498; Leavenworth, etc., R. Co. v. U. S., 92 U. S. 745. That pre-emption claims are exempted from the grant is supported by section 3 of the act. It is as follows:

"Sec. 3. That the legislature of the proper territory may provide for the manner in which private lands and possessory claims on the public lands of the United States may be condemned; and where such provision shall not have been made, such condemnation may be made in accordance with section 3 of the act entitled 'An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the government the use of the same for postal, military, and other purposes, approved July first, eighteen hundred and sixty-two,' approved July second, eighteen hundred and sixty-four."

Counsel for plaintiff in error urges that by the words "possessory claims" congress intended only to protect the improvements of a settler. The explanation is not adequate. See, also, Enoch v. Railway Co. (decided by the supreme court of Washington; opinion filed May 24, 1893) 33 Pac. 966. The cases of Railroad Co. v. Baldwin, 103 U. S. 426, and Railroad Co. v. Tevis, 41 Cal. 489, do not militate with the conclusions we have reached. In the former case the grant was a present one, and necessarily, as the court said, all persons acquiring any portion of the public lands after its date took subject to the grant. In the case of Railroad Co. v. Tevis, the plaintiff was the successor of the Central Pacific Railroad Company, who had been granted by congress a right of way over the public lands Kerr claimed as a pre-emption, and though he had settled on the land, and had improved it, he had not filed a declaratory statement when the right of way attached. The court held that he was neither the owner nor a claimant of the land within the meaning of section 3 of the act granting the right of way to the railroad, which provided a means of ascertaining damages in case the owner or claimant of the land and the railway company could not agree. The facts of the case, therefore, and the one at bar are different.

The plaintiff in error claims that the circuit court erred in sustaining an objection to the following question:

"Q. How much less, if any, was this tract of land worth that spring (1889) after the road had been constructed over it, and with the road upon it as it is now constructed, than it was worth that spring before the road was constructed, and before it was known that the road was going to be constructed over it?"

The appropriation of the land was made on the 5th day of June, 1889, while Washington was a territory, and the law of the territory then was that compensation should be made to the owner of land taken "irrespective of any increased value thereof, by reason of the proposed improvement." In support of the relevancy of the question, plaintiff in error cites Railroad Co. v. Coleman, 3 Wash. St. 234, 28 Pac. 514. This case, however, was overruled in Enoch v. Railway Co. (filed May 24, 1893) 33 Pac. 966. The circuit court, therefore, did not err in sustaining objection to the question. Judgment is affirmed.

In re QUAN GIN.

(District Court, N. D. California. May 3, 1894.)

No. 10,948.

CHINESE MERCHANTS—FIRM NAME.

Act Cong. Nov. 3, 1893, provides that a Chinaman seeking entrance into the United States on the ground that he was formerly engaged as a merchant therein must show that his business was conducted "in his own name." *Held*, that such person must be excluded where it appears that the business was conducted under a firm name of which his own name was no part, though there is evidence that he was a partner, and that Chinese merchants do not, in general, conduct business in individual or partnership names.

Exceptions to Special Referee and Examiner's Report, recommending discharge. Exceptions taken by the United States. Exceptions sustained.

Thos. D. Riordan, for petitioner.
Charles A. Garter, U. S. Atty.

MORROW, District Judge. The petition in this case alleges that Quan Gin is unlawfully restrained of his liberty on board the steamship Belgic, on the claim made by the master of the vessel that Quan Gin is not entitled to land, under the provisions of the act of May 6, 1882, and the acts amendatory thereof and supplementary thereto. 22 Stat. 58, 23 Stat. 115, 25 Stat. 504, 27 Stat. 25. The petition alleges that these acts do not apply to him, and that he is entitled to land, and come into the United States, by reason of the fact that he is not a laborer, but a merchant, and a member of the firm of Yow Kee & Co., dealers in general merchandise at No. 17 Waverly place, and for more than one year prior to his departure was a member of the said firm.

A Chinaman claiming to be a merchant, and making application for entrance into the United States on the ground that he was formerly engaged in this country as a merchant, is required by the act of November 3, 1893 (28 Stat. 7), to establish by the testimony of two credible witnesses, other than Chinese, the following facts: (1) That the applicant was engaged, in this country, in buying and selling merchandise, (2) at a fixed place of business; (3) that the business was conducted in his own name (4) for at least one year before his departure from the United States; (5) that during such

year he was not engaged in the performance of any manual labor, except such as was necessary in the conduct of his business as such merchant.

In support of the petition, Quan Gin testifies that he came to this country, first, in the year 1878; that he went to China, the last time, on the steamer Gaelic, in November, 1892; that when he went to China he was in the firm of Yow Kee (general merchandise), No. 17 Waverly place; that the total capital of the firm was $11,000; that there are 10 partners in the firm, including himself, and his interest was and is $1,000; that he had been a member of the firm prior to his departure for China, for seven or eight years; that he was assistant bookkeeper and collector; that Lim You is the manager of the firm, and Lim Lung interpreter. Neither of these two persons so identified as being connected with the firm is produced as a witness, but a Chinaman named Lim See is called, who testifies that he has an interest of $1,000 in the general merchandise firm of Yow Kee, No. 17 Waverly place. This witness is not otherwise identified as belonging to the firm. He testifies, however, that Quan Gin had an interest amounting to $1,000; that Quan Gin was the outside man, and also kept the accounts. T. F. Scott, a drayman, testifies that he knows Quan Gin, who had a store on Clay street, and moved up to Waverly place; that the firm name was "Yow Kee." The witness understood that Quan Gin was a partner; saw him around the store, attending to the business of the firm, and performing such acts as a partner would perform. James W. Waldie, bookkeeper for the American Biscuit Company, testifies that he thinks he has known Quan Gin for six or seven years. He has been buying crackers from the company. He thinks the firm name was "Yow Kee," but whether Quan Gin was a member of the firm he would not swear to, inasmuch as he could not swear to any man being a member of a firm. M. W. Levy, a produce and commission merchant, testifies that he remembers Quan Gin. He had a store on Clay street, and afterwards at No. 17 Waverly place. He does not remember the store name, but, to the best of his knowledge and belief, Quan Gin was a member of the firm. He says he sold the firm potatoes for seed, beans, and strawberry plants, and other little things. No explanation is given why it is alleged in the petition that Quan Gin is a member of the firm of Yow Kee & Co., and no testimony submitted to support that allegation. It seems to be assumed that the testimony that he was a member of the firm of Yow Kee is sufficient, but no explanation is furnished as to how he could be a member of a firm designated by a single individual name. In the argument it was said that Chinese merchants select words of supposed lucky import for company or firm names, but there is no proof upon that point in the case; and the court is not advised, even by counsel, as to whether "Yow Kee" is a word or a name. The fact that in the petition the firm name is given as "Yow Kee & Co." would indicate that the name is not a word, but the business title of two or more individuals associated together. The law requires that, to establish the character of a merchant for a Chinese person seeking to enter the United States, it must appear,

among other things, that the business in which he was engaged "was conducted in his own name." As there is no proof in this case that Quan Gin conducted any business in "his own name," and no explanation is given of the fact that his name does not appear in the firm name, as is usual in partnerships in this country, he must be refused a landing, in accordance with the express direction of the statute. But the question submitted to the court for determination is as to the character of evidence required to establish the fact that a merchant is conducting business in his own name. Must his name appear, either individually or as a partner, in the conduct of the business? The attention of the court has been called to an opinion of the attorney general of the United States, dated April 6, 1894, in which he holds that:

"A Chinese person does not bring himself within the statutory definition of 'merchant,' unless he conducts his business either in his own name, or in a firm name of which his own is a part."

It is contended, in opposition to this view of the law, that such an interpretation will exclude nearly every Chinese merchant seeking to enter the United States, since, as before stated, it is claimed that Chinese merchants do not, as a rule, conduct their business affairs in individual or partnership names. This may be so, but, if it is so, it is a consideration to be addressed to the lawmaking power, and not to the court.

"The power to exclude or to expel aliens, being a power affecting international relations, is vested in the political departments of the government, and is to be regulated by treaty or by an act of congress, and to be executed by the executive authority according to the regulations so established, except so far as the judicial department has been authorized by treaty or by statute, or is required by the paramount law of the constitution, to intervene." Fong Yue Ting v. U. S., 149 U. S. 713, 13 Sup. Ct. 1016.

The attorney general gives a most convincing reason for his interpretation of the statute. He says:

"This requirement that a merchant must conduct the business in his own name can have but one purpose, to wit, that he who is a merchant in fact shall also be known to be such by the parties with whom he deals, and by the public generally. That purpose could readily be defeated if it were possible to conceal his identity by trading under an assumed name, or under the disguise of a 'Co.'"

When it is considered how easy it is for a Chinese person seeking admission into the United States to claim a small interest in the business of buying and selling merchandise, it is evident that the statute has been wisely framed to prevent the admission of Chinese persons into the United States upon the fictitious and fraudulent claim that they are merchants. In my opinion, therefore, when an application is made by a Chinaman for entrance into the United States on the ground that he was formerly engaged in business in this country as a merchant, he must, before being admitted, establish by the testimony of two credible witnesses, other than Chinese, among other things, that he conducted the business in which he was engaged, either in his own name, or in a firm name of which his own is a part. The exceptions of the district attorney to the report of the commissioner are sustained.

KRAFT v. UNITED STATES.

(Circuit Court, S. D. New York. April 20, 1894.)

CUSTOMS DUTIES—CLASSIFICATION—PRINTED TISSUE PAPER.

Tissue paper having certain colors, in stripes and plaids, printed or stamped thereon, and not of one uniform color, *held* to be dutiable at 8 cents per pound and 15 per cent. ad valorem, under paragraph 419 of the act of October 1, 1890, as "tissue paper, white or colored," and not at 25 per cent. ad valorem, under paragraph 423, as "printed matter, not specially provided for."

Appeal by Importers from Decision of Board of United States General Appraisers. Decision affirmed.

The importations consisted of white tissue paper, printed on one side with colored stripes and plaids. The collector assessed duty thereon under paragraph 419 of the act of October 1, 1890. The importers duly protested, claiming same to be dutiable as "printed matter," under paragraph 423 of said act. The board of United States general appraisers sustained the collector's classification. The contention of the importers was that "colored" tissue papers were commercially confined to those dyed in a vat, and that the articles in suit were not known in trade and commerce as "colored," but as "printed tissues," "striped tissues," and "plaid tissues," and were "printed matter."

Stephen Greeley Clarke, for importers.
Henry C. Platt, U. S. Atty., for the United States.

TOWNSEND, District Judge (orally). This is an appeal from the decision of the board of general appraisers classifying certain paper as "tissue paper" under the provisions of Schedule M, par. 419, of the tariff act of 1890. Certain colors and patterns have been printed or stamped on the paper in question. The importer claims that it should be classified as "printed matter," under paragraph 423 of said act. The decision of the board of appraisers is affirmed, because the method by which the paper was colored does not affect its character as "colored tissue paper," and, furthermore, because the article does not fall within the class of "books, etchings, maps, charts, and all printed matter," embraced within the provisions of paragraph 423.

PARK et al. v. UNITED STATES.

(Circuit Court, S. D. New York. May 3, 1894.)

CUSTOMS DUTIES—ACT OF OCTOBER 1, 1890—TRUFFLES.

Truffles *held* to be dutiable at 45 per cent. ad valorem, under paragraph 287 of the tariff act of October 1, 1890, within the clause, "Vegetables of all kinds, prepared or preserved, including pickles and sauces of all kinds, not specially provided for," and not at 40 per cent. ad valorem, under paragraph 271, as assimilating to "mushrooms, prepared or preserved in tins, jars, bottles or otherwise."

Appeal from Decision of Board of United States General Appraisers. Board.

Park & Tilford, in 1891, imported truffles in bottles. Duty was assessed thereon by the collector of customs at New York at 45 per cent. ad valorem, under paragraph 287 of the act of October 1, 1890.

Importers protested, claiming duty at 40 per cent. ad valorem, under paragraph 271, and that truffles are a species of fungi and assimilate to mushrooms. The board of United States general appraisers sustained the importers' protest, and reversed the decision of the collector. The collector appealed from the decision of the board to the United States circuit court.

Edward Hartley, for importers.
Henry C. Platt, U. S. Atty.

WHEELER, District Judge. These truffles are not mushrooms, in similitude to which it is claimed they should be assessed, but are found to fall, commonly and commercially, within "vegetables of all kinds prepared or preserved, including pickles and sauces of all kinds not specially provided for." They, in some way, vegetate, and are a kind of vegetable. Judgment of the board of appraisers reversed.

SMITH, Surveyor of Customs, v. MIHALOVITCH et al.

(Circuit Court of Appeals, Sixth Circuit. April 3, 1894.)

No. 119.

1. CUSTOMS DUTIES—CLASSIFICATION—GLASS BOTTLES.
Flint-glass bottles, molded, and holding more than one pint, are dutiable at one cent per pound, under paragraph 103 of Act Oct. 1, 1890, and not at 60 per cent., under paragraph 105.

2. APPEAL—MATTER NOT APPARENT ON RECORD.
The provision of paragraph 104 of Act Oct. 1, 1890, that certain glassware shall not pay a less duty than 40 per cent. ad valorem, cannot be applied on appeal where the record does not show that the duty imposed is less than that rate.

In Error to the Circuit Court of the United States for the Western Division of the Southern District of Ohio.

In June, 1891, the defendants in error, Mihalovitch, Fletcher & Co., imported from Germany, through the port of New York, certain flint glassware, claimed by them to be bottle glassware. The merchandise was forwarded in bond to the custom house in Cincinnati, where the acting surveyor of customs assessed it for duty at 60 per cent. ad valorem, under paragraph 105 of the act of October 1, 1890. To this action of the surveyor the importers duly protested, claiming said assessment to be illegal, and insisting that the duty should have been assessed under paragraph 103 of said act, and asking to have $108.75, so illegally assessed, refunded. The importers appealed from the action of the surveyor at Cincinnati to the board of general appraisers at New York, under the act of June 10, 1890. In October, 1891, that board filed a decision sustaining the protest of the importers, and found the articles imported to be flint-glass bottles, under paragraph 103 of the act above cited, and to be dutiable at one cent per pound. Under the provisions of section 15 of the

act of June 10, 1890, the surveyor of customs, through John W. Herron, district attorney, filed his application in the circuit court of the United States for the southern district of Ohio, in October, 1891, asking that court to reverse the decision of said board of general appraisers. At the April term, 1892, of said court, the case was heard upon the issues made by the protest of the importers and the application of the surveyor of customs and the evidence of the parties, and thereupon, after due consideration, the circuit court affirmed the decision of the said board, and dismissed the surveyor's application. From this order a writ of error was taken to this court.

John W. Herron, U. S. Dist. Atty., and Henry Hooper, Asst. U. S. Dist. Atty., for plaintiff in error.

Wright & Wright, for defendants in error.

Before TAFT and LURTON, Circuit Judges, and RICKS, District Judge.

RICKS, District Judge (after stating the facts as above). When this case was tried in the circuit court, the question was whether the articles imported should be classified under paragraph 103, or paragraph 105, of the act of October 1, 1890. Paragraph 103, under which the importers claim, reads as follows:

"Green and colored, molded or pressed, flint and lime glass bottles, holding more than one pint, * * * and other molded or pressed, green and colored, and flint or lime glass bottle ware, not specially provided for in this act, one cent per pound."

Paragraph 105 reads as follows:

"Flint and lime pressed glassware, not cut, engraved, painted, etched, decorated, colored, printed, stained, silvered or gilded, sixty per cent. ad valorem."

The circuit court found that "these articles are not pressed glassware. They are molded, which brings them within an express provision of paragraph 103." We agree with this conclusion of the circuit court for the reasons stated in the opinion filed in the cause. 55 Fed. 476. The district attorney now insists that if the judgment of the circuit court is affirmed, and the articles are to be classified under paragraph 103, then they are dutiable at the rate of 40 per cent. ad valorem, under the last clause of paragraph 104, which reads:

"No article manufactured from glass described in the preceding paragraph shall pay a less rate of duty than forty per cent. ad valorem."

But the record does not contain the evidence to enable or justify us in applying this clause of paragraph 104 to the case as presented, because it nowhere appears that the duty imposed in this case was less than 40 per cent. of the value of the importation. The judgment of the circuit court is therefore affirmed.

NOTE. See Marine v. Packham, 3 C. C. A. 210, 52 Fed. 579.

PUSEY & JONES CO. v. MILLER et al.

(Circuit Court, D. Delaware. April 30, 1894.)

No. 153.

1. INTERPLEADER—BILL—DEMURRER.
A bill of interpleader against two defendants which shows on its face that one of the defendants has no claim, either legal or equitable, to the debt due from the complainant is demurrable.

2. PATENTS FOR INVENTIONS—LICENSE—RIGHTS OF CO-OWNERS.
Where a patent is owned by several parties, and one of them issues a license to a third person, the other owners have no claim against the licensee for any part of the royalty, their remedy, if any, being by suit against the licensor for an accounting.

In Equity. Bill by the Pusey & Jones Company against Mary Ann Miller and Will W. Bierce.

Benjamin Nields, for complainants.
Branch Giles and E. Clinton Rhoads, for defendant Miller.

WALES, District Judge. This is a bill in the nature of a bill of interpleader, by which the plaintiff seeks protection and relief from the conflicting demands of the defendants. The material facts in the case are these:

Mary Ann Miller, the executrix of Lewis Miller, and one of the defendants herein, has brought an action at law in this court against the plaintiff to recover the sum of $3,000, which is alleged to be due to the estate of Miller under the terms of a written contract between him and the plaintiff, dated January 14, 1892, whereby the plaintiff had agreed to pay to Miller that amount of money, as a license fee or royalty, for the right to construct a patented Taylor cotton press for Will W. Bierce, of the state of Alabama. The further sum of $212.40 is claimed by the executrix as a balance due to her husband's estate for royalties on other cotton presses built by the plaintiff. John F. Taylor, being the inventor and sole owner of all the patents covering what is known as "Taylor's Steam and Hydraulic Cotton Press," on the 23d of January, 1877, sold and assigned to Lewis Miller and William Boardman, each, one-third interest and share in and of these patents for all of the United States, excepting certain territory specifically reserved to the assignor. Prior to the making of this assignment, which was duly recorded, the parties named therein had, on the 19th of December, 1876, entered into articles of agreement (tripartite), wherein it was stipulated, among other things, that Boardman, in consideration of the assignment to him of a one-third interest in the patents, would advance to Taylor the sum of $25,000, and would also furnish to Lewis Miller such sums as the latter might require "to enable him to carry on the business of the concern." The advance of $25,000 to Taylor was to be reimbursed to Boardman by Taylor out of his one-third of the profits. Miller, by way of payment for the one-

third interest of the patents to be transferred to him, was to devote his time, attention, and energy to the building, selling, and using, or otherwise disposing of the inventions or patent rights. It was further agreed that the profits to be derived from the business should be shared equally between the parties, and that the losses sustained should be borne in like proportion. John F. Taylor, on July 20, 1892, sold and assigned to Will W. Bierce, one of the defendants, his remaining one-third interest in the cotton-press patents, and at the same time transferred to Bierce his share of all debts and claims, owing or unpaid, or which at any time might become due to him, under the agreement of December 19, 1876, from Lewis Miller and William Boardman, or either of them, their, or either of their, estates. Miller and Boardman had both died before the date of the assignment from Taylor to Bierce.

Will W. Bierce is indebted to the plaintiff in the sum of $9,901.41, with interest thereon, being a balance due and unpaid on a Taylor cotton press furnished by plaintiff to Bierce, and which the latter refuses to pay unless the plaintiff will deduct therefrom the sum of $3,212.40, claimed by Bierce as the assignee of Taylor. Bierce, as assignee of Taylor, has also brought a suit in equity, in the court of common pleas of Philadelphia, No. ———, against Mary Ann Miller, the executrix of Lewis Miller, and Hannah E. Boardman, the administratrix of William Boardman, for an accounting of the moneys received by the estates which they, respectively, represent, by virtue of the agreement of December 19, 1876, and of the assignment of January 23, 1877. In his bill, Bierce alleges that Miller and Boardman made large profits in operating the patents, to the one equal third part of which Taylor was entitled, but that neither Miller nor Boardman had ever rendered any account to Taylor, or to his assignee. Prior to the bringing of the action against the Pusey & Jones Company by Miller's executrix, Bierce had notified the company that the sum of $3,212.40, claimed by the executrix, and for which she now sues, belonged to him, and cautioned the company not to pay the same to the executrix. The Pusey & Jones Company now tenders itself ready and willing to pay the said sum of $3,212.40 to Miller's executrix, or to account for the same to Will W. Bierce, as this court may determine, and therefore prays that the defendants may be decreed to interplead, and settle between themselves their respective rights or claims, and that in the mean time the executrix of Miller may be enjoined from prosecuting her action against the company. Mrs. Miller, the executrix, has appeared by counsel, and entered a general demurrer to the plaintiff's bill. The subpoena was returned non est as to Bierce, and there has been no appearance for him.

The purpose of a bill of interpleader is to compel the claimants of the same thing, debt, or duty from the party liable therefor, to litigate their respective claims between themselves; the party liable being under no independent liability to any of the claimants, and being merely in the position of a stakeholder, without interest

in the matter himself. A bill in the nature of an interpleader lies by a party in interest to ascertain and establish his own rights, when there are other conflicting rights between third persons; as where a mortgagor wishes to redeem a mortgaged estate, and there are conflicting claims between third persons as to their title to the mortgage money, he may bring them before the court to ascertain their rights, and to have a decree for redemption, and to make a secure payment to the party entitled to the money. 2 Story, Eq. Jur. §§ 807–824. By the one bill the plaintiff seeks protection from rival claimants and a multiplicity of suits. By the other, he seeks relief, as well as protection. It is essential, in every bill of interpleader, that each of the defendants claims a right, and such a right as they may interplead for. If, in the facts set forth in the bill, it is evident that the claim of one of the defendants (there being only two) is not such that it can be sustained on legal or equitable grounds, there is no cause of interpleader. Id. § 821. And this requires that the claims of the defendants in the present case should be investigated. On the contract of January 14, 1892, between Lewis Miller and the Pusey & Jones Company, there can be no doubt of the liability of the company to Miller's estate; and unless Bierce can show a superior right to the money in controversy, or a well-founded legal or equitable claim to it, the plaintiff's bill cannot be sustained. Bierce, as assignee of Taylor, is the owner of whatever rights were held by the latter, at the time of the assignment, in the cotton-press patents, and to the profits derived from them, under the partnership articles of December 19, 1876, between Taylor, Miller, and Boardman. As between the three partners, Taylor was undoubtedly entitled to one-third of the income from the patents during the existence of the partnership; but when that partnership was dissolved by the death of Boardman, on July 14, 1891, the mode of division provided for in the articles came to an end. There was no provision in the articles for a continuance of the partnership after the death of any one of its members. As far as can be gathered from the bill and exhibits, the partnership was a secret one, and had never transacted business, as a firm, with third parties. The cotton-press patents were not, and had never been, owned or operated by the firm. The interest in the patents which was owned and held by each member of the firm was his own individual and separate property, and constituted no part of the firm's assets; and, immediately upon the dissolution of the firm, each one of the surviving members was no longer accountable to the other, as a partner, for a division of the profits which he might thereafter make from the working of the patents himself, or by issuing licenses to others to use them. Such being the relation of Taylor and Miller to these patents, on January 14, 1892, and long after the partnership had ceased to exist, it becomes pertinent to inquire what right or interest Taylor could have in the royalties which the Pusey & Jones Company contracted to pay to Miller, and on which the executrix of Miller has now brought an action against the plaintiff in this bill. It is unnecessary to consider the extent

of Miller's accountability to Taylor for moneys received by the former during the partnership. The debt in controversy between the defendants was incurred after the partnership had ended, when Taylor and Miller had become nothing more than co-owners, or tenants in common, of the patents; each being at liberty to use his property, at his own discretion, for his own profit and advantage, with a possible liability to account for royalties if one should receive more than the other. The rights and liabilities of the co-owners of a patent, when not modified by contract or agreement among themselves, in respect to royalties received by them, in the light of all the authorities on the subject, may be stated thus: Where a patent belongs to several persons in common, each co-owner can assign his share, and sue for an infringement, and can also work the patent himself, give licenses to work it, and sue for royalties payable to him for its use, and is entitled to retain, for his own benefit, whatever profit he may derive from the working, although he may be liable to account for what he receives in respect of the licenses. 1 Lindl. Partn. 62; Sheehan v. Railroad Co., 16 Ch. Div. 59; Mathers v. Green, L. R. 1 Ch. App. 29; Clum v. Brewer, 2 Curt. 506, Fed. Cas. No. 2,909; Curran v. Burdsall, 20 Fed. 837; Manufacturing Co. v. Gill, 32 Fed. 697; De Witt v. Manufacturing Co., 66 N. Y. 462; Gates v. Fraser, 9 Ill. App. 628; Hall, Pat. Est. 75. In Dunham v. Railroad Co., 2 Ban. & A. 327, 7 Biss. 223, Fed. Cas. No. 4,151, it was said by Judge Drummond that, where a party owning less than the whole of the thing patented makes a grant or license under the patent, it would seem the better rule to hold, if there is any liability at all, that he shall be answerable to the others, rather than the other patentees shall look to the grantee or licensee. In Curran v. Burdsall, supra, the court held that, if one of several joint patentees assigns to a third party, the estoppel upon the assignor must work a license to the assignee to use the patent, and the joint owners of the patent must look to the one who assigns, for an accounting. The rule deducible from the authorities would seem to be that the license of one or more of several owners in common of a patent confers a right as against all, and that the remedy of the other tenants in common, if they have any, is by a suit for an account for whatever may have been received by them. In other words, the licensee of a patent held by two or more co-owners is liable to his licensor only, and not to the other co-owners, for license fees or royalties, unless it is otherwise stipulated in the license.

All of the items contained in the bill of particulars filed by the plaintiff in the pending action of Miller's Executrix v. The Pusey & Jones Company are for debts incurred after the dissolution of the partnership between the owners of the cotton-press patents, and to none of which could Taylor, or his assignee, have any claim. The Pusey & Jones Company became indebted to Miller under an independent contract with him in respect to the patents, and the company is responsible only to Miller's estate for whatever may be due under that contract, as well as under other agreements made with Miller after the dissolution of the partnership. The argument

of the demurrer by counsel took a very wide range, but in my view, without adding any others, sufficient reasons have been assigned for dismissing the plaintiff's bill, with costs, and it is so ordered.

PHILADELPHIA NOVELTY MANUF'G CO. v. WEEKS.

(Circuit Court of Appeals, Second Circuit. April 19, 1894.)

No. 95.

1. PATENTS—LIMITATION OF CLAIM—INFRINGEMENT—STAPLING MACHINES.
   The Heysinger patent, No. 226,402, for a stapling machine for filing and binding papers, must be limited, in view of the prior state of the art, to the specific structures described and claimed; and its claims covering a clinching base, a staple driver, and both in combination, are not infringed by an apparatus which lacks a part of each device either expressly incorporated in the claims, or described in the specifications as essential. 52 Fed. 816, affirmed.

2. SAME—INVENTION.
   Altering the slots of the guide clip of a stapling machine so as to permit the staple driver to be inserted both crosswise and lengthwise, or so as to give sufficient room to drive a staple with a projecting eye, does not involve invention. 52 Fed. 816, affirmed.

3. SAME.
   The Heysinger patent, No. 274,941, for a stapling machine, is void for want of invention. 52 Fed. 816, affirmed.

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

This was a suit by the Philadelphia Novelty Manufacturing Company against Albertus A. Weeks, for alleged infringement of letters patent No. 226,402, dated April 13, 1880, and No. 274,941, dated April 3, 1883, both issued to Isaac W. Heysinger, and relating to what are known as "stapling machines," being small tools for inserting and clinching wire staples near the edges of superimposed sheets of paper. The circuit court dismissed the bill (52 Fed. 816). Complainant appealed.

Augustus B. Stoughton, for appellant.
Hector I. Fenton, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. The apparatus described consists of two separate tools. One of these is a staple driver, consisting, essentially, of a flat tube containing a flat blade movable therein, the open end of the tube receiving a staple, crown upward, which is ejected from the tube or staple case by a blow on the end of the blade or plunger, and thus the staple legs are inserted or driven through the mass of papers upon which the mouth of the staple case is superimposed. The other tool is a clinching base, which clips the paper between a slotted guide arm and a base containing a clinching cavity beneath the slot in the guide. The tools are to

be used together; but the staple driver may obviously be used with any clinching base which will clinch the ends of the staples driven upon it, even though such base does not contain any distinguishing feature of complainant's structure. So, too, the clinching base of the patent may obviously be used with any form of staple driver which will drive the staples upon the clinching cavity, even though such staple driver differs widely from that described in the patent. The first claim covers the clinching base; the second covers the staple driver; the third covers both tools in combination. The judge of the circuit court found that defendant did not infringe.

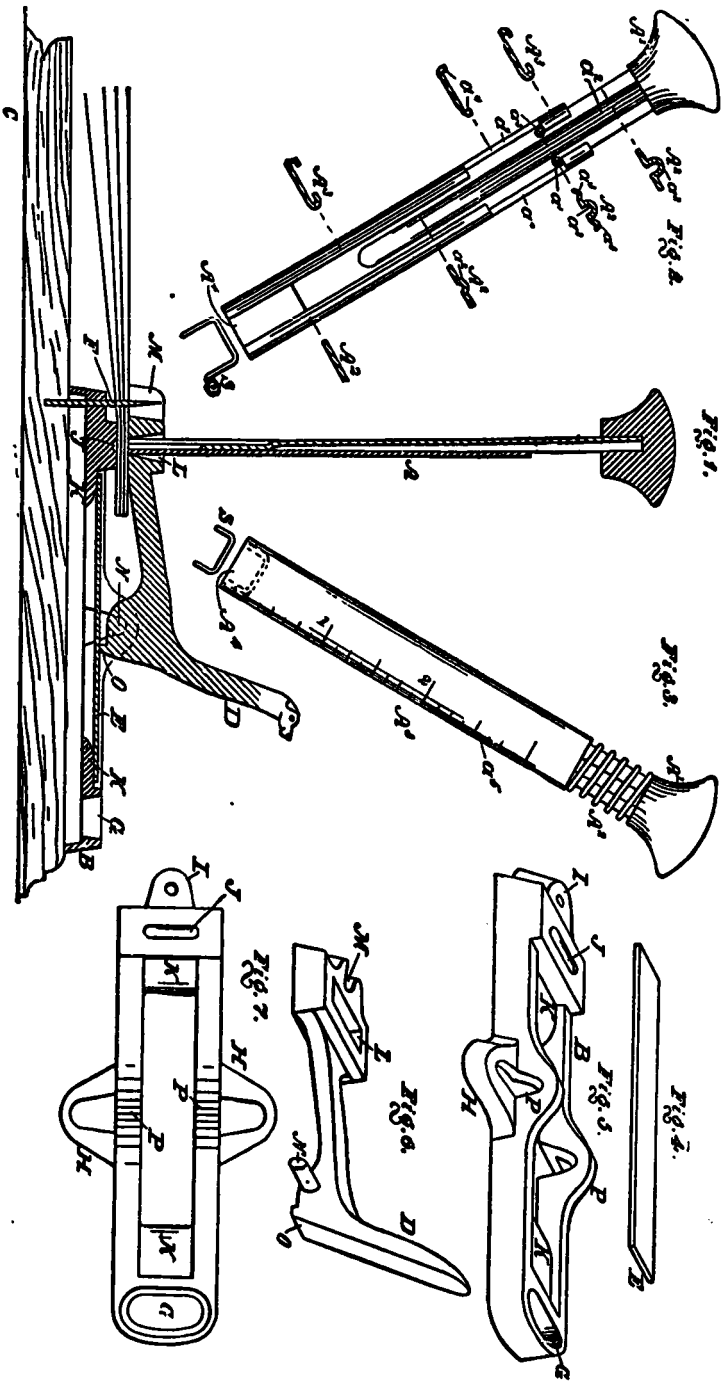
It is unnecessary to discuss at length the numerous patents put in evidence, or the minute details of varying construction which make up the state of the art. The field of invention was a very narrow one before Heysinger entered it, and whether he contributed anything of patentable novelty is extremely doubtful. Be that as it may, it is manifest that his claims can be sustained, if at all, only for the specific structures which he described and claimed. As to the second claim, we concur with the circuit judge in the conclusion that defendant's staple driver more closely resembles an earlier patent to Brown (No. 218,277, August 5, 1879) than it does Heysinger's. The third claim of Heysinger's patent expressly incorporates, as one of the essentials of its combination, "a tubular external case, longitudinally grooved," and grooved, as the reference to the drawing shows, throughout its entire length. When the patentee was referred by the patent office to Brown's patent, he sought to distinguish it from his device by showing that "Brown does not use any external groove at all, his tube being a closed one." And, to escape the reference, Heysinger expressly inserted in this third claim the statement above quoted as to the longitudinal groove. Defendant's driver, like Brown's, has no such groove, and it is difficult to understand upon what theory appellant now contends that such difference is immaterial. In fact, his brief does not contain any argument in support of such contention. The first claim of the 1880 patent is for:

"A paper-filing clip, B D, having the recessed clinching block, J, and guide slot, L, or its equivalent, substantially as and for the purpose herein described."

The specifications contain the following references to the clip:

"Fig. 4 is a perspective view of the spring of the clip part; Fig. 5, a like view of the base of the clip; Fig. 6, the vibrating clamping and guide arm of the same; Fig. 7, a plan of the base of the clip from above." "The device consists of two parts,—one, the clip or base part, which, as shown in Fig. 1, may be attached, singly or in pairs, to a baseboard." "The base part consists of a metallic base, Fig. 5, so cast or formed as to admit of the reception of the clamping arm, Fig. 6, from beneath, the pins, N, N, upon opposite sides of said clamping bar, thus engaging in sockets, P, P, which act as journal boxes; said clamping bar being held up to its place by the flat spring, E, which is afterwards slipped into its seat; the ends being supported by the shoulders, K, K; the center being free to sink beneath the heel, O, as the thumb lever, D, is depressed."

The accompanying figures make this explanation intelligible:


Fig. 1.
Fig. 2.
Fig. 3.
Fig. 4.
Fig. 5.
Fig. 6.
Fig. 7.
Fig. 8.

"The clamping arm, Fig. 6, consists of a thumb piece, D, clamp, L, and heel, O, the whole supported in position by the pins, N, N." "At its forward end, L, the clamp bar is slotted * * * for the reception of the nose of the driver." "In front of this slot is the bifurcation, M (which may be a slot or a hole). The object of this is to embrace the sides of the pin, F (located at I in the base), and force the papers which may be placed in the clamping jaws down upon the same, so that they may be held from slipping while others are placed upon them. * * * This pin may also, for special purposes, be dispensed with sometimes. Beneath the slot, L, when in place, is a raised part of the base, J, forming a block, upon which the slotted portion, L, of the clamping arm rests, and which, together with it, forms the jaws whereby the papers are held firmly together." "The clamping arms, Fig. 6, are so constructed that when the thumb lever is depressed the heel, O, will pass sufficiently far beneath the bearing, N, to hold the slotted portion, L, raised from the base, J, until the end, M, is pressed upon, when it will close with a snap, and drive the papers down upon the pin, F (Fig. 1). In using two of these clips, they are set open, and stand thus until the papers are laid in place, when they are successively closed, or the thumb pieces, D, D, may be connected by a cross bar, so that both are actuated simultaneously."

The circuit judge held that this carefully described arrangement of parts, whereby the clip might be set open or "cocked" while the papers were being inserted, thus leaving both hands free for arranging them suitably in place, and whereby, when the papers were so placed, it might be closed with a snap, was an essential part of the device described, and must be read into the claim, as being the "paper-filing clip, B D." In this opinion we concur. The specification contains no suggestion that this particular arrangement of parts may be dispensed with, as it does with regard to the pin, F; and where a patentee has thus carefully and specifically pointed out the details of a structure, which details, as he shows, discharge a stated function, it is not for the court to declare them immaterial. Defendant has no such arrangement of parts. The upper arm of his clip is held in engagement with the base, or with the intermediate paper, by a spring impinging upwardly upon the thumb piece, and not permitting the thumb piece to be set back or cocked. It seems probable that, in consequence, defendant's clip is not as convenient in use as the complainant's, but certainly it does not infringe.

So far as the patent of 1883 is concerned, there is nothing to add to the opinion of the judge of the circuit court. In view of the state of the art, there was no patentable invention in altering the slots of the guide clip so as to permit the staple driver to be inserted both crosswise and lengthwise, nor so as to give sufficient room to drive a staple with a projecting eye. The decree of the circuit court is affirmed, with costs.

PANAMA R. CO. v. NAPIER SHIPPING CO., Limited.

(Circuit Court of Appeals, Second Circuit. April 18, 1894.)

ADMIRALTY—REVIEW OF COMMISSIONER'S FINDINGS.

The findings of a commissioner appointed to ascertain damages in relation to questions of fact depending on conflicting evidence should not be disturbed by the court, unless error or mistake is clearly apparent.

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

This was a libel by the Napier Shipping Company, Limited, against the Panama Railroad Company, to recover damages for injuries received by libelant's steamer Stroma while lying at respondent's pier at Colon, Panama. The district court originally dismissed the libel (42 Fed. 922), and libelant appealed to the circuit court, where the decree was affirmed pro forma, and an appeal taken to this court. On February 16, 1892, this court reversed the decree (1 C. C. A. 576, 50 Fed. 557), with directions to ascertain the amount of libelant's loss, and render a decree therefor with costs. The cause was accordingly referred to a commissioner, and on the coming in of his report the exceptions taken thereto by respondent were overruled, and the report adopted. From this decree respondent has now appealed.

Coudert Bros., for appellant.

Butler, Stillman & Hubbard (Wilhelmus Mynderse, advocate), for appellee.

Before WALLACE and SHIPMAN, Circuit Judges.

PER CURIAM. The only questions raised by this appeal relate to the award of damages made by the decree of the circuit court upon overruling the exceptions of the appellant to the report of the commissioner to whom it was referred to ascertain the libelant's damages. The exceptions, aside from those taken to the allowance of interest, challenge the correctness of the commissioner's findings upon matters of fact. The only ones relating to the allowance of interest which have been argued orally or in the brief of counsel for the appellant also depend upon the correctness of the commissioner's findings upon matters of fact, the contention being that interest should only have been allowed upon the amount of damages which should have been awarded, instead of upon the amount actually awarded.

We think the court below properly adopted the commissioner's findings of fact, and correctly overruled the exceptions. The conclusions of such an officer, like those of a master in chancery, will not be disturbed as to matters of fact which depend upon conflicting testimony, unless error or mistake is clearly apparent. Whether the expenses of the libelant in raising and patching the steamer at Colon were reasonably incurred under the circumstances, whether it was more judicious to bring her to New York, in view of the extensive repairs which were necessary, than to attempt to have them made at New Orleans, whether the repairs made in New York were necessarily consequent to the injuries inflicted by the negligence of the appellant, or were in part consequent upon the negligence of the servants of the libelant, whether the sum paid for repairs was reasonable in amount or not, and whether the expenses and losses incurred by the libelant were or were not enhanced by any want of diligence or prudence on its own part, were all questions de-

pending upon conflicting testimony and inferences of fact. The circuit court could not have safely disturbed the conclusions of the commissioner.

The decree is affirmed, with interest, and costs of both courts.

UNITED STATES v. TWO HUNDRED AND FIFTY KEGS OF NAILS.

(Circuit Court of Appeals, Ninth Circuit. April 2, 1894.)

No. 139.

SHIPPING—COASTING TRADE—VIOLATION OF STATUTE.

The statute prohibiting the transportation of merchandise between ports of the United States in foreign vessels (Rev. St. § 4347) is not violated by shipping goods from New York to Antwerp in one foreign vessel, and afterwards forwarding them by another to a California port, although this was the intention from the outset.

Appeal from the District Court of the United States for the Southern District of California.

This was a libel by the United States seeking the forfeiture of 250 kegs of nails for violation of Rev. St. § 4347. The circuit court overruled a demurrer to the answer, and entered judgment against the United States, from which they have appealed.

George J. Denis, for the United States.

Page & Eells and Andros & Frank, for appellee.

Before McKENNA and GILBERT, Circuit Judges, and HANFORD, District Judge.

GILBERT, Circuit Judge. The United States filed a libel of information for the forfeiture of merchandise claimed to have been unlawfully transported from one port of the United States to another port therein, in vessels owned by subjects of a foreign power, in violation of section 4347 of the Revised Statutes. The owner of the merchandise made a special defense, setting forth the facts constituting the shipment. These facts are that the merchandise was wholly of the produce and manufacture of the United States; that it was shipped at New York in a Belgian vessel, consigned, under regular bills of lading, to a commercial house at Antwerp; that there the merchandise was discharged and landed, and was subsequently shipped on a British vessel, consigned to the owners at the port of Redondo, in California, under bills of lading signed by the master of the British ship, and was carried to Redondo, where it was entered at the customhouse as a manufacture of the United States which had been exported, and was now returned to this country; that the owners produced the certificate of exportation from New York, and presented to the collector at Redondo the evidence required by the regulations of the treasury department that the merchandise was entitled to free entry; that, at the time of the exportation from New York, it was the intention to land the goods at Antwerp, and afterwards forward them by another vessel to Redondo.

The United States demurred to this answer upon the ground that the same did not state facts sufficient, in law, to constitute a defense.

The demurrer was overruled, and decree entered against the libelant, and from that decision this appeal is taken.

The decision of the case upon the appeal must depend upon the proper construction to be given to section 4347 of the Revised Statutes, which reads as follows:

"No merchandise shall be transported, under penalty of forfeiture thereof, from one port of the United States to another port of the United States in a vessel belonging wholly or in part to a subject of any foreign power; but this section shall not be construed to prohibit the sailing of any foreign vessel from one to another port of the United States, provided no merchandise other than that imported in such vessel from some foreign port, and which shall not have been unladen, shall be carried from one port or place to another in the United States."

Is the transportation of merchandise which is described in the answer rendered illegal by the language of the statute? The facts set forth in the defense show that the merchandise in question was not transported directly from one port to another port of the United States, nor was it transported in one foreign vessel. On the other hand, it was carried from a port of the United States to a foreign port in a foreign vessel, and was there reloaded into a second foreign vessel, and thence carried to another port of the United States. The laws of the United States for the protection of shipping, and for the collection of revenue in duties, are intended for the practical use of men engaged in commerce. They are intended to be read in the light of commercial usage, and they are to be interpreted "according to the commercial understanding of the term used." Elliott v. Swartwout, 10 Pet. 137. In interpreting the provisions of such a statute, it is rather the letter of the law, than its spirit, which is to be regarded.

In the plain and ordinary meaning of the words, "to transport goods from one domestic port to another" means to carry goods in one continuous voyage, either directly from the one port to the other, or by the customary voyage pursued in commerce between the ports. It does not mean to carry them in two distinct and separate voyages, or in two distinct vessels. When the merchandise in this case was carried from New York to Antwerp, in an opposite direction from its ultimate destination, and was there discharged, there clearly had been, so far, no violation of the statute. Neither was the subsequent reloading and transportation to Redondo, in itself, a violation of the statute. But it is said that the two voyages are to be regarded as one, and that, viewed in the light of the result, the penalty of the statute has been incurred. But it is not the result that is prohibited by the statute. Were these goods transported from one port in the United States to another port in a vessel belonging in whole or in part to foreign subjects? If they were, the penalty denounced by the statute has been incurred. If they were not, then it makes no difference that the result accomplished was that which is intended to be obviated by the statute.

It was the intention of congress, by this act, to protect American shipping. It was evidently not considered necessary to extend the protection further than the words of the statute indicate. It was

not contemplated that American shipping, in carrying goods between domestic ports, would ever be put to the strain of competition with foreign bottoms by transportation in the circuitous method disclosed in this case. The protection of the statute goes no further than the words, in their plain, obvious sense, indicate. Shippers of merchandise are still left free to transport goods from New York to Redondo by sea in any method they see fit, provided they do not ship them direct from the one port to the other in the prohibited vessel. The protection of the statute was intended to be limited, and the court has not the right to extend it further than to the transportation precisely described in the terms of the statute.

But it is urged that the facts disclosed in this case amount to a palpable evasion of the statute, and that such is admitted to have been the intention of the parties to the transaction. The purpose the parties had in view can make no difference with the interpretation of the statute. They practiced no concealment or fraud upon the government. Their acts were done openly. They had the statute before them for their guidance. The unlawful act there defined was malum prohibitum only. The statute left them free to ship goods from New York to Redondo in any manner they saw fit, save and except the manner therein prohibited. They followed a method not mentioned in the statute. They had the right to assume that the whole intention of congress had been expressed in the words of the statute.

This view is sustained by the subsequent legislation of congress upon the same subject. Section 4347 is a re-enactment of the act of congress of March 1, 1817, entitled "An act concerning the navigation of the United States." 3 Stat. 351. On July 18, 1866, in consequence of evasions of that law already committed or threatened on the Canadian frontier, congress passed an act which is now embodied in the Revised Statutes as section 3110, and reads as follows:

"If any merchandise shall at any port in the United States on the northern, northeastern or northwestern frontiers thereof, be laden on any vessel belonging in whole or in part to a subject of a foreign country, and shall be taken thence to a foreign port to be reladen and reshipped to any other port in the United States on such frontiers, either by the same or any other vessel, foreign or American, with the intent to evade the provisions relating to the transportation of merchandise from one port of the United States to another port of the United States in a vessel belonging in whole or in part to the subject of a foreign power, the merchandise shall, on its arrival at such last-named port, be seized and forfeited to the United States, and the vessel shall pay a tonnage duty of fifty cents per ton on her admeasurement."

This section of the statutes expresses the legislative intention upon the subject of the evasion of the provisions of section 4347. It furnishes conclusive proof that that subject was brought to the attention of congress. Congress thereupon passed the act prohibiting such evasion, but confined the prohibition to transportation between ports within certain defined territorial limits,—the ports of the northern, northeastern, and northwestern frontier. The will of congress with reference to this subject having been expressed by this enactment in regard to certain specified ports, transportation

by this method between all other domestic ports is, by implication, excluded from the prohibition. But it is contended that the force of this consideration is overcome by the fact that section 3110 imposes a new penalty,—a penalty to be enforced against the ship, in addition to the forfeiture of the cargo; and the argument is that it was the purpose of congress to impose additional restrictions to transportation on the northern frontier by way of the Canadian ports in evasion of section 4347, and to leave other violation of that section to be punished by the penalty therein provided. We find no warrant for so narrowing the scope of section 3110. No reason can be suggested why congress should intend one punishment for evasion of the law by transportation via Canadian ports, and another for other transportation evasive of section 4347. Section 3110 contains the expression of the will of congress concerning the whole subject of the evasion of the previous statute. It is probable that, at that time, evasion of the law by transportation by way of a European port was not contemplated, or if thought of, was deemed so improbable as to require no prohibition.

But if the terms of section 4347 are admitted to be ambiguous and uncertain, so that the court may be left in doubt concerning their application to the facts presented in this case, then it follows, from settled legal principles of construction of that class of statutes, that the doubt must be resolved against forfeiture. Sutherland, in his work on Statutory Constructions (section 361), says:

"No case has arisen in which a penalty or forfeiture has been sustained for being within the supposed intention of the statute when not within its terms."

And he quotes from Dwarris on the same subject as follows:

"Judges, therefore, where clauses are obscure, will lean against forfeitures; leaving it to the legislature to correct the evil, if there be any. With this view, the ship-registry acts, so far as they apply to defeat titles and create forfeitures, are to be construed strictly, as penal, and not liberally, as remedial, laws."

This principle has been universally applied to provisions of the revenue acts. In Adams v. Bancroft, 3 Sumn. 384, Fed. Cas. No. 44, Story, J., said:

"Laws imposing duties are never construed beyond the natural import of the language, and duties are never imposed upon the citizens upon doubtful interpretations; for every duty imposes a burthen on the public at large, and is construed strictly, and must be made out, in a clear and determinate manner, from the language of the statute."

In the case of U. S. v. Breed, 1 Sumn. 160,[1] it appeared that the duty on white or powdered sugar was 4 cents a pound; and on loaf sugar, 12 cents a pound. Certain sugars were imported, which were powdered and white; but it was contended that the sugar was in fact loaf sugar, highly refined, and that it had been crushed for the purpose of evading the act. But the court said:

"To constitute an evasion of a revenue act which shall be deemed, in point of law, a fraudulent evasion, it is not sufficient that the party introduces another article, perfectly lawful, which defeats the policy contemplated by the

[1] Fed. Cas. No. 14,638.

act. There must be substantially an introduction of the very thing taxed, under a false denomination or cover, with the intent to evade or defraud the act. * * * It is a misfortune incident to all laws that they are necessarily imperfect, and, from human infirmity, fall short of all the intended objects. But in all such cases it is the business of legislation, and not of courts of justice, to correct the evil."

The principles announced in that case guided the decision of the court in the case of Merritt v. Welsh, 104 U. S. 694, in which the court said:

"Great stress is laid on the charge that sugars are manufactured in dark colors on purpose to evade our duties. Suppose this is true. Has not a manufacturer a right to make his goods as he pleases? If they are less marketable, it is his loss. If they are not less marketable, who has a right to complain? If the duties are affected, there is a plain remedy. Congress can always adopt such laws and regulations as it may deem expedient for protecting the interests of the government."

It may be added that, since the commencement of the present suit congress has amended section 4347, and has made its interdiction extend to transportation such as was had in this case, by inserting in that section the following words:

"And the transportation of merchandise in any such vessel or vessels from one port of the United States to another port of the United States via any foreign port shall be deemed a violation of the foregoing provision." 27 Stat. 455.

It is the judgment of the court that the decree be affirmed.

UNITED STATES v. REED.

(Circuit Court of Appeals, Second Circuit. April 19, 1894.)

No. 94.

SEAMEN—SHIPPING COMMISSIONERS' EXPENDITURES.

Under Act June 26, 1884, c. 121, § 27, which provides for audit and payment of expenses of shipping commissioners, expenditures required to enable a commissioner to discharge his official duties and to maintain the "suitable premises" therefor required by Rev. St. § 4507, are a proper charge against the United States, and the provisions of the act in that respect are not repealed by Act June 19, 1886, § 1, providing for payment of compensation to the commissioners and their clerks only.

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

This was an action by James C. Reed against the United States, brought under Act March 3, 1887 (24 Stat. 505), for expenditures by him as shipping commissioner. The circuit court rendered judgment for plaintiff. The United States appealed.

Henry C. Platt, U. S. Atty., and Charles D. Baker, Asst. U. S. Atty., for the United States.

George E. P. Howard, for appellee.

Before LACOMBE and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. The plaintiff, prior to July 1, 1884, had been duly appointed shipping commissioner of the United States

at the port of New York, had duly qualified, and entered upon the discharge of his duties. He continued to hold that office and discharge its duties until March 1, 1891. During part of this period he occupied rooms in the United States barge office. Subsequently, by direction of the secretary of the treasury, he removed his offices from said barge office, and procured offices at No. 25 Pearl street, and storage room for deceased seamen's effects at No. 19 Pearl street, in said city. Between the 1st day of July, 1886, and the 1st day of March, 1891, the plaintiff incurred various expenses and made various disbursements, amounting in the aggregate to the sum of $4,033.71, for rent of offices and storage of deceased seamen's effects, cost of said removal of his offices, for stationery, telephone service, for Maritime Register, ice, freight on blanks, safe-deposit vault, telegrams, repairs, etc. The record shows that these were proper, necessary, and reasonable expenditures, required to enable the commissioner to comply with the statutes and regulations relating to his official duties. Without them, it would not be practicable for him to discharge those duties, to make his official reports, or to maintain the "suitable premises" for the transaction of the public business which the law requires. Rev. St. U. S. § 4507. That any of the items charged for are unreasonable in amount, or the prices excessive, nowhere appears.

It is unnecessary to enter into any extended discussion as to the provisions of the original act of 1872, which created the office, regulated its administration, and fixed the fees to be paid and the compensation to be received by the commissioner out of those fees. Reference may be had to In re Shipping Com'r of Port of New York, 13 Blatchf. 339, Fed. Cas. No. 12,792. Nor has section 4507, Rev. St. U. S., which requires the commissioner to lease suitable premises at his own cost, any bearing upon the questions here raised, inasmuch as the subsequent act of June 26, 1884, c. 121, § 27 (23 Stat. 59), is controlling of the case at bar. It reads as follows:

"Section 27. The secretary of the treasury shall appoint a commissioner for each port of entry which is also a port of ocean navigation, and which in his judgment may require the same; such commissioner to be termed a shipping commissioner; and may from time to time remove from office any such commissioner whom he may have reason to believe does not properly perform his duties, and shall then provide for the proper performance of his duties until another person is duly appointed in his place. Provided, that shipping commissioners now in office shall continue to perform the duties thereof until others shall be appointed in their place. Shipping commissioners shall monthly render a full, exact and itemized account of their receipts and expenditures to the secretary of the treasury, who shall determine their compensation and shall from time to time determine the number and compensation of the clerks appointed by such commissioner with the approval of the secretary of the treasury subject to the limitations now fixed by law. The secretary of the treasury shall regulate the mode of conducting business in the shipping offices to be established by the shipping commissioners, as hereinafter provided, and shall have full and complete control over the same, subject to the provisions herein contained; and all expenditures by shipping commissioners shall be audited and adjusted in the treasury department in the mode and manner provided for expenditures in the collection of customs. All fees of shipping commissioners shall be paid into the treasury of the United States, and shall constitute a fund which shall be used under the direction of the secretary of the treasury to pay

the compensation of said commissioners and their clerks and such other expenses as he may find necessary to insure the proper administration of their duties."

Expenses such as these now under consideration appear to have been audited by the treasury department, as a proper charge against the United States, and paid down to July 1, 1886. Where the statute which renders such expenditures a necessary incident to an office does not expressly or by clear implication provide that they shall be paid for by the incumbent of the office out of his compensation, they are, under the authorities, a proper charge against the United States. Andrews v. U. S., 2 Story, 202, Fed. Cas. No. 381; U. S. v. Flanders, 112 U. S. 92, 5 Sup. Ct. 67. The statute last quoted expressly provides for their audit, adjustment, and payment.

The appellant refers to the act of June 19, 1886 (24 Stat. 79), the first section of which is as follows:

"Section 1. On and after July 1, 1886, no fees shall be charged or collected by inspectors of steam-vessels or shipping-commissioners, for the following services to vessels of the United States. [Here follows a long enumeration.] Collectors or other officers, inspectors of steam-vessels and shipping commissioners who are paid wholly or partly by fees shall make a detailed report of such services and the fees provided by law, to the secretary of the treasury, under such regulation as that officer may prescribe; and the secretary of the treasury shall allow and pay from any money in the treasury not otherwise appropriated, said officers such compensation for said services as each would have received prior to the passage of this act; also such compensation to clerks of shipping commissioners as would have been paid them had this act not passed: provided, that such services have, in the opinion of the secretary of the treasury, been necessarily rendered."

The contention that this section repeals the provisions of the act of 1884 (supra) as to expenditures by shipping commissioners other than for clerks is wholly without merit. There is nothing in the act last quoted which is susceptible of any such construction. It contains no repealing clause, it does not refer directly or indirectly to such expenditures, nor does it necessarily imply any intention to impose the burden of maintaining suitable premises for the transaction of the public business, which the shipping commissioner is expressly required to procure (section 4507, U. S. Rev. St.), upon him instead of upon the government, which requires it to be maintained, and which had assumed the obligation of maintaining it, and paying the necessary expenses thereof, under the acts of 1872 and 1884.

There is no weight in the suggestion that, at the time the compensation of the shipping commissioner was fixed under the section above quoted from the act of 1884, "he was informed that it was to be understood that from such compensation he should pay all his official expenses except for employes and rent." The law regulating this subject is to be found, not in the "understanding" of some former secretary of the treasury, nor in the "information" given to the plaintiff, but in the statute itself, which is too clear and unambiguous to admit of but one construction. The judgment of the circuit court is affirmed.

HOT SPRINGS INDEPENDENT SCHOOL DIST. No. 10, OF FALL RIVER COUNTY, v. FIRST NAT. BANK OF HOT SPRINGS et al.

(Circuit Court, D. South Dakota, W. D. March 1, 1894.)

No. 80.

REMOVAL OF CAUSES—ACTION UNDER UNITED STATES LAWS—NATIONAL BANKS

A suit to compel the receiver of a national bank to pay to complainant certain assets of the bank in his hands is one arising under the laws of the United States, within the meaning of the acts of March 3, 1887, and August 13, 1888, in regard to the jurisdiction of the federal courts.

Suit by the Hot Springs Independent School District No. 10, of Fall River County, S. D., against the First National Bank of Hot Springs and Alvin Fox, receiver of said bank.

Martin & Mason and Anderson & Anderson, for complainant.
William R. Steele and Henry Frawley, for defendants.

SANBORN, Circuit Judge. This is a motion to remand this suit to the state court on the ground that it is not a suit "arising under the constitution or laws of the United States" under the act of March 3, 1887, as corrected by the act of August 13, 1888 (25 Stat. 433; Supp. Rev. St. p. 612, § 2). This suit is brought to compel the receiver of this insolvent national bank to first pay to the complainant, out of the funds of the bank in his hands, several thousand dollars, before he pays any dividend to any creditors, on the ground that this receiver holds this sum of money as a trust fund for the complainant, and not as a part of the property of the bank, to be distributed among its creditors. Whatever funds and property this receiver has, he has received from this insolvent bank, and he holds them by virtue of the laws of the United States relative to the appointment and action of receivers of such banks. His defense to this suit, and to every suit brought against him as receiver, is based upon these laws of the United States under which he holds his appointment, and in accordance with which he must discharge the trust devolved upon him. In this suit he has interposed a demurrer to the plea of the complainant, and the question now at issue is, what construction shall be placed upon the provisions of the national banking laws with reference to the distribution of the funds of insolvent banks by receivers under the admitted facts of this case? I am clearly of the opinion that this case is one arising under the laws of the United States, and the motion to remand is denied. Sowles v. Witters, 43 Fed. 700; Sowles v. Bank, 46 Fed. 513; San Diego Co. v. California Nat. Bank, 52 Fed. 59.

SWOPE v. VILLARD et al.

(Circuit Court, S. D. New York. May 16, 1894.)

1. CORPORATIONS—RIGHT OF STOCKHOLDER TO SUE IN BEHALF OF CORPORATION—RECEIVERS.

A stockholder of a corporation that is in a receiver's hands has no right to sue upon a cause of action in favor of the corporation upon refusal of

the receiver to sue on the stockholder's request, without showing that he has asked the court that appointed the receiver to direct him to sue.

2. SAME—PLEADING.
A bill by a stockholder in a suit by him upon a cause of action accruing to the corporation which alleges that he has requested the directors to sue, and that they have neglected and refused to do so, without showing when or how the request to sue was made, nor upon what showing of facts, nor whether the persons who then composed the board of directors are still in office, is demurrable as not showing that the stockholder has exhausted all means within his reach to obtain redress within the corporation itself.

3. ACTION AGAINST RECEIVERS—LEAVE OF COURT.
Supp. Rev. St. 614, which declares that any receivers appointed by federal courts "may be sued in respect of any act or transaction of his in carrying on the business" without leave of court, does not authorize a suit by a stockholder of a corporation against its receiver and others, without leave of court, upon a cause of action which accrued to the corporation before the receiver was appointed, and upon which the receiver has refused to sue, since such refusal does not constitute an act or transaction in carrying on the business.

Bill by Swope against Villard and others.

Wm. F. Randel, for complainant.
Evarts, Choate & Beaman, for defendants Colby and Hoyt.
Carter, Hughes & Kellogg, for defendant Abbot.

TOWNSEND, District Judge. The questions herein are raised by the demurrers of the defendants Colby, Hoyt, and Abbot to this bill in equity, brought by a stockholder owning 25 shares in the Northern Pacific Railroad Company, to enforce a cause of action in favor of said company against said defendants and Henry Villard. The said company and its receivers are also joined as defendants. The facts alleged as showing such cause of action against said Villard, Colby, Hoyt, and Abbot need not be fully stated, in view of the conclusions reached; but, in brief, the bill alleges that said defendants, being directors in the defendant corporation, and the owners of certain railroad properties, conspired, confederated, and agreed together to cheat and defraud said Northern Pacific Railroad Company by, in substance and effect, selling to it and causing it to buy, said properties, for a price greatly in excess of the cost and value thereof, and at an exorbitant profit to themselves, and that, in execution of said conspiracy and fraudulent combination, said defendants conveyed said properties to one corporation, and caused it to lease the same to another corporation, both of which were controlled by said defendants, and caused said lease to be transferred to said Northern Pacific Railroad Company. The bill further alleges that three of said four defendants were, during all this time, directors of the defendant corporation; that they procured the other directors to consent to said lease by fraudulent misrepresentations as to the value of the property, and by concealment of their personal interests therein; and that said lease was afterwards ratified by a majority of its stockholders, who were ignorant of these transactions. The allegations upon which this stockholder claims the right to enforce this cause of action are as follows:

"* * * That he has requested the board of directors of the said Northern Pacific Railroad Company and the defendant receivers to institute and maintain an action to compel defendants Henry Villard, Charles L. Colby, Colgate Hoyt, and Edwin H. Abbot to make such restitution and repayment as above mentioned, which they, the said directors and said defendant receivers, have heretofore neglected and refused to do, and further avers that, up to the time of the appointment of said receivers, it was impossible for him to obtain any action by said board of directors hostile to the personal interests of said defendants above named, or either of them; and, since the appointment of said defendant receivers, it has been likewise impossible for plaintiff to induce said receivers to take any action hostile to said defendants."

The objections presented by the demurrers are as follows: That the court has no jurisdiction of the cause of action set forth in the bill, inasmuch as it appears on the face of the bill that the receivers of the Northern Pacific Railroad Company, who are necessary and indispensable parties to the suit, were, prior to its commencement, appointed by the United States circuit court for the eastern district of Wisconsin, which court has exclusive jurisdiction of the matters alleged in the bill, and of said receivers, who have since been discharging their duties under said order, and that it does not appear that any leave to sue said receivers has been obtained from said court; that said bill does not set forth with particularity any efforts of the complainant to secure such action as he desires on the part of said corporation and its directors and stockholders, and does not show that he made an earnest effort to induce said directors and stockholders, or said receivers, to enforce said alleged claim, or any reason for his failure so to do. Laches, want of equity, and that the complainant is not entitled to the relief prayed for, are also claimed.

This suit is brought, in the right of the Northern Pacific Railroad Company, to enforce a cause of action alleged to exist in its favor. The first question presented is, therefore, whether the complainant, in his bill, alleges such facts as entitle him to assert and enforce such cause of action in the interest of that company. The cause of action, if it exists, is one which it belongs primarily either to the railroad company itself, or to the receivers appointed as alleged in the bill, to enforce; and the bill will not lie unless it appears from the facts alleged that, for the protection of the rights of the company, the plaintiff, as a stockholder, should be permitted to represent it, to assert the cause of action and demand relief in its behalf. If the result of the appointment of receivers was to vest in them the management of the railroad company's affairs, to substitute them for the directors with respect to its property and rights generally, and, in particular, with respect to causes of action existing in its favor, there is no need of considering the allegations as to the efforts made to induce the company, before such appointment, to sue for the relief which the complaint seeks to obtain for it here. The right of a stockholder to sue to enforce a cause of action in favor of the corporation arises only from failure of the managers of its affairs at the time to use their powers and to do their duty in respect thereto. If the ordinary powers and duties of directors have been suspended by a receivership, if they are not at the time the managers of its affairs, if they have no power to enforce a cause

of action in its favor, they have and can have no duty in the premises, and their inaction, or refusal to act, can have no legal effect whatever. That the right of a stockholder to sue, as representing the corporation, depends, not upon the attitude of the managers of its affairs in the past, but upon the attitude of the managers at the time the right is asserted by the stockholder's bill, cannot be doubted. Hawes v. Oakland, 104 U. S. 450; Porter v. Sabin, 149 U. S. 478, 13 Sup. Ct. 1008.

It appears from the bill, and was claimed by both sides on the argument, that the receivers, by their appointment in Wisconsin, were vested with the management of the company's property and rights, although the nature of the receivership is not so fully shown as might be desired; in other words, that they were, at the time when this suit was brought, the proper persons to enforce any such cause of action as the complainant asserts. The inquiry, therefore, becomes this: Does the bill show such neglect or refusal by the receivers to enforce this cause of action as entitles the complainant to sue in their stead? The receivers are merely officers of the court. The management of the affairs of the company was taken by the court; by the receivers only as its officers. Receivers can act only under the orders of the court. A request for action by the receivers is not complete until it reaches the court itself, to which the receivers are responsible. Neglect of such a request, or even a refusal of such a request by the receivers alone, certainly cannot justify a stockholder in usurping the receivers' functions, by prosecuting in another court a cause of action which the receivers should have prosecuted. It is the fundamental doctrine, in regard to such stockholders' suits as this, that the stockholder must have exhausted reasonable effort to cause action to be taken by the proper managers of the company's affairs. Such reasonable effort is not exhausted, when the management is in a court, until such court has been asked to act, or to direct action by its receivers. It may well be doubted whether the refusal of such an application by the court would give a stockholder the right to sue. Neglect and dereliction of duty can hardly be charged against a court; especially, in one federal court against another. The refusal of the court to direct suit upon an alleged cause of action would seem rather to prevent a stockholder from suing thereon, than to give occasion for his doing so, unless the court expressly authorized him to sue. This seems to be the result of the decision in Porter v. Sabin, 149 U. S. 478, 13 Sup. Ct. 1008, in which Justice Gray says:

"When a court exercising jurisdiction in equity appoints a receiver of all the property of a corporation, the court assumes the administration of the estate. The possession of the receiver is the possession of the court; and the court itself holds and administers the estate through the receiver, as its officer, for the benefit of those whom the court shall ultimately adjudge to be entitled to it. Wiswall v. Sampson, 14 How. 52, 65; Peale v. Phipps, Id. 368; Booth v. Clark, 17 How. 322, 331; Union Bank v. Kansas City Bank, 136 U. S. 223, 10 Sup. Ct. 1013; Thompson v. Insurance Co., 136 U. S. 287, 297, 10 Sup. Ct. 1019. It is for that court, in its discretion, to decide whether it will determine for itself all claims of or against the receiver, or will allow them to be litigated elsewhere. It may direct claims in favor of the corpora-

tion to be sued on by the receiver in other tribunals, or may leave him to adjust and settle them without suit, as in its judgment may be most beneficial to those interested in the estate."

But, however this may be, there would seem to be no doubt that a stockholder cannot have exhausted reasonable effort to secure the enforcement of a cause of action in the manner in which it should, primarily, be enforced, without applying to the court in which the management of the corporate affairs is vested. No such application is alleged in the bill herein. The only allegations are that plaintiff has requested the receivers to sue, and they have neglected and refused to do so. The further allegation that, since the appointment of the receivers, it has been "impossible for plaintiff to induce said receivers to take any action hostile to said defendants," is hardly to be accepted as an allegation of fact. Squair v. Lookout Mountain Co., 42 Fed. 729.

If, now, it be assumed that for any reason the receivers were not, by their appointment, vested with the power to enforce the alleged cause of action, then the railroad company was the proper party to sue; and upon this assumption the allegations of the bill do not justify action by the complainant in its stead. All that is alleged in this regard is that plaintiff has requested the directors to sue, and they have neglected and refused to do so. The further allegation that, up to the time of the appointment of the receivers, it was "impossible for him to obtain any action by the board of directors hostile to the personal interests of said defendants above named," is not an allegation of the facts, but a conclusion, merely. It may, however, be noticed, in passing, that the plaintiff limits this allegation of impossibility to the time before the appointment of the receivers. The bill does not show when or how the request to sue was made, nor upon what showing of facts, nor whether the persons who then composed the board of directors still continue in office. Only a minority of the board is charged with the wrongs asserted. It is said that the majority acted in what they did through misunderstanding, which would naturally have passed away some time ago. Moreover, although the transactions complained of took place in 1889 and 1890, and there has been ample time to attempt to secure proper attention to them through action of the stockholders, yet it does not appear that any effort has been made to bring about such action. For these and other reasons, even upon the assumption that the powers of the directors in the premises were not suspended by the receivership, the bill does not seem to me to satisfy the requirements of the rules laid down in Hawes v. Oakland, 104 U. S. 450, and similar cases. It does not appear that the complainant "exhausted all the means within his reach to obtain, within the corporation itself, the redress of his grievances, or action in accordance with his wishes."

Another fatal defect of the bill is that it does not show that the court which appointed the receivers has given the complainant leave to sue them. If the effect of the appointment of the receivers was such as appears from the bill, and was assumed or conceded on the argument, these receivers are indispensable parties; and the decision of the supreme court in Porter v. Sabin, 149 U. S. 478, 13 Sup.

Ct. 1008, is conclusive. In that case, after a receiver of a corporation had been appointed by the state court, plaintiffs requested him to sue its president and auditor for money and property lost by their mismanagement. This request was brought to the attention of the court, and, being opposed by a majority of the stockholders, was denied. Then plaintiffs began their suit in the federal court, and applied to the state court for leave to make the receiver a party, and this application was denied; and this was shown in the amended bill. Upon demurrer this bill was dismissed. Justice Gray, delivering the opinion of the supreme court, says:

"Any claim against the receiver of a corporation the court may permit to be put in suit in another tribunal against the receiver, or may reserve to itself the determination of; and no suit, unless expressly authorized by statute, can be brought against the receiver, without the permission of the court which appointed him. Barton v. Barbour, 104 U. S. 126; Railroad Co. v. Cox, 145 U. S. 593, 601, 12 Sup. Ct. 905."

It is argued that the necessity for obtaining such leave of court is dispensed with by section 3 of the act of August 13, 1888 (U. S. Rev. St. Supp. 614), which provides as follows:

"That every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property without the previous leave of the court in which such receiver or manager was appointed."

No act or transaction of the receivers is involved in this suit, unless it be their refusal to sue as requested. In my opinion, that is not an act or transaction of theirs in carrying on the business, within the meaning of this statute.

It is argued that leave to sue the receivers may now be given in this cause, the court taking notice of the fact—not alleged in the bill, but shown, it is said, by its records—that this court, after the appointment of the receivers in Wisconsin, appointed the same persons receivers in a similar cause here. It is unnecessary to decide whether the court, in one cause, is bound to know what its record in another cause discloses, or what action the court has taken in another cause. Nor is it necessary to decide whether, by its expressed or tacit consent in a suit brought against receivers, the court which appointed them may properly cure the defect of lack of leave at the time the suit was begun. It is enough to say that the allegations of the bill and the records of this court either show that the relation of the receivers to the alleged cause of action against Villard and others depends upon their appointment in Wisconsin, and not on their appointment here, or are insufficient for the determination of this question, and that if it is for this court to decide whether this suit should proceed, as against the receivers, this should be decided, not upon the allegations of this bill (which are made upon information and belief, and are admitted only by the demurrants, and by them only for the purposes of their demurrers), but upon a hearing in the cause in which the receivers were appointed, after proper notice to the parties to that cause. No action of this court, however brought about, and whether in this suit or the other, can remove the objection to the bill first stated in this opinion, for

that objection goes to the cause of action. If plaintiff had no right to sue when he began his suit, he cannot maintain his suit by reason of anything occurring thereafter. The demurrers are sustained. Let the bill be dismissed, as against the demurring defendants.

RICHARDSON et al. v. GREEN et al.

(Circuit Court of Appeals, Ninth Circuit. April 19, 1894.)

No. 119.

1. WILLS—CONTEST OF VALIDITY.
   Under the laws of Oregon the validity of a will cannot be contested in the proceedings to probate it, which are purely ex parte; but such contest must be made the subject of a direct attack upon the will in a formal suit inter partes.
2. SAME—JURISDICTION OF FEDERAL COURTS.
   The proceeding under the laws of Oregon to contest the validity of a will which has been already admitted to probate, being a suit between parties, is one of which the United States circuit court may take jurisdiction, where the amount in controversy is sufficient, and the parties are citizens of different states.
3. SAME—ADMISSION OF PROBATE.
   In a suit to set aside a will on the ground that it was forged, where the bill fails to allege the probate of the will, but defendant's answer alleges that it was admitted to probate, the defect in the bill is cured by the answer, and a demurrer on the ground of such defect must be regarded as waived.
4. SAME—LACHES.
   In a suit to set aside a will as being forged, no laches can be imputed to plaintiff on account of the length of time which has elapsed since testator's death, where the suit was commenced immediately after the will was probated by the parties claiming under it, and there are no rights of third persons involved.

Appeal from the Circuit Court of the United States for the District of Oregon.

This was a suit in equity by Clarinda Green and others against Julia Terwilliger and others. There was a decree for complainants (56 Fed. 384), and defendants appeal.

C. A. Dolph and R. Williams, for appellants.

L. L. McArthur and E. W. Bingham, for appellees.

Before McKENNA, Circuit Judge, and KNOWLES, District Judge.

KNOWLES, District Judge. This was an action brought to cancel a certain deed purported to have been made by Philinda Terwilliger to her daughter, Julia Terwilliger, and also a certain will devising to said daughter certain real estate. Said instruments, among other charges concerning the same, are alleged to be forged, and for this reason their cancellation is sought. The bill of complaint is as follows:

"To the Honorable, the Judges of the Circuit Court of the United States for the District of Oregon: Clarinda Green, Anna B. Green, Philinda Green, Mary F. Green, and Mary O. Green, a minor eleven years old, by her next friend, Mary F. Green, her mother, all residents of Nordhoff, Ventura county, state of California, and all citizens of said state of California, bring this,

their bill, against James Terwilliger, Julia Terwilliger Richardson, and T. M. Richardson, her husband, who are all residents of Multnomah county, state of Oregon, and citizens of said state of Oregon. And thereupon your orators complain and say that the defendant James Terwilliger, and his wife, Philinda Terwilliger, became the owners by settlement, etc., of a donation land claim under the act of congress approved September 27, 1850, commonly called the 'Donation Law,' and the acts amendatory thereof; said claim being notification No. 640, certificate No. 1,078, and situate and described as follows: 'Claim 39, notification 640, certificate 1,078, situate in section 9, 10, 15, and 16, in township 1 south, range 1 east, Willamette meridian, containing 630 and 34-100 acres, in Multnomah county, state of Oregon. That the east half of said claim was duly designated by the surveyor general to be held by said wife, Philinda Terwilliger, in her own right. That said Philinda Terwilliger, while still seised as aforesaid of a large portion of said claim, to wit, about 150 acres of the east half of said claim, of the value, at this time, of not less than $25,000, died intestate on or about October —, 1873. That said Philinda Terwilliger had living at the time of her death two children, namely, William O. Green, by her first husband, John H. Green, and the defendant Julia, now intermarried with defendant T. M. Richardson; and that they, said William O. Green and said Julia, were the sole heirs of the said Philinda Terwilliger, and succeeded by inheritance to all the real property of the said Philinda Terwilliger, subject to the estate by the curtesy therein of her said husband, the defendant James Terwilliger. That said James Terwilliger, ever since the death of his said wife, Philinda Terwilliger, has been, and still is, in the lawful possession of all said property as tenant by the curtesy. That your orator Mary F. Green was the wife of said William O. Green, and that said William O. Green died intestate on or about May 21, 1878, without ever having sold or disposed of his interest, or any portion therein, in the estate of his mother, said Philinda Terwilliger. That said William O. Green had by his said wife the following named children, who survived him, and were his sole heirs, to wit: Fannie E. Green, and the complainants Clarinda Green, Anna B. Green, Philinda Green, and Mary O. Green. That said Fannie E. Green, when eleven years old, died, on or about April 11, 1883, without her interest in said estate having been disposed of, leaving her said mother, Mary F. Green, and her said four sisters, her sole heirs. That your orator Mary F. Green is entitled to the undivided 1-50th part, and your other orators are each entitled to the undivided 6-50th parts, and the defendant Julia Richardson is entitled to the undivided 25-50th parts of all the real property which the said Philinda Terwilliger owned at the time of her death, subject to the estate of the said James Terwilliger therein as tenant by the curtesy. That for several years prior to and up to the time of the death of the said Philinda Terwilliger she resided on said claim with the defendants James Terwilliger, and their said daughter, Julia. That soon after the death of said Philinda Terwilliger, said daughter Julia and said T. M. Richardson were intermarried, and that they and the other defendant, James Terwilliger, have ever since resided together. That the defendants have informed your orator that said Philinda Terwilliger had willed all of said real property to her said daughter Julia, to the entire exclusion of your orators, and that the defendants had the will in their possession; and at other times defendants have stated that said Philinda Terwilliger had deeded said real property to said Julia, and that said James Terwilliger had the deed. Your orators are informed and believe and allege that the defendants have such a pretended deed in their possession or under their control, but your orators allege and charge that any will and any deed which the defendants have, or either of them has, or under which defendants claim, or either of them claims, which purports to divest your orators of any rights or interest which they have as aforesaid in the estate of said Philinda Terwilliger as heirs at law is a false, forged, and fraudulent instrument. Your orators allege that no will of said Philinda Terwilliger has ever been filed for probate, nor has any deed from her to any of the defendants ever been filed for record, nor has said pretended deed or will ever been exhibited to your orators; wherefore your orators are unable to give a more particular description of said alleged writing, or of its contents. Your orators allege

and charge that the said several claims, representations, and pretensions of the defendants are wholly false, and are made by them for the purpose and with the intent of injuring your orators, and defrauding them of their said estate, and that the defendants purposely withhold said alleged will from probate, or said alleged deed from record, and from the inspection of your orators, in order that the evidence of the validity of said deed or will may be lost or obscured by lapse of time, and in order that the witnesses, or pretended witnesses, to said will or deed may die before the existence of such instrument becomes known, and in order that your orators may be disabled from contesting its invalidity with as much ability and force as they might have done if the same had been produced and proven or recorded at the proper time. Your orators allege that said James Terwilliger, since the death of his wife, Philinda Terwilliger, has sold considerable portions of said east half of said claim, and conveyed by deeds purporting to convey title to the same in fee simple. And that your orators believe, and therefore allege, that if he is not restrained by this honorable court, he will likewise sell and convey other portions thereof, and thereby throw a further cloud upon the title of your orators. In consideration whereof, and forasmuch as your orators are remediless in the premises by any action at law," etc.

Then follows the prayer to the bill, and also some seven interrogatories propounded to defendants as to their knowledge of said deed or will or both, and as to where the same are, and as to whether they claim to own an interest in said land, etc. To this bill defendants filed a demurrer, on the grounds: First, that the matter specified therein is within the jurisdiction of courts of probate, and is not within the jurisdiction of the circuit court; and, further, because there is not in the bill such a statement of such a case as entitled plaintiffs to any discovery from defendants, or to any relief against them, or either of them. This demurrer was overruled by Judge Deady. Subsequently defendants filed their plea in bar to said bill, setting forth the execution of the will by Philinda Terwilliger, and the probate of the same by the county court of Multnomah county, state of Oregon, on the 27th day of March, 1889. This was overruled. Defendants then filed their answer to the bill, denying the allegations of the same as to the forgery of the will and deed, and alleged that both were duly executed, and then alleged that the will was probated as set forth in the plea. Upon the bill, answer, and replication, the cause went to trial, and upon the facts the court found that both deed and will were forgeries. It will be seen that the parties have changed somewhat since the commencement of the cause, Julia Richardson having died in the mean time, and two of the plaintiffs having married.

The first question for consideration: Did the circuit court have jurisdiction of this cause, or was it within the exclusive jurisdiction of the county court of Multnomah county, Or., where Philinda Terwilliger died? The constitution of the state of Oregon provides that "the county court shall have the jurisdiction pertaining to probate courts," etc. Const. art. 7, § 12. The laws of Oregon provide: "The county court has the exclusive jurisdiction in the first instance pertaining to a court of probate, that is, (1) to take proof of will." There is no definition which describes generally the jurisdiction pertaining to probate courts. They are courts created, as a rule, by statute, and their jurisdiction defined by

statute. In each state where such courts exist their powers are defined by its laws. Often powers are given to them which are different from those which pertain to such courts in any other state. There is no common-law definition which applies to such courts. In considering the constitution of Oregon, then, we must have recourse to the legislation of that state to determine what jurisdiction pertains to probate courts. The territory of Oregon had, by virtue of its organic act, probate courts, and I think in determining what is meant by the clause in the constitution of Oregon we may refer to the laws of that territory in limiting the jurisdiction of the same. I have not found them, so far as they pertain to the question here presented, different from the present laws of Oregon. In determining what is the probate of a will under the laws of Oregon, I find no better guide for this court than the decisions of the highest court of that state.

In the case of Hubbard v. Hubbard, 7 Or. 42, the supreme court said:

"Under the English practice there were two modes of proving a will of personal property,—'the common form,' in which the will was propounded by the executor, and proved ex parte; 'the solemn form,' in which the next of kin of the testator were cited to witness the proceedings, and in which the proof was taken per testes, or in form of law, as it was called. * * * In this state, probate in common form is the only one which appears to have been adopted by any positive enactment of the legislature. Code, §§ 1051, 1052, 1060, 1061."

The same conclusion was reached in Luper v. Werts, 19 Or. 122–126, 23 Pac. 850. In this last case the court urges that it would be better for the legislative authority to require the probate court to issue citation to be served on parties interested in the estate, and have a contest concerning any will. This, I think, shows there was no law in Oregon, when this action was commenced, to warrant any contest upon the validity of a will at the time the same was being probated. What was the effect of probating a will in this manner? The supreme court of Oregon has held that in that state the will could not be attacked in any collateral proceeding. Hubbard v. Hubbard, supra. Under the English law, and in most of the states, a will devising real estate, so far as it affected the same, could be attacked collaterally, such as in an action of ejectment. The probating of a will in the common form had no effect as regards real estate in England. 1 Jarm. Wills, p. 51 (*28). This is a rule in most of the states, but in Oregon a different rule has been established. Under the decisions of the supreme court of Oregon, after a will has been probated, then any one interested in the estate can attack the will in what is called a "direct proceeding." Jones v. Dove, 6 Or. 188; Hubbard v. Hubbard, 7 Or. 42; Brown v. Brown, Id. 299; Clark's Heirs v. Ellis, 9 Or. 133; Chrisman v. Chrisman, 16 Or. 128, 18 Pac. 6; Luper v. Werts, 19 Or. 122, 23 Pac. 850; Potter v. Jones, 20 Or. 240, 25 Pac. 769; Rothrock v. Rothrock, 22 Or. 551, 30 Pac. 453. It is important to determine the nature of this proceeding. In the first place, we find that there are parties to the same (see the style of the above causes); that it is not an

action in rem, in which a contest is made against the validity of the will, and no parties in the sense that one is plaintiff and the other defendant. In the case of Clark's Heirs v. Ellis, supra, we find in the statement of facts the following:

"This proceeding was originally commenced in the county court of Union county by petition of respondents as the heirs at law of William Clark, deceased, against the appellants, to set aside the will of said Clark, and to revoke the probate thereof."

In the case of Luper v. Werts, supra, I find that there Sarah L. Luper filed a petition in the county court to vacate the order admitting the will to probate, and alleging therein that the pretended will was void, etc. The administrators with the will annexed, one of whom was a devisee in the will, and the other the husband of one of the devisees, filed an answer to this petition. It is evident that this was a trial between the parties. In the supreme court one party is termed the appellant and the other the respondent. In the petitions named, as far as can be observed, the same facts are set forth as would be under the same circumstances in a bill in equity.

We now come to the question, can this proceeding be classed as a suit of a civil nature at common law, or in equity? It is provided in section 629, Rev. St. U. S., that:

"The circuit courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature at common law, or in equity," etc.

In the case of Weston v. City Council, 2 Pet. 449, Chief Justice Marshall said of the term "suit":

"The modes of proceeding may be various, but, if the right is litigated between parties in a court of justice, the proceeding by which the decision of the court is sought is a suit."

In the case of Gaines v. Fuentes, 92 U. S. 10, Justice Field, in delivering the opinion of the court, said:

"The suit in the parish court is not a proceeding to establish a will, but to annul it as a muniment of title, and to limit the operation of the decree admitting it to probate. It is in all essential particulars a suit for equitable relief, to cancel an instrument alleged to be void, and to restrain the enforcement of a decree alleged to have been obtained upon false and insufficient testimony."

An examination of the dissenting opinion of Justice Bradley in this case will show that the question as to whether such an action was a suit in equity of a civil nature was the one under discussion. The court held it was such a suit. In this case, also, we observe pointed out the difference between a proceeding in a probate court to prove and establish a will and a case where the validity of a will is litigated between parties. After stating that a federal court has no jurisdiction of the proceeding to probate a will, Justice Field says:

"The reason lies in the nature of the proceeding to probate a will as one in rem, which does not necessarily involve any controversy between parties. Indeed, in the majority of instances, no such controversy exists. In its initiation all persons are cited to appear, whether of the state where the will is

offered or of any other states. From its nature, and from the want of parties, or the fact that all the world are parties, the proceeding is not within the designation of cases at law or in equity."

An examination of the case of Ellis v. Davis, 109 U. S. 485, 3 Sup. Ct. 327, will show that the supreme court again makes a distinction between the probate of a will and an action to try the validity of a will between parties, and when there is a decree or judgment which affects only the parties to the action.

In the Broderick Will Case, 21 Wall. 503, it is stated that ordinarily the probate of a will is a proceeding in rem. It should be observed that in California the proof of a will is of a solemn character, and much different from the ex parte mode of probating a will in Oregon. The suit for contesting a will after the probating of the same in Oregon is undoubtedly one between parties, and binding only the parties thereto, and hence is such a one as a circuit court of the United States could take jurisdiction of when the amount in controversy is sufficient, and the parties plaintiff and defendant citizens of different states.

In the suit of Gaines v. Fuentes, supra, after stating that a suit to annul a will and limit the operation of its probate was in the nature of a suit for equitable relief, the supreme court again says:

"There are no separate equity courts in Louisiana, and suits for special relief of the nature here sought are not designated 'suits in equity,' but they are none the less essentially such suits; and if by the law obtaining in the state, customary or statutory, they can be maintained in a state court, whatever designation that court may bear, we think they may be maintained by original process in a federal court where the parties are, on the one side, citizens of Louisiana, and the other, citizens of other states."

Here it will be seen that if a suit is essentially a suit of a civil nature for equitable relief, and it is customary to prosecute the same in any state court where the action arose, whether the same is a county court or a probate court or a district or circuit court, the proper federal court will have concurrent jurisdiction of the same with such state courts, where the amount is sufficient and the parties are citizens of different states, as prescribed by the United States statutes. It should be observed, also, that when it is customary for such state courts to hear and determine such equitable suits, a United States court, under proper conditions, may hear them. It is not necessary that a statute should exist authorizing the same. The suit in the county court of Oregon in such matters is not authorized directly by any statute, but is a customary exercise of jurisdiction. It was, I think, the intention of the court to approve of the above view in the case of Ellis v. Davis, supra. In it the court said:

"And where provision is made by the laws of a state—as is the case in many—for trying the question of the validity of a will already admitted to probate by a litigation between parties in which that is the sole question, with the effect, if the judgment shall be in the negative, of rendering the probate void for all purposes as between the parties and those in privity with them, it may be that the courts of the United States have jurisdiction, under existing provisions of law, to administer the remedy and establish the right in a case where the controversy is wholly between citizens of different states."

In the Broderick Will Case it was admitted, if a state by statute authorized the bringing of a suit to declare a will void in its courts of law or equity, the same could be maintained in a proper case in a federal court. The views here expressed are supported by the case of Brodhead v. Shoemaker, 44 Fed. 518. I do not think the case of In re Cilley, 58 Fed. 977, can be considered as an authority against them. That was an attempt to remove a proceeding probating a will, and which had been appealed from the probate court to a higher court. As near as can be collected from the statement of the facts, it was a proceeding in rem, in which a contest was presented, and not a suit between parties. The title of the cause, In re Cilley, clearly indicates this.

It is urged by appellants that this suit cannot be maintained, because the appellees had a plain, speedy, and adequate remedy at law. No such remedy has been pointed out to this court under the laws of Oregon. It is true that in Ellis v. Davis, supra, the court decided that under the laws of Louisiana the complainant had a remedy at law in an action of revindication. This action would seem to be somewhat in the nature of an action of ejectment at common law, and the action to recover possession of real estate under the code practice. The will devising real estate could be thus attacked in England and many of the states, but in Oregon, when a will is probated, it cannot be attacked in any collateral proceeding. James Terwilliger had the right to the possession of the property as a tenant by curtesy, and no action could be maintained against him for the possession of the premises. There seems to be a dispute between the counsel for the opposite parties in this case as to the right the plaintiff would have, under the laws of Oregon, to compel the production of the will in the probate court, and the probating of the same. Whether or not such right would exist depends upon the construction of a statute of that state which does not seem to have been interpreted by the highest court thereof. But let it be granted that plaintiffs could have caused the production of the will in the probate court, what relief would that have afforded them? As we have seen, the probating of the will would have been in the common form,—ex parte. They would not have been a party to the proceeding. What relief the course suggested would have afforded plaintiffs it is difficult to see.

There is another question of more moment and difficulty presented in the fact that at the time the bill was filed in this action the will had not been probated. Justice Matthews, in the case of Ellis v. Davis, supra, says:

"And as, by law, in almost all the states, no instrument can be effective as a will until proved, no rights in relation to it capable of being contested between parties can arise until preliminary probate has been first made."

The statement here would seem too broad. The truth is that a valid will, before it is probated, devises the title to the lands described in the will, which takes effect upon the death of the testator. The probating of a will in common form, as we have seen, in England, has no effect upon real estate. 1 Jarm. Wills, *28. By

some statute in England, passed in 1857, it would seem the probate of a will furnished prima facie evidence of its validity and contents. The only effect of probating a will in common form in most of the states is that it can be introduced in evidence. This, I think, is the effect of the decisions in Oregon. As a valid will conveys title to real estate to the devisees named therein, it would appear that the assertion of the devising by will of certain real estate by parties residing on the land would be a cloud upon the title of the heirs, and there ought to be some remedy for removing that cloud. In this case plaintiffs had no remedy at law. They could not bring an action to recover the possession of the property. The probating of the will afforded no relief to them. They would not be a party to the proceeding. It would be ex parte. Philinda Terwilliger died in 1873. This action was commenced in 1889. Sixteen years had elapsed since her death, and the deed had not been recorded, and the will was not probated. All this time there was a vague assertion of title to the premises in Julia Terwilliger, now by virtue of a deed, and again by virtue of a will. Plaintiffs had never seen these instruments. They had not been exhibited to them. The only remedy that could be afforded them would be to compel the probating of this will in an ex parte manner, so that they might bring the very suit they have in this case. It will be observed that under the decisions in Oregon, when a will is attacked as a forgery, after it is probated, the probating amounts to nothing, and the burden is cast upon the parties claiming under the will to prove the validity of the will. Hubbard v. Hubbard, supra. This is analogous to the rule that prevails in those states where a will to real estate can be attacked in a collateral action in a suit at law, such as ejectment. It would seem like demanding of plaintiffs a vain thing to institute proceedings to compel the probating of a will under such circumstances. It is true, there are decisions which hold that a court of equity will not try the validity of a will. Such is the rule expressed in 1 Story, Eq. Jur. 184, and 2 Story, Eq. Jur. 1445, 1446. This rule is based upon the ground that, as far as personal property is concerned, the probate of the will was vested in courts having the same powers as the ecclesiastical courts of England, and was conclusive; and, as to the real estate, the probating was not conclusive, and there was a remedy at law, namely, ejectment, in which the validity could be tried. At the time this rule was adopted no such conditions were presented as we find in Oregon. Considering the conditions of this case, that time was passing, and witnesses liable to die, and it would seem that a remedy ought to be afforded in a court of equity for the wrongs alleged on the part of plaintiffs. As Judge Sawyer said in the case of Sharon v. Hill, 10 Sawy. 48, 20 Fed. 1:

"There is a charge of forgery and fraud, and we think the instrument, if a forgery and fraud, ought to be canceled. If there is no remedy in equity for such a wrong as is charged, then the law is, indeed, impotent to protect the community against frauds of the most far-reaching and astounding character. If there is no precedent for a case upon the exact state of facts disclosed by the bill, it must be because no instance exactly like it has ever before arisen."

But let it be conceded that as a rule of law the relief asked in this bill could not be granted until the will was probated, that no rights in relation to it capable of being contested between the parties could arise, then how stands this case? The bill does not show that the will had been probated. But the plea and the answer in the case both show that on the 28th day of March, 1889,—24 days after the bill was filed,—said will was filed and probated in the county court in and for Multnomah county, state of Oregon. At this time the bill in the case could have been amended, and this fact set forth, although it was a fact that occurred after the bill was filed, and a condition of bringing the suit. Equity rule 28; Story, Eq. Pl. § 885, note 6; Fost. Fed. Pr. (1st Ed.) 240; Buck v. Buck, 11 Paige, 170. The appearance of defendants was made on the day the will was probated. There is a rule that when a complaint is defective in some material allegation, and that allegation is supplied by the answer, the defect in the complaint is cured. Pom. Rem. & Rem. Rights, § 579; Bate v. Graham, 11 N. Y. 237; White v. Joy, 13 N. Y. 83–86; Vernam v. Smith, 15 N. Y. 327. It is true, these decisions arose under the code pleading, but I see no reason why the same rule should not apply under any system of pleading. It would seem highly technical for a court to reverse a cause, and compel a new trial, when all the facts necessary for the proper determination of the cause are before it in the record. I find the same principle is maintained in the federal courts. In the case of Hagan v. Walker, 14 How. 29–35, facts stated in an answer were held to show that what would appear to have been a defective statement in the bill was not essential on account of the existence of these facts. In the case of Johnson v. Waters, 111 U. S. 640, 4 Sup. Ct. 619, it was held that the statement of facts in the answer could be called into requisition to show that a claim was not prescribed as stated. In the case of Cavender v. Cavender, 114 U. S. 464, 5 Sup. Ct. 955, a demurrer had been interposed to the bill for a defective statement of the cause of action, and overruled. The defendant answered. The supreme court said, in considering the error in overruling the demurrer: "If there was any defect in the statement in the bill, it was rendered immaterial by statements in the answer, and is not ground of complaint." The demurrer in this case, under such circumstances, must be considered as waived. The plea stated the very facts which made the bill good, if it was necessary that the will should be probated before the action was commenced. There were other reasons for overruling the plea, which, on account of the position I have taken as to the right to maintain the action in the circuit court, it is not necessary now to discuss.

Appellants urge that the appellees were guilty of laches in not bringing this suit at an earlier date, and that the bill should have stated facts showing the cause of the delay. In support of this proposition several decisions of the supreme court have been cited. These cases were all different as to the facts from the case at bar. In the case of Badger v. Badger, 2 Wall. 94, there was a sale of real estate at administrator's sale. It was a public sale, well known to the widows, heirs, and guardian. It was bid in by a friend of one

of the administrators, and soon after conveyed to him. This administrator was Daniel Badger, a brother of the other heirs. It was, some 25 years afterwards, claimed that this sale was void as fraudulent. Fraud in such a transaction does not make the sale void, but only voidable. A failure to avoid the same within a reasonable time is construed into a waiver of the fraud. It also appeared that the most important witnesses in the case had died, and that the brother who purchased the property had gone into possession of the same. The case of Marsh v. Whitmore, 21 Wall. 184, was a case where fraud was charged in a sale, and time had elapsed. The sale was a voidable one, and no sufficient excuse for the delay in seeking to avoid the sale appeared in the bill. The case of Wood v. Carpenter, 101 U. S. 140, was a case of the fraudulent confession of judgments and assignment of property. These were transactions which, if not disaffirmed, amounted to a waiver of the fraud. In this case at bar, the charge is that the deed and will are forgeries. The beneficiary in each instrument never took possession of the property under the same. It does not appear that any third person, under the strength of these instruments, has acquired any of the property described therein. The instruments have never been made records, as they should have been if genuine. Time will not make a forged instrument valid. It might be that a party might so conduct himself as to be estopped from asserting that an instrument was forged. It is stated in Pomeroy's Equity Jurisprudence (section 918) that when a person is deprived of his property by a forgery he can recover it from an innocent purchaser, if he has done nothing to estop him from asserting his right. In some cases it has been held that only when the adverse party has been lulled into doing something which he would not have done but for the neglect or delay in asserting a right will the doctrine of laches apply. Gibbons v. Hoag, 95 Ill. 45; Daggers v. Van Dyck, 37 N. J. Eq. 130; 12 Am. & Eng. Enc. Law, "Laches," p. 544. It would seem hardly to comport with a court appealing to right and conscience to hold that, unless an heir should bring a suit within what might be termed a reasonable time to cancel a forged will which had not been probated, still in the hands of those implicated in its forgery, and having done nothing to estop him from asserting his rights, he would be held to have waived or affirmed the forgery; and, further, that under such circumstances, unless he should give full and particular reasons for not bringing an action within a limited time in his bill, he would have no standing in a court of equity. The bare statement of such propositions ought to be their own refutation. But, if it should be granted that the position as to laches of appellant is correct, still, in this case, considering the position that this action could not be maintained until the will was probated, there is no room for the doctrine of laches in the case. The suit was actually commenced before the will was probated or the deed recorded.

There appears to have been some complaint as to the evidence of experts giving evidence from a comparison of handwritings. This is permitted by section 765 of Hill's Annotated Laws of Oregon, and the case of Connecticut Mut. Life Ins. Co. v. Union Trust Co., 112

U. S. 250, 5 Sup. Ct. 119, sets the matter at rest, as far as this court is concerned, in favor of the admission of such evidence. We have found as a fact that both the deed and will were never executed by Philinda Terwilliger, and are forgeries. We have reached this conclusion from a comparison of the acknowledged handwriting of said Philinda Terwilliger with that exhibited in the signatures of said instruments. We have been guided in reaching this conclusion by our own inspection, guided somewhat by the evidence of the experts in the case. There are quite a number of circumstances, independent of this comparison of handwritings, which lead to the same conclusion. Julia Terwilliger Richardson, on March 21, 1875, wrote her brother, William O. Green, a letter. To this letter James Terwilliger added a note, in which he stated, among other things, as follows: "If there is anything more that can be done for you, it shall be done, as your mother deeded all her property here to Julia after her and my death." This corresponding with the language in the deed, there can be no doubt but this note was written by him. Why did he then fail to state anything about the will, if there was one? The will bears date the day Calvin Green, one of her sons, was killed in Eureka, Nev. He is not named in the will, but her other son is. It is evident that the naming of this son in the will was with the view of preventing him from contesting the will under the laws of Oregon. Waterman, who swears he wrote the will, testifies that Philinda Terwilliger knew it was necessary to mention her sons in the will, or, under the laws of Oregon, they would come in for their share in the estate as though no will had been executed. Is it probable that, remembering one son, she should forget the other under such circumstances? Is it not more probable that the one who wrote this will knew at the time there was but one son living, and did not recall, or did not know, that Philinda Terwilliger could not have known of the death of the other, at the date given to the will? Then there is the important circumstance that the will and deed were kept for near 16 years without giving any publicity thereto. No record was made of them. It does not seem reasonable that James Terwilliger would have kept the will in his possession for near 16 years without taking legal advice concerning the same, and having it probated, if he felt that it was genuine. His evidence upon the subject of keeping this will as he did, and not communicating the fact to his daughter, is not satisfactory. The daughter, Julia, testifies that she did not know of this will until in 1881, some eight years after her mother died, when she was told of it by her uncle, John Terwilliger. James Terwilliger says he found this will, after the death of his wife, among her papers and "knickknacks." He does not say he knew of this will before this time. Taking human beings as we find them, we feel sure that any man of ordinary intelligence would have made known the fact of finding this will as he swears he did. Any one called upon to weigh human testimony must judge of its probability in connection with his knowledge of human nature, and the probable conduct of any human being under a given state of circumstances. We should say that it would be the natural act of

any reasonable person finding so important an instrument, under such circumstances, to make it known to those interested. But he, according to his own testimony, said nothing to any one. When he wrote to William O. Green, some two years after his mother's death, he says nothing about it, under circumstances that would have induced a declaration on the subject, for in that letter he mentions the deed. The reasons it is said Philinda Terwilliger gave for disinheriting her sons are not satisfactory. "She said that her sons had had their time to make money, and that, therefore, she would give them nothing." Again, it is said that she urged that they had got all the property got by her first husband, Green. We do not know what the law of Oregon was, at the time she reached there, upon the right of the wife in the personal property of her husband; at common law, upon a distribution of the same, she would have been entitled to only one-third thereof. 2 Bl. Comm. 515. Green had been drowned in the Indian country, in what is now part of the state of Idaho. The value of this property was not much, at all events. Then it is claimed that all the estate of Calvin Green was given to William O. Green. This proves to be untrue. It further appears that the estate of Calvin Green was of no value to his brother William. These matters exhibit that James Terwilliger, his daughter, and friends were seeking for some motive for the unnatural act of a mother disinheriting her sons. For a mother to do this should require some strong motive, when we consider the unfaltering love of a mother for her offspring. Philinda Terwilliger was no exception, as we view the evidence, in this regard, among mothers. The motives assigned for this act seem not to be based upon facts, and are illusory. It would seem that Waterman wrote the will, and yet he does not remember that there was an erasure in the signature of Philinda Terwilliger. He remembers many minute circumstances, according to his evidence, in regard to writing the will, but nothing as to this fact. It looks somewhat as though this was a fact he would prefer not to have investigated. One would think, when his mind was called to so important a fact, he would have remembered it. After this will was made there is no doubt there was some talk about it; not open talk, but information given secretly of the fact that such an instrument existed. This would be the natural conduct of human beings, under the circumstances, considering that the will was forged. Julia hears of it first from her uncle, John, in 1881, eight years after her mother's death, and not from her father. It is singular, after having received this information, she says nothing to her father upon the subject, or he to her. Yet when Mary F. Green came to the house about this time she speaks to her father, requesting that he exhibit the will and deed to Mrs. Green, as though familiar with the fact that he possessed the instruments, and he was aware that she knew he possessed them. In some points the evidence of Julia and her father does not fully agree. In considering the evidence of the witnesses who are relatives of Julia Terwilliger, we find it quite manifest that they thought it perfectly just that her mother, Philinda, should give her all the property she had become possessed of after

her marriage with James Terwilliger. They seem in some way to have been impressed with the idea that this property had been acquired by the joint action of the father and mother. The truth is, however, that this 150 acres of land was a gift of the United States to Philinda Terwilliger as a reward for her becoming a pioneer in the settlement of its distant possessions, and that the means which enabled her to reach Oregon she derived from her first husband, Green. We find, therefore, that the opinion that the will is a forgery, judging from the handwriting, is corroborated by many circumstances bearing upon the question. When we consider that the deed is defective, we find a motive for the forging of the will; and when we find that the will is a forgery, we feel that interested parties were willing to commit any forgeries in order to vest the title to this real estate in Julia Terwilliger. Judging from the handwriting in the signature to the deed, we feel confident Philinda Terwilliger never wrote it.

The evidence in this case was so fully and ably discussed by Judge Hawley, presiding upon the trial of the cause in the district of Oregon, we cannot hope to say more than he has upon the facts in the case which led him to the conclusion that both deed and will were forgeries. 56 Fed. 384. We concur fully in his views upon this point, and hence feel that it is unnecessary to more fully present them ourselves.

It is ordered that the judgment of the circuit court be, and the same is hereby, affirmed, with costs.

McKENNA, Circuit Judge. I concur in the reasoning and conclusion of my associate as to the deed and will, and think both are forgeries. I believe, also, that the authorities cited by him establish that courts of equity, by virtue of their general authority to enforce equitable rights and remedies, have no power to avoid a will, or to set aside its probate on the ground of fraud, mistake, or forgery; this being within the exclusive jurisdiction of courts of probate. But where such a remedy is given to a state court by an action inter partes, the remedy may be adopted by the federal courts if the controversy is between citizens of different states. By the constitution of Oregon (article 7, § 12) and by its statutes (Hill's Ann. Laws, § 895) the county court has exclusive jurisdiction in the first instance of the probate of wills. The probate is in the common form, but the judgment is conclusive until set aside on appeal or impeached by direct proceedings (Jones v. Dove, 6 Or. 188; Hubbard v. Hubbard, 7 Or. 44); and all acts done under it in the course of administration are valid (Brown v. Brown, Id. 285). A suit, however, may be maintained in the county court to declare the will void, and revoke its probate. Clark's Heirs v. Ellis, 9 Or. 132, and cases supra. The nature of this suit is not precisely defined by the decisions, but it is certainly inter partes, and seems to be within the doctrine declared in Ellis v. Davis, 109 U. S. 496, 497, 3 Sup. Ct. 327. This remedy existing in the Oregon courts, it could be exercised by the United States circuit court, but preliminary probate of the will was essential to it. Ellis v. Davis,

109 U. S. 497, 3 Sup. Ct. 327. This probate had not been made when the suit at bar was brought. It therefore follows no cause of action existed to cancel the will. The defendant demurred to this ground of relief. The cause of demurrer stated was "that the said matter is within the jurisdiction pertaining to courts of probate, and is not within the jurisdiction of this court, and does not contain sufficient matter of equity whereupon the court can ground any decree in favor of said complainants, or give complainants any relief against these defendants." This is not very clear, but, interpreting it by the brief of appellants' counsel, the point was not intended to be made that the United States circuit court had no jurisdiction because there had been no preliminary probate, but that the relief sought was essentially a matter of probate, and resided exclusively in the state court having probate jurisdiction. The demurrer was overruled, the court filing no opinion. On the 27th of March, 1889,—23 days after the bill was filed,—the will was probated in the first instance in the proper county court of Oregon, and this fact alleged in a plea in abatement, and that it was established as the last will and testament of Philinda Terwilliger, and that the decree of the court had not been reversed or appealed from. The plea was held insufficient. Its allegations were substantially repeated in the answer which was filed at the same time as the plea. It will be observed that the plea and the answer repeating it were based on the same ground as the demurrer,—that a court of equity had no jurisdiction. The answer, however, brought into the pleadings the necessary condition of the maintenance of the suit, and on this fact, with the others proved, I think it was competent to the court to give relief. It was sufficient if the court had jurisdiction at the time the decree was entered. Railroad Co. v. Ketchum, 101 U. S. 298. The decree, however, should be modified. It follows the prayer of the bill, and not the case as made. It should have adjudged the will invalid, and the revocation of its probate in accordance with the relief given in the Oregon courts.

PARKS v. BOARD OF COM'RS OF WYANDOTTE COUNTY.

FIRST NAT. BANK OF LANSDALE v. SAME.

(Circuit Court, D. Kansas, First Division. May 16, 1894.)

Nos. 6,766, 6,864.

1. CONSTITUTIONAL LAW—DELEGATION OF TAXING POWER—ROADS.
   Acts Kan. 1887, c. 214, which provides that, if the resident landowners within half a mile on either side of a road shall petition the county commissioners to improve the road, the latter shall appoint three road commissioners to take charge of the improvement and assess two-thirds of the expense against the lands in the district, the balance to be paid out of the general county fund, is an unconstitutional delegation of the taxing power, since Const. Kan. art. 2, § 21, which declares that "the legislature may confer upon tribunals transacting the county business of the several counties such powers of local legislation and administration as it shall deem expedient," necessarily precludes any implication of authority to

delegate to road commissioners or to resident landowners near a road the power of taxing all the property in the county. Board v. Abbott (Kan.) 34 Pac. 416, followed.

2. SAME—COUNTY WARRANTS.
Certificates of indebtedness issued by a county by virtue of an unconstitutional law are void.

In Equity. On demurrer.

Suits by Clarence A. Parks and the First National Bank of Lansdale, Pa., respectively, against the board of commissioners of Wyandotte county, Kan.

Buchan, Freeman & Porter, for plaintiffs.
McGrew & Watson, for defendant.

WILLIAMS, District Judge. The bills in these causes seek to recover against the county of Wyandotte upon instruments in writing executed by road commissioners appointed by the county commissioners under an act of the legislature of the state of Kansas entitled "An act for the improvement of county roads" (Acts 1887, c. 214). The county commissioners filed answers to the bills, setting up the unconstitutionality of the act, and denying that the persons who signed the instruments had any authority in law to execute them. The complainants demurred to the answers. The act provides that whenever a majority of the resident landowners within one-half mile on either side of any regularly laid-out road within the terminal points mentioned in the petition shall petition to the board of county commissioners of any county for the improvement of a road it shall be the duty of the county commissioners to appoint three road commissioners, resident landowners of the county, to take charge of the improvement. In payment for work done or materials furnished the act authorized these road commissioners to issue certificates bearing interest at the rate of 7 per cent. One-third of the expense of the improvement was to be paid out of the general county fund, and two-thirds to be assessed by these road commissioners against the lands in the district, according to the benefits. By the terms of the act, a few landowners along any road might set in motion the machinery of taxation, and tax the whole county; and at the same time the act delegated to these road commissioners the power to assess the lands of the district. Local assessments are an exercise of the taxing power. Cooley, Tax'n, 623, 624. The rule that legislative authority cannot be delegated applies to local assessments, the same as to other taxes. Id. 655

Does the constitution of the state of Kansas authorize the legislature to delegate the power of taxation either to the signers of these petitions or to these road commissioners? Can a tax be arbitrarily forced upon the taxpayers of a county, either by individuals or by officials in whose appointment they have no voice? The power of taxation is a power inherent in all governments. In a constitutional government, the people, by the constitution, confer it on the legislature. It is one of the highest attributes of sovereignty. It includes the power to destroy. It appropriates the property and

labor of the people taxed. Unrestrained power of taxation necessarily leads to tyranny and despotism. Hence, in all free governments, the power to tax must be limited to the necessities for the purposes of government, and the agencies for local taxation should be fixed and their powers limited by organic law, and they should be so selected as to be directly answerable for their official acts to their local constituencies or districts to be taxed. If they act corruptly, those directly interested may then remove them, and appoint others. If those directly interested have no voice in their appointment, or power to remove them, they have no means of correcting their abuses. No other rule can secure those to be taxed from oppression and fraud on the part of the taxing officers. In McCulloch v. Maryland, 4 Wheat. 428, Marshall, C. J., said:

"The only security against the abuse of this power [the taxing power] is found in the structure of our government itself. In imposing a tax the legislature acts upon its constituents. This is, in general, a sufficient security against erroneous and oppressive taxation."

This reasoning applies with equal force to all kinds of taxation, and has been applied as well to local assessments or improvement districts as to taxes levied in local, political, and municipal corporations. Wilcox v. Paddock, 65 Mich. 23, 31 N. W. 609; Harward v. Drain Co., 51 Ill. 130; People v. Hurlbut, 24 Mich. 88–108; People v. Township of Springwells, 25 Mich. 153; Board of Park Com'rs v. Common Council of Detroit, 28 Mich. 228; Schultes v. Eberly, 82 Ala. 242, 2 South. 345; Pope v. Phifer, 3 Heisk. 698, 699. Self-taxation, or taxation by officers chosen by or answerable to those directly interested in the district to be taxed, is inseparable from that protection of the right of property that is either expressly or impliedly guarantied by all written constitutions, under our system of government. Of all the powers of government the one most liable to abuse is the power of taxation. If placed in hands irresponsible to the people of the district to be taxed, its abuse is a mere question of time. If taxes may be forced on the people of a whole county, arbitrarily, by a few people signing a petition, it is plain that the people of the county, being the district to be taxed, have no voice in or control over the tax. There is no limit to the cost of these improvements, and the taxpayer is absolutely without means to check or control abuses that naturally follow arbitrary and irresponsible power over the property of others. The act is a plain violation of the principle of self-taxation, and a clear invasion of the right of property. The people, by the constitution, did not authorize the legislature to so jeopardize the right of property. The legislature is not the fountain—not the source—of power. Under our system of government the legislature can exercise only such powers as the people have delegated to that body, either expressly or by necessary implication, by the constitution. All rights not so delegated are retained by the people. The right to life, liberty, and property is among the inherent and inalienable rights that the people did not commit to the legislature. Constitutions are adopted and governments administered for the pro-

tection, and not for the destruction, of these reserved rights of the people. People v. Morris, 13 Wend. 328; 1 Blackw. Tax Titles, §§ 15, 16. Illegal or oppressive taxation is destructive of the right of property, and is not government, under the constitution; but is misgovernment. "We suppose it will be conceded by every one that the legislature have no inherent power of any kind; that they possess no power except such as is delegated to them by the people; and that, unless the constitution of the state authorizes them to enact such a law as the one now under consideration, they had no authority to do so." Leavenworth Co. v. Miller, 7 Kan. 489. The conferring on the legislature of the sovereign power to tax is for the purposes of government. In pursuance of the purposes of government, the legislature may delegate the power to counties, cities, towns, and villages. Cooley, Tax'n, 63. If not expressed in the constitution, this power to delegate exists by necessary implication, for the reason that counties, cities, towns, and villages are parts of the machinery of state, and the delegation of the taxing power to them is necessary in the administration of the state government. In some states the power of the legislature to delegate the taxing power is not left to be supplied by necessary implication, but the people, by the constitution, expressly authorize the delegation of the taxing power to certain agencies named in the instrument. The constitution of Kansas fixes the agencies for local taxation, and the limit of their powers is well defined by the two following provisions:

"Sec. 21, art. 2. The legislature may confer upon tribunals transacting the county business of the several counties such powers of local legislation and administration as it shall deem expedient."

"Sec. 5, art. 12. Provision shall be made by general laws for organization of cities, towns and villages and their power of taxation, assessment, borrowing money, contracting debts and loaning their credit, shall be so restricted as to prevent the abuse of such power."

The express authority here granted precludes any implication of the authority to delegate the power of taxation to any other agencies than those named. Keesee v. Board of Ed., 6 Cold. 127; Harward v. Drain Co., 51 Ill. 130; Updike v. Wright, 81 Ill. 49. There is nothing in either of the sections to authorize the delegation of the power to tax, or the power to make these special assessments, to the signers of these petitions for the improvement, nor to the road commissioners. Neither of these bodies is the tribunal that transacts the county business, nor is the improvement within any organized city, town, or village. The constitution not having authorized the legislature to so delegate the taxing power, no such authority existed. Schultes v. Eberly, 82 Ala. 242, 2 South. 345; Cooley, Tax'n, 61; 1 Desty, Tax'n, 419; 1 Blackw. Tax Titles, 118. The road commissioners, by the terms of the act, need have no interest in the improvement, nor does the power that appoints them have any interest in the district to be assessed. The road commissioners are in no way answerable for their acts to the owners of the lands of the district, nor have the taxpayers of the county any discretion, voice, or control over the affairs of the district, although they

pay one-third of the cost. It is an arbitrary proceeding. The majority of any small district may force the tax upon the whole county.

Since the filing of these bills the supreme court of Kansas has held this act unconstitutional in the case of Board v. Abbott, 34 Pac. 419. The court in this case said:

"The act gives a majority of the resident landowners of a special and small taxing district, established at their instance, the power to subject the land and personal property within the district to two-thirds of the cost of improving any county road in the district, according to the benefit to the land and personal property within such taxing district; and, in addition, gives such resident landholder in such special and small district the power to compel all the taxpayers of the county to pay one-third of such special taxes and assessments, without having any voice, either through their own votes or through the action of any county tribunal or other elected officers. * * * Only a part interested have any authority. They can, under this statute, impose taxes or special assessments on other taxing districts and on the whole county, without any right of such other taxing districts to vote, or the county as a whole to have any voice in the proceedings."

I fully concur with the conclusion of the supreme court of Kansas.

The act being unconstitutional, what is the standing of the instruments sued on? "An unconstitutional act is not a law. It confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed." Norton v. Shelby Co., 118 U. S. 441, 6 Sup. Ct. 1121. The road commissioners were authorized, by section 6 of the act, to issue certificates for work done or materials furnished. The instruments sued on certify that the county of Wyandotte is indebted to and promises to pay the bearer the sum named in each certificate. These certificates all refer to the act, and recite what they were given for, and are signed by the road commissioners. The act being unconstitutional, it created no authority in the road commissioners. They in no way represented the county, and their signatures could no more bind the county than the signatures of any other citizens of the county. The face of the certificates contained the evidence of their invalidity, and were notice to every person receiving them that they were invalid. As there was no law authorizing the county to enter into such contracts, and the instruments sued on not having been executed by any authority that represented the county, they could not be ratified. Marsh v. Fulton Co., 10 Wall. 677; Risley v. Village of Howell, 57 Fed. 544. These certificates cannot be a charge against the county. The demurrers to the answers are overruled.

PUTNAM v. JACKSONVILLE, L. & ST. L. RY. CO. et al.

(Circuit Court, S. D. Illinois. December 8, 1893.)

1. APPOINTMENT OF A RECEIVER OF RAILWAY.

Upon bill to foreclose railway mortgage, and for appointment of a receiver, filed by a bondholder, alleging that the mortgagor railway company had made default in the payment of taxes lawfully levied and im-

posed upon the railway premises, and that, in certain counties, it suffered and permitted its railroad to be sold for such taxes, and alleging that the mortgagor is hopelessly insolvent, and unable to pay its present and accruing indebtedness, and that it has failed, neglected, and refused to pay wages and operating expenses, and other obligations and indebtedness, amounting to more than $200,000, and alleging that complainant, upon discovering such facts, applied to the trustee to take action, and that the trustee has failed and neglected to take any steps, *held*, that a case was made for the appointment of a receiver.

2. SAME—CLAIM FOR LABOR AND SUPPLIES.
In view of the rule of Fosdick v. Schall, 99 U. S. 235, and later cases, giving claims for labor and supplies a preference over the mortgage debt, a bondholder has a right to apprehend that his interest will suffer in that respect if such claims are allowed to remain in arrears.

3. SAME.
Intervening petition of persons holding labor claims, which have not been reduced to judgment, *held* not to show grounds for appointing a receiver, although such claims are against three railway companies, or one of three railway companies, whose lines are operated together as one line under a common name, and there is a complication or confusion of accounts between such companies.

4. SAME—BILL FOR AN ACCOUNTING.
Semble, that a bill for an accounting, under any ordinary circumstances (in this case, by receivers of one of the railway companies whose railways are operated under a single management, and as a single line, for an accounting of such joint management), does not warrant the appointment of a receiver until the account has been adjusted, and a liability established.

This was a motion by complainant, Henry W. Putnam, a holder of bonds secured by mortgage from the Jacksonville, Louisville & St. Louis Railway Company to the Finance Company of Pennsylvania, upon his sworn bill of foreclosure, for the appointment of a receiver of the railway and premises and property covered by such mortgage; also, application for a receiver, of certain intervening petitioners, employes of the Jacksonville Southeastern Line, of which the defendant railway company was a part; and also the application for a receiver, upon their intervening petition, of the receivers of the Chicago, Peoria & St. Louis Railway Company, which road was also a part of the Jacksonville Southeastern Line.

The Chicago, Peoria & St. Louis Railway Company was owner of about 168 miles of railway, extending from Pekin, Ill., through Havana, to Jacksonville, Ill., with a line from Havana to Springfield, and a line of railway from Litchfield to East St. Louis, which latter line was disconnected from the former lines. The Jacksonville, Louisville & St. Louis Railway Company was the owner of the line of railway extending from Jacksonville, Ill., through Litchfield, to Centralia,—a distance of about 112 miles. The Litchfield, Carrollton & Western Railway Company was the owner of the line of 52 miles of railway extending from Barnett, Ill., westerly, to Columbiana, on the Illinois river. These lines of railroad were under one management, and were operated together under the name of the Jacksonville Southeastern Line. There appeared to be, however, no express agreement between the companies, providing for such joint operation, or for the terms thereof. The business was conducted in the name of the Jacksonville Southeastern Line. The employes were employed by the management under this name.

Article 2 of the mortgage in question, from the Jacksonville, Louisville & St. Louis Railway Company to the Finance Company of Pennsylvania, provided that "until default shall be made by said party of the first part, its successors or assigns, in the payment of interest or principal of said bonds, or in the due observance of the covenants and agreements hereinafter contained on the part and behalf of the said first party of the first part, said party of the

first part, its successors and assigns, shall be suffered and permitted to remain in the actual possession of said railway and premises, and to exercise the franchises and rights relating thereto, and to collect, receive, and use the revenues and profits thereof in any manner which will not impair the lien created by these presents." And the mortgagor thereby covenanted that it (the mortgagor), remaining in the possession of said railway and premises, should and would keep the said railway in good order, and safe running condition, and should and would, from time to time, pay and discharge all taxes, assessments, and governmental charges lawfully imposed upon said railway and premises, so that the priority of said mortgage might be duly preserved, and that said mortgagor would not do or suffer any act or thing whatever whereby the lien of said mortgage might or could be impaired, until said bonds, and all interest thereon, should be fully paid and satisfied. Article 3 of the mortgage provided that in case default should be made in the payment of any installment of interest upon said bonds, or any of them, when such interest should become due and be demanded, and such interest, or any part thereof, should remain unpaid and in arrears for six months, or in case default should be made in the due observance and performance of the covenant of further assurance in said mortgage, or in the payment of any taxes, assessments, or other governmental charges which might be lawfully levied or imposed upon said railway or premises, or any part thereof, and either of said defaults should continue for six months, or in case default should be made in the payment of the principal of said bonds, or any of them, then it should be lawful for said trustee or enter into and upon the said railway and premises, and the same to have, hold, and enjoy, operating said railway, making such repairs, replacements, and improvements thereto as the trustee might deem expedient, and to collect and receive all revenues and profits, and after deducting expenses and payments for taxes and assessments, or other charges or liens prior to such mortgage, to apply the revenues and profits to the payment of interest as therein provided. Article 5 provided that in case default should be made in any installment of interest, and such interest should remain unpaid and in arrears for six months, the principal of each and all of said bonds might be declared by said trustee, or by a majority in interest of the holders of all of said bonds outstanding, to be, and should become and be, due and payable immediately. Article 6 provided that in case default should be made in the payment of interest upon any of said bonds when such interest should become due, and be demanded, and such default should continue for six months, or in case default should be made in the payment of the principal of said bonds, it should be the duty of the trustee to take appropriate proceedings, at law or in equity, to enforce the rights of the holders of said bonds, upon a requisition signed by holders of at least one-third in amount of said bonds outstanding.

The bill of complaint of Putnam, which was filed December 7, 1893, alleged that said mortgagor railway company had made default in the payment of taxes lawfully levied upon said railway and premises, and that said default had continued for more than six months prior to December 1, 1893, and still continues; that on May 8, 1893, said mortgagor railway company, being in default in the payment of its taxes due for the year 1892 in Clinton county, Ill., suffered and permitted its road to be sold for such taxes, and the same was sold, as provided by law, to one Keshner, for the sum of $1,302.84; that said railway company did not pay the taxes lawfully levied upon said railway and premises in Macoupin county, Ill., for the year 1892, amounting to $2,538.35; and that, by reason thereof, penalties to the amount of $634.59, costs and interest to the amount of $51.03, had accrued, and that by reason of such failure said railway and premises in said county were forfeited to the state of Illinois, and that said taxes, penalties, costs, and interest in said counties are still due and unpaid, and that in both of said counties such default had continued for more than six months, and that said mortgagor railway company is, and for more than six months prior to December 1, 1893, has been, in default for taxes lawfully levied and imposed upon such railway and premises for the years 1890 and 1891, in various counties in Illinois through which said railway extends; that penalties, costs, and interest have accrued upon the same; and that the railway and premises of said company have, in some of

the counties through which it extends, been sold, and in others forfeited to the state of Illinois, for and on account of such taxes. The bill alleged that said mortgagor railway company is hopelessly insolvent, and unable to pay its debts and current and presently accruing indebtedness; that it has failed and refused to pay wages and operating expenses, and other obligations and indebtedness, although the payment thereof has been duly demanded; that such unpaid indebtedness in arrears amounts to more than $200,000, and that said railway company will be unable to pay the interest upon the bonds secured by said mortgage which will fall due January 1, 1894, amounting to $32,500; and that said railway company has failed and neglected to keep its said railway in good order and safe running condition, but has suffered and allowed the same to become and remain, and it now is, in bad order, and unsafe running condition. The bill further alleged that complainant ascertained the facts alleged in said bill of complaint as to such defaults about December 5, 1892, through his solicitor, in Chicago; that thereupon said solicitor advised him of such facts, whereupon, on December 7, 1893, complainant communicated with said trustee in said mortgage, and advised said trustee of said default of said railway company, and of its insolvency, and of the necessity of action on the behalf of the bondholders for the protection of the lien and security of said mortgage, and requested said trustee to take proper steps for the protection of the interests of the bondholders represented by it, and to institute legal proceedings for the appointment of a receiver to conserve and protect the interests of said bondholders, and that said trustee has failed and neglected to take any steps in the premises; and that, thereupon, complainant was advised by counsel, and avers, that it is necessary for the protection of the lien and security under said mortgage, and of the rights of the holders of said bonds, to apply to a court of equity for relief in the premises, to the end that said property be conserved, and the rights and interests of complainant and other bondholders protected.

The intervening petition of the employes stated the amounts owing to them under their employment by the Jacksonville Southeastern Line, but such claims were not in judgment. The petition of the receivers of the Chicago, Peoria & St. Louis Railway Company alleged the joint operation of said lines of railroad under the name of the Jacksonville Southeastern Line; that the books were kept under that name; that moneys belonging to said Chicago, Peoria & St. Louis Railway Company had been used by the management to pay indebtedness of said Jacksonville, Louisville & St. Louis Railway Company; that the books of account of the fiscal transactions of said Jacksonville Southeastern Line had been so conducted as to be misleading; that the Chicago, Peoria & St. Louis Railway Company had been wrongfully charged with divers items, and that the Jacksonville, Louisville & St. Louis Railway Company had not been charged with items for which it was chargeable; that an accounting between said companies, and of the affairs of said Jacksonville Southeastern Line, was necessary,—and also alleged the defaults in the payment of taxes, and tax sales and forfeitures, which are alleged in said bill of complaint of said Putnam.

Upon bill of complaint of the Mercantile Trust Company, Trustee, v. Chicago, Peoria & St. Louis Railway Company, and upon certain intervening petitions consolidated therewith, the court had previously appointed receivers of the Chicago, Peoria & St. Louis Railway Company, and included in such receivership the Jacksonville, Louisville & St. Louis Railway, and the other railways above mentioned, composing the Jacksonville Southeastern Line; and upon the petition and motion of the Jacksonville, Louisville & St. Louis Railway Company for the release of its railway from such receivership, and the restoration to it of its property by such receivers, such motion was sustained by the court. But before such restoration was consummated or directed the present application for a receiver of the Jacksonville, Louisville & St. Louis Railway Company was made and heard.

W. D. Guthrie and Peck, Miller & Starr, for complainant.

C. M. Osborn and I. L. Morrison, for defendant Jacksonville, L. & St. L. Ry. Co.

Gardner & McFadon, for defendant Finance Co. of Pennsylvania.
Bluford Wilson, for intervening petitioners.

Before WOODS, Circuit Judge, and ALLEN, District Judge.

WOODS, Circuit Judge (orally, after stating the facts). This case, as now presented, rests on the bill of Mr. Putnam, a bondholder, and the intervening petition of labor claimants, and of the receivers in the case of The Mercantile Trust Company v. Chicago, Peoria & St. Louis Railway Company.[1] I do not think that the petition of the laborers, in itself, affords ground for appointing a receiver. What I said concerning their attitude in the other case is applicable here. They are simply creditors of the three companies. There is no obstacle to their enforcing their remedy at law against all the companies liable, if they can get them all into court at the same time, or against any of them separately; and, so far as they are concerned, the complications that arise out of the joint liability of the several companies are entirely immaterial. Their remedy is direct and easy. The fact remains, however, that, as between the companies concerned, there is complication or confusion of accounts to an extent that needs disentanglement, and there is force in the proposition, as a mere collateral consideration, that the existence of these accounts, and their character, lend support to the application for the appointment of a receiver, though furnishing, as already said, no legal ground for such action.

The bill or petition of the receivers of the other road presents, or would present, if there were necessity to determine the question, a more important and difficult inquiry. It shows the necessity of an accounting between these two companies, growing out of the operation of their roads under the joint arrangement which has heretofore prevailed; and I suppose the averments are sufficient to make a case for an accounting in equity. But whether, on such a bill, before any liability has been established, a court of equity ought to appoint a receiver, I think quite doubtful. I am inclined to believe, though not committing myself or the court to the proposition, that a bill for an accounting, under ordinary circumstances, does not warrant the appointment of a receiver until the account has been adjusted, and a liability established. But this, again, it is urged, though not itself a cause for an appointment of a receiver, furnishes strong support for the application, if otherwise well founded. If the Jacksonville road is allowed to go out of court as a corporation in the independent control of its own officers, the jurisdiction of this court over the question of an accounting would perhaps be lost. These receivers, in order to enforce any remedy against that corporation, would probably have to go into a state court. I suppose there is no doubt of that; and the fact affords a strong motive, though not legal cause, for this court's retaining possession, if it has and can hold, or ought to take, the possession. Theoretically, we are asked to take possession. By the order that

[1] 61 Fed. 372.

we made the other day for the surrender of this line by the receivers in the other case, the property is theoretically in the hands of the company, though actually yet in the custody of the court; and it is a question now of retaking possession by appointing a receiver in this case.

This brings us to the bill of the complainant, Putnam. On its face, this bill is sufficient, we think, to justify the appointment of a receiver. By the terms of the mortgage which the complainant, as one of the bondholders, seeks to enforce, the mortgagor was bound to pay taxes, and save the railroad company from default in that respect. It is alleged that such defaults have occurred. In respect to two counties, the details and the amounts involved are stated; and it is averred, in general terms, that in the other counties through which the road runs similar defaults have occurred. I agree with counsel that it was competent for—and, under the circumstances, the burden was fairly thrown on—the respondent to show that there were no such defaults as are generally alleged, or that they were of slight significance, or for small amounts, if such are the facts. It is further alleged in the bill that the company is insolvent, the averment being of an indebtedness exceeding $200,000, of which the answer admits as much as $90,000; and it appears that within a short time there will be an installment of interest due on the bonded or mortgage debt amounting to about $40,000. It is further averred that labor claims are unpaid, the showing in that respect being of a liability to the amount of $45,000. This company is liable for that amount, though its share of the debt, if equitably distributed between it and the other companies, is only 30 per cent. of that sum. Do these facts establish such insolvency as to justify the appointment of a receiver? The default in respect to taxes, and the significance of such defaults, have been strongly presented; and, to men familiar with affairs, such delinquencies are necessarily significant. The penalties that arise from failure to pay taxes; the enormous interest in the form of penalties,—imply that the failure to discharge the liability came from a stress of circumstances practically impossible to be overcome.

There is another phase of this growing indebtedness of the company in which the mortgagees or bondholders are interested. By the law, as it has grown up under the case of Fosdick v. Schall, 99 U. S. 235, and later cases, establishing what is known in this circuit as the "six-months rule," claims for labor and supplies, if not otherwise provided for, become entitled to preference over the mortgage debt. They, perhaps, do not constitute—I do not think they constitute—a lien on the property, such as to entitle the holders of them to apply for a receivership without first having established their demands. If such claims constituted a fixed or certain lien, their holders might be entitled to have receivers appointed to take care of their interests. But while there is not, strictly speaking, a lien, there is a preferential right, which may be enforced against the mortgaged property, if there be no other means of payment; and consequently, to the extent that such demands are permitted to accumulate, the rights of the mortgagee are liable to be postponed. This

bondholder, therefore, has a right to apprehend that his interest will suffer in that respect; and even if the delinquent taxes were paid, as it has been suggested they might be, that element of danger to his rights would not be eliminated. I cannot escape the conviction that practically this road is insolvent, and to such a degree as to require the interference of the court.

There is force in the suggestion of counsel that the troubles of the company have come from the general financial stress. But it is from financial stress peculiar to the debtor, or affecting business generally, that insolvency is wont to happen; and, looking at the situation of the country as it is, there is no present promise or clear prospect of a recurrence of good times, and there may be ground for apprehending yet worse before the coming of better conditions. On the whole case, it is evident that it is better for all interests that the matters in dispute be kept within the control, and that the adjustment of the liabilities between these companies should be settled under the supervision, of one court. The case is in such shape that we may assert jurisdiction, and I believe the best interests of all parties, as well as of the public, will be promoted by the exercise of our authority. We will therefore grant this petition.

There is another fact, somewhat aside, but important. It appears that the existing receivership, thus far, has been beneficial. Under the prior management, there had been default in the payment of current expenses for three or four months, amounting to about $140,000. One hundred thousand of that has been extinguished, and current expenses since the receivership have been paid; so that in less than three months the earnings of the road under the receivers have been sufficient to pay the operating expenses for nearly six months, and, with continued prosperity and successful management, the receivers, after a little while, may be discharged, and the roads returned to their owners. I think the proposition of separate receivers for the two roads is the right one.

TOWLE et al. v. AMERICAN BLDG., LOAN & INV. SOC.

(Circuit Court, N. D. Illinois. March 10, 1894.)

BUILDING AND LOAN ASSOCIATIONS—DISSOLUTION IN EQUITY—ACCOUNTING.

Where a building and loan association, organized under a statute which declares that borrowers may repay their loans at any time, and be entitled to a credit of one-eighth of the premium for each of the unexpired years of the association's eight-year period, is dissolved by a court of equity before the expiration of the eight-year period because it is losing money, the court called in all the loans, and distributed the proceeds among the stockholders, giving the borrowers credit for the unearned part of their premiums, as though they had voluntarily paid up, but gave them no credit on their loans for assessments and fines paid by them, since all the stockholders are alike responsible for the losses of the association.

Suit by Marcus Towle and others against the American Building, Loan & Investment Society. A receiver was appointed to take charge of the defendant's business, and he applies to the court for instructions.

Jesse A. Baldwin, for complainants.
W. G. Cooke, for defendant.
Collins, Goodrich, Darrow & Vincent, for the receiver.

GROSSCUP, District Judge. The receiver in this cause asks for the direction of the court relating to the terms on which the borrowers from the association may repay their loans, and, also, the claims which the receiver shall advance on like questions in cases of compulsory foreclosure. The laws of Illinois provide that each stockholder in a building and loan association may borrow from such association upon the security of his stock, not to exceed $100 for each share thereof (that being the par value); that he shall give, in addition thereto, real-estate security acceptable to the board; and that he shall have the right at any time to repay the loan, in which case there shall be refunded to him the one-eighth of the premium thus bid for each of the unexpired years of the eight-year period during which the association is supposed to run. The law also provides that each stockholder shall have the right to withdraw from the association, and, upon a compliance with certain conditions, shall be entitled to receive the amount paid in, and such proportion of the profits thereof as the by-laws may determine, less all fines and other charges. These associations are essentially corporate copartnerships. They have no function except to gather together, from small, stated contributions, sums large enough to justify loans. Their officers are the agents of every stockholder. They have no debtors or creditors except the stockholders, and whether a stockholder is creditor or debtor depends on whether he has exercised his privilege of borrowing money from the common fund. The insolvency of such an institution is sui generis. There can be, strictly speaking, no insolvency, for the only creditors are the stockholders by virtue of their stock. The so-called insolvency is such a condition of the affairs of the association as reduces the available and collectible funds below the level of the amount of stock already paid in. The association is said to be insolvent when it cannot pay back to its stockholders the amount of their actual contributions, dollar for dollar. The association does not deal as a corporate entity with its borrowers as strangers. The by-laws determine who become borrowers, and the officers, who are agents of such borrowers, as well as of the remaining stockholders, in the transaction, simply execute these by-laws. None of the liabilities or maxims, therefore, which apply to contracts between strangers are applicable to these transactions. The transaction of borrowing is not between strangers, or the result of contract or dealing, but is simply the execution of pre-existing rights among the stockholders. I think it plain that, when the condition of the association shows that, instead of making profits, it loses the principal of the contributing stockholders, there is power in a court of equity to wind up its affairs upon purely equitable principles. This will consist in calling in the loans, and paying out the funds thus received to the stockholders. It is not seriously disputed that on such an adjustment the borrower is under obligation to repay the actual sum received, together with interest thereon.

The first question is whether he is entitled to a credit for the amount of assessments paid upon his stock. I think not. Such a credit practically would be paying par on his stock, a preference over other stockholders to which clearly he is not entitled. Neither do I think he should be allowed credit for fines paid in. They are the result of his personal delinquencies, and, eo instanti, become the common property of all the members of the association.

The most difficult question relates to the premium. The borrower has, at a stated meeting, bid a certain premium, presumably the highest offered, for the privilege of obtaining the loan. The gross amount of this premium has already been deducted from the money advanced, but is included in the face of the loan. It is urged that he ought to be credited with the premium, because he has neither received it in money, nor its consideration in the length of time for which the loan was to run, or in the manner of its repayment as originally contemplated. The objection would be insuperable if the borrower at the time of the loan stood in the attitude of a stranger to the association, and the act of borrowing constituted such contract as usually arises upon a loan. In such a case the lender could not insist upon the premium while withholding a portion of the consideration and benefit upon which it was passed. But the relation between the borrower and his associate stockholders, and the legal relationship arising from the transaction, are not of that character, as has already been pointed out. It follows that these legal principles are not necessarily controlling. The question emancipates itself, therefore, from legal or contract technicalities, and reduces itself to one of simple equity and fair play. The inability of the association to proceed to its expected termination by reason of the impairment of its collectible loans is attributable alike to each stockholder. The officers of the association are their agents, and the results of their investments are alike the fortune or misfortune of each stockholder, whether it be borrower or nonborrower. When a condition thus brought about justifies a court of equity in peremptorily terminating the career of the association, the adjustment should be made as near upon the line of what would take place if the association lived out its life as is possible. I can think of no fairer rule than to regard the nominal life of the association as eight years, and to look upon each year short of that period as an aliquot portion thereof. This would give the borrower credit for such premium as the number of years, or fractional portions thereof, unlived by the association, bear to the whole period of its normal life of eight years. To that extent, the premium is unearned; for the period already passed, it has been earned. It is true that the borrower might not have bid the premium if he had foreseen the premature death of the association; but neither would his fellow stockholders, with a like foreknowledge, have contributed their installments. The misfortune of the one is not greater than that of the other. If the borrower were to be credited with the entire premium, the taking of possession of the assets by a court of equity would immediately reduce the already impaired assets by the amount of the aggregate premiums. It might easily be that the intervention

of equity near the close of the eight years would, under such circumstances, be a positive boon to the borrower, by incidentally deducting from the loan a large percentage of the principal. The temptation and uncertainty thus introduced ought, if possible, to be averted. The receiver is directed to proceed in accordance with the foregoing outlines.

WESTERN UNION TEL. CO. v. POE, Auditor of State of Ohio, et al.

(Circuit Court, S. D. Ohio, E. D. April 23, 1894.)

1. TAXATION—MARKET VALUE OF CORPORATE STOCK.
   A tax upon the property of a telegraph company ("Nicholl's Law," Rev. St. Ohio, § 2778a), determined, in part at least, by the aggregate value of the shares of its capital stock, conflicts with a constitutional provision (Const. Ohio, art. 12, § 2) that the taxation of all taxable property shall be "by a uniform rule," because the market value of such stock bears no necessary relation or proportion to the value of the tangible property of the corporation, and because it involves elements of value, such as the good will and earning capacity of the business, which are not taxable in the state, and not used therein to determine the value of the taxable property of individuals or other corporations.
2. SAME—FRANCHISE OF CORPORATION.
   Such tax cannot be supported as a tax upon the franchise of the corporation to do business in the state, or as a tax upon the business of the corporation, or as a tax upon the property of the corporation, combined with such franchise and business, because the legislature has not prescribed any definite mode of ascertaining the amount of such tax, and could not, under the constitution, commit the determination of such amount to the discretion of a board of appraisers.
3. INJUNCTION—ILLEGAL TAX.
   A federal court has no general equitable jurisdiction in such case to enjoin a board of appraisers from certifying the amount to be assessed in each county upon the ground that such tax is illegal, nor does it acquire such jurisdiction under the provision of a state statute (Rev. St. Ohio, §§ 5848, 5849) that an action may be brought to prevent the illegal levy of a tax against a corporation or person beneficially interested in the proceeds, and against a county auditor who completes the levy by placing it on the tax duplicate.
4. SAME—MULTIPLICITY OF SUITS.
   In such case, however, a federal court has jurisdiction to enjoin the board in order to prevent a multiplicity of suits in the several counties of the state.
5. SAME—AMOUNT IN CONTROVERSY.
   The jurisdiction of the federal court will not be defeated in such case by the fact that the assessment will not amount to $2,000 in any single county, because, the action being against the board of appraisers, the whole amount to be certified is the amount in controversy.

This is a Suit in Equity to enjoin the assessment of a tax brought by the Western Union Telegraph Company, a corporation and citizen of New York, against the state auditor, attorney general, and state treasurer of Ohio. It now comes on for hearing on demurrer to the bill, and on a motion by complainant for preliminary injunction.

The main questions at issue are of the validity, under the federal and Ohio constitutions, of a law of Ohio known as the "Nicholls Law," imposing taxes on telegraph, telephone, and express companies. The bill avers that the complainant owns and operates lines of telegraph in nearly all of the states of

the Union, including Ohio, said lines consisting of poles with cross arms, supporting suitable wires, for the transmission of telegraphic messages by means of electricity, and employs thousands of men as officers and operators, clerks and messengers, together with line repairers and others. That on April 27, 1893, the legislature of Ohio passed a law for the taxation of telegraph, telephone, and express companies, which made defendants a board of tax appraisers for such companies, and directed them to value and assess the property of such companies as follows:

"Sec. 2778a. Every express, telegraph and telephone company embraced in section 2777, whether chartered by the laws of this state, or any other state or county, doing business in this state, shall, annually, between the first and tenth days of May, return to the auditor of state, under the oath of its treasurer, the amount of its capital stock, its place of business, the par value and market value (or if there be no market value, then the actual value) of its shares at the time of said return. The return shall also contain a statement in detail of the entire real and personal property of said companies and where located and the value thereof as assessed for taxation; and telegraph and telephone companies shall, in addition thereto, return the whole length of their lines and the length of so much of their lines as is without and is within the state of Ohio, which lines shall include what said telegraph and telephone companies control and use, under lease or otherwise; and said board of appraisers and assessors shall in determining the value of the property of said companies in this state, to be taxed within the state and assessed as herein provided, be guided by the value of said property as determined by the value of the entire capital stock of said companies, and such other evidence and rules as will enable said board to arrive at the true value in money of the entire property of said companies within the state of Ohio in the proportion which the same bears to the entire property of said corporation, as determined by the value of the capital stock thereof, and the other evidence and rules as aforesaid. Express companies shall in making said return, include therein as a part thereof a statement of their entire gross receipts for the year ending the first day of May, of the business done within the state of Ohio; giving the receipts of each office in said state and the location thereof for said year."

The bill further avers that complainant made a statement to the auditor, a copy of which is filed with the bill, showing the amount of its capital stock, and the market value thereof, so far as said market value could be shown, together with a statement of the location and value of its property in the state of Ohio, the number of miles of its telegraph lines in Ohio, and the total length of its lines everywhere. That, acting upon the information thus furnished, and under the requirements of the statute, and not in the exercise of their individual judgment of the valuation of the property of complainant, defendants made an appraisement and assessment against complainant of $2,011,000, wrongfully pretending that the sum is named as the value of complainant's property in Ohio. That, unless restrained by this court, the defendants, as such board, will certify this assessment, in accordance with the act, to the auditors of 87 counties in the state, wherein complainant's lines run, in the proportion of the mileage of lines in each county to the state mileage. That said auditors will, on receipt thereof, certify the same to the respective county treasurers for collection. That the rate of taxation in Ohio for the year 1893 varies, according to the county, from 2½ to 3 per cent., so that the aggregate assessment against complainant upon said illegal and excessive valuation will amount to between $50,000 and $60,000, and in several counties of the state not only the assessment, but the difference between the assessment under said law and an assessment upon a true and lawful valuation of complainant's property will exceed $2,000. That in truth the entire value of complainant's property in Ohio at all times in the year 1893 prior to and subsequent to May 1, 1893, does not exceed $647,000, and, estimated as all other property is for taxation in the state, would fall far below that sum. That complainant is the owner of lines of Atlantic cable extending to Cuba and England, and connecting in England with lines of other companies extending to all parts of Europe, and also of lines in Canada. That the total mileage of its lines is 189,576 miles, in-

cluding the mileage in Ohio, which is 8,272 miles. That the cash value of complainant's property cannot be ascertained approximately by applying the proportion which its lines in Ohio bear to the whole number of miles of its lines, upon a valuation of all the shares of its capital stock, because such a valuation includes elements of value not existing in Ohio, and not taxable within said state, and some of which are not taxable at all; and also because the lines are not of uniform value per mile, either as to gross or net income earned upon the various lines or as to cost of construction and maintenance. That included in the total mileage are thousands of miles of ocean cable, costing $4,000 per mile, while the lines per mile in Ohio cost but $103.60 per mile. That the income per mile in many states is much greater than in Ohio, and that the average income per mile in the entire system is much greater than that of the lines in Ohio. That the market price of comp ainant's stock affords no fair or reasonable or just method of forming an opinion as to the value of its property or of fixing a basis of value for the taxation thereof, because it is speculative and variable, dependent on conditions having no relation to complainant's business or property. That the actual value of complainant's shares is made up of property of various kinds in various states, of valuable contracts with railroad companies and other companies and individuals, of franchises conferred by act of congress of July 24, 1866 (14 Stat. 221), of franchises granted by other states and muncipalities in them and by foreign governments, of business experience, good will, and skill employed in the prosecution of its business, of investments in bonds and stocks of other corporations aggregating $7,633,230.12, and real estate out of Ohio worth more than $5,000,000. That the tax proposed to be levied under the assessment sought to be enjoined would amount to 30 per centum of its earnings in Ohio from all its business in Ohio, including interstate commerce,—an unheard of rate of taxation, and substantially destructive of its business in said state. That the complainant's property in Ohio is of the simplest character, consisting only of poles, wires, office furniture, and instruments used in telegraphy. The bill avers that the law is void, because it does not require the valuation of the property of complainant and other companies according to its true value in money, as the property of all other corporations and individuals is valued for taxation, and as all property is required to be valued for taxation under the state constitution in Ohio, but directs a valuation according to the opinion of the board of appraisers as to the value of the capital stock of such companies, which is determined by the diligence, fidelity, and skill with which the business of said companies is conducted, by its good will, and by the property of said companies in many states, and by the general financial conditions existing in the country. "To the end, therefore, that the complainant may not be subjected to a multiplicity of suits which would otherwise be brought against it for the recovery of said assessment, to wit, suits in eighty-seven counties in which it does business in Ohio," a provisional injunction restraining defendants from certifying the said assessment to the various county auditors in which complainant does business, and, after final hearing, a perpetual injunction are prayed for.

Upon the filing of the bill, Judge Sage granted a temporary restraining order until a motion for a preliminary injunction could be made, heard, and disposed of. Defendants thereafter interposed a general demurrer to the bill. The motion and the demurrer came on for hearing. The court decided that the bill was defective, in that it admitted certain taxes to be due, without any averment that they had been paid; but allowed complainant a week in which to pay them, and to file an amendment showing such payment. The amendment was filed. A reargument was ordered on the merits. The minutes of the board, which accompanied the affidavit, showed its findings and final action with reference to complainant as follows: "That on the 1st day of May, 1893, the amount of the capital stock of said corporation, issued and outstanding, was $94,000,820. The par value of its shares was $100 each, and the market value of its shares on said day was $87 each. That the value of the entire capital stock of the company on said day was 940,008 1-5 shares at $87 a share, or $81,780,713.40. That there should be deducted from the value of the capital stock so found ($81,780,713.40) the value of the in-

vestments of the company in bonds and stocks of other corporations, being $7,633,230.12, and the value of the real estate owned by it outside of Ohio, being $5,013,326.64; making altogether $13,646,556.76; leaving $69,134,156.34, being the value of the entire capital stock of the company as based upon and represented by the lines of the company. That the whole length in miles of said company, both within and without the state of Ohio, was on the said day 189,576 miles, and the length of such lines in the state of Ohio was 8,272 miles. That the proportion of the entire value of the capital stock of said company employed in business in Ohio and represented by property taxable therein was on said 1st of May, 1893, 8,272-189,576 of $69,134,156.64, which equals $3,016,614.67. On consideration of the foregoing, the fact that property generally in Ohio is taxed at not more than two-thirds of its actual value, the statement in the return of the company that to reproduce the lines in this state will cost the sum of $1,649,279.10 (which the board regards as an insufficient estimate, and, at any rate, much below the existing value of said lines as an entirety), and other facts and evidence contained in the return of the company and otherwise brought to the attention of the board, on motion the board unanimously fix and determine the value of the property of the Western Union Telegraph Company in the state of Ohio to be assessed and taxed therein at the sum of $2,011,076.45." An affidavit of the state auditor was filed, showing that in no one county in the state would the tax to be collected from the Western Union under this assessment equal $2,000, and that the difference between the tax assessed and the tax admitted to be due was much less than that sum.

Brown & Wells and Ramsey, Maxwell & Ramsey, for complainant.
J. K. Richards, Atty. Gen., and Thos. McDougall, for respondents.

TAFT, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The first question for consideration is whether this court has any jurisdiction, as a federal court in equity, to grant the relief prayed in the bill. Section 5848 of the Revised Statutes of Ohio provides that suits may be brought to enjoin the illegal levy and collection of taxes and assessments. Section 5849 provides that actions to enjoin the illegal levy of taxes and assessments must be brought against the corporation and person for whose use or benefit the levy is made, and, if the levy would go on the tax duplicate of the county, the county auditor must be enjoined. These actions give the right to relief by injunction on the sole ground that the tax is illegal, enlarging in this respect the ordinary equitable jurisdiction to enjoin the levy or collection of taxes. The remedy thus afforded will be enforced in federal courts of equity (Cummings v. Bank, 101 U. S. 153), but, of course, its extent is limited by the statute which gives it existence. Now, it is obvious from section 5849 that the only persons against whom such an action can be brought to prevent the levy of a tax are the corporation or person beneficially interested in the proceeds of the tax and the auditor who takes the final steps in completing the levy by placing it on the duplicate. Jones v. Davis, 35 Ohio St. 474. These bills are not filed against either the corporations for whose use the tax will be collected or against the county auditors. The bill cannot be sustained, therefore, as invoking the special remedy afforded by the sections of the Ohio statutes above quoted.

Can they be sustained on the general equitable jurisdiction of the court? It is well settled that the mere illegality of a tax is no

ground for invoking equitable relief. Shelton v. Platt, 139 U. S. 591, 599, 11 Sup. Ct. 646. But we find, set up in the bills, a ground upon which courts of equity frequently grant relief, and that is, to avoid a multiplicity of suits. If the amounts assessed by the board are certified to the various county auditors, the complainant will be compelled to bring a suit, either to prevent collection of these taxes or to recover them back after paying them, in each one of 87 counties. This will be most oppressive, and would certainly seem to furnish ground for equitable interference by this court, unless other objections advanced by counsel for defendant, and now to be considered, must prevail.

It is first said that the injunction sought is premature, because against the valuers, and not against the collecting officers. If such a suit can be brought, then it is argued that a bill will lie to enjoin the legislature from passing the bill. This is a non sequitur, instead of a reductio ad absurdum. What is here sought to be enjoined is the certificate by the board of appraisers to the county auditors of the amounts to be assessed against plaintiff. The auditors are then, by law, required to place the same upon the tax duplicate, and deliver the duplicates to the county treasurers as warrants for the collection of the taxes. The duties of the county auditors and treasurers in this matter are wholly ministerial. The law reposes in them, no discretion whatever, to reduce or modify the assessment. It is said that the state auditor has power to correct all injustice in assessments for taxation, and constitutes a tribunal of review for the purpose. I cannot agree with this contention. It is true that, generally speaking, the state auditor is at the head of the taxing department of the state. By section 166 of the Ohio Revised Statutes he is required to instruct the auditors of the several counties in the state; and by section 167, which is the section chiefly relied on, his power is thus defined:

"He may remit such taxes and penalties thereon as he ascertains to have been illegally assessed, and such penalties as have accrued or may accrue in consequence of the negligence or error of any officer required to do any duty relating to the assessment of property for taxation or in the duplicate of taxes in any county; provided, that when the amount to be remitted in any one case shall exceed one hundred dollars, he shall proceed to the office of the governor and take to his assistance the governor and attorney general and in all such cases may remit no more than shall be agreed upon by a majority of the officers named."

I think this section does not confer any power on the state auditor, the governor, and attorney general, to correct assessments under the Nicholls law, which provides such special machinery for assessments as to prevent its application; otherwise the taxing system of Ohio would present the absurdity of subjecting the quasi judicial action of a board consisting of the state auditor and two others to the review of the state auditor alone in every case where the assessment does not exceed $100, and in cases involving more than $100 would make a majority of the reviewing court to consist of the majority of the court of first instance. The action of the board of appraisers in certifying the assessments to the county auditors is, therefore, a finality.

It is suggested that there is the possibility that the county auditor and county treasurer may refuse to comply with the duty imposed by an unconstitutional law. Certainly these county officers are not tribunals established to consider constitutional questions, before whom complainants could be heard. The presumption is that they will obey a law which was in due form passed by the legislature, and will assume its validity, especially when it has been treated as valid by the head of the taxing department and the head of the law department of the state. The possibility suggested is too remote, to prevent a court of equity from properly treating the certificate of the board of appraisers, as a final step, directly to the prejudice of the complainants, with no taxing tribunal or authority to whom it can appeal in the procedure provided by the law, before the tax is to be collected. The supreme court of Ohio in Jones v. Davis, 35 Ohio St. 474, did not hold that a proceeding to enjoin a board of equalization from certifying an assessment to the county auditor was premature. They only held that a proceeding to enjoin the auditor before he had added the assessment to the duplicate was not too late, because, until that time, he had not completed his levy, which section 5849 of the Ohio Revised Statutes gives the taxpayer, a special remedy against him to enjoin. Of course, the complainant here, under section 5849, might bring actions to enjoin the county auditor or county treasurer of each county from levying or collecting these assessments, but then the multiplicity of suits would be an accomplished fact, and the basis for general equity jurisdiction in the matter would have disappeared. It is said that the equity jurisdiction to prevent a multiplicity of suits is never exercised except against those who are about to bring the suits. No case is cited which makes this distinction, and I do not see any good reason for it.

Again, it is urged that the affidavits filed show conclusively that in no single county will the assessment against the complainant amount to $2,000; wherefore the argument is that the jurisdiction of this court cannot be supported by adding together the amounts due in each county. If my conclusion is correct, that this action will lie against the board of appraisers, there is nothing whatever in this objection, because the amount involved in controversy in the suit is the whole amount to be certified by the board under the law, less the aggregate amount which the complainant must pay in the various counties of Ohio, under such laws as are in force if the Nicholls law is not valid. That difference admittedly exceeds $2,000. For this reason, I am of the opinion that the bill does present a case for equitable relief in a federal court.

Another reason advanced by counsel for defendants, why the relief prayed for should be denied, is that the complainant has only tendered or paid to the various county treasurers the amounts due on the valuation of their real and personal property as it claims it to be, according to the local rates of taxation, but has not tendered or paid the amount due on its gross receipts for business within the state of Ohio, as provided by the law, which the Nicholls law

was passed to supplant, and which is in force, if the Nicholls law is invalid. This objection I shall defer considering until later.

The Nicholls law purports to tax only the real and personal property owned by telegraph, telephone, and express companies in Ohio. The gist of the act is contained in the following sentence, found in the latter part of section 2778a:

"And said board of appraisers and assessors shall in determining the value of the property of said companies in this state, to be taxed within the state and assessed as herein provided, be guided by the value of said property as determined by the value of the entire capital stock of said companies and such other evidence and rules as will enable said board to arrive at the true value in money of the entire property of said companies within the state of Ohio, in the proportion which the same bears to the entire property of said corporation as determined by the value of the capital stock thereof, and the other evidence and rules as aforesaid."

The validity of the foregoing method of valuation, so far as complainant is concerned, depends on the correctness of two propositions. The first is that the telegraph plant in one state has an added money and taxable value as a plant in that state, because it is physically a part of a great system or machine covering the country. This is substantially the same principle as that involved in the taxation of interstate railroads in Ohio, which has met the approval of the state supreme court (Insurance Co. v. Ratterman, 46 Ohio St. 153, 166, 19 N. E. 560), and its soundness may therefore be conceded. See, also, State Railroad Tax Cases, 92 U. S. 575.

The second proposition is that the market value of the aggregate shares of the capital stock of telegraph, telephone, and express companies is a proper guide in fixing the true value in money of their real and personal property in Ohio in constitutional uniformity with the mode of assessing the real and personal property of individuals and other corporations. The language of the legislature is by no means clear in defining the method of valuation, but this much is certain: that the board are enjoined, unless exceptional circumstances require otherwise, to consider the value of all the shares of the capital stock as a basis or controlling element in estimating the value of the real and personal property of the corporation. The capital stock is the only element of value specifically mentioned, and that occurs twice in the same involved sentence. Other evidence and rules are referred to, but they are left to the board to select or adopt. The one thing which the board is required to consider in each case is the value of the capital stock. It is true that the board may exercise a discretion in their appraisement to give more or less evidential weight to the value of the capital stock. But here is the legislative declaration that in every case such value must be considered, and the necessary implication is that it is an important element. The object of this clause was to increase the valuation of the property of corporations above that which it would have, without reference to the capital stock. The two laws which the Nicholls law supplanted in the taxation of foreign telegraph and express companies imposed a tax upon all the real and personal property owned by those corporations in Ohio, and also a tax, decided to be a franchise tax, measured by a percentage

of the gross receipts from business done within Ohio. Rev. St. Ohio (Smith & Ben.) §§ 2744, 2778; Telegraph Co. v. Mayer, 28 Ohio St. 521; Ratterman v. Telegraph Co., 127 U. S. 411, 8 Sup. Ct. 1127. Now, we may take judicial notice of the commendable efforts of the legislature of Ohio, in view of the condition of the state treasury for a number of years past, to increase the taxable sources of revenue, and we may reasonably infer that it was not the legislative intent to reduce the tax upon telegraph companies or any other foreign or domestic corporation. When, therefore, for a tax upon all the personal and real property of such companies, assessed without reference to the value of the capital stock, and a franchise tax as well, there is substituted a tax upon the property of the corporation in Ohio on a valuation to be determined, in part at least, by the aggregate value of the shares of its capital stock, we must necessarily infer that this basis of valuation is expected to add substantially to the valuation of the same property when made without reference to such a standard. Convincing evidence is found that this construction of the law is sound in the result of the valuations under the new law as compared with those under the old, and the course taken by the board in every case which has come to the notice of the court. In each, the board began with the market value of the capital stock, and made its deductions from that to reach the value of the property. The intrinsic or cost value of the property seems to have been lightly regarded as compared with the market value of the capital stock. Now, it is true that what the appraisers have done does not necessarily determine the meaning of the law, but it is persuasive of the intent of the legislature. We are led, by this construction of the Nicholls law, to consider what necessary relation, if any, there is between the market value of the capital stock of the companies embraced within its terms and the true value in money of their property as it may be assessed for taxation in Ohio. A share of stock entitles its owner to a proportionate share in the net earnings of the corporation, and, upon dissolution, to a proportionate share in the assets of the corporation after the debts are paid. Its value in a corporation whose corporate life is not limited by its charter depends almost wholly on the net earnings of the corporation or on its prospective capacity for producing them. The aggregate market value of the stock of any business corporation therefore approximates an amount reached by capitalizing the aggregate annual dividends, on a basis of something higher than the usual rate of interest for money loaned, the rate varying, as interest of money loaned varies, with the risk of the investment and the certainty of the annual payments. The annual earnings of a business corporation depend, not on the value of the visible, tangible property of the corporation as a passive investment, like real estate or government bonds or mortgages, but they depend on the good will of the business, its volume, the speed with which the money capital can be turned over, the business skill and experience and economy of its management. The share of stock is property. It is a chose in action, entitling its owner to yearly payments from a corporation, if there are net earnings. But the elements that are united

to produce those earnings are not all, or a majority of them, in the form of tangible property, though it may be conceded that they were acquired by investing tangible capital. A corporation does not own its capital stock, divided into shares. It owns the property which, when used in a business with skill and industry, aided by the good will, owned perhaps long before the particular property was ever purchased, will produce the net earnings, out of which the dividends on the stock are to be paid. This is true of all active business corporations, including telegraph companies, just as it is true of individuals in business, that their annual profits are the result, not of their real estate, business plant, and merchandise only, but of those things united with the good will and the skill, experience, and economy used in the conduct of the business. Now, it certainly could not be said that the annual profits of a dry goods store capitalized on a basis of 6 per cent. would afford any proper guide to the value of the real estate, the merchandise, and the ready capital used in the business. Where the property earns the money as real estate earns rent, or as money loaned earns interest, the earnings do determine very largely the value of the property; but where, as in a business of an individual or a corporation, the investment is active, instead of passive, there is no necessary relation between the value of the tangible property and the earnings. Would any one claim that the value of the presses, type, press franchises, money capital, and office furniture and other tangible property of a newspaper could be determined by its net earnings, or, if it be a corporation, by the market value of its capital stock? Clearly not. And why? Because nearly all its capital has been expended in securing circulation and advertising patronage, or, in other words, good will. This is an extreme example, it is said. Take a bank. There is no business in which the capital invested is kept more nearly in the form in which it was, when invested, than in that of banking, and yet it is well known that the assets of a bank are often much less in value than the profits of the business capitalized at the usual rate of interest. Would the fact that the shares in a banking corporation with a capital stock of $100,000 were selling at $150 each on a par value of $100 be any evidence that the bonds, choses in action, and money and other resources in the vaults of the bank were worth any more than they appear to be on an appraisement without reference to the value of the bank's capital stock? Certainly not. The increase in the value of the bank's capital stock over its resources is due to the good will which invites the confidence of the public in the honesty and prudence of its management, and attracts deposits and business, and to the skill and experience and foresight of its officers in making profitable and safe loans. What is true of a newspaper, a bank, and a dry goods store is equally true of a telegraph company. As averred in the bill, its earnings, and, therefore, the value of its capital stock, is largely dependent on its good will, the honesty, skill, economy, and experience of its management and its employes, added to its property. Its net earning capacity is also affected by business arrangements with railroad companies, and by municipal concessions of the right

to use roads and streets. It seems clear to me that the market value of its capital stock has no necessary or proper relation to the value of the tangible property of the company. If it has, then the earning capacity of a dry goods store should be an element in valuing its capital and merchandise; the profits of a newspaper, in reaching the assessable value of its presses, plant, and ready capital; the profits of a bank, in deciding upon the value of the bonds and bills receivable and money in its vaults.

Now, it is true that the capital stock of a corporation represents, and is a measure of, the tangible and intangible factors of value which unite to earn dividends, and therefore of those factors in which the original capital of the company was invested. The enjoyment of both factors by the owner is protected by the state, and both may, in the absence of any constitutional restriction, be subjected to taxation. The aggregate market value of the shares of stock in the company is as good a measure of their united value for purposes of taxation as it is possible to find. The legislatures of some states have taxed the capital of a corporation, as invested in both the tangible and intangible factors of profits, by reference to the market value of its capital stock. In such states, it is permissible to tax the property of corporations by a different rule from that of individuals, and it is no objection to including in the value of the property or capital of a corporation the good will of the business, even if such an element of earning capacity is not taxed, when enjoyed by individuals. But such is not the rule in Ohio. Article 12, § 2, of the constitution of Ohio declares that "laws shall be passed taxing by a uniform rule all moneys, credits, investments in bonds, stocks, joint stock companies or otherwise; and also all real and personal property according to its true value in money." In construing this provision the supreme court of the state has decided that:

"Taxing by a uniform rule requires uniformity not only in the rate of taxation, but also uniformity in the mode of the assessment upon the taxable valuation. Uniformity in taxing implies equality in the burden of taxation, and this equality of burden cannot exist without uniformity in the mode of assessment, as well as in the rate of taxation. * * * It must be extended to all property subject to taxation, so that all property must be taxed alike equally, which is taxing by a uniform rule." Bank v. Hines, 3 Ohio St. 15.

If, therefore, we find that good will and those other intangible factors of the value of the capital stock of a business corporation are neither taxable as property themselves, under the Ohio laws and constitution, nor as an increment to the value of the tangible property of a corporation, or an individual in business, then an Ohio law which requires the value of the capital stock to be a guide in determining the value of the tangible property of a small class of business corporations must be wanting in that uniformity which the constitution enjoins in tax laws, and is therefore void.

It becomes necessary, then, to examine the tax laws of Ohio as they tax the property of other corporations and individuals, with the view to determine whether good will, business skill, economical management, and the other intangible sources of net earnings and factors of stock value are taxed against other corporations and

individuals directly, or by increasing the valuation of tangible property. The subjects of taxation as property are mentioned in article 12, § 2, quoted above, as "all moneys, credits, investments in bonds, stock, joint stock companies or otherwise; and also all real and personal property." The legislature defined the meaning of the various terms used in the constitution in section 2730, and with one exception—that of "credits"—we may well assume that the section is a proper construction of the constitution. The section defines real estate to be not only lands and buildings and fixtures, but all rights and privileges belonging or in any wise appertaining thereto. Investments in stocks are defined to be all moneys invested in the capital or stock of a corporation the stock of which is or may be divided into shares, transferable by each owner without the consent of the other stockholders, for the taxation of which no special provision is made by law, held by persons residing in this state. Personal property is defined to be every tangible thing which is the subject of ownership, whether animate or inanimate, other than money, and not forming part of any parcel of real property as before defined; and the capital stock, undivided profits, and all other means not forming part of the capital stock of every company, whether incorporated or unincorporated, interests in ships and boats, and money loaned on real estate security. Credits are defined to be the excess of the sum of all legal claims and demands, whether for money or other valuable thing, or for the labor or service due or to become due to the taxpayer, estimated at its true value in money over and above the legal debts due by him. This definition, as already stated, is not in compliance with the constitution, because it permits a reduction of the sum of legal demands of the taxpayer by the legal debts due from him; but otherwise the constitutionality of the definitions of the section has not been questioned. Bank v. Hines, 3 Ohio St. 1. Now, it seems clear that the good will of a business, and the other intangible factors of business earnings, are not included in these definitions of personal or real property, or of the other terms describing the kinds of property to be taxed under the constitution. It would certainly cause a surprise and shock to the business community of Ohio, to have it decided that it is the duty of every business firm and corporation to return for taxation the estimated value of its good will, and the estimated value of the skill and experience and economical management of the employer and employed, or to use such factors of his profits to increase the taxable valuation of his tangible business capital. Section 2731, Rev. St. Ohio, subjects all property as it is described in section 2730, whether belonging to individuals or corporations (except certain exempted property), to taxation. Sections 2734–2738 make provisions for the listing by persons of all their personal property, moneys, credits, and investments in bonds, stocks, and otherwise. Section 2739 prescribes the rules for valuing property of persons as follows:

"In listing personal property it shall be valued at the usual selling price thereof, at the time of listing and at the place where the same may then be; and if there be no usual selling price known to the person whose duty it is to fix a value thereon, then at such price as it is believed could be obtained

therefor, in money, at such time and place; investments in bonds, in stocks, joint stock companies, or otherwise, shall be valued at the true value thereof in money; money whether in possession or on deposit shall be entered in the statement at the full amount thereof, except that depreciated circulating notes shall be entered at their current value; every credit for a sum certain payable either in money, property of any kind, labor or service, shall be valued at the full amount of the sum so payable, except that if it be for a specific article or for a specified number or quantity of any article or articles of property or for a certain amount of labor or services of any kind it shall be valued at the current price of such property or of such labor or service at the place where payable; and annuities or moneys receivable at stated periods, shall be valued at the sum which the person listing the same believes them to be worth in money at the time of listing."

Merchants and manufacturers are required to pay, not upon the stock of merchandise which they have on a certain day in the year, but they are required to average the value of their stock on hand each month of their business, and pay tax on that as personal property. In other respects their returns are like those of other persons. Section 2744 prescribes the ordinary mode of assessing the taxable property of all corporations except banking corporations in the state of Ohio, whether organized in this state or not. It requires their chief officers to list for taxation—

"All the personal property which shall be held to include all such real estate as is necessary to the daily operations of the company, money and credits of such company or corporation, at the actual value in money, in manner following: In all cases return shall be made to the several auditors of the respective counties where such property may be situated, together with a statement of the amount of said property which is situated in each township, village, city, or ward therein. The value of all movable property shall be added to the stationary and fixed property and real estate and apportioned to such wards, cities, villages or townships, pro rata, in proportion to the value of the real estate and fixed property in said ward, city, village, or township, and all property so listed shall be subject to and pay the same taxes as other property listed in such ward, city, village or township."

Section 2740 requires all personal property of every description, moneys and credits, investments in bonds, stocks, joint-stock companies, or otherwise, to be listed in the name of the owner thereof on the day preceding the second Monday of April in each year, but provides that no person shall be required to list for taxation any share or shares of the capital stock of any company the capital stock of which is taxed in the name of the company. The property of railroad companies is assessed for taxation as a unit. The roadbed, the equipment, the money, and choses in action are added together, and the value distributed according to mileage through the counties of the state and between Ohio and adjacent states. Unincorporated banks are taxed on their assets less their liabilities. Incorporated banks are not taxed at all, but their stockholders are taxed, under section 2762, upon their shares on a valuation based on the resources of the bank. It is very manifest from this review of the provisions for assessing the taxable value of the tangible property of individuals and corporations in business that neither the profits of the business nor the good will nor those other intangible factors in the earnings of profits are required to be considered, and it is very certain that they never are considered.

The difference between the taxable value of the property of a corporation and the value of its shares was considered by the supreme court of Ohio in Insurance Co. v. Ratterman, 46 Ohio St. 153, 19 N. E. 560. The question in the case was whether shares of stock in a foreign railroad corporation, which paid taxes on a large amount of property in Ohio, but also had much property elsewhere, were returnable for taxation in the hands of their owners. The holders sought exemption under that proviso of section 2746, Rev. St. Ohio, already quoted, which exempts holders of shares of stock from returning them when the corporation pays taxes on its "capital stock" in Ohio. The words "capital stock," as there used, had been construed to mean all, or substantially all, the property of a corporation. The claim of the stockholders was denied. In meeting the argument that to tax the shares in the hands of the stockholders and the property of the corporation, too, was double taxation, Judge Spear, at page 162, 46 Ohio St., and page 560, 19 N. E., in the course of an able opinion, used this language:

"The corporation is the legal owner of all the property of the company, real and personal; and within the powers conferred upon it by its charter, and for the purposes for which it was created, can deal with the corporate property as absolutely as a private individual can deal with his own. The interest of the shareholder entitles him to participate in the net profits in proportion to the number of his shares, to have a voice in the selection of officers, to manage the business of the company in like proportion, and, upon its dissolution, the right to his proportion of the property of the corporation that may remain after payment of its debts. This is a distinct, independent interest or property, held by the shareholder like any other property that may belong to him; is under his sole control, so that he may sell or hypothecate it. He is entitled, from net earnings of the corporation, to dividends upon his stock; and the value of the stock depends largely upon its capacity for earning dividends. The shares of stock may be worth much more than the property of the corporation,—that is, the franchise may be very valuable, while the visible capital may be of but little value, and dividends may be greatly out of proportion to the tangible property,—as frequently occurs in regard to street railroads, gas companies, electric light companies, etc. Farrington v. Tennessee, 95 U. S. 686, 687; Watson v. Spratley, 10 Exch. 236; People v. Commissioners, 4 Wall. 244; Union Bank v. State, 9 Yerg. 490; Cook v. City of Burlington, 59 Iowa, 251, 13 N. W. 113. It follows from this that, although the shareholder may be affected, as regards the extent of his dividends, by taxation of the property of the corporation, yet a tax on the shares is not a tax on the capital of the company, and e converso a tax on the capital is not a tax on the shares held by the stockholders. Taxation of the capital and property of the corporation, though it be accepted by the state as an equivalent for, is not the same as, a tax on the shares."

In the case of Miller v. Bank, 46 Ohio St. 424–428, 21 N. E. 860, Chief Justice Minshall did say:

"A share in the bank is but a fractional part of its capital owned by one who contributed an equivalent part of the capital, or his transferee; and the aggregate of all the shares held by individuals in a bank is equal to the aggregate of its capital. So that, if all the shares in a bank were assessed for taxation in its name, and payment of the tax required of it, the effect would be precisely the same as a tax upon the aggregate capital of the bank."

This statement was true, because, under the law for assessing the value of the shares of the bank, the auditor did not take their market value, but he found the value of each share by adding all the

property of the bank and money and other resources together, and dividing by the number of shares. The words quoted have, therefore, no application to the relation of the market value of shares to the visible capital even in a bank, and still less to that in a trading corporation.

It is clear, for the reasons stated, that the market value of the shares of capital stock in the complainant and other like companies bears no necessary relation or proportion to the value of the tangible property in Ohio or elsewhere; that the market value of the shares depends on elements of value not taxable in Ohio, and not used to determine the value of the taxable property of individuals or other corporations. If so, it seems necessarily to follow that it is prescribing an unconstitutional rule for the valuation of the property of telegraph, telephone, and express companies to enjoin upon the appraisers of their property, as the Nicholls law does, to consider, as an important element increasing the valuation of their property, the value of the aggregate shares of the capital stock of those companies. The bill avers that the amount assessed against the complainant is three times the real value of its property in Ohio. The affidavit of the state auditor shows that the mode of reaching the value of the property of the telegraph company in Ohio was to reduce the total market value of all the shares by the real estate out of Ohio and the stocks and bonds in the treasury of the company, and to take the remainder as the value of the lines of the company, reaching the part of that value in Ohio by using the ratio of the mileage of the lines in Ohio to their total mileage. This appraisement was not an appraisement of the property of the company in Ohio at all. The board entirely ignored the fact that in this result was included the good will of the company, the valuable and economical arrangements with railroad companies for joint use of lines, the public concessions by which streets and roads are occupied, the skill and experience of the employes, none of which are taxable under the laws of Ohio, but all of which contribute, as the bill avers, in a large degree to the net earnings upon which the market value of the capital stock is based. Tax by such a measure of value is an income tax, and not a property ad valorem tax. It is true that the $3,000,000, which, by the mode of valuation just described, the board reached as the actual value of the property in Ohio, was reduced to $2,000,000, to accord with the unconstitutional and unlawful practice prevailing among assessing officers in this state of valuing not at the true value in money but at two-thirds that value. That reduction, however, does not remove the illegality in such a valuation of the property caused by the assumption that a telegraph company's property in the sense of the Ohio constitution is equal to the market value of its capital stock.

But it is said that I am wrong in construing the Nicholls law to require, as an important and controlling element in the valuation of telegraph property, the market value of capital stock of the company, and that it is my duty as a judge to sustain the law if it can be done by construction. For the reasons I have given, I do not think that the market value of the shares of capital stock has

any legitimate effect in increasing the value of the tangible and visible property of this telegraph company in Ohio. It does not help the law any, to point out that the market value of the stock is only to be used to determine the true value in money of the company's Ohio property; and that if, in fact, the value of stock should have no effect in the estimate, we must give controlling weight to the words which embody the standard of value fixed by the constitution. The board is enjoined to determine the value of the property to be taxed by using as a guide the value of the capital stock and other rules which shall enable them to fix, not the true value in money of the company's property, but its true value in money in proportion to the entire property of the company as determined by the capital stock and other rules. In other words, it is merely a legislative declaration that the true value in money of the entire property of the company is determined by the entire capital stock of the company and other rules, and the true value in money of the Ohio part is merely a proper proportion of the value of the entire property thus determined. The only construction which would eliminate the error of the law is one which would require the board to ignore the market value of the shares as an element of value. If this were a possible construction (as I think it is not), the result in this case would not be different, for the present assessment would have to be enjoined as not authorized by law. Certain it is, that courts will not permit injustice to be done to a class of taxpayers by a law which is so worded as to mean one thing to the courts when its validity is attacked, and another thing to the taxing officers when they come to enforce it. Either the law means what the officers construe it to mean, and its validity is to be tested on that construction, or they are to be enjoined from enforcing it except as the courts shall construe it. Cummings v. Bank, 101 U. S. 153.

Much stress has been laid on two cases decided by the supreme court of the United States, cited in support of this law. The first —that of W. U. Tel. Co. v. Attorney General of Massachusetts, 125 U. S. 530, 8 Sup. Ct. 961—was a suit for taxes by the attorney general of Massachusetts against the telegraph company under the general law of the state. By that law, all corporations chartered by the state were required to return the market value of the aggregate shares of their capital stock and all their works, structures, real estate, and machinery subject to local taxation without the state. Railroad and telegraph companies were required to return the whole length of their lines, and the length of them without the state. Every corporation was required to pay what in the law is called "a tax upon its corporate franchise at a valuation thereof equal to the aggregate market value of the shares in its capital stock," after deducting in the case of railroad and telegraph companies whose lines extended beyond the limits of the commonwealth such portion of the whole valuation of their capital stock, ascertained as aforesaid, as was proportional to the length of that part of their line lying without the commonwealth, and also an amount equal to the value of their real estate and machinery located and

subject to local taxation within the commonwealth, and after deducting in the case of other corporations an amount equal to the value of their real estate and machinery subject to local taxation wherever situated. By another section these provisions were made applicable to a foreign telegraph company. The answer of the telegraph company denied the right of the state to tax its corporate franchises received from another state, and made its chief defense that such a tax was really a tax upon the franchises received by it from the United States government, by virtue of which it was given the right to occupy all the post roads in the state as an agent of the government and for interstate commerce, and that, even as a tax upon its franchise, it was unfair, because it did not deduct from the market value of its entire capital stock the real estate owned by the company in other states; but there was no averment or evidence to show that the value of the company's property in the state was less than the amount assessed against it. The supreme court gave most of their consideration to the defense founded on the fact that the company was enjoying a franchise from the United States government, holding that, though this prevented the state from excluding the company from post roads, it did not prevent the state from taxing their property. The court upheld the tax as a tax against the corporation on account of the capital owned and used by it in the state of Massachusetts. The discussion is summed up by Mr. Justice Miller as follows (125 U. S. 552, 8 Sup. Ct. 961):

"The tax in the present case, though nominally upon the shares of the capital stock of the company, is, in effect, a tax upon that organization on account of property owned and used by it in the state of Massachusetts; and the proportion of the length of its lines in that state to their entire length throughout the whole country is made the basis for ascertaining the value of that property. We do not think that such a tax is forbidden by the acceptance on the part of the telegraph company of the rights conferred by section 5263, Rev. St., or by the commerce clause of the constitution. It is urged against this tax that in ascertaining the value of the stock no deduction is made on account of the value of real estate and machinery situated and subject to local taxation outside of the commonwealth of Massachusetts. The report of Examiner Fiske, to whom the matter was referred to find the facts, states that the amount of the value of said real estate outside of its jurisdiction was not clearly shown, but it did appear that the cost of land and buildings belonging to the company, and entirely without that state, was over three millions of dollars. In the statement of the treasurer of the company, it is said that the value of the real estate of the company within the state of Massachusetts was nothing. Since the corporation was only taxed for that proportion of its shares of capital stock which was supposed to be taxable in that state, on the calculation above referred to, and since no real estate of the corporation was owned or taxed within its limits, we do not see why any deduction should be made from the proportion of the capital stock which is taxed by its authorities. But, if this were otherwise, we do not feel called upon to defend all the items and rules by which they arrived at the taxable value on which its ratio of percentage of taxation should be assessed; and, even in this case, which comes from the circuit court, and not from that of the state, we think it should appear that the corporation is injured by some principle or rule of the law not equally applicable to other objects of taxation of like character. Since, therefore, this statute of Massachusetts is intended to govern the taxation of all corporations therein, and doing business within its territory, whether organized under its own laws or those of some other state, and since the principle is one

which we cannot pronounce to be an unfair or an unjust one, we do not feel called upon to hold the tax void, because we might have adopted a different system had we been called upon to accomplish the same result. It is very clear to us, when we consider the limited territorial extent of Massachusetts, and the proportion of the length of the lines of this company in that state to its business done therein, with its great population and business activity, that the rule adopted to ascertain the amount of the value of the capital engaged in that business within its boundaries, on which the tax should be assessed, is not unfavorable to the corporation, and that the details of the method by which this was determined have not exceeded the fair range of legislative discretion. We do not think that it follows necessarily or as a fair argument from the facts stated in the case that there was injustice in the assessment for taxation."

The Massachusetts case has no application whatever to the question we are now considering under the state constitution. The question which the court had there to consider was whether the mode of assessing the value of the company's property was unfair in two respects: Was it unfair with respect to the mode of assessment against like property in Massachusetts held by other corporations? Second. Did it include in the valuation against the telegraph company anything not within the taxing jurisdiction of Massachusetts? As to the first question, the court found that by general law the state taxed all corporations on the difference between the assessed value of the tangible property subject to local taxation and the market value of the shares of the capital stock. This, though in name a tax on the franchise, was held to be a tax on the capital of the corporation used in its business. The property, as thus valued, of course included the element of the good will in Massachusetts, the skill and economy of the local management, and local franchises which the money capital of the corporation had been invested to secure. The elements of value were all within the taxing jurisdiction of Massachusetts, and, as they were taxed as capital against the corporations of Massachusetts, there was no reason why they should not be taxed as such against foreign corporations whose enjoyment of the same things of value were protected by the law of the state.

The question in the case at bar is whether the mode of valuing complainant's property under the Nicholls law is within the meaning of article 12, § 2, of the Ohio constitution, according to its true value in money, and uniform with the valuation of other property taxed in the state. I have tried to show that the valuation for taxation of property used in business in Ohio by including as an element of its value the good will of the business, and the other things, not property, which unite to earn profits, is not the mode prescribed for the valuation of any property except that of the companies covered by the Nicholls law, and is presumably, therefore, not a method of assessing according to its true value in money as enjoined by the Ohio constitution. In the case of Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, 11 Sup. Ct. 876, the tax which was disputed was in terms a tax upon the capital stock of the company, which owned 100 cars or more, passing constantly into, through, and out of the state of Pennsylvania. The amount of the tax was determined by taking that proportion of the entire

capital stock of the company which the number of miles operated by its cars in Pennsylvania bore to the total mileage operated by the company. The court below sustained the tax as levied upon that part of the capital stock invested and used in Pennsylvania. No complaint was made by the company that the amount taxed exceeded the value of the company's capital invested in property which was at times within the taxing jurisdiction of Pennsylvania. The sole question was whether the tax based on the mileage of the cars which were engaged in interstate commerce was not a tax on interstate commerce. The discussion was as to the situs of the cars. There is no constitutional limitation in Pennsylvania, as there is in Ohio, which requires the property of corporations to be taxed in the same way as that of individuals, and which prevents the valuation of their taxable property on a different scale from that of individuals. The Pennsylvania case is quite as inapplicable to the case at bar as the Massachusetts case, and for the same reasons.

A strong argument has been made to show that the companies embraced within the Nicholls law are of a peculiar class, and that, therefore, special rules for the assessment of their property are not a departure from true uniformity in taxation. The case of Express Co. v. Seibert, 142 U. S. 339, 12 Sup. Ct. 250, is cited to this point. In that case the question was whether a tax upon the gross receipts of an express company was violative of section 3, art. 10, of the constitution of Missouri, which required taxes levied to be "uniform upon the same class of subjects within the territorial limits of the authority levying the tax," when such a tax was not imposed on railroad companies. It was held that there was no lack of uniformity in the discrimination between the two classes of corporations because of the inherent difference in the manner of conducting their business. Mr. Justice Lamar, speaking for the court, said on page 351, 142 U. S., and page 250, 12 Sup. Ct.:

"This court has repeatedly laid down the doctrine that diversity of taxation, both with respect to the amount imposed and the various species of property selected either for bearing its burdens or for being exempt from them, is not inconsistent with a perfect uniformity and equality of taxation in the proper sense of those terms; and that a system which imposes the same tax upon every species of property, irrespective of its nature or condition or class, will be destructive of the principle of uniformity and equality in taxation, and of a just adaptation of property to its burdens."

That this is true as to an economic principle, and that it is equally true in considering the question whether the enforcement of a tax against any property by a state is the denial of the equal protection of the laws secured by the fourteenth amendment to the federal constitution, must, of course, be conceded; but that it is true as constitutional law in Ohio must be denied. The constitution of Ohio does impose the same tax on every species of property, as therein defined, according to its true value in money. The constitution of Missouri permitted the classification of property and diversity of taxation on the different classes. The Ohio constitution does not. Speaking of the differences between railroad and steamboat companies and express companies, Mr. Justice Lamar said, in the same case:

"The vital distinction is this: Railroad companies pay taxes on their roadbeds, rolling stock, and other tangible property, as well as generally upon their franchise; and steamboat companies likewise pay tax on their tangible property. This tax is not necessarily an ad valorem tax at the same rate as is paid on other private property in the state belonging to individuals. Generally, indeed, it is not, but is often determined by other means, and at different rates, according to the will of the legislature. Kentucky Railroad Tax Cases, 115 U. S. 321-337, 6 Sup. Ct. 57. On the other hand, express companies such as are defined by this act have no tangible property of any consequence subject to taxation under the general laws. There is, therefore, no way by which they can be taxed at all, unless by a tax upon their receipts from business as transacted."

No one can read this passage without seeing that the learned justice was dealing with a state constitution very different from that of Ohio. It is true that a tax on gross receipts of a foreign telegraph company has been sustained in Ohio (Telegraph Co. v. Mayer, 28 Ohio St. 521), not as a tax on property, but as a tax on a franchise, which is not property in Ohio (Bank v. Hines, 3 Ohio St. 1). Whenever property is taxed in the latter state, whether it be the property of a railroad, a steamboat, or an express company, it must pay the same tax according to its true value in money. It needs no argument to establish that telegraph companies, express companies, and telephone companies conduct a business yielding very large profits in proportion to the tangible property owned by them, and that the protection which they enjoy from the government of the state requires and justifies the imposition of taxes upon them greatly in excess of the general rate per cent. on their taxable property assessed at its true value in money, as required by article 12, § 2, of the constitution of Ohio; but it does not justify the fictitious valuation of their property for taxation in violation of that section. The inequality must be remedied by taxes based on something other than property, and this brings us to another argument on behalf of defendants.

It is said that if the tax imposed by the Nicholls law cannot be supported as a property tax it may be supported as a tax upon the franchise of the corporation to do business as such in Ohio, or as a tax upon its business in the state. The question of the power of the legislature of Ohio, under its constitution, to tax franchises or business has been much mooted, and in the language of some of the earlier decisions the power was expressly or impliedly denied, but an examination of the later decisions of that court seems to me to leave no doubt that by a proper construction of the constitution such a power is vested in the general assembly. Article 2, § 1, of the constitution provides that the legislative power of this state shall be vested in a general assembly, which shall consist of a senate and house of representatives. By this section it has been held that the taxing power was conferred on the general assembly, subject to such limitations as are thereafter imposed in the constitution. Article 12, § 2, enjoins the legislature to pass laws taxing by a uniform law all moneys, credits, investments in bonds, stocks, joint-stock companies, or otherwise, and also all real and personal property. The effect of this is only to limit the character of the law which the legislature may pass when taxing that which is property

within the terms used in that article. It has no effect to limit the character of a law passed to tax business or franchises, nor does it take away the power to tax them conferred by the general grant of legislative power. In Telegraph Co. v. Mayer, 28 Ohio St. 533, a tax upon the gross receipts of the complainant company was sustained as a tax upon the privilege it enjoyed of doing business and exercising its corporate franchise within the state. This decision has never been reversed or questioned as far as the state question is concerned, and fully establishes the right contended for by counsel for the state. See, also, Baker v. Cincinnati, 11 Ohio St. 540, 543; Adler v. Whitbeck, 44 Ohio St. 565, 9 N. E. 672; Anderson v. Brewster, 44 Ohio St. 585, 9 N. E. 683; Marmet v. State, 45 Ohio St. 68, 12 N. E. 463; State v. Reinmund, 45 Ohio St. 214–218, 13 N. E. 30; Ashley v. Ryan, 49 Ohio St. 504, 31 N. E. 721.

While, therefore, the power of the legislature to tax the privilege of the telegraph company to exercise its corporate franchise in Ohio must be conceded, I cannot see how it is possible to construe and enforce the Nicholls law as one taxing the franchise or the business of the company, or as one taxing the property and franchise and business of the company all together, because the law fixes no definite mode of ascertaining the amount of tax to be imposed for franchise and business, but leaves the amount above the intrinsic value of the property to be fixed at the discretion of the board of appraisers. It may be conceded that strict uniformity in a franchise or business tax as to different classes of corporations is not necessary, because the power is not controlled by article 12, § 2; yet it is certain that the legislature cannot delegate to a board of appraisers to determine how much shall be imposed on any corporation or class of corporations as a franchise or business tax. Had this law fixed exactly the amount of tax to be paid, by fixing the value to be assessed as a certain proportion of the capital stock, it could not, as I have attempted to show, be held valid as a property tax; but it would be a question whether it might not be supported, under the state constitution, as a property and franchise tax together (see suggestion by Judge Johnson in Telegraph Co. v. Mayer, 28 Ohio St. 531–540), or as a franchise tax only. In the Mayer Case, the amount of the tax was certainly fixed by the gross receipts and the rate per cent. of property tax in each county. But here the board is enjoined to value property, and consider as an element in the value of it that which has no necessary relation to its value as such, and which, in view of laws taxing other property, cannot constitutionally affect its taxable value. What weight shall be given to this element, is left to the board. To uphold the law as a tax on a franchise or business would be, therefore, to commit to the discretion of the board, the amount which should be paid as tax for such franchise or business. This would be a delegation of legislative power to executive officers, not permissible under the constitution. Cincinnati, W. & Z. R. Co. v. Commissioners of Clinton Co., 1 Ohio St. 77–87.

I have reached the conclusion that this law is unconstitutional with great reluctance, and only after much consideration of it, fully

realizing the duty of a court to sustain a law if it can be done, particularly under the circumstances of this case. It is exceedingly embarrassing for a federal court to pass upon the validity of a state law, under a state constitution, in advance of the supreme court of the state, which is the ultimate tribunal on all such questions. Pelton v. Bank, 101 U. S. 143, 144. For this reason, I ordered a reargument of the case. If I could avoid passing on the question before the state supreme court shall have passed on it, with a due sense of my judicial obligation to litigants who, under the constitution and laws of the United States, have the right to invoke my judgment, I would gladly do so; but I have now held the case since December last, when the first argument was made, and since March 23d, when the second argument was made, and I think I ought not to delay longer when pressed by counsel for a decision. I ought to add that if the case could have been made to turn on a question under the federal constitution, I should have passed the state question without deciding it; but this was impossible. As, in my opinion, the law is invalid for the reasons given, it is unnecessary to consider the federal questions raised.

One thing more remains to be said, and that is, in regard to the payment of taxes by the complainant. If the part of the Nicholls law prescribing the mode of valuation is to be held invalid, then the whole law must be held invalid, because it is manifest that it was the invalid parts which induced the passage of the other provisions. The whole system constructed in the Nicholls law revolves around that as its prominent feature. With the law, must go the clause repealing old section 2778, for it is certain that the repealing clause would not have been passed, had the legislature anticipated a judicial declaration of the invalidity of section 2778a. The result is that section 2778 of the Revised Statutes is now in force, and the complainant ought to pay its taxes thereunder. It has, as the amendment to the bill and affidavits show, paid taxes on its real and personal property in Ohio, but not the taxes due under section 2778. Until this is done, it is not entitled to equitable relief. Unamended section 2778 prescribes that the telegraph company shall pay at the same rate per cent. as the tax on property in each county, upon the gross receipts in the county from business done within the state. In counties where the tax under the Nicholls law exceeds that under old section 2778, the preliminary injunction prayed for will be granted on condition that the taxes due therein under old 2778 are paid within 10 days from the filing of this opinion. In counties where the taxes to be paid under old 2778 exceed those due under the Nicholls law,—which must be the case in two or three counties with large cities,—the complainant cannot be injured, even if the certificate of the board of appraisers goes down to the auditor, and the tax is collected; for, if the Nicholls law is invalid, the company must there pay more taxes than those certified. As to the certificates to such counties, the board will not be enjoined. Counsel can doubtless agree in respect to which counties certificates should not be enjoined, and prepare the order of injunction accordingly. If within 10 days the additional

taxes have been paid in counties to be affected by the injunction thus drawn, and another amendment to the bill, with affidavit, is filed, showing such payment, the demurrer to the amended bill will be overruled; otherwise the bill will be dismissed.

ADAMS EXPRESS CO. v. POE, Auditor of State of Ohio, et al.

(Circuit Court, S. D. Ohio, E. D. April 23, 1894.)

No. 637.

TAXATION—EXPRESS COMPANIES—NICHOLS LAW.

The "Nichols Law" (Rev. St. Ohio, § 2778a), which provides that the taxable value of the property of express companies doing business within the state shall be based upon the market value of their capital stock, violates Const. Ohio, art. 12, § 2, which requires that the taxation of property shall be "by a uniform rule;" for the value of the capital stock includes good will and other intangible elements of value, which are not taxed as against individuals and other corporations.

This is a suit in equity to enjoin the assessment of a tax, brought by the Adams Express Company, a joint-stock company under the laws of New York, in the name of its president, Henry Sanford, against the state auditor, attorney general, and state treasurer of Ohio. It now comes on for hearing on demurrer to the bill, and on motion by complainant for preliminary injunction.

The main questions at issue are the same as those considered in the opinion just filed in the case of the Western Union Telegraph Company against the same defendants (61 Fed. 449). The bill avers that the complainant prepared and filed with the state auditor a statement, for the year 1893, of the amount of its capital and property, and of its gross receipts, in each county in the state of Ohio, and the aggregate value of its shares, together with a detailed report of all the property owned by the complainant in the state of Ohio, and where located, and the amount at which the same was assessed for taxation; that the defendants, as a board of appraisers, under the Nichols law fixed, in accordance with its requirements, the value of the property of the complainant within the state of Ohio at the sum of $460,033.08; that they threaten to certify the sum to the auditors of the various counties, as directed by the state, after apportioning the amount in the ratio of the gross receipts of complainant from its business in each of the counties to the entire gross receipts in the state; that, unless restrained by an order of this court, the defendants will make such certification to the auditors of 67 counties in which complainant does business, who will at once, as required by the said pretended laws, certify the same to the respective treasurers of each of said counties for collection, where it will be necessary, unless the board is restrained, to bring suits to enjoin the collection of the assessment; that the rate of taxation in Ohio for 1893 varies, according to the county, from 2½ to 3 per cent., so that the aggregate assessment against the complainant upon the illegal and excessive appraisement will amount to between $12,000 and $14,000, and in one or more counties will exceed $2,000; that the complainant owns no line of railroad in the state of Ohio, and that it conducts its business on many lines of railroad under contract with owners of said railroads; that it owns no real estate in said state, except such as is used in stabling its horses owned and used by it in the collection and distribution of goods, wares, and merchandise, and that its personal property in said state consists entirely of office furniture and tools, horses, and wagons; that the total value of its personal property in the state of Ohio does not exceed the sum of $53,500; that it has paid all taxes due upon its real estate within the state to date; that the Nichols law is unconstitutional and void, in this:

that it does not provide a method for the taxation of property according to the true value in money, but is really an attempt to enforce against telegraph, telephone, and express companies the payment of a tax for the privilege of doing business in said state, by placing a fictitious value upon their property, not authorized by the constitution of the state of Ohio; that the scheme of taxation set forth in said alleged law professing to tax property in the state of Ohio does not do so, because it directs the board of appraisers, in ascertaining the value of the property of express companies in Ohio, to be "guided by," and to "determine the value" of the companies' property in said state by, the value of the companies' capital stock; that the value of the companies' capital stock is fixed and determined by the nature, extent, and uses of their property, not only in Ohio, but in many other states of the United States, and by the skill, diligence, fidelity, and success with which their business is conducted in all these states; that complainant employs many thousands of men, who are constantly engaged as messengers in carrying goods, wares, and merchandise from one part of the country to another, and otherwise, and that its income is largely the result of their efforts; that it owns valuable securities of other companies and holds valuable contracts and business arrangements with other corporations, and that all of these, with the good will which it has earned in the course of more than 50 years of service to the public in said business, go to make up the value of the shares of its capital; that the whole number of shares of said company is 120,000, and the market value of said shares, of the par value of $100, each, has ranged from $140 to $150, a price very much above the actual value of all the property of said company; that the law is a tax upon interstate commerce; that the method of taxation, if enforced against it, will destroy the business of complainant in Ohio, and compel it to abandon the said state, to its great and irreparable damage. The prayer of the bill is that a multiplicity of suits may be avoided, and the injury threatened, as above set forth, may be averted, by a preliminary injunction, and that, after hearing, a final injunction shall be granted against the defendants from certifying the appraisements under the Nichols law to the county auditors.

Subsequently, an amendment to the bill was filed, averring the payment of taxes upon the real and personal property of the company in each county in Ohio. An affidavit was filed by the defendants, showing the method by which the appraisement of the defendants was reached. The affidavit shows that the board had the following facts before it: That the number of shares of the capital stock of the Adams Express Company was 120,000. That the market value was from $140 to $150 per share, making the actual amount of 120,000 shares, at $140 per share, $16,800,000. That the total value of the personal property in Ohio of the Adams Express Company, consisting of office furniture, horses, and wagons, was $53,080.74, and that the gross receipts of the business done by the company within the state of Ohio for the year ending the 1st of May, 1893, was $175,034. That the total value of the real estate of the Adams Express Company everywhere was $3,050,272.47, and the total value of the personal property of the company was $1,034,481.43. That in the statement of the Adams Express Company were included reports from 363 offices. That from 2 of these offices the personal property was returned of the value of less than one dollar; from 72 of the offices the personal property in each instance was returned at a value of one dollar; from 51 offices the value of the personal property was returned of over one dollar and under two dollars. That the express company made no returns of safes, pouches, or other personal property used on the railroad lines in the state in the transaction of its business. The affidavit shows, and so do the minutes of the board, that "in arriving at the value of the property of these express companies taxable in Ohio the board did not follow any fixed rule, except the rule that property in Ohio is ordinarily taxed at no more than two-thirds of its actual value, and the law governing this board. The board considered the facts, already stated, set out in the returns and supplementary statements, and also other facts in said returns, and in the testimony of the authorized agents of the companies who appeared before the board. For purposes of comparison, the board examined the gross receipts returned by these companies in preceding years. Taking all the

information the board had or could secure, the value of the capital stock of the company, its gross receipts within Ohio, the return of personal property made, and the character thereof, and evident under-valuation and omission therein, the number of offices, the amount of business done, the nature and value of the property and capital required to carry on such business, and other evidence and information, the board in each instance ascertained what it considered the fair proportion of the property of the company employed by it in Ohio, and fixed the value of the property of such company situate and taxable therein, being guided, in determining the value of the property, by the value of the entire capital stock, and other evidence and information before the board."

Ramsey, Maxwell & Ramsey, for complainant.
J. K. Richards, Atty. Gen., and Thos. McDougall, for respondents.

TAFT, Circuit Judge (after stating the facts as above). The validity of the Nichols law has been considered in the opinion—filed at the same time with this—in the case of the Western Union Telegraph Company against the same defendants (61 Fed. 449), and all the questions of law therein considered are raised by the bill and demurrer and the motion for an injunction in this case. The question of jurisdiction by reason of the amount involved is also the same as in the Western Union Telegraph Company Case. It is admitted that the difference between the aggregate amount of the certifications to the county auditors about to be made by the defendants against the Adams Express Company under the Nichols law, and the amount which that company will pay under previous laws, if the Nichols law is finally held invalid, amounts to $241,918.34, which difference, at the rate of taxation prevailing in Ohio, makes a tax of from $6,000 to $7,000. It is true that in no single county does this tax difference equal or exceed $2,000; but, as already held in the Western Union Telegraph Company Case, I do not think that the difference in any one county is the measure of the amount in controversy in this action. There is very little to add to what has been said in the telegraph opinion. The lack of uniformity in the mode of assessment under the Nichols law with that generally prevailing in Ohio in respect to property of individuals and other corporations is more marked in the case of this complainant than it was in the case of the telegraph company. There is a suggestion in the report of the assessors that the express company did not return all its property, because its return did not include the safes and pouches which must be used in its business. But it is not claimed, and could not be, that the failure to return the safes is an explanation of the difference between $53,000, the amount returned by the company as the value of its property in Ohio, and the $460,000 at which the board has assessed the value of that property. The earning capacity of an express company, which largely determines the value of the shares of its capital stock, is even more dependent than the earning capacity of a telegraph company upon its good will, skill and honesty of its employés, and upon its franchises and other rights and privileges not property. A very important source of the revenues of an express company is the business arrangements which it has with railroad companies, by vir-

tue of which, for a lump sum, fixed annual payments, or percentage of gross receipts, the railroad company permits a particular express company to use its cars for the transportation of its merchandise, and to use its stations, depots, and employes for the transaction of its local business. It is very doubtful, in my mind, whether such a business arrangement is personal property, to be returned for taxation under the laws of Ohio. It certainly is not real estate, because it gives an express company no interest in the land. It is intangible. The making of such a contract probably involves the personal character, so to speak, of the contracting express company, its good will, and its reputation for honesty and promptness, so that a contract made with it would be inalienable by it. It is certain that express companies have never been required to make returns of such contracts as personal property, and the definition of personal property, as given in section 2730, does not include it, for personal property, as there defined, is as follows:

"The term 'personal property' shall be held to mean and include, first, every tangible thing being the subject of ownership, whether animate or inanimate, other than money, and not forming part of any parcel of real property, as hereinbefore defined; second, the capital stock, undivided profits, and all other means not forming part of the capital stock, of every company, whether incorporated or unincorporated, and every share, portion, or interest in such stock, profits, or means, by whatsoever name the same may be designated, inclusive of every share or portion, right, or interest, either legal or equitable, in and to every ship, vessel, or boat, of whatsoever name or description, used or designed to be used either exclusively or partially in navigating any of the waters within or bordering on this state, whether such ship, vessel, or boat shall be within the jurisdiction of this state or elsewhere, and whether the same shall have been enrolled, registered, or licensed at any collector's office, or within any collection district in this state or not; third, the money loaned on pledge or mortgage of real estate, although a deed or other instrument may have been given for the same, if between the parties the same is considered as security merely."

Such contracts or business arrangements would seem to be more nearly included as "credits," which are defined by the same section as follows:

"The term 'credits' shall be held to mean the excess of the sum of all legal claims and demands, whether for money or other valuable thing, or for labor or service due or to become due to the person liable to pay taxes thereon, including deposits in banks or with persons in or out of this state, other than such as are held to be money, as hereinbefore defined, when added together (estimating every such claim or demand at its true value in money), over and above the sum of legal bona fide debts owing by such person."

And yet it is doubtful whether the right to enforce a contract unexecuted on either side could be said to be a legal demand for services due or to become due. However this may be, even if the value of such contracts were taxable as property in Ohio, there still would remain the good will of the business, the skill and experience of the officers, the discipline among, and honesty of, the employes of the company, which contribute so largely to the earnings, and yet are not taxable property in Ohio.

The suggestion is made that the return of the company is an undervaluation, because no personal property, or a very small amount, is returned from any offices of the company in Ohio. I do not know why

that should indicate undervaluation, because it plainly grows out of the fact that, at the many small stations along the lines of the railroad upon which the express companies operate, the express company uses the office furniture and the office of the railroad company, and has no property of its own. There was in this case no mileage basis for the distribution of the capital stock, and the board of appraisers are unable satisfactorily to explain the basis upon which they affixed, to property returned by the express company as worth $53,000, an additional value of over $400,000, except that in reaching this additional value they considered the gross receipts of the company in Ohio, and the market value of its entire capital stock, and other evidence and information. This only confirms the conclusion reached in the case of the telegraph company, that the board construed the Nichols law to mean that there should be apportioned to the state of Ohio for taxation, as property within the state, a fair share of the aggregate market value of the capital stock of the company.

It is very true, as said by the supreme court in the case of Express Co. v. Seibert, 142 U. S. 339, 12 Sup. Ct. 250, that the tangible value of express companies is in a very small ratio to the protection which they receive from the government of the state, and therefore that it is entirely just that their burdens of taxation should not be proportioned to the visible tangible property upon which they may be taxed. But the difficulty in Ohio is that, under the constitution, the property of the corporations and individuals must be taxed by a uniform rule, and the inequalities of taxation produced by the fact that large earnings are made by corporations with small tangible property cannot be obviated by affixing to the property of such corporations a fictitious value, plainly not based on the true value of it in money. The tax must be imposed on something other than property.

The same order of injunction will be made in this case which was directed in the case of the telegraph company. As, under the old law, the taxes paid by the express companies were proportioned to the gross receipts in each county, and the same method of distribution is prescribed under the Nichols law, it is apparent that the complainant will not have to pay, under the old law, any more taxes in any particular county than it would have to pay under the Nichols law. For this reason, the order of injunction will cover the certifications to all the counties, and will be made conditional on the complainant's paying the taxes on its gross receipts from business done within the state of Ohio in each county for the year ending May 1, 1893, with interest and penalty, and, when an amendment to the bill showing such payments has been filed, the demurrer will be overruled; otherwise, and unless this amendment is filed within 10 days, the bill will be dismissed.

UNITED STATES EXP. CO. v. POE, Auditor of State of Ohio, et al.

AMERICAN EXP. CO. v. SAME.

(Circuit Court, S. D. Ohio, E. D. April 23, 1894.)

Nos. 675 and 674.

FEDERAL COURTS—JURISDICTIONAL AMOUNT—TAXATION.

In a suit in the federal court to enjoin an assessment under a state law alleged to be unconstitutional, a preliminary injunction will be denied where it appears, by uncontradicted affidavits, that the increased tax imposed by reason of such illegal assessment is less than $2,000, though the averments of the bill are sufficient to give the court jurisdiction.

In Equity. On demurrer. Bills by the United States Express Company against Ebenezer W. Poe, auditor, John K. Richards, attorney general, and William T. Cope, treasurer, of the state of Ohio, and by the American Express Company against the same defendants. Bills dismissed.

Ramsey, Maxwell & Ramsey, for complainants.

J. K. Richards, Atty. Gen., and Thos. McDougall, for respondents.

TAFT, Circuit Judge. These are suits in equity brought to enjoin the collection of taxes under the so-called "Nichols Law" of Ohio, and on the merits present much the same questions which have already been decided in the cases of the Western Union Telegraph Company and the Adams Express Company against the same defendants. 61 Fed. 449, 470. In these cases, however, it clearly appears by affidavit that the difference between the amounts upon which the complainants must pay taxes under the laws in force, if the Nichols law is invalid, and the amounts upon which they are required to pay by the assessments of the defendants as a board of appraisers under the Nichols law, is in the case of the American Express Company but $23,000, and in the case of the United States Express Company but $18,082. The average rate of taxation in Ohio, as shown by the affidavits, is from 2½ to 3 per cent. Such a percentage of this difference would make the whole amount in controversy in each case less than $2,000. It is true that the averments of the bill are sufficient to give the court jurisdiction, but the affidavits show (and there are no counter affidavits) the facts to be as above stated. While, therefore, I cannot sustain the demurrers to the bills, on the ground that, on their faces, they show a lack of the jurisdictional amount in controversy, I can refuse the preliminary injunction on that ground. I can dismiss the bills on the ground that they do not show a payment of the taxes due under old section 2778, Rev. St. Ohio, which would be in force if the Nichols law is unconstitutional, and can refuse to permit an amendment such as I have permitted in the Western Union Telegraph Company and Adams Express Company cases. The demurrers in this case to the bills will, therefore, be sustained, and the bills dismissed.

PACIFIC ROLLING-MILL CO. v. HAMILTON et al.

(Circuit Court, D. Washington, N. D. March 31, 1894.)

MECHANICS' LIENS—WHO ENTITLED TO—CONSTRUCTION OF STATUTE.

A statute gave a lien to any person furnishing materials, etc., to the owner of any building or other improvement, "or his agent," and further declared that "every contractor, subcontractor, architect, builder or person having charge * * * either in whole or in part, of any building or improvement shall be held to be the agent of the owner for the purposes of this chapter." 1 Hill's Code Wash. § 1663. *Held*, that the enumerating words were all qualified by the words "person having charge," etc., and that one who merely contracted with the manager of a construction company, in his individual capacity, to furnish materials for use by the company, and afterwards purchased the materials from plaintiff, was not the agent of the company, so as to entitle plaintiff to a lien.

Bill by the Pacific Rolling-Mill Company against C. L. Hamilton and James Street Construction Company, a corporation, to recover the balance of purchase price of materials used in the construction of the James Street Cable Railway in Seattle, and to establish and foreclose a lien for said balance. On final hearing.

Mitchell Gilliam, for complainant.

Eben Smith, for defendants.

HANFORD, District Judge. This is a suit in equity to recover from C. L. Hamilton $6,731.22, being the balance of the purchase price of materials sold and delivered by the complainant to said Hamilton, to be used in the construction of the James Street Cable Railway in Seattle, and to establish and foreclose a statutory lien upon said railway and the power house and real estate connected therewith and appurtenant thereto. Hamilton has not been served with process, nor appeared to defend. The James Street Construction Company, owner of the property upon which a lien is claimed, has, after demurring to the bill, answered, contesting the claim to a lien. Evidence and arguments have been submitted in behalf of the complainant and said defendant. As to many of the questions argued by counsel I have not formed a definite conclusion. Having found one fatal objection to the lien, it is not expedient for me to pass upon or discuss the other points. The statute of this state under which the lien is claimed provides as follows:

"Every person performing labor upon or furnishing materials to be used in the construction, alteration or repair, of any mining claim, building, wharf, bridge, ditch, dyke, flume, tunnel, fence, machinery, railroad, wagon road, aqueduct to create hydraulic power, or any other structure, or who performs labor in any mine or mining claim, has a lien upon the same for the work or labor done or materials furnished by each respectively whether done or furnished at the instance of the owner of the building or other improvement, or his agent; and every contractor, sub-contractor, architect, builder or person having charge of any mining or of the construction, alteration or repair, either in whole or in part, of any building or other improvement, as aforesaid, shall be held to be the agent of the owner for the purposes of this chapter." 1 Hill's Code Wash. § 1663.

The vital defect which I find in the complainant's case is in the failure to show that the materials were furnished by it at the in-

stance of the owner of the cable railway, or any agent of the said owner. The bill does not charge that the complainant contracted with the owner directly, but, on the contrary, avers that the materials were sold by it to Hamilton, and this averment is, by the evidence, fully proven. It is alleged that Hamilton was a contractor with the owner, and that the materials were sold to him as such contractor. This is not equivalent to charging that he was an authorized agent of the owner of the cable-railway property upon which a lien is claimed, unless the law constitutes every person who contracts to supply material for a new structure an agent of the owner. I do not, however, intend to rest my decision upon a strict construction of the pleadings. Upon the merits of the case, considering the law and the evidence, I hold that Hamilton was not actually nor constructively an agent of the owner of this cable-railway property for any purpose whatever. He did not contract with said owner, but, on the contrary, refused to deal with the company, both before and after buying the materials. He did enter into a contract in writing with the acting manager of the company in his individual capacity to sell and deliver the materials to him, and at the time of delivering the bills of lading for said materials required as a condition of said delivery that said manager should individually sign a negotiable promissory note, which was given in payment for part of the purchase price. After entering into said contract with the manager to sell to him specified materials, Hamilton bought the same from the complainant. The materials were, by Hamilton's direction, shipped consigned to said manager, but the bills of lading were sent to a bank in Seattle, accompanied by a draft for the sum of $12,970.63, the purchase price, to him. Upon delivery of the bills of lading he received from said manager $8,074.85 in cash and a negotiable note for $4,395.58, leaving unpaid $800 (of the price to the manager), to cover any shortage that might be discovered in the shipment; and took up the draft by paying to the bank $6,485.31 in cash and giving his note for the same amount, the bank receiving payment in that manner under instructions from the complainant. These transactions afford no ground for assuming that the owner of the cable-railway property voluntarily made Mr. Hamilton its agent. He had no charge or control of the work of constructing the cable railway, or any part of it. The most that can be claimed as to his connection with the owner is that he was a subcontractor for supplying part of the materials required for constructing the cable railway.

The complainant's whole case is founded upon an assumption that the statute constitutes a person holding such relation to an owner of a new structure an agent with authority to subject the structure to a lien for the price of materials sold to him. In the statute under consideration the words "contractor" and "subcontractor" are each used as one of a group or class of words each of which is ordinarily and prima facie understood to be descriptive of a person having charge or superintendence of construction work, and the enumeration concludes with the general phrase, "or person having charge of any mining or of the construction, altera-

tion or repairs, either in whole or in part, of any building or other improvement," which applies to all the persons enumerated and qualifies each, with the same certainty as if the words of the general phrase were inserted and repeated between each of the words, "contractor," "subcontractor," "architect," "builder." Therefore, according to a well-defined rule for construing statutes, a subcontractor, to be an agent of the owner of any building or other improvement by virtue of this statute must be one having charge in whole or in part of the construction, alteration, or repair thereof. U. S. v. Chase, 135 U. S. 255, 10 Sup. Ct. 756. To so construe this statute as to make a mere vendor of materials the agent of his vendee's vendee with authority to charge the property of the latter with a lien in favor of his vendor, would be extremely unreasonable. Hence my conclusion that, as Mr. Hamilton did not have charge of any part of the cable railway, he was not an agent of the owner of it.

The James Street Construction Company has paid the full value of the materials to one who owned and had lawful right to sell them, and receive said payment. I find no ground for justly requiring it to pay again.

Decree dismissing the bill, with costs.

SWAN et al. v. CITY OF ARKANSAS CITY.

(Circuit Court, D. Kansas, Second Division. May 16, 1894.)

1. MUNICIPAL CORPORATIONS—BONDS.
   Under Comp. Laws Kan. 1885, c. 19, art. 1, § 5, which declares that the powers granted to cities of the second class "shall be exercised by the mayor and council of such cities," and article 7, § 111, which directs that funding bonds shall be duly issued only after an ordinance therefor shall be duly passed, funding bonds signed by the mayor of such a city, and attested by the city clerk, under the city seal, without any ordinance or resolution of the mayor and council, are void.

2. SAME—ESTOPPEL BY RECITALS.
   A recital in such bonds, to the effect that all the requirements of the statutes have been strictly complied with in issuing them, does not estop the city from denying their validity.

Action by the firm of Swan & Barrett against the city of Arkansas City to recover interest on certain bonds.

Rossington, Smith & Dallas, for plaintiffs.
John A. Eaton and Pollock & Love, for defendant.

WILLIAMS, District Judge. This is an action against defendant, which is a city of the second class, on interest coupons of bonds issued under the provisions of an act of the legislature approved March 8, 1879, authorizing a refunding of indebtedness. Under this act, bonds issued by any city are to be signed by the mayor, and attested by the city clerk, under the seal of the city. There were 54 bonds issued, each of $1,000, bearing 6 per cent. interest

per annum, evidenced by coupons, which, not being paid, are the subject-matter of this action. The bonds recite:

"That they were executed and issued by the city to compromise and refund its matured and maturing indebtedness heretofore legally created by said city and in accordance with the above named act of 1879."

And there is this further statement in the bonds:

"And it is hereby certified that the total amount of this issue of bonds does not exceed the actual amount of the outstanding indebtedness of said city, and that all the requirements of the provisions of the foregoing act have been strictly complied with in issuing this bond."

They were signed by the mayor, and attested by the city clerk, under the seal of the city. The other provisions of law relating to cities of the second class in force at that time, in so far as they are applicable to the issues raised in this case, are:

"The powers granted to and conferred upon cities of the second class shall be exercised by the mayor and council of such cities, as provided by law." Comp. Laws Kan. 1885, c. 19, art. 1, § 5.

"Before any bonds authorized by this act shall be issued, an ordinance of the city shall be duly passed, providing for the issuance and exchange or sale of said bonds; and said bonds or coupons when issued, shall be signed by the mayor and city clerk and shall have the seal of the city attached thereto." Id. c. 19, art. 7, tit. "Funding Bonds," § 111.

Section 10, c. 19, art. 1, directs the clerk to keep an ordinance book, in which all ordinances shall be recorded immediately after their passage. The bonds sued on were issued by the mayor without any ordinance of the council authorizing their issuance, nor is there any record of a resolution of the council to that effect. From the evidence it is clear that a great fraud was perpetrated on the city by the issuance of these bonds. The mayor was the president of the railroad company to whom the bonds were issued; the president of the city council was the president of the construction company, and nearly every member of the council was a guarantor of a subscription to the railroad company. At first the city issued $24,000 in bonds and $30,000 in warrants to the company, but the brokers in New York, Coler & Co., being unwilling to purchase these, the bonds now sued on were issued at their suggestion. The object was to estop the city from ever questioning the validity of these bonds and warrants. The evidence of Mr. Coler, the broker who purchased the bonds, leaves no doubt in my mind that he was fully cognizant of the fraud practiced upon the city. Whether Coler was the agent of plaintiffs, and whether his knowledge affects plaintiffs, it is unnecessary to decide in this case, for the proof is conclusive that plaintiffs purchased these bonds from Spitzer & Co., who were innocent holders, and all their rights passed to plaintiffs. Porter v. Steel Co., 122 U. S. 267, 7 Sup. Ct. 1206; Scotland Co. v. Hill, 132 U. S. 107, 10 Sup. Ct. 26. Plaintiffs are, therefore, entitled to all the protection which the law gives to holders of this class of securities, who purchased them without notice and for value. Since the decision of the supreme court in the Knox Co. Case, 21 How. 539, it is the settled doctrine of the United States courts that, in an action on municipal bonds by an innocent holder, the municipality

will be estopped to deny the truth of all recitals contained in the bonds which the officers issuing them were, by law, to determine before issuing the bonds. But this does not affect the power of the corporation or its officers to issue the bonds. No recitals can estop the municipality from pleading a want of power to issue the bonds, for the reason that municipalities and the officers thereof are but agents with limited powers, and their authority to act must be found in the public acts, and will not be presumed to exist. It requires no citation of authorities for this rule, and the learned counsel for plaintiffs in their able brief concede this to be the law.

The evidence clearly shows that these bonds were issued without any ordinance or resolution of the mayor and council. Is this fatal? On behalf of plaintiffs it is urged that the recitals in the bonds "that all the requirements of the provisions of the act have been strictly complied with in issuing them makes it unnecessary for a purchaser to examine the public records of the city for the purpose of ascertaining whether the mayor had been duly authorized to issue the bonds; that it is within the power of the mayor to pass upon that fact, and the issuance of the bonds by him is conclusive that the power existed." I cannot give my assent to this proposition, nor do any of the cases cited by the diligent counsel go to that extent. The decisions of the United States circuit court of appeals for the eighth circuit are conclusive on this count, and National Bank of Commerce v. Town of Grenada, 10 U. S. App. 692, 4 C. C. A. 212, 54 Fed. 100, is decisive of this case. In that case the court says:

"The plaintiff was bound to know, independently of the recitals in the bond that there was such an ordinance in existence. If the officers authorized to issue the bonds upon a condition are not the appointed tribunal to decide the fact which constitutes the condition, their recital will not be accepted as a substitute for proof. The very ground of the estoppel is that the recitals are the official statement of those to whom the law refers the public for authentic information on the subject."

There can be no doubt that this is the correct rule of law, and any other rule would place every city at the mercy of a single officer. The general laws of Kansas expressly vest all powers granted to cities of the second class in the mayor and council. Cities cannot act except through them. How are they to act, and how are their acts to be made known to the public? Chapter 19, art. 7, § 111, directs that funding bonds shall be issued only after an ordinance shall have been duly passed. It is true the bonds sued on herein were issued under the provisions of a later act of the legislature, but the fact that the act of 1879 fails to provide for the manner in which the bonds shall be issued raises the presumption that the legislature considered the laws then in force sufficient for that purpose, and for that reason made no further provision on that subject.

It cannot be denied that a city in Kansas cannot act except through its mayor and council when duly assembled for that purpose, and their acts must be evidenced by the record, whether by ordinance or resolution; and, as the proof in the case at bar failed to show that they acted in either manner, it is unnecessary to determine whether a resolution authorizing the refunding would be sufficient. It was

plaintiffs' duty, before purchasing the bonds, to examine the records, and ascertain whether the mayor and council had ever authorized their issuance, and, failing to do so, they will be charged with notice of the facts which they could have ascertained by such an examination. Neither Board v. De Kay, 148 U. S. 591, 13 Sup. Ct. 706, nor City of Alma v. Guaranty Sav. Bank, 60 Fed. 203, have any application to this case, as the only question involved there was whether a resolution of the mayor or council submitting the question of issuing bonds at an election was sufficient. In my opinion, the act of the mayor in issuing these bonds was wholly without authority, and they are therefore void. As this disposes of the case, it is unnecessary to pass on the other issues raised by the defense. There must be judgment for the defendant.

COTTON v. DACEY et al.

(Circuit Court, D. Kansas, Second Division. May 16, 1894.)

1. PRINCIPAL AND AGENT—FRAUD—MORTGAGE SUBROGATION.
   One who intrusts money to an agent to be invested in land, and whose agent fraudulently used the money to pay off a mortgage on certain land belonging to a corporation organized by the agent, may, on discovering the fraud, be subrogated to the rights of the mortgagee.
2. LIS PENDENS—ATTACHMENT.
   One who attaches land after a bill to establish an equitable interest in the land has been filed, but before service of process in such suit has been made on him, and who does not obtain judgment in his action until such service has been made, does not acquire, by his action, any rights in the land superior to the equities set up in the bill.
3. SAME—AMENDMENT.
   The fact that, after a sale of the land under the attachment judgment, a demurrer to the bill is sustained, with leave to amend, does not subordinate the equities set up in the bill to the lien of such judgment, where the bill is subsequently amended, since the amendment relates back to the institution of the suit.

In Equity.

Suit by Henry E. Cotton against W. G. Dacey and others.

Edwin White Moore, for complainant.

Bentley & Hatfield and Ira E. Lloyd, for defendants.

WILLIAMS, District Judge. It appears from the pleadings and testimony in this case that one of the defendants, Phipps, went from the state of Kansas east, for the purpose of procuring money to be invested in real estate in the vicinity of Ellsworth and Wichita, Kan., representing that said lands were exceedingly valuable, could be platted into town lots and blocks, and would return a large profit upon the investment to be made; that he, or the parties with whom he was connected, had options on said lands; that he obtained from the plaintiff and one Babcock the sum of $7,750, to be invested in such lands, representing to them that other citizens of adjacent cities were about to make similar investments, and that, with the money thus furnished, the plaintiff and Babcock and two

other persons mentioned by him were each to have a fourth interest in the lands, and that parties in Kansas were to have the other fourth interest. Phipps returned to Kansas with the money, and instead of investing it in lands, as contemplated by the agreement with the plaintiff and Babcock, he entered into an arrangement with the Daceys, who are defendants herein, and inaugurated a joint-stock company or corporation known as the Ellsworth Midland Investment Company, the capital stock of which was $200,000, Phipps receiving 300 shares, representing $30,000. No land whatever was purchased by Phipps with the money thus intrusted to him by the plaintiff and Babcock, but the Daceys had, prior to that time, purchased 272½ acres of land, paying therefor in cash $5,250, and executing a mortgage upon it for the sum of $8,000. This, by the arrangement between Phipps and the Daceys, constituted the capital stock of the Ellsworth Midland Investment Company, of which Phipps had, as shown, 300 shares, and the Daceys and their coadjutors the remaining 170 shares. The money of the plaintiff was used to pay off the mortgages upon a portion of the lands to which the Daceys have title, unless the same has been merged into the Ellsworth Midland Investment Company. The plaintiff repudiates the transaction between Phipps and the Daceys, and charges that it was a conspiracy from the beginning between Phipps and the Daceys to swindle him out of his money, and he asks that he be subrogated to the rights of the mortgagees in the lands upon which the mortgage existed which his money paid off, and asks that the lands be now decreed to be sold, to reimburse him for the money out of which he has been wrongfully deprived.

I think a statement of the case is sufficient to show, without further evidence, that there was collusion between Phipps and the Daceys in the entire transaction, and that a fraud has been perpetrated by them upon the plaintiff in this action, and that, as between the plaintiff and the Daceys and Phipps, they are entitled to the relief asked for. I am aware that there are authorities without number that, where a volunteer pays off a mortgage, he cannot be subrogated to the rights of the mortgagees, but where a fraud has been practiced upon him, and his money fraudulently used by connivance with his agent, or the one intrusted by him with his money, and the mortgagor, then a court of equity certainly should grant him the relief asked for, to be subrogated to the rights of the original mortgagee. Phipps had not a right to do anything with the money intrusted to him but to invest it in lands. That was the contract; that was the understanding; and no hint was conveyed to the plaintiff that his money thus obtained from him was to be thrust into the maw of a Kansas corporation organized as this was, he to receive such an insignificant share of the stock as to render him entirely helpless, and without any voice in the management of the corporation or company. When we consider the original cost of the lands,—$13,000,—and that the plaintiff furnished, in order to pay off the mortgages upon it, the sum of $7,750, it would seem that anything like a fair consideration of his rights would have induced the parties forming the Ellsworth Midland In-

vestment Company to have given him shares of the stock commensurate with the money that was invested. But, though he furnished more than half of the money, he received less than one-sixth of the stock, and that, too, under a distinct contract that his money was to be invested in lands. In view of the fraud thus apparently perpetrated upon the plaintiff, so far as the rights of the Daceys and Phipps are concerned, he should be and is clearly entitled to be subrogated to the rights of the original mortgagee.

But it is contended that one Evans, who is made a defendant herein, has rights superior to the rights of the plaintiff, because he has obtained, in the district court of the county where the land was situated, a judgment against the Daceys, the original owners of the land, and by virtue of said judgment and attachment proceedings his rights are superior to the rights of the plaintiff herein. His claim is based upon a fee or commission to be paid him for the purchase of the lands in controversy, and his original claim was in the sum of $1,472.15 for commissions, amounting to $5 per acre for the purchase of the land. The court may say in passing that such commissions are at least quite liberal, and seem to be acquiesced in by the Daceys, whether they were contracted for or not. The suit of Evans was instituted in said court after the filing of the original petition in this suit in the circuit court of the United States for the district of Kansas, second division. But it is claimed that, because no subpoena was issued until after the proceedings by attachment were instituted under the Evans suit, and because he was diligent and pursued his suit to judgment, and a sale was had of the property, his rights are superior to the rights of the plaintiff in this action; and the court is referred to numerous authorities in the state of Kansas which counsel insist shall regulate the course of procedure in this court. While due deference is paid to the decisions of the state courts of the state in which the courts of the United States are held in common-law proceedings, yet the courts of the United States refuse to be governed in equity proceedings by any statute law or the decision of any state court thereunder. This admits of no question, and the inquiry here is, was the institution of this suit in the circuit court of the United States sufficient notice to Evans, as provided for by the rules of said courts, or to all parties claiming any interest in the lands in this action? It is true, as contended by counsel for Evans, that a suit is not so pending as to operate as constructive notice until the process has been served or publication made. Games v. Stiles, 14 Pet. 326. And the writ in this case was not served until after Evans had instituted attachment proceedings against the land, although the bill had been filed February 5, 1892, and service had on the defendants other than Evans on July 5, 1892, and on C. J. & J. M. Evans on October 6, 1892, which was prior to final judgment in the district court of the state in favor of Evans. So the suit in this court was constructive notice to all the parties who now set up any equities in the lands sought to be subjected to the claim of plaintiff in this case, prior to the rendition of the judgment under which they purchased; and they cannot be held as innocent purchasers, for, up to

the time of the service of process in this case, they had done nothing by which they were within the definition of an innocent purchaser, which is that he is one who, at the time of his purchase, advances some new consideration, surrenders some security, or does some other act which leaves him in a worse position should his purchase be set aside. Perry, Trusts, par. 239. The attachment proceedings instituted by Evans did not affect the rights of plaintiff, or render his rights any greater as against the plaintiff. It must be borne in mind that the rights of the plaintiff grew out of the fact that, by the fraud and conspiracy between Phipps and Dacey, by which the money of plaintiff was used to redeem the lands in controversy from the mortgages, a trust is established in favor of the plaintiff in the lands which a court of equity will favor and enforce. This was the condition when Evans' attachment proceedings were instituted, and they did not terminate the trust, nor deprive him of the benefits or protection accruing to him thereunder. The equities of the plaintiff are such as to appeal strongly to the conscience of a chancellor, and I am clearly of the opinion that he is entitled to the relief prayed for as against Evans and those claiming to be innocent purchasers of the lands in controversy. But much stress is laid on the fact that, after the sale of the lands under Evans' judgment, a demurrer was sustained to the bill filed by the plaintiff herein, with leave to amend, and that for that reason the claim of Evans is paramount and superior. If the bill in this case was sufficiently amended, after demurrer and leave to amend was given, to afford the plaintiff the relief he asks for, the amendment relates back to the institution of the suit, and neither Evans nor those holding under him can take anything by this objection or this contention. I have deemed it unnecessary to enter into any discussion as to the validity of the attachment proceedings instituted by Evans, because, with my views of the case, the plaintiff is entitled to the relief asked for, regardless of the invalidity of such proceedings. Let decree be entered as prayed for in the original and amended complaint.

STEELE et al. v. CRIDER et al.

(Circuit Court, D. Kansas, Second Division. May 16, 1894.)

APPEAL—ACTION ON BOND.

An appeal bond which is given in a cause in which no appeal lies, and which does not operate to stay execution, creates no liability.

Action by Dudley M. Steele and J. W. Walker against James H. Crider, John A. Cragen, Edgar Henderson, William S. Grosvenor, and C. A. Magill upon an appeal bond.

Rossington, Smith & Dallas, for plaintiffs.
J. D. Houston, for defendants.

WILLIAMS, District Judge. It is shown by the petition and answer in this case that the defendant James H. Crider, as prin-

cipal, and the other defendants as sureties, executed for the benefit of the plaintiffs, in one of the courts of the Indian Territory, held at Muskogee, an interpleaders' bond, conditioned according to law; that, upon the trial of his interplea in said court, a judgment was rendered against him, and he—desiring, as is stated in the petition, to appeal to the supreme court of the United States from said judgment—executed in said court an appeal bond, with the defendants herein as sureties upon said bond. The bond, omitting the captions, is as follows:

"That we, James H. Crider, as principal, and John A. Cragen, Edgar Henderson, Wm. S. Grosvenor, and C. A. Magill, as sureties, are held and firmly bound unto Steele & Walker, a partnership composed of Dudley M. Steele and J. W. Walker, plaintiffs herein, in the full and just sum of four thousand dollars, to be paid to the said firm of Steele & Walker, their heirs or assigns, or their certain attorney, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals and dated this 20th day of May, in the year of our Lord 1890. Whereas, lately, at a term of the United States court for the Indian Territory, held at Muskogee, in the Indian Territory, in a suit depending in said court between Steele & Walker, partners as aforesaid, and Mackey & Company, a firm composed of T. E. Mackey and one Thomas Jones, wherein James J. Crider was an interpleader for attached property, a judgment was rendered against the said J. H. Crider, interpleader for attached property, and in favor of said Steele & Walker, and the said J. H. Crider having obtained leave to appeal, and filed a copy thereof in the clerk's office of the said court, to reverse the said judgment in the aforesaid suit, and a citation directed to the said Steele & Walker, citing and admonishing them to be and appear at the supreme court of the United States to be holden at Washington on the second Monday of October next: Now, the condition of the above obligation is such that if the said J. H. Crider, interpleader in said cause, shall prosecute such appeal to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void, else to remain in full force and effect." [Signed] ——.

No supersedeas was issued or allowed after the execution of said bond, and the said Crider failed to prosecute his appeal. The plaintiffs thereupon filed a transcript of the said judgment in the supreme court of the United States, and thereupon had said appeal dismissed.

The question for consideration is whether said bond has any force or effect whatever, or whether it can afford any ground for an action in this or any other court. Section 691, Rev. St. U. S., is as follows:

"All final judgments of any circuit court, or of any district court acting as a circuit court, in civil actions brought there by original process or removed there from courts of the several states, and all final judgments of any circuit court in civil actions removed there from any district court by appeal or writ of error, where the matter in dispute exclusive of costs exceeds the sum or value of two thousand dollars, may be re-examined and reversed or affirmed in the supreme court upon a writ of error."

Section 692 of said Revised Statutes reads as follows:

"An appeal shall be allowed to the supreme court from all final decrees of any circuit court or of any district court acting as a circuit court in cases of equity and admiralty and maritime jurisdiction, where the matter in dispute exclusive of costs exceeds the sum or value of two thousand dollars, and the supreme court is required to receive, hear and determine such appeals."

Section 42 of the Supplement to the Revised Statutes (page 738) reads as follows:

"Appeals and writs of error may be taken and prosecuted from the decisions of the United States court in the Indian Territory to the supreme court of the United States in the same manner and under the same regulations as from the circuit courts of the United States, except as otherwise provided in this act."

So it seems that there was no such thing as an appeal provided for by law from the judgment of the court in the Indian Territory in the case in which this bond was executed, and the inquiry then is whether this bond so executed has any force and effect whatever. In Saltmarsh v. Tuthill, 12 How. 387, where a bond on appeal was taken in a common-law case, instead of writ of error, the supreme court said:

"The appeal did not remove the case, and the writ of error was sued out too late to stay execution. It is immaterial whether it was a mistake of the party, or of the court."

In Bank v. Mixter, 124 U. S. 721, 8 Sup. Ct. 718, the court said:

"No attachment can issue from the circuit court of the United States in an action against a national bank before final judgment in the cause, and if such an attachment is made on mesne process, and it is then dissolved by means of a bond conditioned to plaintiff to pay the judgment which he may recover, given in accordance with the provisions of the law of the state in which the action is brought, the bond is void, and the sureties are under no liability to plaintiff."

No further citation of authorities is deemed necessary to show that this bond had no force and effect, except, possibly, as a bond to secure the costs; and if this bond had been filed within 60 days from the rendition of the judgment, and had actually operated in law as a supersedeas bond, then, under the rules of the supreme court, it would have been a bond to secure the costs. See Hotel Co. v. Kountze, 107 U. S. 378–388, 2 Sup. Ct. 911. But it appears that this bond was not filed within 60 days from the rendition of the judgment, for it seems that the appeal was allowed May 17, 1890, and the bond was not filed until August 31, 1890; and, inasmuch as there was no supersedeas allowed in this case, the plaintiffs in the case in the territorial court could have sued out an execution, and had their remedy against the maker and sureties of the interpleaders' bond, at any time. I am therefore of the opinion that, upon the pleadings in this case, the defendants are entitled to judgment, the finding of facts and law being as stated herein. Let judgment be entered accordingly.

WALTON et al. v. UNITED STATES.

(Circuit Court, W. D. Pennsylvania. April 17, 1894.)

No. 20.

1. INTEREST ON JUDGMENTS AGAINST UNITED STATES—ACTIONS OF TORT.
The provision made by section 10 of the act of March 3, 1887, for interest on judgments against the United States, does not apply to an

action brought in the court of claims, under authority of a special act (Act March 2, 1889), to recover damages for injuries to a vessel by collision with a government pier; for the cause of action, being a tort, is excepted out of the general statute, and, in the absence of any provision for interest in the special act, none is allowable.

2. CIRCUIT COURTS — JURISDICTION — SUIT FOR INTEREST ON COURT OF CLAIMS JUDGMENT.

A circuit court has no jurisdiction to award interest on a judgment which was rendered by the court of claims without making any provision for interest, and which has been paid; for such interest is merely an incident to the judgment, and the question of its allowance was for the determination of that court.

This was a suit by Joseph Walton and Isaac N. Bunton against the United States of America to recover interest on a certain judgment rendered by the court of claims. Defendant demurred to the petition.

George A. King, for plaintiffs.
Harry Alvin Hall, for the United States.

BUFFINGTON, District Judge. On January 2, 1884, the steamer I. N. Bunton was sunk in the Ohio river by collision with the pier of the Davis Island dam, a structure erected by the United States government. By special act of congress of March 2, 1889 (25 Stat. 1334), the claim of the owners for this loss was "referred to the court of claims, to hear and determine the same to judgment with the right of appeal as in other cases." On March 16, 1889, suit was brought in said court on said claim, and on April 22, 1889, judgment rendered that the "claimants do have and recover of and from the United States the sum of thirty-one thousand six hundred and ten dollars ($31,610)." No appropriation for the payment thereof was made until September 30, 1890. Thereafter the said sum was paid. Interest is claimed from April 22, 1889, to September 30, 1890, on the judgment, and to enforce this claim, amounting to $1,840.51, the present proceeding is brought, and to it a demurrer has been filed.

The case involves two questions: First, is interest recoverable upon the judgment; and, secondly, if so, has this court jurisdiction to enforce such claim? It is well settled that interest is not allowed on claims against the government, whether they arise on contract or tort; the only exceptions being where the government stipulates to pay it, or it is given by express legislation. U. S. v. Bayard, 127 U. S. 260, 8 Sup. Ct. 1156. The petitioners claim it on this judgment by virtue of section 10 of the act of March 3, 1887, which provides: "From the date of such final judgment or decree, interest shall be computed thereon at the rate of four per centum per annum, until the time when an appropriation is made for the payment of the judgment or decree." Whether this section refers to judgments of the court of claims, or is not restricted to those of the circuit and district courts, as contended by counsel for government, we do not at present feel called on to decide, for, in our opinion, this case does not arise under that act or is it thereby affected. It will be noted the original cause of action, being a tort, was ex-

cepted from the jurisdiction of the circuit, district, and court of claims by said statute. To enable the plaintiffs to sue, the special act of March 2, 1889, was passed, which provides "the claim" shall be referred to, and the court of claims shall "hear and determine the same to judgment." This act is the warrant for that court's jurisdiction, and measures the relief to be granted. In pursuance thereto, that court has fixed the amount, but has not decreed the payment of interest thereon. There is no provision in the act allowing interest on the claim or on the judgment; nor is there any general statute allowing it which includes this special case of an excepted cause of action specially referred to this particular court. When the court had fixed the amount, the time of payment was the subject of legislative will thereafter. So far as interest was concerned, the status of the case was as though congress had originally passed a private act fixing the amount, and ordering it paid, but making no appropriation for such payment. Under such facts, it could not well be contended that interest ran until an appropriation was made. We are therefore of opinion that no interest upon the judgment is recoverable.

But conceding for the present purposes it is, the question still remains, can such right be enforced by the present proceeding? The judgment was recovered in a court of competent jurisdiction, and interest, if recoverable at all, is recoverable as an incident to that judgment. Manifestly, it is the province of that court to enter a judgment or decree which shall embrace all matters incident to the controversy before it. It will be noted we are not asked to enforce a judgment of the court of claims, for its judgment, to the extent to which it went, is now paid, but we are asked to say whether that judgment bore the incident of interest or not,—in substance, to decide what the court of claims has omitted to decide. In our opinion, the question is one incidental to the original suit, and the court of claims is the proper forum for its determination.

For the reasons set forth, the demurrer is sustained.

ACHESON, Circuit Judge, concurs.

NEWPORT NEWS & M. VAL. CO. v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. April 3, 1894.)

No. 45.

CARRIERS—LIVE STOCK—PENALTY FOR FAILURE TO UNLOAD.

Under Rev. St. §§ 4386-4388, forbidding interstate carriers of animals to confine them more than 28 consecutive hours without unloading for rest, water, and feeding, unless prevented "by storm or other accidental causes," and imposing a penalty for "knowingly and willingly" failing to comply with this provision, such unloading is excused by unavoidable causes only, and therefore not by an accident to a train, due to negligence.

In Error to the District Court of the United States for the District of Kentucky.

Holmes Cummins, for plaintiff in error.
Geo. W. Jolly, for the United States.

Before TAFT and LURTON, Circuit Judges, and KEY, District Judge.

LURTON, Circuit Judge. This was a suit by the United States to recover from the Newport News & Mississippi Valley Company the statutory penalty imposed by sections 4386, 4387, and 4388 of the Revised Statutes of the United States for the detention of cattle while being transported over appellant's line of railroad, for a longer period than 28 consecutive hours, without being unloaded for rest, food, and water. There was a verdict of guilty, from which the railroad company has appealed. The statute involved is as follows:

"Sec. 4386. No railroad company within the United States whose road forms any part of a line of road over which cattle, sheep, swine, or other animals are conveyed from one state to another, or the owners or masters of steam, sailing, or other vessels, carrying or transporting cattle, sheep, swine, or other animals from one state to another, shall confine the same in cars, boats, or vessels of any description for a longer period than twenty-eight consecutive hours, without unloading the same for rest, water and feeding, for a period of at least five consecutive hours, unless prevented from so unloading by storm or other accidental causes. In estimating such confinement, the time during which the animals have been confined without such rest on connecting roads from which they are received shall be included, it being the intent of this section to prohibit their continuous confinement beyond the period of twenty-eight hours, except upon contingencies hereinbefore stated. Sec. 4387. Animals so unloaded shall be properly fed and watered, during such rest, by the owner or person having the custody thereof, or in case of his default in so doing, then by the railroad company or owners or masters of boats or vessels transporting the same, at the expense of the owner or person in custody thereof; and such company, owners or masters shall, in such case, have a lien upon such animals for food, care and custody furnished, and shall not be liable for any detention of such animals. Sec. 4388. Any company, owner or custodian of such animals who knowingly and willingly fails to comply with the provisions of the two preceding sections shall, for every such failure, be liable for and forfeit and pay a penalty of not less than one hundred nor more than five hundred dollars. But when animals are carried in cars, boats, or other vessels in which they can and do have proper food, water, space and opportunity to rest, the provisions in regard to their being unloaded shall not apply."

The district judge charged the jury, in substance, that if they found that the live stock had been confined on the cars of the appellant company for a longer period than 28 consecutive hours, without being unloaded for rest, food, and water, it would be no defense that such confinement had been caused by an accident to the train, due to negligence. The case must turn upon the correctness of this charge. Was the appellant "prevented from unloading by storm or other accidental causes?" If so, then the penalty has not been incurred. The contention of counsel for appellant is that the excuse for overconfinement specified in the act, "storm," is one of a class within what the law regards as an "act of God," against which a common carrier does not insure, and that congress has to that class added another of a different character, described as "other accidental causes;" that the use of the disjunctive

"or," after "storm," indicates a purpose to except detentions due to causes not the act of God, and described by the term "accidental;" that this construction finds support in section 4388, which imposes the penalty only upon such carriers as "knowingly and willingly" fail to comply with the requirements.

This reasoning, while plausible, is not satisfactory. To yield to it would emasculate a statute having a most humane object in view. Congress did not mean that simply because the carrier had encountered a storm, therefore he should be excused. It must appear that the storm "prevented" obedience. The storm could not be prevented. Its consequences may be avoided or mitigated by the exercise of diligence. If, with all reasonable exertion, a carrier is unable, by reason of a storm, to comply with the law, then he has been unavoidably "prevented" from obeying the law. If, notwithstanding the storm, he could by due care have complied with the law, then he is at fault, because "his own negligence is the last link in the chain of cause and effect, and in law the proximate cause" of the failure to comply with the law. Therefore, to avail himself of the excuse of "storm," the carrier must show, not only the fact of a storm, but that with due care he was "prevented," as an unavoidable result of the storm, from complying with the law. We can reach but one conclusion as to the meaning of congress by the expression "other accidental causes."

If the storm is no excuse, unless its unavoidable effect was to prevent compliance, then it follows that no other accidental causes would be an excuse, unless that cause and its effect are likewise unavoidable. The meaning of the general words, "other accidental causes," must be ascertained by referring to the preceding special words. The rule "noscitur a sociis" is clearly applicable. A storm is unavoidable, in the sense that it cannot be prevented. "Other accidental causes" must be taken to mean other unavoidable accidental causes. An effect attributable to the negligence of the appellant is not an unavoidable cause. The negligence of the carrier was the cause; the unlawful confinement and unreasonable detention, but an effect of that negligence. What is an inevitable or unavoidable accident has been very thoroughly considered by this court in the case of Weeks v. Transit Co., 61 Fed. 120. It was there said that an inevitable accident—

"Was an occurrence which could not be avoided by that degree of prudence, foresight, care, and caution which the law requires of every one under the circumstances of the particular case."

Again, we said:

"An accident is said to be inevitable when it is not occasioned in any degree, either remotely or directly, by the want of such care and skill as the law holds every man bound to exercise."

These definitions apply to an unavoidable accident, which is, in the sense of the law, an inevitable occurrence, as defined in that case, and those cited therein. If the accident was one which might have been avoided by due care, then the carrier must be taken to have contemplated the reasonable consequences of his

own negligence. In this sense, he may be said to have "knowingly and willingly" failed to comply with the requirements of the law. If he was not prevented by lawful excuse, he has knowingly and willingly failed to unload for rest, food, and water, as required by law. The several sections of the act must be construed together. We must give effect to the first section, as well as to the third. To put the construction upon the words "knowingly and willingly" contended for by appellant, would be to eliminate the positive terms of the affirmative section of the act. Congress has specified the excuse which will take a case without the act. If the statutory contingencies are not shown to have prevented compliance, the carrier has willingly failed to unload as required.

In view of this construction of the act, the other assignments of error are immaterial. The case turned below exclusively upon the question as to whether the delay in unloading had been due to a negligent accident to the train. The facts were submitted to the jury under a proper charge, so far as appellant is concerned.

The judgment must be affirmed.

FISHER v. KNIGHT.

(Circuit Court of Appeals, Third Circuit. April 20, 1894.)

No. 4.

1. BANKS—DEPOSITS—INDIVIDUAL AND TRUST FUNDS—SET-OFF—RECEIVERS.
   Debts of a partner and his firm to a bank cannot, in equity, be set off by a receiver of the bank against trust moneys which the partner, after the debts were contracted, mingled with the firm deposits, without the bank's knowledge, and the whole amount of which remained continuously in the bank until it failed. 58 Fed. 991, affirmed.
2. TRIAL TO COURT—AGREED STATEMENT—WAIVER.
   A stipulation in an action of assumpsit to submit the case to the court on an agreed statement of facts, with like effect as though the same had been found by a jury, judgment to be entered for the party which the court finds entitled, waives all questions as to the remedy adopted; and judgment may be entered for the party having the equitable right, without inquiring whether the same could be enforced at law. 58 Fed. 991, affirmed.

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

This was an action at law by Robert B. Knight, to the use of Burton Binns, assignee for the benefit of creditors of the Benevolent Order of Active Workers, against Benjamin F. Fisher, receiver of the Spring Garden National Bank. By stipulation the case was submitted to the court on an agreed statement of facts, and judgment rendered for plaintiff. 58 Fed. 991. Defendant then sued out this writ of error. The stipulation and statement were as follows:

"It is hereby agreed by and between the parties to the above case that the following facts shall be submitted to the court for its opinion and judgment, with like effect as though the same had been found by the verdict of a jury. R. B. Knight, being about to leave the city of Philadelphia, gave on the 28th day of April, 1891, to N. T. Lewis, $2,000, for safe-keeping. This money, with other money of the firm of N. T. Lewis & Son, was, upon the 30th day of April, 1891, deposited to the credit of said firm in the Spring

Garden National Bank, against which they had the full right to draw checks at will. The bank officials had no notice that the money did not belong to the firm of N. T. Lewis & Son, or that it had been handed to the said Lewis to keep for the said Knight. On the 8th day of May, 1891, the Spring Garden National Bank failed, and closed its doors, and subsequently the defendant was appointed receiver thereof. Upon the 30th day of April, after the deposit made upon said day, there stood to the credit of N. T. Lewis & Son, upon the books of the said bank, the sum of $2,557.72, and at the time of the failure and appointment of the receiver, as aforesaid, there remained to the credit of said N. T. Lewis & Son the sum of $3,002.75 upon the books of the said bank, and at no time between those dates was there less than $2,000 on deposit. The said Knight has not received any payment whatever on account of the $2,000, either from the bank or the said Lewis. The said Lewis, at the time of the failure, was the holder of $500 of the stock of the Spring Garden National Bank, and was duly assessed by the comptroller of the currency in said sum of $500, which, with interest from the 2d day of January, 1892, remains due and unpaid. He was further indebted upon a note dated March 30, 1891, and payable July 2, 1891, for $1,000, discounted March 30, 1891, by the said bank, for the said firm of N. T. Lewis & Son, and by the said bank transferred to the clearing-house association as collateral security for clearing-house certificates, which note remains due and unpaid. He was further indebted upon a note of Mary E. Gill, dated February 14, 1891, payable four months after date, for $52.64, upon which a payment of $27.57 has been made, the balance remaining due and unpaid, the said note having been discounted for the credit of N. T. Lewis & Son, February 17, 1891. The defendant has refused, and still refuses, to pay the amount of the deposit, or a dividend thereon, either to Knight or Lewis. On the 8th day of March, 1893, the said Knight executed an assignment of all claims held by him against both N. T. Lewis and the defendant, to Burton Binns, Esq., assignee for the benefit of creditors of the Benevolent Order of Active Workers, as per copy hereto annexed.

"If, on the above facts, the court shall be of opinion that the receiver is entitled to set off the said liability of Lewis as a stockholder of the Spring Garden National Bank, and the amount of said note of $1,000 and interest thereon from dates of maturity, against the claim of the plaintiff, then judgment to be entered for the defendant, but otherwise for the plaintiff, for the sum of $2,000, with interest and costs. Each party reserves the right to take a writ of error from the decision of the court."

Henry K. Hewitt and Ellery P. Ingham, for plaintiff in error.
Henry Budd, for defendant in error.

Before ACHESON and DALLAS, Circuit Judges, and GREEN, District Judge.

ACHESON, Circuit Judge. There is abundant authority for the doctrine that the real ownership of a fund deposited in a bank may be shown to be in another than the person in whose name the deposit is made, and the fund recovered from the bank by the true owner, if the bank has not been misled or prejudiced by the apparent ownership. Frazier v. Bank, 8 Watts & S. 18; Stair v. Bank, 55 Pa. St. 364; Bank v. King, 57 Pa. St. 202. Upon the admitted facts and under the authorities we are of the opinion that the fund in controversy belonged to the plaintiff, and was recoverable by him from the bank or its receiver. The court below was clearly right in holding that the defendant could not set off against the plaintiff's claim the liability of N. T. Lewis as a stockholder of the bank, or the amount of the note for $1,000. The liability of Lewis upon his assessment was altogether his individual

debt, and in no view of the case was it a proper set-off. Norcross v. Benton, 38 Pa. St. 217. Neither the bank nor the receiver had done anything upon the faith of the apparent ownership of the fund, and neither was prejudiced in consequence of the deposit having been made in the name of N. T. Lewis & Son. The note was not taken on the credit of the deposit. It was discounted 30 days before the plaintiff's money came into the bank. Nearly two months elapsed after the closing of the bank before the note matured. The bank had no lien upon the deposit for a debt not due. Jordan v. Bank, 74 N. Y. 467, 472. The rights of the parties were fixed upon the insolvency of the bank and the appointment of the receiver. As the defendant had no right then to apply the plaintiff's money to pay the debt of N. T. Lewis & Son, he has no such right now. Certainly the mere delay of the plaintiff in bringing suit until after the maturity of the note did not change the situation.

By the very terms of the case stated judgment was to be given in favor of the plaintiff if the opinion of the court upon the question of set-off was against the defendant. Nevertheless we are asked to reverse the judgment upon the ground that the plaintiff should have proceeded by a bill in equity, instead of by a suit at law. This objection to the mode of procedure was not raised by the defendant in the court below, and it should not avail him in this court, even if originally well founded. There was a clear, and we think binding, waiver of all objection to the form of the proceedings. The plaintiff, it will be perceived, did not seek any relief of a distinctively equitable nature. His suit was merely for the recovery of a sum of money. Then, again, by the Pennsylvania statute, set-off is a legal defense. Now, the parties by virtue of their agreement embodied in the case stated dispensed with a trial by jury, and submitted the controversy to the judgment of the court. The case, then, was properly before the court for determination, and it made no difference whether the judge was sitting on the law side or the chancery side of the court. In either case the result would have been the same. The defendant did not ask permission to withdraw from the case stated, but took his chance of a judgment favorable to himself. The objection which he now raises in this court to the course of procedure below comes too late. This case essentially differs from that of Hurst v. Hollingsworth, 100 U. S. 100, in which there was a blending of equitable and legal causes of action in one suit, and where there was a denial by the trial court of permission to the plaintiff to recede from a stipulation improvidently made. There is much in the opinion of the supreme court in Hurst v. Hollingsworth (page 102) tending to sustain the view we take here.

Furthermore, upon this record we are not prepared to adjudge that the plaintiff's cause of action was not cognizable at law. Every presumption is to be made in favor of his right to maintain a suit at law for the recovery of his property. The terms of the submission of the controversy to the decision of the court virtually conceded that the legal title to the fund was in the plaintiff. The

language of the case stated, we think, does not exclude the hypothesis that in making the deposit Lewis acted as the agent of the plaintiff. It may well be presumed that what he did was within the contemplation of the parties when the money was handed to him, and that, while the deposit was nominally on account of N. T. Lewis & Son, it was really on account of the plaintiff. Now, it is firmly settled that the contract of an agent is the contract of his principal, for whom he acted, and that the undisclosed principal may sue thereon at law in his own name, and this even where the contract is in writing, and the principal is not mentioned therein. Skinner v. Stocks, 4 Barn. & Adol. 437; Barry v. Page, 10 Gray, 398; Ford v. Williams, 21 How. 287. Hence, in the case of the Duke of Norfolk v. Worthy, 1 Camp. 337, where money of the principal was paid by the agent as a deposit on a contract made by and in the name of the agent, who apparently was acting on his own account, it was held that the principal might recover back the deposit in a suit at law in his own name, the contract having been rescinded. The judgment of the circuit court is affirmed.

LAKE ERIE & W. RY. CO. v. BAILEY et al.

(Circuit Court, D. Indiana. January 20, 1893.)

No. 8,811.

MASTER AND SERVANT—LABOR ORGANIZATIONS—CONTEMPT.

Where the members of a labor organization combine and confederate for the purpose of enforcing their demands by the seizure of their employers' property, or to prevent other men, by force and intimidation, from entering such employment, they are guilty of a crime; and, where such acts violate an injunction, they will be punished for contempt of court.

On the 16th day of January, 1893, the Lake Erie & Western Railway Company filed its bill for injunction against the defendants to restrain them from obstructing and interfering with the movements of its trains. A temporary restraining order was issued at once, in accordance with the prayer of the bill, and a further hearing of the cause was set for the 25th day of January, 1893, and certified copies of this order were served upon the defendants by the marshal. Afterwards, upon affidavits filed by the complainant showing that certain of the defendants had violated the restraining order, a rule was entered against them, requiring them to show cause why they should not be attached for contempt. On their failure to appear pursuant thereto, it appearing that service of the monitory order had been made upon them, an attachment was issued, and they were brought before the court and tried. As a result of the trial, some of the defendants were convicted, and others were acquitted.

W. E. Hackedorn, John B. Cockrum, and Miller, Winter & Elam, for Lake Erie & W. Ry. Co.

BAKER, District Judge, in pronouncing sentence upon those who were convicted, said orally:

The court recognizes the right of any man or number of men to quit the service of their employers, and it recognizes the right of men to organize if they deem it expedient to better their condition. It also recognizes the hardships of the life of the average laboring man. Their conditions are often such as to touch the sensibilities of a feeling heart. The court is also aware of the scanty wages which they often receive, and of their long and arduous hours of service, frequently exposed to the rigors of an inclement season. All these things are calculated to produce sympathy in every right-minded man. It is laudable for men, whether they are day laborers or are engaged in other vocations of life, by organization to take any lawful course for the purpose of bettering their condition; but it must be done according to those principles that lie at the very foundation of the social compact. Man was created for organized society; and in order that society shall exist, whatever may be the form of government, it is absolutely indispensable that the great fundamental and God-given right of every human being, unrestrained and unintimidated, to labor and enjoy the fruits of his toil, should be protected. There is little excuse for labor to organize, and, by unlawful means, attempt to overthrow the law. Society is organized under our form of government on the recognition of man's rights as man. If society were overthrown, and men turned back into conditions of anarchy, as they were, in large measure, during the dark ages, when power and force made right, the condition of the laboring man would not be bettered. If such were the condition of society, the man or the men with great intellectual power and great wealth would become the masters of the laboring classes as in those dark ages, and the laborer would be little better than a slave. The effort of these defendants, as the evidence in this case shows, is an effort, not only to overthrow the law, but also an effort to overturn the just authority of the courts. To permit this would be an offense, not only against society, but against the laboring men themselves. In the convulsions of society, when law becomes silent and force reigns, it is the humble and the poor and the powerless that become the victims. The condition of things that is evidenced by these strikes is well calculated to impress thoughtful men with their danger. I do not know but that I am a little old-fashioned in my notions, but I confess that I cannot look with any degree of tolerance on the false and dangerous teachings of those who actively, or by their silent acquiescence, are leading labor organizations to think that, because they are organized in associations, they have the right to seize property, or, by intimidation, to prevent well-disposed people from laboring. In my judgment, it is no less criminal for an organized body of men to commit these wrongs than it would be for a single man, armed with bludgeons or revolvers, to commit the same wrongs on the persons or property of others. I confess that, so far as I can see, if my property or personal rights are invaded by a body of men who call themselves "organized laborers," there is no more distinction,

either in the view of God's law or human law, than if the same things were done by a single individual. Indeed, it would be more tolerable if it were done by the midnight robber in the silent watches of the night than if it were done by an organized body of men. I think it would be wholesome if this lesson, which was taught me by my parents in a rude frontier cabin in the early settlements of Northwestern Ohio, had been taught these men by their fathers and mothers. When I come to the final disposition of these cases, I shall deal justly and mercifully with these men; but I do not intend that it shall ever be said of me, if anything shall ever be said, that, as a magistrate, I failed in the discharge of my duty in any such way as tended to unsettle the foundations of our government. I am charged with a great and solemn duty. There can be no greater or more solemn duty than that which requires judges to impress on men, not only the supremacy of the law, and the rightful supremacy of the law, but that it is necessary that men should be punished who violate the law, in order that the fabric of human society may not go to pieces.

In this case the evidence shows that there are a number of men who belong to a secret labor organization whose ramifications reach, not only over the entire extent of the United States, but into Canada as well. It has kindred associations by other names in Europe. All these organizations have the same general aim, and that is by force, violence, and terrorism to compel their employers to submit their business, their property, and their means of livelihood to the arbitrary demands of these associations. In their secret, oath-bound assemblies they determine for themselves on what terms they will work for others. They refuse those who are not members of their association the right to labor when they desire to do so. Those who will not submit to their exactions have no more option about carrying on their business than has the belated traveler when a highwayman presents a revolver, and bids him submit. As I say, I do not see any difference, either morally or legally, between this sort of business, where an organized body of men combine for the criminal and unlawful purpose of compelling somebody else, against his will, to submit to their demands, than if the same thing were done by a single individual. If they compel submission, it is robbery, because whoever compels me, by force or terrorism, to give up one dime of my money, or one dime's worth of my property, is equally guilty, whether it be the man who meets me on the street corner in the nighttime, or an organized band of strikers who take possession of my property and deprive me of its use. But these combinations are infinitely worse than isolated violations of the law, in that they teach general disregard and contempt of law. They make people think that human rights are of no value. They teach the fantastic and monstrous doctrine that a man who is hired to labor, and is paid for his work, has some sort of equitable right in the property of his employer, together with a right of perpetual employment. It has been said on the floor of the United States senate that the laborer has a sort of equitable lien on the property of the man for whom he works, whose money bought the property, together with

the right of perpetual employment. It may do for men that are reckless of the welfare of human society—who care nothing for its peace and good order—to imperil life, property, and liberty, and the perpetuity of our institutions, by teaching such doctrines, but the judge who tolerates it ought to be stripped of his gown, and be driven from the sacred temple of justice. I think these men have been misled; I think they have been deceived by false teachers; but still they ought to have known better than to violate the law of the land, and to trample under foot the solemn processes of the court. I want it to be understood, so far as this court is concerned, that such offenses will not be deemed trivial, and that the law cannot be violated with impunity by any combination of men, under whatever name they may clothe themselves. They will not be permitted to violate the law, and then set themselves above the court. If laborers wish to organize to learn the principles of political economy, to learn something about the great laws of supply and demand, or to learn something about the effect of immigration, and the increase of the number of laborers on the wage market of the country; if they want to organize for the purpose of quitting their employers; in short, if they want to organize to do anything that is recognized as within the pale of the law,—I have no word of criticism. I think that such organizations for lawful purposes are to be commended. But when these organizations, as I said on yesterday, combine and confederate for the purpose of seizing other men's property, or when they undertake, by force and intimidation, to drive other men away from employment, and thus deny them the right of earning a livelihood, they commit a crime,—they commit a crime that this court cannot suffer to go unpunished. There ought to be blazed on the minds of every one of these men that belongs to a labor organization, as with a hot iron, so that they shall know and understand it, that, while it is lawful and commendable to organize for legitimate and peaceful purposes, it is criminal to organize for the invasion of the rights of others to enjoy life, liberty, and property. I will not pass upon the cases of these men now, and before I do pass upon them I shall be glad to know who and what they are; something about their former lives; what they have been doing; whether they have been engaged in criminal combinations before this. The gravity of crime depends upon the character of the criminal. An ignorant boy who, in the heat of excitement or the impulse of the moment, is led into the commission of crime, is to be looked upon with sympathy, and ought to be dealt with lightly; but the man who is given to lawlessness, who is a confirmed criminal and violator of the law, on whom reason and mercy would have no influence, ought to be made to feel the heavy hand of the law, so that if respect for law, and respect for the rights of their neighbors, will have no influence upon them, the power of the law and its judgments may have.

In re BRIGGS.

HUTCHINS v. BRIGGS et al.

SAME v. TATE et al.

(Circuit Court of Appeals, Second Circuit. April 18, 1894.)

1. BANKRUPTCY—JURISDICTION OF CIRCUIT COURT.
Under the supervisory jurisdiction over all bankruptcy proceedings conferred on the circuit court (Rev. St. U. S. § 4986), it may entertain a petition to review the refusal of the district court to remove an assignee in bankruptcy.

2. SAME—CIRCUIT COURT OF APPEALS.
Act March 3, 1891, § 4, which transfers to the circuit courts of appeals created by that act, and to the supreme court, the jurisdiction theretofore exercised by the circuit courts on appeal or writ of error, does not affect the supervisory jurisdiction over bankruptcy proceedings which is conferred on the circuit courts by Rev. St. U. S. § 4986.

3. SAME—APPELLATE JURISDICTION—INTERLOCUTORY ORDERS.
Rev. St. U. S. § 4980, confers upon the circuit courts appellate jurisdiction in bankruptcy cases in the district courts; and Act Cong. March 3, 1891, §§ 4–6, transfers the appellate jurisdiction theretofore vested in the circuit courts to the circuit courts of appeals and the supreme court. *Held*, that this jurisdiction extends only to final judgments, and does not authorize a review of the action of the district court in refusing to dismiss, for want of prosecution, a suit brought by the assignee in bankruptcy.

Appeal from the District Court of the United States for the Southern District of New York.

Petition of appeal from the decision of the district court in the matter of Alanson T. Briggs, a bankrupt, and in the suits of Augustus Hutchins, as his assignee, against Alanson T. Briggs and others, and of the same against Amelia A. Tate and others.

Samuel E. Briggs, as a creditor of the above-named bankrupt, made a motion in the bankruptcy proceedings pending in the United States district court for the southern district of New York to remove the assignee in bankruptcy. He also moved, as a defendant in two suits in equity pending in that court, brought by the assignee of the bankrupt, to dismiss the suits for want of prosecution. The district court denied the motion to remove the assignee, and denied the motion to dismiss the suits in equity, except upon condition of payment by the defendant to the assignee of the sum of $2,650, as counsel fee, costs, and disbursements. Thereupon, Briggs filed in this court a petition of appeal, praying that this court exercise jurisdiction under section 4986 of the Revised Statutes of the United States, conferring a general superintendence and jurisdiction upon the circuit court of all cases and questions arising in the district court, when sitting as a court of bankruptcy, and review and reverse the proceedings of the district court. The assignee in bankruptcy moves to dismiss the petition of appeal.

Geo. C. Lay, for appellant Briggs.

Wm. F. Scott, for assignee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. Properly speaking, there are no appeals pending in this court. No assignment of errors has been filed, no appeal or writ of error has been allowed, and no citation has been issued. But the theory of the petitioner is that the circuit court has no longer jurisdiction to review proceedings in bankruptcy,

under section 4986 of the Revised Statutes; that by the act of March 3, 1891, the jurisdiction which was taken away from the circuit court was conferred upon this court; and that, when exercised, it may be invoked, by the terms of section 4986, by bill or by petition.

Prior to the act of March 3, 1891, establishing circuit courts of appeals, the circuit courts were invested with appellate and revisory jurisdiction over the proceedings of the district courts, in bankruptcy cases, by sections 4980 and 4986 of the Revised Statutes. Each of these sections, however, conferred a distinct jurisdiction; one being appellate, purely, and the other being supervisory. The jurisdiction conferred by section 4980 was appellate. It was to be invoked by an appeal or writ of error, and, except to enable a creditor or the assignee of a bankrupt to review the rejection or the allowance of a claim in the bankruptcy proceeding, it did not extend to a review of any proceedings of the district courts sitting as a court in bankruptcy, but was confined to a review of final judgments or decrees in suits between party and party. From the judgments or decrees of the circuit courts rendered in exercise of appellate jurisdiction over final judgments or decrees of the district court, there was an appeal to the supreme court, when the matter in dispute exceeded $2,000. The jurisdiction conferred by section 4986 was of a supervisory and summary character. It invested the circuit courts with a general superintendence of all cases and questions arising in the district courts, when sitting as a court of bankruptcy. The superintendence might be invoked by a petition or bill, and could be exercised either in term time or vacation. The circuit court was to hear the case, not as an appellate tribunal, but "as in a court of equity." The decisions of the circuit courts made in the exercise of these supervisory powers were not reviewable by the supreme court, but were final. The character of the jurisdiction created by the two sections, and the mode of its exercise, were considered by the supreme court in Morgan v. Thornhill, 11 Wall. 65, and Coit v. Robinson, 19 Wall. 274, as well as in other judgments of that court and of the circuit courts. The distinction between the appellate character of the jurisdiction conferred by section 4980 and the supervisory authority conferred by section 4986 was always recognized. The repeal of the bankrupt act left the provisions of these sections in force as to all pending suits and proceedings in bankruptcy. It is entirely clear that any application made to the circuit court to re-examine and review the action of the district court in refusing to remove an assignee in bankruptcy could only be entertained by virtue of the supervisory jurisdiction conferred by section 4986, and in the exercise of the general superintendence therein provided for. It is also entirely clear that resort could not be had to that jurisdiction to review an interlocutory order made by the district court in a suit between party and party, and that such an order, in a case in bankruptcy, could only be reviewed by the circuit court in the exercise of its appellate jurisdiction, under section 4980, while reviewing a final judgment or decree. Clark v. Iselin, 9 Blatchf. 196, Fed. Cas. No. 2,824. The act of March 3, 1891, does not impair the supervisory jurisdiction of the

circuit courts, under section 4986, over the proceedings of the district courts in bankruptcy. The only language in that act which can possibly be read as intending to do so is found in section 4, which abrogates the appellate jurisdiction of the circuit courts, and transfers to the supreme court and circuit courts of appeals the jurisdiction theretofore exercised by appeal or writ of error by the circuit courts. That language does not necessarily or appropriately divest the circuit courts of a jurisdiction which is supervisory, instead of appellate, and which had not been exercised by an appeal or writ of error, and could have been upon a bill or a petition. The jurisdiction with which that section is concerned is distributed by sections 5 and 6; and in neither of those sections is there any warrant for the inference that congress intended that the appellate power should extend to a review of the interlocutory proceedings in a cause, or be burdened by the duties of such a general superintendence over matters of administrative detail as were reposed in the circuit courts, in bankruptcy cases, by section 4986. By section 6, the appellate jurisdiction deposited with the circuit courts of appeals is to review "final decisions" in the district courts and circuit courts by appeal or writ of error.

For these reasons, we conclude that the action of the district court in refusing to remove the assignee, which is complained of by the petitioner, can be reviewed by the circuit court; that there can be no review of the decision of the district court in refusing to dismiss the bills in equity for want of prosecution, except upon an appeal to this court from the final decrees in each of those suits; and that the motion by the assignee to dismiss the petition of appeal should be granted.

ALART et al. v. UNITED STATES.

(Circuit Court, S. D. New York. April 19, 1894.)

CUSTOMS DUTIES—CLASSIFICATION—VEGETABLES PACKED IN SALT—ACT OCT. 1, 1890.

Cucumbers and cauliflower, packed in salt, *held* dutiable at 45 per cent. ad valorem, under paragraph 287 of the act of October 1, 1890, as "vegetables * * * prepared or preserved, including pickles and sauces of all kinds," and not at 25 per cent. ad valorem, under paragraph 288 of said act, as "vegetables in their natural state not specially provided for."

Appeal by Importers from Decision of Board of United States General Appraisers. G. A. 302, 1080. Decision affirmed.

Certain vegetables, consisting of cucumbers and cauliflower packed in salt, in hogsheads, and imported into the port of New York in December, 1891, by Alart & McGuire, were assessed for duty by the collector of the port under paragraph 287, as above stated. The importers protested, claiming the merchandise was not "pickles," nor "vegetables, prepared or preserved," as known in trade and commerce, but that they were commercially known as "vegetables in their natural state," and properly dutiable under paragraph 288; that they were packed in dry salt only for convenience and preservation during transportation. The United States attorney contended that the terms "prepared or preserved" were not commercial terms, and had been judicially construed by the United States supreme court in Presson v. Russell (decided April 9, 1894) 14 Sup. Ct. 728, which construction would cover and include the imported merchandise in suit.

Stephen Greeley Clarke, for importers.
Henry C. Platt, U. S. Atty., for the United States.

TOWNSEND, District Judge (orally). The decision of the board of general appraisers is affirmed, under the decision of the United States supreme court in the case of Presson v. Russell, 14 Sup. Ct. 728, which seems to be decisive of the question.

RICH v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. May 10, 1894.)

No. 99.

CUSTOMS DUTIES—CLASSIFICATION—ARTISTS' COLORS.

Paragraphs 50 to 60, inclusive, of the paint and color schedule of the tariff act of October 1, 1890, impose different duties on various colors, while paragraph 61 imposes a duty on artists' colors of all kinds. Artists' colors are those named in the preceding paragraphs, when of a fine grade, and specially prepared, and put up for the use of artists. *Held*, that paragraph 61 applies to all artists' colors, and not only to those not enumerated in the preceding paragraphs.

Appraisement for duty of certain artists' colors, imported by one Rich. The circuit court affirmed the decision of the board of general appraisers. The importer appeals.

Comstock & Brown (Albert Comstock, of counsel), for appellant.
Henry C. Platt, U. S. Atty.

Before WALLACE and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. By paragraphs 50 to 60, inclusive, of the paint and color schedule of the tariff act of October 1, 1890, duties are respectively imposed upon various colors, such as "blues," "chrome green," "ochre," "umber," "sienna," etc.; some colors being subjected to a specific, and others to an ad valorem, duty. By paragraph 61 of the same schedule, duty is imposed upon artists' colors of all kinds, in tubes or otherwise. Artists' colors are the colors named in the paragraphs preceding 61, when of a fine grade, specially prepared and put up for the use of artists in tubes, bottles, cakes, or pans, and include, also, some other specially prepared colors. The appellant imported certain colors, including blues, chrome green, ochre, umber, and sienna, of the fine grades, and specially prepared and put up in tubes for artists' use. The importations were commercially known as "artists' colors in tubes." The collector classified the merchandise for duty under paragraph 61. The importer protested, insisting that it should have been classified under paragraphs 50 to 55, 57 to 60, and 62 to 67. The board of general appraisers sustained the action of the collector. Upon appeal to the circuit court the decision of the board of general appraisers was affirmed.

It is contended for the appellant that the enumeration of the earlier paragraphs is the more specific, and that of paragraph 61 the

more general; consequently, that the latter can only apply to such colors as are not mentioned in the earlier paragraphs. The rule undoubtedly is that, where a tariff act imposes a duty on an article by a specific name or description, general terms in the act, though embracing it broadly, are not applicable to it, and the general must give way to the particular. We think the rule has no application to the present case. The case is not one where an article is differently described by different provisions of the act, one general and the other more specific, but is one where the different provisions describe different articles for duty. While the term "artists' colors in tubes or otherwise" describes a class comprehending many colors, it does not describe a class in which the colors of the earlier paragraphs are included. They do not belong to the class, because they are not of the special variety which it embraces until they are prepared for a particular use and put up in a particular form. Each paragraph has its appropriate operation without impinging upon the other. The colors which have undergone the special preparation necessary to bring them within the category commercially known as "artists' colors" are made dutiable by paragraph 61. The colors mentioned in the earlier paragraphs, which have not been advanced so as to bring them within that category, are dutiable under their respective paragraphs. As we are satisfied that the merchandise was properly classified by the collector, and that the decisions of the board of general appraisers and of the circuit court were correct, we do not deem it necessary to consider the question whether the protests of the importer were sufficiently specific. The judgment of the circuit court is affirmed.

THE STARBUCK.

EVANS et al. v. THE STARBUCK.

(District Court, E. D. Pennsylvania. May 4, 1894.)

No. 26.

ADMIRALTY JURISDICTION—DREDGE AND SCOWS.

A dredge and her scows are to be treated as one concern, and are subject to libel in admiralty for wages.

This was a libel by Evans and others against the dredge Starbuck to recover wages.

John Q. Lane and Jos. Hill Brinton, for libelants.

Henry R. Edmunds, for respondent.

BUTLER, District Judge. The claims are for wages. The respondent is a dredge, working in the water with the usual accompaniment of scows. That a dredge and her scows are to be treated as one concern, and are subject to the admiralty jurisdiction has been several times decided, and I think rightly. To discuss the subject would be waste of time. The question of admiralty jurisdiction has been so fully considered that nothing new can be added. The fol-

lowing cases present the subject in every aspect in which it has arisen or is likely to arise: The Pioneer, 30 Fed. 206; The Alabama, 19 Fed. 544; Endner v. Greco, 3 Fed. 411; Disbrow v. The Walsh Brothers, 36 Fed. 608; The General Cass, 1 Brown, Adm. 334 [Fed. Cas. No. 5,307]; McNamara v. The Atlantic, 53 Fed. 607; Two Barges, 46 Fed. 204; The Hendrick Hudson, 3 Ben. 419 [Fed. Cas. No. 6,335]; The Alabama, 22 Fed. 449; Wood v. Two Barges, 46 Fed. 204; The W. F. Brown, Id. 290; The Dick Keys, 1 Biss. 408 [Fed. Cas. No. 3,898]; The Kate Tremaine, 5 Ben. 60 [Fed. Cas. No. 7,622]; A Floating Dry Dock, etc., 22 Fed. 685; The Old Natchez, 9 Fed. 476; Cope v. Dry Dock, 10 Fed. 142.

The claim of Evans is acknowledged to be correct and is allowed. The claim of Clements will be allowed to date of respondent's seizure.

THE BIG JIM.

BAKER et al. v. THE BIG JIM.

(District Court, E. D. Pennsylvania. May 4, 1894.)

No. 60.

ADMIRALTY JURISDICTION—MARINE PUMP.

A marine pump, which is weighted with heavy ballast, so as to rest on piles, but capable of floating and being towed from place to place, and which is used for sucking mud from beneath the water or from scows alongside, and forcing it by steam power onto the adjacent land, is not a subject of admiralty jurisdiction.

This was a libel by Baker and others against the marine pump Big Jim to recover wages.

John Q. Lane, for libelants.
Henry R. Edmunds, for respondent.

BUTLER, District Judge. The claim is for wages on the "Big Jim" a marine pump, resting on piles, driven in the ground under water at League Island. She was weighted with heavy ballast to keep her in place while at work. She was capable of being towed from place to place, where her services were needed, and had been so towed. She was used to suck mud from the bottom of the water, or from scows alongside, and force it by steam power on the adjacent land. A fuller description seems unnecessary. She had none of the characteristics, and was not capable of performing any of the services of a vessel. In my judgment admiralty has no jurisdiction of the libelants' claims. To extend it to such a case would carry it beyond proper limits. For a discussion of the general subject I refer to the cases cited in Evans v. The Starbuck (just decided by the court) [61 Fed. 502].

THE ALERT.[1]

SANDERS v. MUNSON.

(District Court, S. D. New York. May 22, 1894.)

CHARTER PARTY — DELIVERY OF VESSEL IN FOREIGN PORT — TIME—"ABOUT" APRIL 10TH—SEASONABLE START NECESSARY—BREACH OF CHARTER.

Where the charter of a steamer, made at New York on March 3d, which all parties knew was hired for the fruit trade, provided that the vessel should be delivered for charterer's use at a port in the West Indies "about April 10th," *held*, that the word "about" gave the owner only such additional time as might be made necessary by accidents of navigation arising on the voyage after a seasonable start; and such delay in starting as would prevent the ship from arriving at the port of delivery before April 27th was, under the conditions of the trade in which the vessel was to be employed, a breach of the charter, entitling charterer to recover against the owner any damages sustained thereby.

This was a libel by M. J. Sanders against Walter D. Munson for breach of a sub-charter of the steamer Alert to libelant.

Wheeler, Cortis & Godkin, for libelant.

Goodrich, Deady & Goodrich, for respondent.

BROWN, District Judge. The above libel was filed to recover damages for breach of a sub-charter made by the defendant, the original charterer, in not delivering the steamer Alert to the libelant's use at Santa Marta, West Indies, at "about April 10, 1893," as agreed in the sub-charter.

The sub-charter was executed through Hurlbut & Co., ship brokers, in this city, on March 3, 1893. The Alert was at that time in this city undergoing repairs by the owner. The libelant was in business at New Orleans; the defendant resided and was in business in New York. The steamer was sub-chartered to the libelant for use in the fruit trade, between Santa Marta and New Orleans, as was understood by all the parties. A round trip, with a cargo of bananas, between those ports, is usually made in from 12 to 14 days. On the 31st of March the libelant received notice that the steamer would not be able to leave New York before April 19th. The usual trip to Santa Marta from New York occupies eight days,—so that if she met with no accident on the way, she could not be expected to arive at Santa Marta before April 27; and she might arrive there even later than that date, either through failure to have the repairs at New York completed by April 19th, or through delays from sea perils, which might make the voyage from New York longer than eight days. The libelant accordingly, on March 31st, gave notice rescinding the charter. Some negotiations were had between the agent of the libelant sent to this city, and the defendant, for the charter of some other steamer under the defendant's control, but without result; and the steamer Claribel, which was larger and faster, was afterwards chartered by the libelant from other parties.

[1] Reported by E. G. Benedict, Esq., of the New York bar.

Some testimony was offered by the defendant for the purpose of showing that there was a custom in the fruit trade which would admit of a valid delivery of a vessel at a foreign port at any time within 30 days, or upwards, before or after the date named, when the term "about" was used in the charter. The evidence is not sufficient to establish any fixed usage on this point. The use of this phrase is not general, but extends only to some charters made within about four years past. That is quite too recent, and the ideas of the different witnesses are quite too indefinite and unsettled, to show any established custom as to a precise additional time which the word "about" should give. The principal witnesses for the defendant, moreover, stated explicitly that the introduction of this clause in some of their charters, where the vessel was to be delivered at a distant port, was for the purpose of allowing for the uncertainties of navigation to a distant port, on account of the delays that might unavoidably happen on the voyage through some breakdown, or collision, or stress of weather. Interpreted in accordance with this object, it would not warrant any failure to deliver on the date named, except such as occurred through accidental causes arising upon a voyage commenced in season to arrive at the date named, under the usual conditions of navigation. Thus interpreted, this phrase would not justify any delay in a seasonable start, even though that delay was caused by the need of repairs. Tully v. Howling, 2 Q. B. Div. 182. This is, in fact, the same as the legal construction that would be given to the phrase in the absence of any evidence, but upon the common knowledge of sea perils, and the prior law, which puts at the risk of the vessel any failure to arrive at the precise date named, when that date is material and fixed without qualification. Lowber v. Bangs, 2 Wall. 728; Shubrick v. Salmond, 3 Burrows, 1637; Tarrabochia v. Hickie, 1 Hurl. & N. 185; Behn v. Burness, 3 Best & S. 751; Tully v. Howling, 2 Q. B. Div. 182; The Samuel W. Hall, 49 Fed. 281.

I cannot doubt in this case that time was an essential element of the contract; all the correspondence shows that it was so regarded from the first. The fruit season is short; the cargo perishable; previous arrangements must necessarily be made, and were made, for the bananas at Santa Marta. The vessel was to run in a line, and make semi-monthly trips. The proper care of a fruit cargo does not permit any material delay in starting on the voyage at the expected time. The use of the word "about" does not signify that time was here immaterial; but only that the precise day named was not warranted, and that allowance was to be made for accidents of the seas in going to Santa Marta. It did not absolve the vessel from the duty to leave the port of departure at a time sufficient in the ordinary course of navigation to reach the port of delivery at the date named. I hold the word "about" in this case to give only such additional time as is made necessary by accidents of navigation arising on the voyage after a seasonable start.

In the present case, the delay in starting according to the notice given by the defendant, would amount to at least 19 days, about

equal to a time sufficient for 1½ round trips, and the delay might even exceed that. This would manifestly be a substantial non-compliance with the charter, since it would not give the charterer the benefit of seasonable voyages, or of the full season's business, as was contemplated. The libelant, under this charter, had a right, as it seems to me, to the use of the vessel substantially for the whole banana season, and for the whole number of voyages, and at the times, contemplated.

In the case of Tully v. Howling, supra, Mellish, J., says:

"It was admitted on the argument before us that the year for which the Conquest was chartered commenced on the 9th of April, and that the Conquest was not really ready to receive cargo, so that the plaintiff could have had the use of her, until the 17th of June; and therefore the questions simply are, whether a person who has agreed to charter a vessel for twelve months, commencing from the 9th of April, is bound to wait until the 17th of June before he obtains possession of the vessel, and whether he is then bound to take her for a period of less than ten months? In other words, in a charter for a stipulated time, is the time of the essence of the contract, or is the charterer bound to take the vessel for a time substantially different from the time specified in the charter? We are of opinion that as in a charter for a voyage the specified voyage would be of the essence of the contract, and the charterer, if he could not have the use of the vessel for the specified voyage, would not be bound to take her for any other voyage, so in a charter for time, if the charterer cannot have the vessel for the specified time, he is not bound to take the vessel for a shorter time or a substantially different time, and if he cannot get the vessel for the specified time he may throw up the charter. In all contracts which are to be mutually performed the party who claims the performance must be ready to perform his part of the contract, and cannot compel the opposite party to take something substantially different from that which was contracted to be given."

The libelant, as I must hold, had a right to refuse to wait for the Alert, and to recover such damages as he may show to have resulted from the breach of the charter.

It was contended for the defendant that another steamer, equally good, viz. the Bergenzeren, was seasonably tendered by him in place of the Alert, but refused by the libelant when it was found that the Alert would not be able to leave New York in time. The Claribel, a large steamer, was chartered at a higher price. This, however, goes only to the question of damages. The facts as to the sufficiency of the Bergenzeren are but imperfectly proved; nor are the facts in evidence sufficient to show upon what basis the libelant's damages should be estimated; or whether he is justified in claiming for a costlier steamer than the Bergenzeren, or for a longer period than one or two voyages, until the Alert was ready.

Decree for the libelant, with a reference to compute the damages.

THE ALLIANCA.[1]

HIGGINS et al. v. THE ALLIANCA.

(District Court, S. D. New York. May 15, 1894.)

1. MARITIME LIENS—PREMIUM OF INSURANCE—DOMESTIC VESSEL—STATE LAW—DEBT CONTRACTED ABROAD—SPECIFICATIONS—SUBROGATION.
   Libelants, as brokers acting for a domestic steamship company, procured insurance on the vessels of the company in England, T. & Co., their English correspondents, obtaining the policies from underwriters there. According to the established usage in England, T. & Co. paid the premiums, and charged them against the libelants, but they filed no specifications of lien here. Libelants denied any legal liability to T. & Co., but afterwards reimbursed T. & Co., and, themselves filing specifications, brought these suits against the vessels of the company to recover the money advanced. The law of New York state gives a lien for certain debts "contracted within this state." *Held* that, T. & Co. having no lien, both because the debt was contracted in England and because they had filed no specifications, libelants could acquire none from them by subrogation.
2. SAME—ADVANCES—REPAYMENT OF DEBT NOT ACCOMPANIED BY LIEN—CREATION OF NEW LIEN.
   The law of New York state gives a lien "for advances made for the purpose of procuring necessaries for a ship or for the insurance thereof." *Held* that, to create a lien, the advances must be made for the purpose of obtaining the insurance, or paying off those who have a lien therefor; and where they are made merely for the purpose of repaying an old debt, not accompanied by any lien, no lien is created in favor of the person making such advances.

This was a libel by A. Foster Higgins and others against the steamship Allianca to enforce an alleged lien under a statute of the state.

Wing, Shoudy & Putnam and R. D. Benedict, for libelants.
Carter & Ledyard, for respondents.

BROWN, District Judge. The above libel, and three others of similar purport, were filed for the purpose of enforcing alleged liens, under the law of this state, for moneys advanced by the libelants for the payment of certain premiums upon policies of insurance procured in England by the libelants, as brokers, through Tyson & Co., their English correspondents, in behalf of the United States & Brazil Mail Steamship Company, upon their steamers Seguranca, Vigilancia, Allianca, and Advance. The policies ran for one year each, and were taken out in England at various dates from March to November, 1892, by Tyson & Co., who were insurance agents at Liverpool and London. By the established usage of business in England, the underwriters there look alone to the local agent or broker who procures the insurance for the payment of the premiums. The debt for premiums is owed to the insurer by the broker alone. Tyson & Co., in pursuance of this usage, paid to the underwriters the premiums on each policy shortly after it was issued, and the policies were forwarded to the libelants.

[1] Reported by E. G. Benedict, Esq., of the New York bar.

The libelants had for several years previous been accustomed to procure the insurances upon the company's vessels, and to attend to the adjustment and collection of any losses that might happen thereunder. Before the present policies were issued, the libelants, in consequence of the steamship company's delays in reimbursing Tyson & Co. for the premiums advanced on previous policies, made an agreement with the president of the company that the present policies, when issued, should be retained by the libelants in their possession for their security. There were two ways in which the possession of the policies might serve as such security: (1) By exercising the option to cancel the policies at any time during the current year, whereby the unearned premiums, according to the provisions of the policies, would be returned by the insurers, thus limiting any further liability for the premium, and reimbursing the advances to that extent; (2) by enabling the libelants, upon the adjustment and collection of any losses happening upon any of the policies, to apply the receipts for losses to the payment of the premiums advanced by Tyson & Co. on all the policies.

The libelants had been for several years in the habit of obtaining other policies from English underwriters through Tyson & Co., in behalf of other shipowners. Tyson & Co., from time to time, sent to the libelants an account current, in which all the premiums paid and advanced by Tyson & Co., in pursuance of the English usage above stated, were charged against the libelants; and the latter were credited in the account with all moneys collected by Tyson & Co. in the transaction of the insurance business in behalf of all the libelants' customers. Mr. Gourlie, one of the libelants, who had special charge of these matters, testified that the libelants had never recognized the balances stated in these accounts as debts owing by them to Tyson & Co., nor had they ever, before the present instance, advanced moneys to Tyson & Co. to reimburse them for their payment of premiums; but that libelants had acted only as brokers, and had recognized no obligation to Tyson & Co., except to endeavor to procure payment of the premiums from the insured, and to forward the collections to Tyson & Co. as they were received.

On February 28, 1893, after repeated failures to procure from the steamship company sufficient moneys to pay for the current premiums from month to month, amounting to an average of about $5,000 per month, Mr. Gourlie arranged with Mr. Ivins, the president of the company, for an immediate cancellation of the policies on the four vessels insured, as soon as they should arrive in port; the president also telling him to resort to a lien for their security. The libelants thereupon, shortly afterwards, gave orders for the cancellation of the policies, and remitted to Tyson & Co. about $30,000. the balance owing for premiums already earned upon the current policies up to that date, and thereupon filed notices of liens therefor upon the four vessels above named, under chapter 482 of the Laws of 1862 of this state. Mr. Gourlie testified that he considered Mr. Ivins' request to cancel the policies, and to look to his lien, as equivalent to a request to repay to Tyson & Co. the balance owing

for premiums already earned, and that he could not properly direct Tyson & Co. to cancel the policies without paying such earned premiums.

The state act provides, in section 1, that "whenever a debt amounting to $50 or upwards shall be contracted by the master, owner, builder, etc., of any ship or vessel, or the agent of either of them within this state * * * (subdivision 4) on account of loading or unloading, or for advances made for the purpose of procuring necessaries for such ship or vessel, or for the insurance thereof * * *, such debt shall be a lien upon such vessel," etc. Subdivision 5 of section 1 gives a lien "whenever a debt amounting to $25 or upwards shall be contracted as aforesaid, within this state, on account of the towing or piloting such vessel, or on account of the insurance, or premiums of insurance of or on such vessel or her freight." Section 2, as amended by the Laws of 1886, c. 88, provides that "such debts shall cease to be a lien at the expiration of twelve months after the said debt was contracted, unless at the time when said twelve months shall expire such ship or vessel shall be absent from the port at which said debt was contracted; in which case, said lien shall continue until the expiration of thirty days after such ship or vessel shall next return to said port; and in all cases such debts shall cease to be a lien upon such ship or vessel unless the person having such lien shall within thirty days after said debt is contracted cause to be drawn up and filed specifications of such lien," etc. By the express language of this statute it applies only to debts "contracted within this state." The obligation of the steamship company, therefore, to Tyson & Co., in England, for the premiums of insurance paid by them, constituted no lien upon these vessels, both because no specifications were filed by them, and because the debt to Tyson & Co. for such premiums was contracted in England, where the policies were taken out, and where the payment of premiums was made. Tyson & Co., therefore, having no lien, the libelants could acquire none from them by subrogation.

The libelants claim a lien, however, under the fourth subdivision of the first section of the act, which gives a lien "for advances made for the purpose of procuring necessaries of such ship or vessel, or for the insurance thereof." This provision must be construed in harmony with the evident meaning of the context, and with the general purpose of the act. The act is drawn in language familiar to the maritime law, and its phrases must be interpreted in accordance with maritime usage. The intent of the act evidently is to supplement the maritime law of this country by providing for certain liens upon domestic ships in cases in which our maritime law does not recognize any lien, except upon statutory provision; and to allow a lien also for the building and insurance of vessels, for which a maritime lien is given by the law of most maritime countries, but not by ours. The act provides, in accordance with the policy of the maritime law, against any long continuance of secret liens, by requiring a public registration of the claim in all cases within 30 days after the debt was contracted. The presumed necessities and

conveniences of commerce are the foundation of all maritime liens, and the state act recognizes the same need for domestic ships as for foreign ones. Advances of money in order to obtain necessaries are placed by the maritime law on the same footing as the necessaries themselves; if they are made for the purpose of obtaining the necessaries, or of paying those who have a lien therefor, they enjoy the same privilege. Thomas v. Osborn, 19 How. 29; The J. B. Williams, 42 Fed. 533. Subdivision 4, above quoted, adopts the same rule, and should be subject to the same construction. It does not apply to advances which are neither made for the purpose of obtaining necessaries or insurance, nor are the means of discharging an existing lien for either, but are simply the means of repaying an old debt, not accompanied by any lien. This qualification, which is expressly established by the language of subdivision 4, as respects advances for necessaries, is, by implication from the context, equally applicable to advances for insurance. Both clauses are ejusdem generis. As the libelants' advances to Tyson & Co. were not made for the purpose of procuring insurance, nor of paying off any lien held by Tyson & Co., subdivision 4 does not apply. Subdivision 5 cannot apply, for that evidently refers to a debt contracted directly and immediately for premiums, whereas the debt to the libelants is in effect a debt for money borrowed to repay an old debt for premiums owed to Tyson & Co.

To sustain this claim of lien would, in effect, nullify the evident general intent of section 2, which is to prevent both the long continuance of liens and their secret character. If the payment by the libelants of Tyson & Co.'s advances for premiums made from 4 to 12 months previous can be the foundation of a new lien, where no lien existed before, then, similarly, new liens could be created for old debts for supplies at any time during 6 years after the original debts arose. This is manifestly contrary to the object and the intent of the statute. Even where the original supply men had neglected to comply with the statute by filing specifications within 30 days, and so lost their liens, a reimbursement by a third person at the debtor's request, no matter how long after, would, upon the construction contended for, create new liens for these ancient supplies. I cannot give the statute such a construction. A different question would have been presented had the libelants been originally liable to Tyson & Co. for the premiums, as guarantors or otherwise, but the evidence of Mr. Gourlie excludes that question, as he denies any original liability. The libel must, therefore, be dismissed.

THE C. P. MINCH.

(District Court, N. D. New York. May 17, 1894.)

SALVAGE—WHAT ARE SALVAGE SERVICES.

A vessel anchored near shore on a dark, squally night, in a heavy sea, swung round towards the shore, and her bow began pounding on a sand bar. The master went ashore with part of the crew, found a tug, and sent her out next morning. After he left, the mate and remaining seamen took soundings, found deeper water towards the stern, and let out the anchor chain until the vessel was in deep water, where she rode quietly until morning. The voyage was thereafter completed, and the crew received their wages. *Held* that, even if the master intended to abandon the ship, those who remained were not entitled to salvage, for the danger was not extreme, and their services were but the ordinary services of skillful seamen. The Blaireau, 2 Cranch, 240, The Umattilla, 29 Fed. 252, and The Triumph, Fed. Cas. No. 14,183, 1 Spr. 428, distinguished.

This was a libel against the schooner C. P. Minch, filed by certain of her crew to recover salvage.

George S. Potter, for libelants.
George Clinton, for claimants.

COXE, District Judge. On the 19th of September, 1893, the three-masted schooner C. P. Minch, having a cargo of about 639 tons of stone, set sail from Portage Entries, a port on Lake Superior, destined for Buffalo. Her crew consisted of a master, mate, cook and four seamen. There were also on board two passengers. On the afternoon of the 21st she reached Whitefish Point. The wind was blowing strong from the southeast and it was difficult if not impossible to round the point in the face of the heavy sea and strong head wind. In these circumstances she dropped anchor under the lee of the point about a mile from land in four and one-half fathoms of water. The schooner drew 13 feet. About midnight the wind died down, the glass fell and everything indicated a coming storm. Shortly afterwards the wind veered around and blew hard from W. N. W. A heavy sea was running. It was a rainy, dark and squally night. The vessel swung around towards the shore and her bow commenced pounding on a bar of sand and gravel. The captain then told the crew to get ready and go ashore in the yawl. The libelants, the cook and the two passengers remained on board. The captain and three men succeeded in landing in safety. Shortly after the captain departed, the libelant Talbert, who was the mate, after sounding and discovering that there was deeper water amidships and at the vessel's stern, let out more anchor chain and she went over the bar in 22 feet of water and there lay quietly until the morning. The wind grew lighter about 3 o'clock and fell gradually until daylight. During the afternoon two fishing tugs were anchored near the point. On landing the captain went in search of these tugs and was informed that they were then on the other side of the point. He thereupon procured a lantern and went through the woods to obtain the assistance of one of them for the schooner and crew. The master of the tug declined to go out until

daylight, but did, in fact, start about 5:30 a. m., just as day was breaking. After some maneuvering the tug made fast to the schooner and with the assistance of the latter's sails pulled her into the lake. The schooner then set sail, rounded the point and proceeded on her journey to Buffalo. The captain and the three men who had gone ashore followed the schooner in the tug and after signaling her twice the schooner hove to and they were taken aboard, the master assuming command. On reaching Buffalo all the crew, including the libelants, received their wages.

The libelants concede the general rule that mariners cannot libel their own vessel for salvage. It is, however, contended that these libelants are within the exception recognized by The Blaireau, 2 Cranch, 240; The Umattilla, 29 Fed. 252; and the Triumph, 1 Spr. 428, Fed. Cas. No. 14,183. In each of the cases cited there was no doubt regarding the following propositions: First. The vessel was seriously injured and in imminent peril. Second. The master and crew had deserted her. Third. The voyage was actually broken up and no wages were received. Fourth. The libelants' services were of the most meritorious character. They braved great dangers, suffered the severest hardships and saved or contributed to save the ship from destruction.

In the case at bar, on the contrary, there is the gravest doubt upon each of these propositions. The Minch was in no sense a wreck; she had received no injury; she was not leaking to any appreciable extent; she had lost no part of her tackle and when the master left her she was as staunch and strong as at any time during the voyage. There was absolutely no reason for abandoning her sine spe revertendi. The shifting of the wind placed her in a dangerous situation, that was all. If the wind had increased and if the anchor had failed to hold she might have been stranded. The situation was critical but not desperate. It demanded men of ordinary honesty, skill and bravery. It is true that the schooner was pounding on the bar of sand and gravel, but this difficulty was quickly relieved by the libelants. It required nothing but ordinary seamanship to use the lead, and, having ascertained the depth of the water, to relieve the vessel by shortening or lengthening the anchor chain as the circumstances required. Any seaman would expect to render such services as part of his vocation. After reading the testimony I am convinced that it required fully as much courage to embark in the master's yawl and attempt to make a landing through the breakers as to remain on the schooner.

Very little is said in either brief as to the action of the two passengers, but to my mind their conduct is very persuasive upon this question. They were under no obligation to the vessel. They had nothing but their own safety to consult. They could go or stay as they pleased, and yet they deliberately preferred to remain. That there was no real danger at the time the master left the schooner is sufficiently proved by the libelant Talbert. He testified:

"Q. I suppose you were very much frightened when the captain left the vessel? A. No, sir; I was not. Q. Why not? A. Because I thought she

could be saved; if a man worked her right she could get off. Q. My question was why you were not frightened. A. Because there was nothing to be frightened at."

To find on these facts that the captain left intending to abandon the vessel is to convict him of lunacy or barratry.

There is testimony of language used by the master and some acts of his which tend to support the theory of the libelants, but taking into consideration the entire testimony and particularly his action with reference to the tug I am compelled to think that it was his purpose to save the schooner if possible. Assuming him to be a man of ordinary honesty and common sense it is simply incredible that he intended to abandon her because she was in a position of danger. But even upon the assumption that the master abandoned her, either because he was panic-stricken or deliberately and willfully intended to wreck her, his conduct did not absolve the libelants from their duty to the vessel. The services which they rendered were the ordinary services of skillful seamen. The vessel had a right to them by virtue of the existing contract. Rev. St. U. S. § 4525. It would, in my judgment, be a most dangerous precedent to hold that a seaman is entitled to salvage each time he extricates his vessel from an awkward or hazardous situation. That these libelants did anything more than was required of them by the situation I cannot believe. Their wages have been paid in full and they have no claim for anything further. The Neptune, 1 Hagg. Adm. 227, 237; Miller v. Kelly, 1 Abb. Adm. 564, Fed. Cas. No. 9,577; The Dodge Healy, 4 Wash. C. C. 651, Fed. Cas. No. 2,849; The Franklin, Blatchf. & H. 525, 543, Fed. Cas. No. 11,646; The John Perkins, 21 Law. Rep. 87, Fed. Cas. No. 7,360; The Wave, 2 Paine, 131, Fed. Cas. No. 17,300; 2 Pars. Shipp. & Adm. 264; Cohen, Adm. 55, 56.

The libel is dismissed.

THE EXPRESS.

(Circuit Court of Appeals, Second Circuit. February 20, 1893.)

No. 50.

Appeal from the District Court of the United States for the Southern District of New York.

In Admiralty.

For decision of the district court, see 48 Fed. 323.

Joseph F. Mosher (Carpenter & Mosher, on the brief), for appellant, the New England Terminal Co.

James M. Ward, assistant counsel to the corporation (William H. Clark, counsel to the corporation, on the brief), for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. We agree with the opinion of the court below in this cause, and affirm the decree, with interest and costs in this court to the appellee.

THE NEBRASKA.

HOFFMAN v. THE NEBRASKA.

(District Court, N. D. Illinois. April 30, 1894.)

1. MARITIME LIENS—REPAIRS AND SUPPLIES—STATE STATUTES.
   Where an Illinois vessel is taken to a Wisconsin port to be altered and refitted, there being no necessity for doing the work at that particular port, no maritime lien arises therefor, since such liens are founded on necessity; but the contractor has a lien under the Wisconsin statute, which gives liens to the builders and repairers of water craft.
2. SAME—WAIVER—MORTGAGE.
   A lien for repairs created by state law is not lost by taking a note and mortgage on the vessel, where the note expressly states that it is not given or accepted in lieu or as a waiver of the lien.
3. SAME—PRIORITIES.
   Liens for repairs and for supplies, one created by the statute of the home port, and the other by that of another state, are entitled to equal rank.
4. SAME—SUPPLIES FURNISHED TO MARSHAL.
   A lien for fuel furnished to a steamboat while in the custody of the marshal should be allowed only in case the net earnings of the boat add to the funds in his hands for distribution, and only to the extent of his proportionate share in such distribution.

Libel by Frank Hoffman against the steam propeller Nebraska.

W. H. Condon and George E. Cramer, for libelant.

GROSSCUP, District Judge. The propeller Nebraska has been sold by the action of this court, and the money is now waiting in court for distribution. There is no claim for seamen's wages, unless it be that of the master, and the fund is to be distributed among the different parties who are otherwise entitled to liens thereon. Unfortunately, it is insufficient to pay all the claimants in full; hence the contest respecting the rank and dignity of the claims. The evidence shows that in view of the World's Fair, and the probability of a large passenger traffic between Chicago and Jackson Park, the owner of the steamer, one Cummings, then residing in Chicago, took her to Milwaukee, and put her in the dry docks of the Milwaukee Dry-Dock Company, under a contract with that company to refit her, in such a way as would make her temporarily adapted to the carriage of passengers. The cost of the refitting amounted to upwards of $14,000, which alone shows that it must have been very extensive and thorough. It consisted of the taking out of her old engines, and their replacement, and such readjustment and reconstruction of the decks as would adapt them to passenger traffic. The statutes of Wisconsin, like those of Illinois, provide that the builder or repairer of water craft shall have, under certain conditions, liens for the material furnished and services rendered thereon, and I think the understanding and dealings between the owner and the dry-dock company were such as, against the owner, would give the dry-dock company a lien under that statute. Subsequently, notes for the amount owing to the company were executed by the owner, with a mortgage upon the vessel securing them, which was duly filed in

the proper register; but these notes on their face provide that they are not given or accepted in lieu, or as a waiver, of the lien. There can be no question that, as between the owner and the dry-dock company, this latter transaction would not defeat the company's lien. After being refitted, the vessel navigated the water of the lakes, and obtained credit for supplies, the claims for which are now before the court for adjudication.

The principal and most important question relates to the character of the dry-dock company's lien. Maritime liens proper are the creation of the law to make navigation possible. They rose in a day when the high seas were the pathway for vessels, and when the nations in whose ports the vessels anchored were much more strangers to each other than they are to-day. The craft of a nation in a foreign port had no credit, except itself, upon which to obtain the repairs or supplies that were necessary to take it home. The necessity of maintaining that credit inviolate caused the courts of the home port to enforce the pledge of the vessel, even to the point of discrimination against the other claimants, except salvage and seamen. It was the only method by which vessels away from home could obtain wings to fly the seas. On this necessity grew up the doctrine of maritime liens proper. The considerations of necessity upon which the lien is based do not exist in favor of the claimants of the dry-dock company. The refitting was not made to give the steamer wings or legs with which to reach her home port. There is no element of stress or necessity in the repairs it provided. The owner could have had the repairs made at any other port as well as at Milwaukee, and he chose that port, not under the stress of an emergency, or to enable his vessel to get home, but simply because, for some reason, it suited his purpose better to have the repairs made there than elsewhere. No reason has been shown—no reason can be thought of—why the old maritime lien, brought into existence for an emergency, should be applied to this case. I am of the opinion, however, that the Milwaukee Dry-Dock Company had, under the statutes of Wisconsin, a lien upon the vessel for the value of such repairs, and that this lien was not waived or set aside by the subsequent transactions between the parties. It is evident that, as between themselves, it was not waived, for every precaution was taken to prevent such inference. The notes and mortgages, subsequently taken, expressly incorporated the intention of the parties that the lien should continue to subsist, and the fact of the lien itself, and of the intentions of the parties respectively thereto, have always been open to the inspection of those asked for supplies, upon the proper records of the port. This lien, however, under the doctrine of the Rumbell Case, 148 U. S. 1, 13 Sup. Ct. 498, comes from the same parentage as the lien of the claimants in the home port, namely, the statutes of the respective states, and is therefore, in the absence of any maritime reason for preferment or subordination, of equal rank therewith. I see no reason in this case why the claimants of the home port or of the Milwaukee Dry-Dock Company should outrank each other. They both contributed to the money-earning capacity of the craft. They

both were necessary to put, and keep, the vessel afloat, and neither would have existence as liens except for the legislation of the respective states. In the distribution, therefore, they will be regarded as of equal rank.

I am not prepared to change, ex post facto, the rule that has formerly governed the courts of this district in the recognition of liens. All supplies that have been furnished from the home port within the last two seasons will be regarded as of equal rank. Neither will I, in its application to this case, change the rule respecting the rank of home and foreign liens. I have, however, submitted these two matters to the consideration of Judges Seaman, Jenkins, and Bunn, within whose jurisdiction the ports of the lake lie, and will make some announcement thereon within a short period.

I can see no reason why an exception should be made in favor of the master in this case, and his claim for services will therefore be disallowed. The claim of the fuel company for fuel, supplied while the boat was in the custody of the marshal, will be allowed only in case the net earnings of the boat added something to the fund now in his hands for distribution, and only to the extent of his proportionate share in such distribution.

The question of how far separate libels were required to properly protect the interests of claimants whose claims were in the hands of one proctor will be submitted to the master for a finding, with instructions to the master that it is the duty of the party representing many claims to so reasonably consolidate them as will fully protect the interest of each claim. Under the foregoing directions the cause will be referred to the master for such further proceedings as are necessary to determine the pro rata amount of each claimant.

THE J. & J. McCARTHY.

VERDON v. STYFFE.

(Circuit Court of Appeals, Second Circuit. April 18, 1894.)

No. 97.

1. SHIPPING—PERSONAL INJURIES—SHIFTING TOWING HAWSER.
   Negligently permitting a tug to go ahead while the master of a canal boat, which she is towing, is shifting the towing hawser from the port cleat to the forward bitts, according to directions received from the tug, thereby catching his fingers in the loop of the hawser, renders the tug liable for at least divided damages. 55 Fed. 85, affirmed.

2. ADMIRALTY APPEALS—DECREE FOR DIVIDED DAMAGES.
   Failure of a party to a decree for divided damages to appeal therefrom prevents the appellate court from reversing the decree as against him.

3. SAME—UNJUSTIFIABLE APPEAL—DAMAGES FOR DELAY.
   Appellee allowed damages to the extent of 10 per cent. on the amount in controversy as damages for delay where appeal from decree in admiralty was, in opinion of appellate court, entirely unjustifiable.

Appeal from the District Court of the United States for the Southern District of New York.

This was a libel by William T. Styffe against the steam tug J. & J. McCarthy, Frederick A. Verdon, claimant, to recover damages for personal injuries. The district court rendered a decree for divided damages (55 Fed. 85), and the claimant of the tug alone appeals.

The facts and the matters in controversy, aside from the testimony, were thus stated by the district judge:

"On the 19th of July, 1892, between 2 and 3 o'clock in the afternoon, the libelant, who was the captain in charge of the canal boat Fred Fassbender, which was going around the Battery in tow of the tug J. & J. McCarthy on a hawser about 40 or 50 feet long, lost two of the fingers of his right hand by getting them smashed in changing the hawser from the port cleat to the forward bitts. The tow had been taken from the Wallabout by two hawsers running to the port and starboard sides. Off pier 5 or 6, East river, the starboard hawser either slipped or parted, and the canal boat, being held by the port line only, began to take a sheer to starboard. The libelant was at that time near the stern of his boat. Seeing the sheer, he ran forward, saw that the starboard hawser was gone, and, according to his testimony, was hailed by one of the men on the stern of the tug, who told him to shift the hawser from the port cleat, and put it over the bitts near the stem; that he attempted to do so; and that while putting the loop which formed the end of the port hawser over the bitts, the tug started up, and that his fingers were thereby caught between the hawser and one of the bitts about six inches from its top."

McCarthy & Berier, for appellant.
Hyland & Zabriskie, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. We are entirely satisfied with the conclusions of the district judge that the libelant was injured by the negligence of those in charge of the tug in permitting her to go ahead, without notice to the libelant, while the libelant was attempting to fasten the tug's hawser in a new location upon his own boat, at the request of those in charge of the tug. We are less satisfied with the conclusions of the district judge that the libelant was also negligent. As, however, the libelant has not appealed from the decree dividing the damages sustained by him, we can only affirm the decree. The merits of the controversy depend entirely upon the credibility of the witnesses who were examined in the presence of the district judge. We think the appeal was entirely unjustifiable, and that the cause is a proper one for allowing to the appellee, in addition to interest, damages for delay to the extent of 10 per cent. upon the amount of his recovery, with costs of this court and of the district court.

The judgment is affirmed, with directions to the district court to decree accordingly.

THE ARGONAUT.[1]

DEMING v. THE ARGONAUT.

(District Court, S. D. New York. May 8, 1894.)

1. SHIPPING—PERSONAL INJURIES—UNCOVERED HATCHWAY.
Leaving hatches open during intervals in unloading, the passage-way and the hatches being reasonably lighted, is not negligence.

[1] Reported by E. G. Benedict, Esq., of the New York bar.

2. SAME—POSITION OF HATCH KNOWN TO LIBELANT.
A stevedore's employe, after quitting work at unloading a ship, in going ashore at night, fell into a hatchway, the position of which was known to him, and which was guarded by coamings 12 to 14 inches high. *Held* that, even if the hatchway was unlighted, his fall was the result of his own carelessness.

This was a libel by Frank Deming against the steamship Argonaut for personal injuries to libelant while employed in unloading the steamship's cargo.

Hyland & Zabriskie, for libelant.
Convers & Kirlin, for defendant.

BROWN, District Judge. The libelant, one of the stevedore's men employed in unloading bananas from the steamship Argonaut to a float alongside of her, at pier 3, North river, on October 23, 1893, fell down the open hatch of the vessel after the men had quit work, and was considerably injured, for which the above libel was filed.

The libelant's testimony, corroborated by a single witness only, is to the effect that after quitting work he left the float by a plank run from the top of the float to the deck of the steamer, for the purpose of going ashore; that it was dark; that the hatches were off, and that no lights were about the hatch, and that he walked into it, having no knowledge of the danger.

I am compelled to find that the libelant's testimony is overborne by many witnesses for the claimant showing that there was an abundance of light immediately about the open hatch; that the lights were left there during supper-time, as work was to be resumed in the evening in order to clear out the dirt and empty boxes. Without referring, therefore, to other points in which the libelant's story is contradicted, I must find that no negligence in the ship is established; since it was not negligence to leave the hatch covers off in the intervals of work, when the passage-way and the hatches were reasonably lighted. The Jersey City, 46 Fed. 134; Dwyer v. Steam-Ship Co., 17 Blatchf. 472, 4 Fed. 493.

The libelant, moreover, had been moving bananas taken out from that very hatchway. He knew its position perfectly. It was guarded by coamings from 12 to 14 inches high; and even if there had been no lights placed at this hatchway at the moment when he went ashore, after quitting work (if in that regard the libelant's story were to be adopted), it could only be by very plain carelessness of the libelant that he should walk into the hatch, and tumble over the coamings. He does not even remember of touching the coamings with his feet at all. Other circumstances in the case diminish reliance upon the libelant's testimony; but without further reference to these, the testimony as to the lights is alone sufficient to prevent the libelant's recovery. Anderson v. The E. B. Ward, Jr., 38 Fed. 44; The Elsie Fay, 48 Fed. 700; Taylor v. Manufacturing Co., 140 Mass. 150, 3 N. E. 21.

Decree for the defendant.

THE ELENA G.

NEAL v. THE ELENA G.

(District Court, E. D. Pennsylvania. April 24, 1894.)

No. 11.

SALVAGE—COMPENSATION.

A bark laden with petroleum was moored at a wharf when an explosion occurred near by setting fire to the wharf and covering the water with burning oil. The bark and cargo, worth about $35,000, were saved by the exertion of five tugs, worth $53,000, at a risk to the tugs and their crews. *Held*, that $6,800 was fair compensation.

In Admiralty. Libel by Neal against the Elena G. for salvage.

J. Rodman Paul and John F. Lewis, for libelant.

Henry Flanders and Edwd. F. Pugh, for respondent.

BUTLER, District Judge. About 4 o'clock on the morning of October 9, 1892, as the respondent lay in the river Schuylkill, at the Atlantic Refining Company's wharf (at Point Breeze) laden with a cargo of 39,641 cases of refined petroleum, moored against the bark "Felix," an explosion occurred at the Gas House wharf, a short distance above, setting fire to that wharf, and to large quantities of oil floating on the river. As the tide was down the flames were carried rapidly to the refining company's wharf, and communicated to the "Felix" and respondent, creating great alarm and danger in that vicinity. Some members of the respondent's crew went ashore to cast off her lines, but were prevented, and their return cut off, by the fire. The balance of the crew remained on board, unable, probably to get off. The flames spread rapidly, and there was great danger they would reach the cargo, and cause instant destruction of the vessel and everything on board. Oil was stored along the wharf near by, and explosions from parts of it were frequent. The situation was one of great peril to the respondent, and to everything in the immediate vicinity. The tug "McCaulley" was lying alongside the respondent when the first explosion occurred, prepared to tow her out, in pursuance of previous arrangement. She immediately endeavored to get under way; but the situation was such (the respondent's entanglement with the "Felix," a large vessel, and being, probably, aground, with the water very low,) that it was impossible to do more without aid than pull her a very short distance from the wharf. Persistence in the effort would, I believe, have been useless to the respondent, and dangerous to the tug. After parting the hawser three times, and seeing other vessels in danger lower down, she went to their aid, returning after the lapse of probably, 20 minutes. The tug "Juno," which had been seriously on fire, was then present throwing water on the burning barks. The "Mary Louise" and the "Churchman" arrived soon after, and the "Bradley" a little later. The "McCaulley" was again made fast to the respondent, and with the assistance of the other tugs, succeeded in pulling her and the "Felix," (still firmly attached) across the channel; where they were held in place until the fire was extinguished. Sub-

sequently the attachment was broken, and the "Felix" soon after, sank, blocking up the passage southward.

The tugs started with the respondent up the channel, which is narrow, and in the existing condition of the water was very difficult for such towage. The tide was down, and unusually high winds had driven the water out. On the way up in search of a place of safety, the bark grounded, and could not be gotten off until the depth of channel had sufficiently increased,—24 hours later. While she lay there, a second fire occurred below, which again threatened her destruction. The river was covered, here and there, with floating oil, which was driven about, endangering all vessels in the vicinity. The tugs fought this fire, and aided to prevent its spreading upward. As soon as the bark could be gotten off, she was taken to a point further up, and moored in comparative safety.

It may be that the services of one, or even more of the tugs might have been dispensed with. Looking at it after the event, I incline to believe they might. But doubtless this did not seem so at the time; and the respondent's officers certainly did not suggest it. All were useful. I do not think the tugs are blamable for the respondent's grounding. In considering this, and other questions respecting the conduct and services of the tugs, the peculiar situation must be kept in mind,—the condition of the channel, its shallowness and narrowness, its burning surface, the constant danger, and the prevailing alarm throughout the vicinity.

Soon after the fire started at the refining company's wharf, engines of the city fire department arrived on the street near by, and commenced throwing water. The situation was such, however, that I think but little of it reached the respondent; and I believe she and her cargo would have been lost if these tugs, or others, had not gone to her assistance. I have not attempted a minute statement of the facts. The respondent's admission of responsibility for salvage services has rendered this unnecessary. The question of amount only is open for consideration.

As we have seen the services involved serious danger to the tugs and their crews. They were highly meritorious, efficient and successful. There is no rule by which their value can be measured with exactness. The general rule on the subject is well understood, and is well stated by Mr. Justice Bradley in The Suliote, 5 Fed. 99—

"Salvage should be regarded in the light of compensation, and not in the light of prize. The latter is more like a gift of fortune conferred without regard to the loss or sufferings of the owner, who is a public enemy, whilst salvage is the reward granted for saving the property of the unfortunate. * * * The courts should be liberal but not extravagant; otherwise that which is intended as an encouragement to rescue property from destruction may become a temptation to subject it to peril."

Still these are but suggestions to aid the judgment. No two cases are alike, and no one is therefore a precedent for another. It is important of course, to avoid extravagance, but it is equally important not to withhold from dangerous and meritorious services their just reward. The difficulty in all cases is to determine what is a just, and not an extravagant, reward. At best the conclusion

reached is but an intelligent guess; and different minds will guess differently.

The respondent and her cargo were worth about $35,000; the tugs were worth $53,000. After full and anxious consideration I have concluded to award the libelant $6,800. This may be too high or too low; but it is the best I can do. I am fortunately relieved from determining how this sum should be apportioned among the tugs. I must, however, apportion the payment between the bark and cargo, as the owners are different. I find the value of the former to be $9,500, and of the latter $24,000. Each will therefore bear and pay its proportion of the $6,800 according to this valuation.

THE CHICAGO.[1]

THE VOLUNTEER.

MURRAY et al v. THE CHICAGO.

PENNSYLVANIA R. CO. v. THE VOLUNTEER.

(District Court, S. D. New York. May 14, 1894.)

COLLISION—STEAM VESSELS CROSSING — FERRY SLIP — INSPECTORS' RULE III—LOOKOUT—SIGNALS.

A tug with a tow alongside was going up the North river close to the New York shore, and approached a ferry slip. A ferryboat, bound for the slip, crossed from the New Jersey shore. The evidence was conflicting as to signals, the ferryboat asserting that when 300 yards distant she gave two whistles to the tug, and received a reply of two, after which no attention was paid to the tug until near the slip; the tug asserting that she neither heard nor gave any signal of two whistles, but that, when the ferryboat was a third of the way across the river, the tug gave a signal of one whistle, to which no answer was received. *Held*, that the tug was in fault for navigating too near the ferry slip and embarrassing the ferryboat, and for not giving an alarm signal on receiving no answer to her own signal; that the ferryboat was in fault for failing to keep a proper lookout after giving her own signal, and hence for failing to observe the attempt of the tug to go across her bow in time to reverse; and that the damages should therefore be divided.

These were cross libels by John Murray and another against the ferryboat Chicago, and by the Pennsylvania Railroad Company against the tug Volunteer, for damages from a collision between the ferryboat and a scow in tow of the tug.

Robinson, Biddle & Ward, for the Chicago.
Goodrich, Deady & Goodrich, for the Volunteer.

BROWN, District Judge. At about 6 p. m., after dark, on the evening of November 28, 1893, as the ferryboat Chicago, from Jersey City, was about to enter her slip at the foot of Cortlandt street on the ebb tide, she came in collision with a loaded sand scow, which was lashed to the starboard side, and in tow of the

[1] Reported by E. G. Benedict, Esq., of the New York bar.

tug Volunteer, which was going up the North river just outside the line of the piers.

The testimony of the pilot of the ferryboat shows that after he had given his first signal of two whistles to the tug when some 300 yards distant, and received, as he says, a reply of two whistles from her, he did not pay any further attention to the tug and tow until he was within a boat's length of Starin's pier, which is at the entrance of the Cortlandt street slip; that he then saw that the Volunteer was coming up in front of him, and that there would be a collision which he could not avoid. To escape the strength of the ebb tide, the tug came up nearly in line with the end of Starin's pier, which was longer than the piers below; and she was proceeding quite slowly. The testimony as to the whistles given, is directly contradictory. The pilot of the Chicago says he gave to the tug a signal of two whistles and got an answer of two, when 300 yards out in the river. The pilot of the tug, and one other witness, testify that they heard no such signal from the ferryboat until she was close to the pier; that the tug at no time gave any signal of two whistles; but that she did give a signal of one whistle to the ferryboat when the latter was a third of the way across the river, to which no answer was received; and that the tug gave no other signal before collision.

The preponderance of witnesses is in favor of the ferryboat, as to the signal of two whistles. I do not see much difference as regards the probabilities of the case. If it is improbable that the tug, had she given two assenting whistles to the ferryboat's signal of two whistles, would have kept on directly under the bows of the ferryboat, contrary to her agreement, and to the manifest danger of her own destruction, it is equally improbable that the ferryboat, after giving a signal of two whistles to the tug, should pay no further attention to the tug, had the tug given her a contrary signal, or no signal at all. I do not undertake to balance these probabilities, or to determine just what the fact was in regard to these signals. For, aside from the question of signals, there are other facts that put each in fault.

The tug was in fault for having no separate lookout; for proceeding so near to the New York shore, to the embarrassment of the ferryboat in entering her slip; for attempting to go ahead of the ferryboat at the mouth of her slip, when she could not do so without embarrassing the ferryboat's entrance; and for violation of the inspector's rule III, in not giving several short and rapid blasts of her steam whistle when she received no response, as her pilot says, from the ferryboat, to her signal of one whistle, and therefore had no certain understanding as to the course or intention of the ferryboat, but relied instead upon the surmise that the ferryboat would wait for the tug.

The ferryboat is in fault for paying no further attention to the tug, incumbered as she was by her tow, after the signal of two whistles, until the tug was so near that collision was unavoidable. Even if she got a reply of two whistles from the tug, and had a

right to expect that the tug would go under her stern, in accordance with that signal, she was not thereby absolved from the duty of attention to the movements of the tug until she got so near that collision was inevitable. Misunderstanding of signals is not in frequent; the execution of intentions is sometimes interrupted, or thwarted by new circumstances. The necessity and the duty to maintain a good lookout continue the same. The design of the rules for signals is not to make them a substitute for a continued lookout, but to add to the previous means of safety against danger, of which a good lookout is the chief. The City of Savannah, 41 Fed. 891; The Clara, 49 Fed. 767; The Ice King, 52 Fed. 896.

Had proper and reasonable attention been given to the tug, it must have been seen that she was not navigating in accordance with the supposed agreement of two whistles, which the pilot of the ferryboat testified that he understood were given by her. The failure of the tugboat to turn to the left, as such signals would have required, or to check her progress towards and across the mouth of the slip, were so evident an indication of some misunderstanding or of an intention to pass ahead of the ferryboat, that had a proper lookout been kept, they must have been observed in time to enable the ferryboat either to repeat her signals, or give a timely danger signal, as in such a case she ought to have done, or else to stop and back, as she also might have done, in time to avoid the collision, notwithstanding the tug's prior faults. The case is, in this respect, like those of The Fanwood, 28 Fed. 373, affirmed on appeal; and The Baltimore, 34 Fed. 660, affirmed 38 Fed. 367; The Frisia, 28 Fed. 249, 24 Blatchf. 40; The John S. Darcy, 29 Fed. 644, affirmed 38 Fed. 619.

The damages must, therefore, be divided.

THE FANWOOD.[1]

DENTZ et al. v. THE FANWOOD.

(District Court, S. D. New York. May 18, 1894.)

1. COLLISION BETWEEN STEAMERS — PROXIMITY TO PIERS — DISABILITY OF ENGINE.
   A tug proceeding, without necessity, about 150 feet from ferry slips, reversed to go astern of a ferryboat coming out on her starboard hand. Her engine caught on the center, the engineer was slow in prying it off, her pilot gave no signal to indicate her disability, and, although the ferryboat reversed as soon, apparently, as her pilot had reason to suppose that the tug would not keep out of the way, the vessels collided. *Held*, that the ferryboat was not in fault.

2. ADMIRALTY—EVIDENCE—ADMISSIONS OF PILOT.
   The admissions of the pilot of a colliding vessel, not being part of the res gestae, are not competent evidence against the ship owner.

[1] Reported by E. G. Benedict, Esq., of the New York bar.

This was a libel by George H. Dentz and another against the ferryboat Fanwood for damages to libelants' steam tug Treush by collision.

McCarthy & Berier, for libelants.
De Forrest Bros., for claimants.

BROWN, District Judge. The Treush, going down the Hudson river about 150 feet distant from the end of the piers, came in contact with the ferryboat Fanwood as she was leaving her slip at Communipaw. When some 250 or 300 feet distant, signals of one whistle were exchanged, which, under ordinary circumstances, would have been in abundant time to enable the tug to keep out of the way of the Fanwood, as it was her duty to do, by stopping and going under the ferryboat's stern. But the tug's engine caught upon the center when the order to reverse was given, and this was the primary cause of the accident. The pilot of the Fanwood, when about 125 feet from the tug, gave a signal of three whistles. The tug gave no answer, and, continuing on unchecked, her stem struck the port guard of the ferryboat at her forward hood, thereby doing herself some damage, for which the above libel was filed.

Assuming that the liability of an engine to catch on the center, and thus delay reversing, is unavoidable, it was the tug's fault, and at her risk, to proceed, without necessity, so near to the end of the piers and ferry slips, where, in case of this temporary disabling of her engine, she would not have either time or space for the performance of her duty to keep out of the way after the ferryboat was seen to be coming out of her slip. The pilot of the Treush, moreover, when he found that his engine was slow in reversing, and had caught upon the center, should have hailed the ferryboat, or given alarm whistles to indicate his disability. He would have done so had he not supposed, as he testifies, that the engine would get to working backwards in time to enable him to keep out of the Fanwood's way. For this reason, apparently, he did not even answer the alarm signals of the Fanwood. If the testimony of one of the witnesses for the libelants is correct,—that 15 seconds was sufficient time for the engineer to pry the engine off the center, and get reversing,—the captain was justified in his expectation, and the additional delay was the engineer's fault.

The libelants' testimony shows that the Fanwood, coming out of her slip under one bell at the speed she was making, could have come to a stop within an advance of 50 feet. As the alarm whistle of the Fanwood was given when she was 125 feet distant, this evidence (which has not been contradicted by the defendant) indicates that the Fanwood might have been brought to a stop before reaching the line of the tug's course. The evidence leaves no doubt, however, that the Fanwood was still under considerable headway when her guard at her forward hood came in contact with the tug, since the latter was given by the shock a strong list to port, which threw overboard two men on board the tug. The

Fanwood is sought to be held on the ground that it was her duty to reverse sooner than she did, and in time to avoid a collision; because, as it is said, she ought to have perceived and known that the tug was, from some cause, helpless, and that the duty of keeping out of the way, therefore, devolved on the Fanwood. There is no doubt of this obligation, if the Fanwood knew, or had sufficient reason to suppose, that the tug was disabled in time to avoid her. But the circumstances do not seem to me to justify this assumption. The tug was a small boat, and unincumbered; she was presumptively capable of being handled with great ease and facility. The West Brooklyn, 45 Fed. 60, 61. She was going slowly, making only about four knots, and could ordinarily stop and turn within a very short distance,—just how quickly the pilot of the Fanwood did not know, and was not presumed to know, as well as the tug's pilot. The tug could certainly stop, ordinarily, within short hailing distance. As soon as she became subject to any disability which would prevent her stopping in time, it was certainly her pilot's duty to give notice of it to the Fanwood when he came within reasonable hailing distance of her, or by previous signals. He did neither; and, in the absence of any hail or signal from the tug, the pilot of the ferryboat was not called on to imagine that any such disability existed, or to suppose that the tug would not stop in time. The ferryboat reversed before the collision, and her quick water carried the tug ahead of her after the collision. I do not see any evidence sufficient to show that the pilot of the ferryboat did not reverse as soon as he had reason to suppose that the tug could not or would not keep out of the way. The West Brooklyn, 45 Fed. 60, affirmed 1 U. S. App. 88, 1 C. C. A. 415, 49 Fed. 688.

According to the testimony, the causes of the collision, independently of the catching on the center, were: (1) The false position of the tug; (2) the engineer's tardiness in getting her off the center; and (3) the captain's failure to hail or signal his disability. The evidence of the pilot's admissions, not being a part of the res gestae, but made some time afterwards, are not, as I understand, competent evidence against the owner; it is only the master whose admissions, as the general representative of the owner, are thus admissible. The Enterprise, 2 Curt. 320, Fed. Cas. No. 4,497; La Champagne, 3 C. C. A. 539, 53 Fed. 293. The libel must therefore be dismissed.

THE DELAWARE.[1]

WINNETT et al. v. THE DELAWARE.

(District Court, E. D. New York. May 7, 1894.)

COLLISION—STEAM VESSELS CROSSING.

A tug having a steamship approaching on her port hand, in a situation justifying the supposition that the steamship will go under her stern, or stop, is not in fault for keeping up her speed.

[1] Reported by E. G. Benedict, Esq., of the New York bar.

This was a libel by Charles H. Winnett and others against the steamship Delaware for the loss of libelants' tug Talisman by collision with the steamship.

Wing, Shoudy & Putnam, for libelants.
Convers & Kirlin, for claimants.

BENEDICT, District Judge. This is an action brought by the owners of the tug Talisman to recover for the loss of that tug, which was sunk at about 10 o'clock on the morning of September 16, 1893, by the steamer Delaware, in Gedney's channel. The steamship was inward bound. The tug was towing the pilot boat Edmund Driggs to her station, and was crossing Gedney's channel, towards the line of the black buoys. The Talisman was struck on her port side by the Delaware. The fireman on the tug was killed while attempting to cast off the towing line, the captain's arm was broken, and several of the crew were thrown overboard.

The fault of the Delaware is clearly proved. The only question remaining for consideration is whether there was a fault on the part of the tug. The faults charged against the tug are—First, in omitting to stop and reverse when risk of collision was evident; second, that the engineer of the tug left his post at a critical moment, when he ought to have executed an order which might have avoided the collision. I find neither of these charges sustained. The tug had an undoubted right to cross Gedney's channel as she did. It was the duty of the steamship to avoid her, and it was equally the duty of the tug to keep up her speed. In my opinion, it would have been a fault on the part of the tug to have stopped, under the circumstances. The vessels were on crossing courses, and in Gedney's channel. When the Delaware approached near to the tug, the tug had reached the western side of the channel. The situation justified the pilot of the tug in supposing that the steamship would go under his stern, or stop, and repelled any supposition that the steamship would pass ahead of him, and over to the western side of the channel. If he had acted on such a supposition, and stopped, he would have been at fault. I also find that the collision was in no way attributable to the fact that the engineer of the tug left the engine, and ran, at the last moment, to save his life.

There must be a decree for the libelants, with an order of reference to ascertain the damages.

EGAN v. BARCLAY FIBRE CO.[1]

SMITH v. SAME.

(District Court, S. D. New York. May 7, 1894.)

1. DEMURRAGE—BILL OF LADING—DELIVERY "AS SOON AS POSSIBLE."
A provision in a bill of lading requiring delivery "as soon as possible" is equivalent to a provision for quick dispatch, and requires the consignee to make use of all means of discharge readily available, and does not admit of a detention of the vessel to suit the convenience or business purposes of consignor and consignee.

2. SAME—DISCHARGE AT CONSIGNEE'S CONVENIENCE—LIABILITY.
Where defendant had a slip, on each side of which were suitable places for discharge, and two of the boats of libelant E. arrived there to discharge at the same time, but defendant, for its convenience, allowed the discharge on one side of the slip only, *held*, that libelant was entitled to demurrage for the detention of his boats for any period over and above the time it would have taken them to discharge simultaneously on opposite sides of the slip; and a second libelant, S., whose boats arrived subsequently to E.'s, was *held* entitled to demurrage for the period after E.'s boats should have been unloaded, and before S.'s boats began to discharge.

These were two libels—one by John Egan, and the other by John A. Smith—against the Barclay Fibre Company, for demurrage for detention of libelant's canal boats on delivery of cargo.

T. Clement Campbell, for libelant.
Peter Cantine, for respondent.

BROWN, District Judge. The bills of lading required delivery of the cargo "as soon as possible." This is equivalent to a provision for quick dispatch in unloading, and required the consignee to make use of all the means of discharge that were readily available; it did not admit of a detention of the vessels for such a disposition of the cargo as merely suited the convenience, or the business purposes, of the consignor and consignee.

Each libelant had two canal boats loaded with wood. Egan's two boats arrived at Saugerties on the 29th of June. The defendant had a slip there in Esopus creek, and on each side of the slip were suitable places for the discharge of wood. Under such a stipulation in the bill of lading, I think it was the duty of the consignee to admit of the discharge of the two vessels at both places at the same time, on the two opposite sides of the slip; and to supply men enough to remove the wood as fast as it was put upon the wharf by the vessel's men. The defendant, for its convenience, allowed the discharge on one side of the slip only, where a car track could be made use of for removing the wood to a shed some five or six hundred feet distant; and the second boat had, therefore, to wait until the first was discharged.

The libelant chose to employ but four men to unload his wood. His witnesses testified that these were sufficient to remove the wood in two days. But what the men hired were capable of do-

[1] Reported by E. G. Benedict, Esq., of the New York bar.

ing, is not the question. The question is whether the defendant caused any further delay by not removing the wood as rapidly as the men employed by the libelant were prepared to remove it from the boat, and would have removed it, but for the defendant's delay. The evidence shows a little delay through imperfection in the track, and also in the changes for empty and loaded cars. The time that the four men employed by the libelant would take to remove the wood can be be arrived at best by looking at the current rate of wages, the amount which the men expected to earn, the amount they usually received per day, and the rate per cord at which they contracted to unload these boats. This evidence shows that from 30 to 40 cords per day is all that the four men expected to remove, or would ordinarily have removed without any delays, and consequently that nearly three days would be required for the unloading of each of Egan's boats, which had 110 cords each.

There was no delay in the preparations for unloading after the arrival of Egan's boats on Thursday, the 29th of June. Work was begun on Friday the 30th; on Saturday the men worked three-quarters of a day only. As July 2d was Sunday, and the 4th a holiday, three days for unloading 110 cords would carry the unloading of the first boat to the forenoon of the 5th. The deck load of the second boat being previously removed, her discharge was completed upon the 7th. The first boat should, therefore, have been fully discharged by the forenoon of Wednesday the 5th; and the other boat by the same time, on the opposite side of the creek. This libelant is, therefore, entitled to two days' demurrage on both boats, which I find to be of the value of $6 each per day, including the men, making $24, or with interest, $25.20.

Mr. Smith's two boats arrived with about 83 cords each on the 30th of June. The defendant is not responsible for the delay caused by the use of the wharf by Egan's boats up to the time when his two boats should have been discharged, viz., by noon of the 5th of July. Mr. Smith employed the four men previously employed by Egan, and began discharging on the 7th, as soon as Egan's boats were unloaded. Upon the rule above stated, each of these boats should have been discharged in two and a half days, on the opposite sides of the slip, and the discharge completed by the night of Friday the 7th. The discharge was not completed until the 13th. Smith is, therefore, entitled to six days' demurrage on his two boats, amounting, at the same rate, to $72, adding interest, $75.60.

Decrees may be entered accordingly, with costs.

JONES v. EVERETT LAND CO.

(Circuit Court of Appeals, Ninth Circuit. April 26, 1894.)

No. 106.

1. WRITS—SERVICE BY PUBLICATION—TIME FOR APPEARANCE.
The amendment of Civ. Prac. Act. Wash. Terr. § 64, relating to service of summons by publication, by act of 1875, requiring a defendant so notified "to appear as if personally served within the county in which the complaint is filed on the day of the last publication," prescribed the time of appearance, which must be within the 20 days fixed by section 60 in case of personal service within the county.

2. SAME—PUBLICATION OF COMPLAINT.
Civ. Prac. Act Wash. Terr. § 63, authorizing an order "that service be made by the publication of the summons," as amended in 1875 by omitting the words "of the summons," did not require publication of the complaint with the summons.

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

This was an action of ejectment by Charles F. Jones against the Everett Land Company. The circuit court directed a verdict for defendant, and entered judgment accordingly. Plaintiff brought error.

Wm. Lair Hill, Junius Rochester, A. D. Warner, W. R. Davis, and W. Scott Beebe, for plaintiff in error.

Francis H. Brownell, for defendant in error.

Before McKENNA and GILBERT, Circuit Judges, and HAWLEY, District Judge.

McKENNA, Circuit Judge. This is an action of ejectment, brought by plaintiff in error against the defendant in error in the United States circuit court, district of Washington. Both parties derive title from Perrin C. Preston; the plaintiff by warranty deeds, and the defendant by sheriff's deed under a decree of foreclosure of a mortgage given prior to the deed to plaintiff in error. The controversy between the parties is at to the sufficiency of the service in the foreclosure suit. The suit was brought September 2, 1876, and service was made by publication, and gave 30 days to appear. The plaintiff contends that it should have required Perrin to appear within 60 days after service, the service being completed after the publication of the summons.

The provision for the issuance and service of summons is as follows:

"Sec. 60. The clerk shall endorse on the complaint the day, month, and year the same is filed, and at any time within one year after the filing of the same, the plaintiff may have a summons issued. The summons shall run in the name of the United States of America, be signed by the clerk, tested in the name of the judge of the court from which it issues, be directed to defendant, and be issued under the seal of the court. The summons shall state the parties to the action, the court in which it is brought, the county in which the complaint is filed, and cause and general nature of the action, and require the defendant to appear and answer the complaint within the time mentioned in this section, after the service of the summons, exclusive of the day of serv-

ice, or that judgment by default will be taken against him, according to the prayer of the complaint, briefly stating the sum of money or other relief demanded in the complaint, and the clerk shall also endorse on the summons the names of the plaintiff's attorneys. The time in which the summons shall require the defendant to answer the complaint shall be as follows: First: If the defendant is served within the county in which the action is brought, twenty (20) days. Second: If the defendant is served out of the county, but in the district in which the action is brought, thirty (30) days. Third: In all other cases, sixty (60) days."

The order of publication and time is provided for in section 64, which is as follows:

"Sec. 64. The order shall direct the publication to be made in a newspaper to be designated, as most likely to give notice to the person to be served, and for such length of time as may be deemed reasonable, at least once a week, and not less than six (6) weeks. In case of publication, where the residence of an absent defendant is known, the court or judge shall also direct a copy of the summons and complaint to be forthwith deposited in the post office, directed to the person to be served, at his place of residence. *When the foregoing provisions have been complied with, the defendant so notified, shall be required to appear as if personally served within the county in which the complaint is filed on the day of the last publication,* proof thereof being made by the affidavit of the publisher or his foreman, and filed before default is taken. Actual personal service of the summons, either within or without the territory, supersedes the necessity of publication."

The part in italics was added as an amendment in 1875. Other amendments were made, not necessary to notice.

The defendant in error contends that this amendment makes the first subdivision of section 60 applicable to service by publication; and plaintiff, on the contrary, insists that it prescribed merely the manner of appearance, not the time of it. We think the defendant's view is correct. Section 60 provides: "The summons shall * * * require the defendant to appear and answer the complaint within," etc.,—that is, answer it in the manner provided by law; and this manner of appearance is made applicable to all summons, no matter within what time to be answered. To provide it again by an amendment was useless. On the other hand, an amendment was necessary to make the first subdivision of section 60, instead of the third subdivision, apply to service by publication; and it was natural enough to insert it in section 64, as the section was concerned with that topic.

It is also urged by plaintiff that the court had no jurisdiction to order publication of summons against Preston, because section 63 provides that "service may be made by publication * * * (3) in an action for sale of real property * * * under a mortgage." A complete answer to this is that the action was for the sale of real property under a mortgage,—strictly so as to Preston, for it was the only relief prayed against him.

Another point is made by plaintiff that a copy of the complaint was not published with the summons, as the practice act required. There is plausibility given to this point, because section 63, as it existed in 1873, contained the words that "such court or judge may grant an order that service be made by the publication of the summons." In 1875 the section was amended in several particulars, and the words "of the summons" omitted. But a careful consid-

eration of other sections, and in view of the universal custom everywhere, as far as we have knowledge, or our attention has been directed, together with the special contemporaneous practice in Washington, as stated to exist by the learned judge who tried the case in the circuit court, convince us that it was not the intention of the legislature to require the publication of a copy of the complaint. What was meant by service by publication had become established, and we feel sure that if the legislature had intended a different meaning—a radical departure—it would have declared directly that a copy of the complaint should be published.

There being no error in the record, the judgment is therefore affirmed.

In re BARNARD.

UNITED STATES TRUST CO. OF NEW YORK v. OMAHA & ST. L. RY. CO.

(Circuit Court, S. D. Iowa, W. D. May 14, 1894.)

1. COURTS—CONFLICTING STATE AND FEDERAL JURISDICTION—GARNISHMENT OF RECEIVER.

Where a receiver appointed by a federal court is brought into state courts through garnishment proceedings instituted by creditors of persons employed in the operation and maintenance of the railroad over which the receiver was appointed, the intent of such proceedings being to reach the wages, in the receiver's hands, of such employes, and to appropriate such wages to the payment of debts owing to the garnishing creditors, *held*: (1) That the receiver and said employes being in the service of the federal court, and the federal court being the proper forum in which to litigate such matters, such court will, by its order, protect said receiver from the serious inconvenience, expense, and possible hazard of litigating in the state courts the matters involved in such garnishment proceedings, and its employes from being starved out of its service, and the efficiency of the road from being thereby impaired. (2) That even though such garnishment proceedings might be brought without leave of said federal court first obtained, yet payment of any judgments therein rendered against the receiver is subject to the general equity jurisdiction of, and must be passed upon by, the federal court appointing the receiver. Act Aug. 13, 1888, c. 866, § 3.

2. SAME—PREVENTING PROSECUTION OF GARNISHMENT OF RECEIVER.

And even if such garnishment proceedings in the state courts might be enjoined, as brought without leave, by injunction issuing out of such federal court, and in the exercise of its general equity powers (which is not now decided), this court will not issue such enjoining writ where the desired result may otherwise be effectively accomplished.

3. SAME.

Under the facts above stated, the federal court may issue its order directing the receiver, after service on him of garnishment notice or process, to file copy of such order, and thereafter to take no further part in such garnishment proceeding, and providing that, if such proceeding be further prosecuted, the claim therein, or any judgment rendered thereon, shall not be allowed to be filed in such federal court, or be paid by the receiver, or out of funds in his hands.

This was a suit by the United States Trust Company of New York against the Omaha & St. Louis Railway Company, in which J. F. Barnard was appointed receiver of the railway company.

Thereafter said receiver made application to the court for an order and writ of injunction, with reference to garnishment proceedings about to be brought in the state courts to reach wages of his employes in his hands.

Sheldon & Sheldon, for United States Trust Co.
N. M. Pusey, for Omaha & St. L. Ry. Co.

WOOLSON, District Judge. The following facts appear from the application of the receiver: The railway under his management extends from Council Bluffs, Iowa, into Davies county, Mo., thus lying partly in the state of Missouri and partly in the state of Iowa. Different persons, residing in the state of Missouri, and who claim to be creditors of employes engaged—in the state of Missouri—in operating and maintaining said line of railway, are about to institute, in the courts of the state of Iowa, actions for the collection of debts by said persons alleged to be due to them from said employes, and, as part of said actions, to attach, by garnishment proceedings against said receiver, the wages due to said employes for services by said employes performed in and about said railway and the maintenance and operation thereof; that said creditors of said Missouri employes will bring said actions in the state of Iowa, instead of in the state of Missouri, expecting thereby, in said Iowa actions, to secure judgments, effective against said receiver as garnishee, to an extent greater than such creditors could have secured, under the exemption statutes of Missouri, had such actions been brought in said state of Missouri, where said employes reside; that said employes are thus put to great hardship and loss in the matter, and the receiver to great trouble and expense if he be compelled to attend to the defense of said garnishment proceedings and to his relation thereto as garnishee defendant. Complaint is also made by the receiver as to similar actions about to be brought in the Iowa courts, by Iowa creditors, wherein said receiver is to be garnished. The receiver avers that said garnishment proceedings are "improperly brought, and such suits in the state courts are without jurisdiction, until leave to bring the same be first granted by this court;" wherefore the receiver asks for an order that all such actions as are above described be brought by intervention in the proceedings pending in this court, and for a writ of injunction enjoining the bringing of said actions in the state courts of Iowa, without leave therefor being first granted.

That the bringing of actions in the state courts by creditors of the employes engaged in connection with said railway, to be accompanied with garnishment of the receiver, must necessarily be attended with trouble and expense to said receiver, cannot be doubted. These actions, it is well known, are generally for comparatively small amounts, and are brought mostly before justices of the peace, over wide-spread area, and in any county in which, under the statutes of the state, service may be had. They thus become to the receiver a matter of serious inconvenience, if not of possible hazard, because of the judgments that may be therein rendered.

But to our mind there is a consideration of a much more serious nature. The railway company is in the hands of this court. Its employes are in the service of this court. It is the duty of the court, through its receiver and employes, to maintain and operate said road as efficiently as practicable. The court recognizes that these employes are generally dependent for their living upon the wages contracted to be paid them for their labor upon and in connection with said railway. These garnishment proceedings are instituted for the purpose of collecting debts due to outside creditors; and the intent is to seize and appropriate these wages—the livelihood—of these employes for the payment of such debts. In other words, the wages of the employes of this court, necessary for their present living, are, in these garnishment proceedings, to be diverted from such use. The effect must be to diminish the power of this court to operate the road. To take away the support of the employes is to cripple the efficiency of such operation, and this court is not powerless to prevent its employes from being starved out of its employ.

For the present purposes, it is not necessary to decide whether or not the actions above described may be brought without the leave of this court first granted therefor. If they may be brought without such leave, yet, by the provisions of the statute relating thereto (25 Stat. 433, § 3), payment by the receiver of the judgments therein rendered could only be made after this court had passed thereon. This statute expressly subjects such actions "to the general equity jurisdiction of the [United States] court in which such receiver was appointed, so far as the same shall be necessary to the ends of justice."

We hesitate to attempt a process of injunction which may in any event or to any degree affect actions pending or about to be brought in the courts of the state. The expressed will of congress and the uniform policy of the federal courts are opposed to the issuance of such injunctions, save in a very few exceptional cases, not necessary to be here described. In the present case we do not find such writ required. The effect desired can be otherwise attained. This court not only does not sanction, but it expressly disapproves of, the bringing of these garnisheeing actions. The power and practice of this court are ample for the consideration of such applications as may be necessary to decide with reference to the appropriation of the wages of the employes of this court to the payment of such debts; and such applications must be made to this court, before funds in the hands of the receiver will be permitted to be thus appropriated. From this court and its receiver is due, and cheerfully extended, to the courts of the state of Iowa, that considerate courtesy which such courts justly merit; but the receiver cannot be permitted to litigate therein matters relating to the wages in his hands belonging to the employes of this court. In this court is found the proper and accepted forum therefor.

The receiver is therefore directed, upon service of notice of garnishment upon him, as receiver, in said state courts, to file therein a

certified copy of the order hereto appended, and thereafter to take no further part as such receiver in said action; and if, notwithstanding the filing of such certified order, the claimant or plaintiff in such action shall prosecute said proceeding, such garnishing plaintiff or claimant will not be granted leave nor allowed to file herein the claim therein presented, or any judgment he may have obtained therein; nor will he be decreed or permitted to receive, from said receiver or out of the funds in his hands, any costs therein incurred, or any wages or funds that may be due or that may belong to the alleged debtor in said garnishment proceeding.

CALDWELL and SANBORN, Circuit Judges, concur in the conclusion, and approve the order.

The clerk of this court will enter of record the following order, and furnish duly-certified copies thereof to said receiver, upon his demand therefor:

Now, on this 21st day of April, A. D. 1894, there coming regularly on for hearing the application of J. F. Barnard, receiver of said railway company, heretofore duly appointed by this court, with reference to the action to be by him taken in garnishment proceedings against him, as hereinafter stated, and it being shown to this court that creditors of employes of this court, employed in the maintenance and operation of said railway company, are about to institute, in the courts of the state of Iowa, actions for the collection of debts alleged to be due from said employes to said creditors, and wherein it is intended that said receiver shall be garnished for wages alleged to be due, or that may hereafter fall due, to such employes for labor with reference to said railway, which said actions and said garnishment proceedings therein would cause said receiver great inconvenience, trouble, and expense, which might be greatly lessened were said creditors to apply in such matters directly to this court, which is open and ready to attend thereto when application is made therefor; and it further appearing to this court that the efficiency of said receiver in the maintenance and operation of said railway would be greatly impeded by the prosecution of said garnishment proceedings, and the appropriation therein of the wages of said employes,—it is therefore and hereby accordingly ordered that whenever said receiver is served with notice of garnishment, or any other notice, writ, or process, issuing out of or pertaining to any of the courts of the state of Iowa, and whereby is sought to be attached, garnished, or appropriated any wages due, or that may become due, to any employe of this court, through said receiver, that, on or before the return day,—when by said notice, writ, or other process said receiver is directed to appear or answer or make a showing with reference thereto, and whether under oath or otherwise,—said receiver do file with the officer serving said notice, writ, or process, and with said court or the clerk thereof, as the case may be, a certified copy of this

order, and do, as said receiver, respectfully decline to proceed further therein; and it is further ordered that, if any plaintiff or claimant in or under said garnishment action, notice, writ, or process shall thereafter further proceed therewith in said state court, such plaintiff or claimant shall not be granted leave nor allowed to file in this court any application or claim for payment of or with reference to said claim so set up in said state court or judgment thereon (if any rendered thereon), nor shall he be decreed or permitted to receive therefor from said receiver or through this court, in any manner, any wages or funds that at any time may be in the hands of said receiver, which may be due or belong to any alleged debtor in such garnishment proceedings, nor the payment of any costs in such proceedings incurred.

NOTE. The above order was subsequently so modified as to permit the copy to be filed with the officer serving the process, etc., to be an uncertified copy.

RICHARDSON v. WALTON et al.

(Circuit Court of Appeals, Third Circuit. April 27, 1894.)

No. 15.

APPEAL—ASSIGNMENT OF ERROR.

Where error is alleged in the findings of fact embodied in a decree of a lower court, the assignment, to be entitled to consideration in the appellate court, should specifically and plainly point out the particular error alleged. Bank v. Rogers, 3 C. C. A. 666, 53 Fed. 776, followed.

Appeal from the Circuit Court of the United States for the District of Delaware.

This was a suit by Charles Richardson against Ephraim T. Walton and Francis N. Buck, former copartners, wherein the bill of complaint prayed that the articles of dissolution be declared to have been procured by fraud and duress, and that the same be reformed in accordance with the real value of the firm's assets at the time of said dissolution. The case is fully reported in 49 Fed. 888. The complainant now appeals from the decree of the circuit court.

S. S. Hollingsworth, Henry N. Paul, Jr., and Anthony Higgins, for appellant.

Benj. Nields and George Gray, for appellees.

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

DALLAS, Circuit Judge. The parties to this suit had been partners for a number of years, when negotiations to dissolve that relation were entered upon, which on July 13, 1885, resulted in the execution of articles of dissolution, by which the plaintiff sold to the defendants all his interest in the partnership business and property, except certain claims and accounts, at a price and upon terms therein set forth. On October 12, 1888, the plaintiff filed his bill to have these articles of dissolution declared to have been procured by fraud and duress, and for reformation thereof "in accordance with

the real value of the firm's assets at the time of the dissolution," which the complainant alleged was much greater than the value which had been placed upon them when the agreement was made.

There is no ground upon which the charge of duress can be supported. The principal question is, did the defendants perpetrate a fraud upon the plaintiff, by which he was led to enter into the contract in question? The allegation of the plaintiff is that the contract was in part based upon an estimate of the profits of the firm for the then current year, which estimate was accepted by the plaintiff under the belief that the defendants had no knowledge of the exact amount of those profits, whereas they were then fully and accurately informed of their amount, but designedly concealed their knowledge, and the fact that they were possessed of it, from the plaintiff, who, in consequence, agreed to accept, with respect to said profits, a sum much less than their true amount. The defendants admit that in the negotiations which led up to the contract the profits referred to were considered, and that they were involved in the agreement which was embodied in that instrument; but they assert that the estimation of their amount, which, after considerable discussion, was acquiesced in by both parties, was arrived at in good faith upon their part, and they positively deny that they then had any information upon the subject which they withheld from the plaintiff. The learned counsel for the appellant ask us to independently consider this question of fact, because, as they suggest, the circuit court made no finding upon it; but this suggestion is incorrect. That court, with reference to this matter, said:

"The burden of proof is upon the plaintiff. The bill charges fraud, and a reformation of the articles of dissolution is sought. To entitle the plaintiff to relief, the proof should be free from all doubts, and convincing; but they do not appear so to be, to us. Taking the proofs as a whole, this much can be safely said: That the evidence is not so clear and satisfactory as to justify a decree sustaining the charge."

Both as to law and fact, we concur in this statement. That the burden was upon the complainant to establish the fraud which he alleged, by clear and satisfactory proof, is unquestionable; and that he failed to do so, our examination of the record has entirely satisfied us. But, if this question of fact had been a doubtful one, this court would not have been disposed to review the finding of the court below with respect to it, in the absence of any assignment specifically pointing out, and indicating with particularity, the precise error alleged and relied upon. Bank v. Rogers, 3 C. C. A. 670, 53 Fed. 776.

What has been said is conclusive, and therefore it is not necessary to consider any other of the points which are dealt with in the opinion of the court below. The decree is affirmed, with costs.

(April 30, 1894.)

PER CURIAM. Since the foregoing was written, attention has been directed to the circumstance that the statement quoted from

the opinion of the court below was not embodied in its decree. Consequently, what has been said as to the absence of a specific assignment of error is inapplicable. This, however, does not affect the judgment heretofore announced, inasmuch as this court did, for itself, examine the question of fact referred to.

CLAP et al. v. INTERSTATE ST. RY. CO.

(Circuit Court, D. Massachusetts. June 5, 1894.)

No. 3,214.

RECEIVERS—BRANCH ROADS.

After the appointment of a receiver for a street-railway company, the court will not appoint a separate receiver for one of its branches, especially where such branch has ceased to be operated, by reason of the destruction of its power house.

In Equity. On petitions of Boston Safe-Deposit & Trust Company, trustee under mortgage of the Attleborough, North Attleborough & Wrentham Street-Railway Company, Charles Francis Adams, owner of certain bonds of the Interstate Street-Railway Company, and the General Electric Company, owner of certain shares of stock of the Attleborough, North Attleborough & Wrentham Street-Railway Company, for appointment of separate receiver in the suit of Harvey Clap and others against the Interstate Street-Railway Company.

William G. Roelker, for complainants.

E. W. Burdett, for complainant United Traction & Electric Co.

Gaston & Snow and Solomon Lincoln, for complainant Boston Safe-Deposit & Trust Co.

H. E. Warner, for complainant Charles F. Adams.

Charles H. Tyler, for complainant General Electric Co.

Walter H. Barney, for respondent receiver.

COLT, Circuit Judge. The only question properly raised by these petitions is whether the receiver, Cornelius S. Sweetland, shall be discharged from the possession and control of that portion of the railway lines of the Interstate Street-Railway Company known as the Attleborough, North Attleborough & Wrentham Street-Railway Company, and a separate receiver appointed to take charge of that property. The real controversy between these petitioners and the Interstate Company cannot be determined except upon proper pleadings and proofs. Whether the Interstate Company acquired a valid title to the Attleborough road, or whether the second issue of bonds by the company was in excess of the amount allowed by law, and other matters in dispute which are set out in the petitions and accompanying affidavits, cannot be decided by the court at this stage of the proceedings, but must await a full hearing according to the usual course of equity procedure. As the case now stands, I have simply to determine whether, in the exercise of a sound discretion, another receiver should be appointed to manage the Attleborough Branch. The office of a receiver is merely to preserve the property

pending suit, and he represents equally all claimants. To appoint a separate receiver for each distinct interest is inadvisable for many apparent reasons. Mr. Sweetland was appointed receiver December 22, 1893. In January the power house burned down, and since then the road has not been operated. As the property is now situated, I cannot see what advantage could be derived from the appointment of an additional receiver. The property is not large, and the services of another receiver are not necessary. It would only increase expenses, and the situation would be further complicated by a division of the property, and by separate, and perhaps hostile, administrations of different portions of it. If the road were running, the court might, upon the showing made by the petitioners, direct the receiver to keep a separate account of the receipts and disbursements of the Attleborough Branch, but, in the present condition of affairs, I see no necessity for making any such order. The burning of the power house has stopped the running of cars, much to the inconvenience of the public. If this had not happened, the effort would have been made to continue the road in operation while it remained in the hands of the court; but as this cannot be done, owing to this accident, I hardly think it within the legitimate powers of the court for it to undertake to set the road in operation again by the outlay of any considerable sum of money, unless it should be requested so to do by all the parties in interest. It is not the business of the court to build railroads or to set railroads in operation which have ceased to run, but its duty is to preserve the property which comes into its hands until it passes to the rightful owners, and incidentally, in furtherance of this end, to continue the operation of the railroad where it is practicable. Petitions denied.

SPOKANE COUNTY v. CLARK.

(Circuit Court, D. Washington, E. D. May 1, 1894.)

NATIONAL BANKS—INSOLVENCY—TRUST FUNDS.

Under Rev. St. § 5242, which forbids all preferences among the creditors of insolvent national banks, a county whose money has been deposited by the county treasurer in a national bank that has become insolvent has no superior right over other depositors in the assets of the bank where it is not shown that the identical fund deposited by the treasurer, or the proceeds of such funds, have come into the hands of the receiver.

In Equity. On motion for injunction.

Suit by Spokane county against F. Lewis Clark, as receiver of the First National Bank of Spokane, to obtain payment in full of its deposit in said bank. Complainant moves for an injunction to forbid payment of dividends to creditors pending suit.

James E. Fenton and D. W. Henley, for plaintiff.

C. S. Voorhees, for defendant.

HANFORD, District Judge. By its bill of complaint in this case, Spokane county asserts against the general creditors of an insolvent national bank a right of priority of payment, notwithstand-

ing the provisions of section 5242, Rev. St., which forbids all preferences among creditors. The right to priority is claimed on the ground that the officers of the bank, at the time of accepting the deposit, knew that the money was in the official custody of the treasurer, and therefore a trust fund. Money held by a bank as trustee is not part of its assets, nor legally subject to claims of its creditors. If the money had been kept intact as a special deposit, or if it were possible to prove that any of the complainant's money, or any securities or property acquired by the bank, by investment of money with which it had been mingled, came into the receiver's hands, according to principles of equity now firmly established, the right of the complainant to the relief prayed for would be clear; but there is no averment in the bill of complaint that the money deposited can be traced, nor that the estate which has come into the receiver's hands includes securities or property of the bank acquired since receiving said deposit. It does not appear that any of said money was invested, nor that it was not all paid out to other depositors or creditors before the bank closed its doors. The complainant's argument is based upon an assumption that the bank profited by tortiously converting the money. That the bank could not acquire title to money of the county by its own wrongful act is manifestly true; but when the holder of trust funds has actually expended the same, and become insolvent, a practical difficulty in the way of restoring the money to its owner arises, which can no more be overcome by a court of equity than by any other human agency. That very difficulty confronts the complainant and the court in this case; for it is a fact that, in place of actual money in the bank when it suspended, there was only a legal liability, arising from the conversion and expenditure of the money deposited by the treasurer. The practical difficulty of the case is not diminished in the least by characterizing the conversion as a tort, or by any stronger term, for the fact remains that the money is gone. It cannot be recovered until found. The plaintiff's right in this suit attaches, not to specific property to which it has title, but only to a chose in action. The law forbids preferences in the distribution of the estate of an insolvent national bank among its creditors, and makes no exceptions of debts due to municipal, county, or state governments, nor in favor of claims arising ex delicto. The statute is founded upon principles of justice and equity, and I find in the facts of this case no basis in reason for a decree requiring the receiver to take from other creditors their just and ratable portions of what may be left to them of the assets of this bank, in order to save Spokane county or its treasurer from loss. I have considered all of the authorities cited upon the argument, but, inasmuch as the supreme court of the United States has made several decisions bearing upon the vital questions at issue, it is not expedient for me to review or comment upon other authorities.

In the case of National Bank v. Insurance Co., 104 U. S. 54, the decision affirms that if money deposited in a bank belonged to a third person, and was held by the depositor in a fiduciary capacity, its character is not changed by being placed to his credit in his

bank account, and that equity will follow a fund through any number of transmutations, and preserve it for the owner, so long as it can be identified; and, if trust funds are mingled with other money, the whole will be treated as trust funds, except so far as the other money can be distinguished and separated. Accordingly, it was determined in that case that a banker's lien upon money and securities on deposit cannot prevail against the equity of the beneficial owner of which the bank has notice, either actual or constructive. The complainant has failed to bring the case at bar within the rule established by the supreme court in the above-mentioned decision, by not alleging that any of the money deposited by the treasurer can be traced to the custody of the receiver and identified, or that any of said money has been mingled with the property which has come into his hands.

The case Peters v. Bain, 133 U. S. 670, 10 Sup. Ct. 354, was a suit in equity by the receiver of an insolvent national bank. One of the purposes of the suit was to charge property in the hands of assignees of an insolvent copartnership with a trust in favor of the bank, because it had been bought with moneys of the bank, which certain members of the firm, who were officers of the bank, had wrongfully used for that purpose. The receiver, by whom the case was appealed to the supreme court, assigned for error that the circuit court held that he was entitled to a surrender of such of the property which it was found had "actually been purchased with the moneys of the bank as he elects to take, but no other;" and it was insisted that the receiver was entitled to a charge upon the entire mass of the estate, with priority over the other creditors of the firm. In answer to this contention, Mr. Chief Justice Fuller, in the opinion of the court, quotes from the opinion of Mr. Justice Bradley in Frelinghuysen v. Nugent, 36 Fed. 229, as follows:

"Formerly the equitable right of following misapplied money or other property into the hands of the parties receiving it depended upon the ability of identifying it, the equity attaching only to the very property misapplied. This right was first extended to the proceeds of the property, namely, to that which was procured in place of it by exchange, purchase, or sale; but if it became confused with other property of the same kind, so as not to be distinguishable, without any fault on the part of the possessor, the equity was lost. Finally, however, it has been held as the better doctrine that confusion does not destroy the equity entirely, but converts it into a charge upon the entire mass, giving to the party injured by the unlawful diversion a priority of right over the other creditors of the possessor. This is as far as the rule has been carried. The difficulty of sustaining the claim in the present case is that it does not appear that the goods claimed—that is to say, the stock on hand, finished and unfinished—were either in whole or in part the proceeds of any money unlawfully abstracted from the bank."

—And then, applying the rule found in Justice Bradley's opinion to the case then in hand, uses the following language:

"The same difficulty presents itself here, and, while the rule laid down by Mr. Justice Bradley has been recognized and applied by this court (National Bank v. Insurance Co., 104 U. S. 54, 57, and cases cited), yet, as stated by the chief justice, 'purchases made and paid for out of the general mass cannot be claimed by the bank, unless it is shown that its own moneys then in the fund were appropriated for that purpose.' "

The difficulty referred to in the above quotation is just the difficulty in this case which I have pointed out.

In the case of Bank v. Armstrong, 148 U. S. 50, 13 Sup. Ct. 533, the supreme court affirmed the decision of the circuit court by Mr. Justice Jackson in the same case, reported in 39 Fed. 684, in which, after citing a list of English and American cases, the learned justice states the rule as follows:

"Those authorities impose upon complainant the duty of tracing the funds it seeks to have impressed with a trust character into the defendant's possession, either in their original form or some substituted form, and the burden of identification is imposed upon all owners seeking to follow their property or its proceeds."

The foregoing authorities and reasons impel me to hold that the complainant is not entitled to the particular relief prayed for, and to deny the application for an injunction.

In re SEATTLE, L. S. & E. RY. CO.

GRIEVANCE COMMITTEE OF BROTHERHOOD OF RAILWAY TRAINMEN, LODGE NO. 196, et al. v. BROWN et al.

(Circuit Court, D. Washington, N. D. May 17, 1894.)

RECEIVERS—MASTER AND SERVANT—RAILROAD COMPANIES.

A receiver of a railroad is not bound by an agreement, made before his appointment, between the railroad company and its employes, whereby the latter are not to be discharged except for cause, to be determined by arbitrators.

Petition by the Grievance Committee of the Brotherhood of Railway Trainmen, Lodge No. 196, Seattle, Wash., and James E. Corcoran, against Thomas R. Brown and John H. Bryant, receivers of the Seattle, Lake Shore & Eastern Railway Company, for an order requiring the receivers to conform to the terms of a certain contract.

Richard Saxe Jones, for petitioners.
Carr & Preston, for receivers.

HANFORD, District Judge. The amended petition in this case contains an accusation against Thomas R. Brown, as receiver of the Seattle, Lake Shore & Eastern Railway, of having wrongfully, without cause or justification, discharged persons theretofore holding positions as conductors on the railway, including the petitioner James E. Corcoran, and sets forth an alleged contract entered into prior to the appointment of said receiver by and between the Northern Pacific Railroad Company (which was then in practical control of the Seattle, Lake Shore & Eastern Railway) and its employes, including the said discharged conductors, containing, among other things, a stipulation that the employes were not to be discharged except for cause; and that, in case of the discharge of any employe, he should, upon demand, be furnished with a written specification of the cause therefor, and have a right to an investi-

gation by the division superintendent and three trainmen, who should have power to take evidence and determine whether the charge was true or false; and that, in the event of a determination by such board of arbitration that there was not sufficient cause for his dismissal, such employe should be restored to his position, and receive compensation during the time of his suspension. The petition alleges that this contract was confirmed and put in force by the officers of the Seattle, Lake Shore & Eastern Railway Company as to all of its employes, and that since his appointment said receiver, with full knowledge of its existence, continued the employes of said company in their positions, and operated the railway thereunder.

While there is room to question the validity of the alleged contract in its entirety as affecting the employes of the Seattle, Lake Shore & Eastern Railway Company, and whether any part of it is binding upon the receiver, I shall place this decision on the ground that the particular stipulations above set forth are not binding upon the receiver. These provisions cannot be binding upon others than the immediate parties, and, so far as the same affect the receiver, are repugnant to the order of the court placing the railway and its operation under his control and management. The idea that employes in the service of a railway corporation have such an interest in the railway property that effect should be given to their contracts of employment, as if they were of the same nature as covenants running with the title to real estate, and therefore binding upon those into whose hands the property may subsequently come, is fallacious, and without any foundation in law. The receiver, as agent of the court, is required to take full control of the operation of the railway, and his responsibility is very great. The nature of his duties and responsibilities makes it absolutely necessary that he should exercise discretion in the selection of conductors and engineers and all who occupy fiduciary positions under him. Any rule or contract binding him to continue in such positions persons with whom he is unable to maintain cordial relations or repose confidence is incompatible with the freedom necessary to the proper exercise of his discretion and performance of his duty. It would certainly be unreasonable to hold him responsible for the conduct of an employe kept in position by a decision of four arbitrators, three of them being such person's fellow servants. A contract to that effect, if intentionally made by a receiver, would be void, because it would necessarily deprive the receiver of an important part of the power vested in him by the order of his appointment. A receiver cannot lawfully thus restrict himself in the exercise of his powers. This contract does not obligate employes to continue in the service of the company for any definite period. As they are left free to terminate their relations with the company at will, except in so far as there may be an implied obligation to not leave their stations so as to interrupt the movement of trains, it is, in legal effect, a contract of hiring for an indefinite term. No legal claim for damages can be predicated upon the mere failure to keep

a promise on the part of an employer to not discharge an employe without cause, or to submit any question as to the existence or nonexistence of sufficient cause to arbitration; much less can a court specifically enforce such an agreement. An agreement to submit differences which may arise in the future to arbitration is, in general, revocable by either party at any time before actual submission of a controversy. No stipulation in the agreement will be sustained, either at law or in equity, defeating this right, so as to prevent the parties having recourse to the courts. 1 Am. & Eng. Enc. Law, 664. It is impossible for the court to actively manage the details of a railway corporation's business except through a general agent. A receiver, as such agent, therefore occupies the position, and has the rights, of an employer, although the men operating the railway under him are, in a certain sense, employes of the court. It is impracticable for the court to give such attention to matters of detail as would be necessary to justify it in overruling a receiver in the matter of selecting or discharging his subordinates. Only in matters of general policy can the court give directions to a receiver. Grievances of his subordinates will receive attention in all matters affecting the general policy of the business intrusted to him, and whenever they amount to an accusation against the receiver of sufficient gravity to justify his dismissal. The remedy proper in case of an abuse of power in such matters is removal of the receiver from office. Continental Trust Co. v. Toledo, St. L. & K. C. R. Co., 59 Fed. 514.

Counsel for the petitioners, in his argument, has vigorously and earnestly denounced the action of Receiver Brown in discharging the petitioner Corcoran, as oppressive and abusive. It has never been regarded as an act of oppression or abuse for a successor in the control of any business to replace employes of his predecessor with men of his own selection, and I do not regard it so in this instance. According to the petition, Mr. Brown, in dispensing with the services of Mr. Corcoran, cast no aspersions upon him, until, in response to demands for reasons, he assigned want of confidence in his honesty. Under these circumstances I cannot find any justification for the denunciation of Mr. Brown. Demurrer sustained.

FARMERS' LOAN & TRUST CO. v. CHICAGO & N. P. R. CO. et al.

(Circuit Court, N. D. Illinois. May 16, 1894.)

1. EQUITY PRACTICE—SETTING PLEA FOR HEARING.
   Where a complainant has a demurrer and plea set down for argument, instead of moving to strike them from the files or filing a replication, he waives the question whether the defendant has not by his previous action in the suit waived the defense set up by the plea and demurrer.

2. RAILROAD MORTGAGE—RIGHT TO FORECLOSE ON DEFAULT IN INTEREST.
   A railroad mortgage provided that, in case interest remained in default for six months, the trustee should, upon request of one-fourth of the bondholders, proceed to enforce their rights, and declared that no bondholder or bondholders should have the right to institute any foreclosure proceedings without first notifying the trustee of such a default. *Held*, that such provisions did not deprive the trustee of the right, in his dis-

cretion, to begin foreclosure proceedings immediately upon default in the payment of interest.

In Equity. On demurrer and plea.

Suit by the Farmers' Loan & Trust Company against the Chicago & Northern Pacific Railroad Company, the Northern Railroad Company, and others to foreclose a mortgage.

Turner, McClure & Rolston and Wm. Burry, for complainant.

Howard Morris, for receiver of Wisconsin Central Railroad Company.

Herrick & Allen and W. M. Cromwell, for other defendants.

JENKINS, Circuit Judge. If I were at liberty to consider the subject of a waiver, a serious question would be presented whether the defendants are not estopped to assert that the suit was prematurely brought. The defendant the Chicago & Northern Pacific Railroad Company appeared upon the application for a receiver, and interposed no objection thereto. Thereafter, upon the application to issue receivers' certificates, both railroad companies appeared, and formally consented to the issuance of the certificates. The plea and demurrer were set down for argument. The only question that can therefore be raised is whether the plea and demurrer are sufficient in law. Farley v. Kittson, 120 U. S. 303, 7 Sup. Ct. 534.

The complainant, to present the question of waiver, should either have moved to strike the plea and demurrer from the files, or should by replication have pleaded the estoppel. I am not, therefore, at liberty to consider the matter of waiver, suggested at the argument as reason why the plea and demurrer should not be entertained. The defendants urge in abatement of the suit that, by the terms of the trust deed, suit was prematurely brought because default in the payment of interest had not continued for six months. The contention rests upon the terms of article 11 of the trust deed, which, so far as essential to be stated, is as follows:

"In case default shall be made in the payment of any semiannual installment of interest on any of the said bonds, and if such interest shall remain unpaid and in arrears for the period of six months, * * * it shall be the duty of the trustee, upon a requisition in writing, signed by the holders of not less than one-quarter in amount of said bonds then outstanding, and upon adequate security and indemnity against all costs, expenses, and liabilities to be by the trustee incurred, to proceed to enforce the rights of the bondholders under this indenture, either by the exercise of the powers granted by articles 9 and 10 of this indenture, or of any of said powers, or by a suit or suits in equity or at law in aid of the execution of such powers, or otherwise, as the trustee, being advised by counsel, shall deem most effectual to enforce such rights, subject to the power hereby declared of a majority in interest of the holders of said bonds that shall be then outstanding, in writing, or by vote, at a meeting duly held, to instruct the trustee to waive any such default, or upon adequate security and indemnity as aforesaid, to enforce the rights of the bondholders by reason thereof: provided, that no action of the trustee or of the bondholders in waiving a default shall extend to or be taken to apply to or affect any subsequent default, or impair the rights of the trustee or of the bondholders resulting from such subsequent default; it being understood, and it is hereby expressly declared, that the rights of entry and sale hereinbefore granted are intended as cumulative remedies, additional to all other remedies allowed by law, and that the same shall not

be deemed, in any manner whatsoever, to deprive the trustee or the beneficiaries under this trust of any legal or equitable remedy by judicial proceedings, consistent with the provisions of this indenture, according to the true intent and meaning thereof: provided always, and it is hereby expressly declared and agreed, that no holder or holders of a bond or of any bonds secured hereby shall have the right to institute any suit, action, or proceeding, in equity or at law, for the foreclosure of this indenture, or for the execution of the trusts thereof, or for the appointment of a receiver, or any other action, suit, or remedy hereunder, or under or upon any bond or coupon for interest hereby secured, without first giving notice in writing to the trustee of default having occurred and continued, as in this article aforesaid, and requesting the trustee, and affording it a reasonable opportunity to institute such action, suit, or proceeding in its own name, or to proceed to exercise the powers hereinbefore granted, and also offering to it adequate security and indemnity against the costs, expenses, and liabilities to be incurred therein or thereby; and such notification, request, and offer of indemnity are hereby declared to be conditions precedent to any suit or action for the foreclosure or for the execution of the trusts of this indenture, or for the appointment of a receiver, and to any other action, suit, or remedy hereunder, or under or upon any bond or coupon for interest hereby secured. And it is hereby provided, declared, and agreed that in case any sale shall be made of the said railroads, chattels, real interests, estates, appurtenances, fixtures, equipment, property, lands, rights, privileges, immunities, or franchises, either by the exercise of the powers granted in article 10 of this indenture, or pursuant to or under a decree or judgment of a court of competent jurisdiction, the purchaser or purchasers at said sale or sales shall be entitled, in making settlement for and payment of the purchase money, to deliver to the trustee, or, in case of a judicial sale, to the person or persons legally appointed and qualified to receive the payment of such purchase money, and to turn in and use any of the bonds or coupons secured by this indenture held by the said purchaser or purchasers in or towards the payment of the said purchase money, reckoning and computing said bonds or coupons at a sum equal to and not exceeding that would be payable out of the net proceeds of said sale, if made for money, to the purchaser or purchasers, as the holder or holders of said bonds or coupons for his or their just share and proportion in that character of such net proceeds, upon a due accounting and apportionment and distribution of said net proceeds."

Article 9, referred to, treats of the right of the trustee to enter and operate the road in case of default in payment of interest continuing for six months. Article 10 treats of the right of the trustee to enter and sell in case of default of the principal of the bond, both powers to be exercised upon requisition and indemnity, as provided in article 11. The language of article 11, which is thought to prohibit the institution of a suit in chancery to foreclose for default in interest unless and until the default shall continue for six months, is as follows:

"It shall be the duty of the trustee, upon a requisition in writing, signed by the holders of not less than one quarter in amount of the said bonds then outstanding, and upon adequate security and indemnity against all costs, expenses, and liabilities to be by the trustee incurred, to proceed to enforce the rights of the bondholders under this indenture, either by the exercise of the powers granted by articles 9 and 10 of this indenture, or of any of said powers, or by a suit or suits in equity or at law in aid of the execution of such powers, or otherwise, as the trustee, being advised by counsel, shall deem most effectual to enforce such rights."

It is clear to my mind that this provision in no way affects the right of the trustee to foreclose immediately upon default in payment of interest. This provision, as I conceive, has only reference

to the exercise of the powers granted by articles 9 and 10, and to proceedings in aid of the execution of such powers. It is, moreover, mandatory, rendering action by the trustee imperative when the requisite number of bondholders shall require it to act upon completion of the stipulated period of default. It does not interfere with the exercise of discretion of the trustee to act or limit its right to act immediately upon default. This view is strengthened by the subsequent provision declaring that the rights of entry and sale are granted or intended as cumulative remedies additional to all other remedies allowed by law, and that the same shall not be deemed in any manner whatsoever to deprive the trustee or the beneficiaries under the trust of any legal or equitable remedy by judicial proceedings consistent with the provision of the trust deed. The subsequent provision in prevention of suits by individual bondholders, without first giving notice in writing to the trustee of default continued for six months, and requesting it to institute suit, are simply restraints upon the action of individual bondholders in supposed antagonism to the interests of the bondholders in a body. I think this case falls within the principle of Railroad Co. v. Fosdick, 106 U. S. 47, 1 Sup. Ct. 10; Morgan's L. & T. Railroad & Steamship Co. v. Texas Cent. Ry. Co., 137 U. S. 171, 11 Sup. Ct. 61; Farmers' Loan & Trust Co. v. Winona & S. W. Ry. Co., 59 Fed. 957. While it is true that a mortgagor has the right to stipulate for a breathing spell for the payment of his matured debt, it is still true that the limitations upon the powers of the trustee to take the legal proceedings to enforce payment upon default should be strictly construed. Guaranty Trust & Safe Deposit Co. v. Green Cove Springs & M. R. Co., 139 U. S. 137, 11 Sup. Ct. 512. The demurrer and plea will be severally overruled, and the defendant ordered to plead to the merits by the first Monday of June next.

FARMERS' LOAN & TRUST CO. v. NORTHERN PAC. R. CO. et al.

(Circuit Court, E. D. Wisconsin. April 26, 1894.)

1. RECEIVERS—PROCEEDINGS FOR REMOVAL.
   On an application for removal of receivers for cause, specific charges should be presented, with proofs, which should be met by the receivers; and a reference to take proofs therein does not follow as of course, but, the application being addressed to the sound discretion of the court, it is first to be determined whether the charges are sufficiently grave to call for answer, and are properly pleaded, and, if answered, whether they are sufficiently refuted; and it rests with the court, if not fully satisfied with respect to the charges stated, to refer the matter for proof, either generally, touching all the charges, or limited to matters in respect of which the court desires further explanation.
2. SAME.
   Indefiniteness and want of directness in such charges against receivers, although, by answering, they waive their right to object, may be considered by the court, in determining whether further investigation is required.
3. RAILROAD COMPANIES—RECEIVERS—APPOINTMENT OF OFFICER.
   One of three receivers of a railroad company operating a transcontinental system was appointed at the request of the trustee in all but one

of the mortgages on the railway, and on the recommendation of the bondholders secured thereby, with the express assent of the railroad company. He had been for many years in the service of the company as general manager of the railway, and as director, vice president, and president of the company; was thoroughly familiar with its history and conditions and necessities; and was a thoroughly competent railroad manager. The proofs established that the road had been managed with prudence and economy, so far as concerned its actual operation, and no fault therein was suggested. *Held*, that the fact that he was an officer and director of the company at the time of his appointment was no ground for revocation thereof.

This was a suit by the Farmers' Loan & Trust Company against the Northern Pacific Railroad Company and others to foreclose certain mortgages of the property of the railroad company, in which Thomas F. Oakes, Henry C. Payne, and Henry C. Rouse were appointed receivers. Thereafter, a petition for removal of the receivers was filed by the railroad company, to which separate answers were filed by the receivers and by the complainant and certain creditors and stockholders, parties defendant. Thereupon, the railroad company moved for a reference to take testimony in respect of the matters stated in the petition.

Silas W. Pettit and John F. Harper, for the motion.

James McNaught, John C. Spooner, and Geo. P. Miller, for the receivers.

H. B. Turner and James G. Flanders, for Farmers' Loan & Trust Co.

W. J. Gibson, for Phillip B. Winston, opposed.

JENKINS, Circuit Judge. On the 28th of December, 1893, the defendant company filed in this court its petition praying for the removal of Messrs. Thomas F. Oakes, Henry C. Payne, and Henry C. Rouse, the receivers of the Northern Pacific Railroad. These gentlemen were appointed such receivers upon the prayer of the complainant, the trustee in all but one of the mortgages upon the railway, and of certain stockholders and creditors of the company, and with the assent of the Northern Pacific Railroad Company. Mr. Oakes, one of the receivers, had for many years been connected with the railway in question, having acted as a director of the company from October 19, 1881, until October 18, 1893; vice president of the company from June 9, 1881, to September 20, 1888; general manager from October 2, 1884, to September 20, 1888; and president from that date until October 18, 1893, when a new board of directors was elected, and Mr. Brayton Ives was by such board elected president, and Mr. Robert Harris vice president, of the company. Upon the filing of the petition, which was verified by Mr. Harris, an order was entered, directing that the receivers answer thereto. Subsequently, and on the 3d day of February, 1893, the receivers filed their separate answers, and separate answers to the petition were also filed by the complainant, the Farmers' Loan & Trust Company, the trustee, and by the defendants W. C. Sheldon & Co. and Phillip B. Winston, creditors and stockholders, upon whose application the receivers had been appointed. The matter then coming on to be heard, it was urged on behalf of the

petitioner that the issues should be referred generally for proof with respect to the matters stated in the petition and answers. This was opposed by counsel for the receivers upon the ground that the allegations of the petition were indefinite, and not specific; that the petition was unaccompanied by proofs, and the charges contained in it had been fully met and overcome, not alone by the denial of the receivers, but by the proofs submitted therewith.

This contention presents for consideration a preliminary question with respect to the correct practice in such cases. At the hearing I held, in effect, that the application was a motion to remove the receivers for cause, and that the moving party should present specific charges, accompanied with proofs, which should be met by the parties proceeded against; that in such case it did not follow, as of course, that there should be an order of reference to take proofs, as upon issue joined upon bill, answer, and replication, but that, the application for removal being in the nature of a motion addressed to the sound discretion of the court, it should first be considered and determined whether the charges were sufficiently grave in their nature to call for answer, and were properly pleaded, and, if answered to, whether they had been sufficiently refuted to satisfy the court with respect to the integrity and competency of its officers; and that it rested with the court, if it was not wholly and fully satisfied with respect to the charges stated in the petition, to refer the matter for proof, either generally, touching all the charges of the petition, or limited to such matters in respect of which the court desired further explanation. And this I conceive to be the proper practice in such cases. In general, the party who asks the court to remove one of its officers for malfeasance or incompetency should be prepared, not only to prefer specific charges of wrongdoing, but to accompany them with proof. It ought not to be tolerated that upon mere vague and unsupported charges one should be compelled to submit to a sweeping investigation into his conduct, and that upon such charges a court could properly be asked to order a general investigation to ascertain whether something might not be found objectionable to his standing. It is a fundamental and most just principle of law that one should not be put to answer vague and indefinite charges. Nor, in general, as to a specific charge of malfeasance, should one be put to his defense, in the absence of evidence tending to sustain the charge. The allegations in this petition are, in respect of some of the charges, indefinite, and wanting in directness, to the extent, as I now view it, that had application been timely made to require the petitioners to make the charges, in the respects objected to, definite and specific, I should have felt compelled to grant the motion. The receivers have, however, seen proper to answer this petition, and at great length. They have thereby, as I think, waived their right to object to it for want of directness of charge,—so far, at least, as to claim that the court ought not to consider it at all, or, if proper reasons exist for such course, to order a reference to inquire with respect to its truth. The court should, however, give weight to the fact that some of the charges are wanting in directness, in determining the question whether, in the light of

the answers, and the proofs therewith submitted, such indefinite charges require further investigation.

I proceed, therefore, to inquire respecting this petition and the showing made in opposition thereto, whether the charges have been fully and satisfactorily answered. Upon the threshold of the inquiry the objection is preferred that Mr. Oakes, one of the receivers, was an officer of the company, for a long time connected with its affairs; that he was officially and responsibly connected with the management which brought the company's affairs to ruin, and therefore should never have been appointed receiver, and should now be removed. The office and duty of a receiver is to hold and preserve the property in controversy during the time that it may remain in the custody of the court. A receiver should, in a large sense, be indifferent, as between the various interests involved. He should have no such personal interest as would interfere with an unbiased and impartial exercise of his duties as receiver. I quite agree with the doctrine that, in general, one who was a director or managing officer of a corporation at the time of its suspension ought not to be appointed its receiver. Mr. High, in his valuable work upon Receivers (section 72), well states the principle upon which the courts act to be "that, if the officers of a corporation are unfit persons for the management of its affairs in their official capacity, they are equally unfit to be intrusted with its management in the capacity of receivers;" and he states the rule of exclusion to be based upon sound principles of public policy. The rule, however, is not inflexible, and is necessarily departed from when it is apparent, in view of the knowledge and familiarity of a particular person with the estate taken in charge by the court, that its best interests will be promoted by his appointment. Sykes v. Hastings, 11 Ves. 363; Newport v. Bury, 23 Beav. 30. This must, however, be understood as subject to the qualification that the integrity of the officer is above successful attack, and that the disaster of the corporation was not promoted by his reckless management. The case of a railway furnishes, perhaps, the most notable instance of the necessity of departure from the rule. Railway management has become a profession. A railway is not a toy that may be trifled with. Its management requires great financial and executive ability, and the practical experience of years. Railway management stands apart as a specialty. The ablest men in other professions and in other walks of life would probably fail in the successful direction of the affairs of a railway, if they are wanting in that knowledge of its needs and requirements that may only be obtained by long experience in its practical management and operation. For the operation of a vast system like that of the Northern Pacific, it seemed desirable that one of its receivers should be a gentleman familiar with the intricate details of its history, and with the necessities peculiar to the system, for, however well qualified one might be with respect to railway management in general, he would, at least for a considerable time, be at sea in the management of a transcontinental line, of whose history he was ignorant, and with the necessities of which he was not familiar. I fully agree with the observation of Judge Gresham in Atkins v.

Railway Co., 29 Fed. 161, that "receivers should be impartial between the parties in interest, and stockholders and directors should not be appointed receivers, unless the case is exceptional and urgent." And his suggestion was followed that such appointment should be made "only on consent of the parties whose interests are to be intrusted to their charge."

This appointment was made at the request of, and upon the nomination by, the trustee of the second and third general and of the consolidated mortgages, the representative of over $160,000,000 of bonded debt, upon the recommendation of the bondholders who were co-complainants with the trustee, and with the express assent of the Northern Pacific Railroad Company. The appointment was made because Mr. Oakes was represented and was deemed to be a most fit person for that position. He had been for many years in the service of the company as general manager of the railway, and as director, vice president, and president of the company; was thoroughly familiar with its history, and its conditions and necessities. Beyond all contention, then or now, he is a thoroughly competent railroad manager. It was made to appear from a comparative table of the earnings of the Northern Pacific, the Canadian Pacific, the Union Pacific, the Central Pacific, the Southern Pacific, the Atlantic & Pacific, the Atchison, Topeka & Santa Fe, the Chicago & Northwestern, and the Chicago, Milwaukee & St. Paul Railways, that from the year 1884 to and including the year 1893 the percentage of expenses to earnings of the Northern Pacific was, with the exception of the years 1884 and 1885, lower than any one of the other companies named, and during the two years mentioned was lower than any of the other companies named, except the Central Pacific and Atchison, Topeka & Santa Fe. During the 10 years mentioned the percentage of expense to earnings was less than that of the Chicago & Northwestern Railway Company,—confessedly, one of the best and most honestly managed railways in the country; the operating expenses being, in the year 1884, 3.56 per cent. less; in 1891, being 4.58 per cent. less; in 1892, being 5.61 per cent. less; and in 1893, 5.72 per cent. less. The proofs before the court established, so far as concerns the actual operation of the road, that it was managed with prudence and economy. There is no suggestion to the court of fault in the operation of the railway. I am therefore persuaded that the case here is within the exceptional class referred to by Judge Gresham, and that the appointment was not only justifiable, but was demanded by the exigency of the occasion. There is no ground, therefore, upon which to assert that the appointment of Mr. Oakes should be revoked merely because he was an officer and director of the company at the time of his appointment. If there be cause for his removal, it must be elsewhere sought for, and based upon other ground. * * *

The court then reviews at length the charges of the petition, and the answers thereto; dismissing the petition as to Messrs. Payne and Rouse, receivers; asserting, as against them, no substantial cause for removal; retaining the petition as to Mr. Oakes; and referring to a master, for investigation, certain of the charges preferred in the petition.

CHRYSTIE et al. v. FOSTER.

(Circuit Court of Appeals, Second Circuit. May 10, 1894.)

No. 108.

BANKS AND BANKING—INDIVIDUAL NOTE OF PRESIDENT.

C., in order to obtain a credit in his personal account with a bank of which he was the president, procured the defendants, a banking firm, to discount his individual note, credit the amount to the bank, and notify the bank that he had deposited the amount with them to the credit of the bank. The bank had previously given C. credit for the amount, and, after being notified by the defendants that the deposit had been actually made with them, allowed C. to overdraw his account. Thereafter, and while his account with the bank was overdrawn, C., in his official character as president, authorized the defendants to charge the note to the account of the bank, and the defendants did so. *Held*, in a suit by the receiver of the bank to recover the deposit, that, unless expressly authorized to do so, the president of the bank could not use the funds of the bank to pay his personal obligation; and, there being no proof of such express authority, the authorization given by him to the defendants was not a defense to the claim.

This is a writ of error by the defendants in the court below to review a judgment for the plaintiff, rendered upon the verdict of a jury by the direction of the court. The plaintiff sued as receiver of the Cheyenne National Bank to recover the sum of $10,000 and interest, as the balance of an account due to the bank from the defendants. At the close of the evidence on the trial, both parties requested the court to direct a verdict, and neither party asked to go to the jury upon any question of fact.

Stern & Rushmore (Chas. E. Rushmore, of counsel), for plaintiffs in error.

Hobbs & Gifford, for defendant in error.

Before WALLACE and LACOMBE, Circuit Judges.

WALLACE, Circuit Judge. The principal question raised by the assignment of errors is whether the trial judge erred in refusing to direct a verdict for the plaintiff. Where the defendant excepts to the direction of a verdict for the plaintiff, but makes no request to go to the jury, he cannot be heard to assail the judgment upon the ground that there were questions of fact for the jury. Provost v. McEncroe, 102 N. Y. 650, 5 N. E. 795. Where both parties move for the direction of a verdict, and neither requests any question of fact to be submitted to the jury, they concede that there is no question of fact, and that the case turns wholly upon questions of law, which are to be determined as though the facts were undisputed. Thereupon every fact having the support of sufficient evidence is presumed to have been found in favor of the successful party, and the finding is conclusive if there is any evidence to sustain it. Kirtz v. Peck, 113 N. Y. 222, 21 N. E. 130; Sutter v. Vanderveer, 122 N. Y. 652, 25 N. E. 907; Leggett v. Hyde, 58 N. Y. 275; Koehler v. Adler, 78 N. Y. 289.

The evidence in the record was sufficient to establish the following facts: The National Bank of Cheyenne, located at Cheyenne,

in the state of Wyoming, had kept an ordinary banker's account with the defendants, private bankers at New York City. Prior to January, 1890, the account had been closed. In January, 1890, Collins, who was then president of the Cheyenne National Bank, in order to credit himself $10,000 in his personal account with the bank, caused entries to be made in the books of the bank,—one to his own credit of $10,000, and another intended to show, and showing, that he had deposited $10,000 with the defendants to the credit of the bank. At or about the same time he handed his own note for $10,000 to one Stebbins, who was a special partner of the defendants, with a request that Stebbins should indorse it, and procure the defendants to give the bank credit for the amount as a deposit made by Rogers. Stebbins indorsed the note, and left it with the defendants, at the same time informing them of what had taken place between Collins and himself. The defendants did not at the time make any specific appropriation of the note, or credit the amount to the bank. Several months later, and about June 1, 1890, Collins informed the defendants that, pursuant to his understanding with Stebbins, they had been charged on the books of the bank with a deposit of $10,000, and that this balance had appeared against them on the books of the bank for several months. At the same time he requested the defendants to notify the bank that the $10,000 had been deposited with them to its credit, and told them that the bank would not draw against the credit. After some correspondence between Collins and the defendant, and on June 7, 1890, the defendants credited the bank on their books with $10,000, and sent them a notice as follows: "Your account is credited this day $10,000 for use J. W. Collins with you." A day or two after they requested Collins to forward to them a new note for $10,000 in the place of that held by them, and which had been placed in their hands by Stebbins. Collins sent them a new note, but it was not satisfactory to the defendants in matters of form, and upon July 23d they again requested him to send them his note, payable on demand, and to send them at the same time, but separately, an authorization signed by him as president of the bank, authorizing them to charge up the note against the bank. Shortly thereafter Collins sent the new note to the defendants, together with the authorization, signed by him as president of the bank, to the effect that whenever a note for $10,000 made by Collins to the order of himself, indorsed by him in blank, should be presented to them for payment, they were to pay the same, and charge the amount to the account of the bank. Thereafter, and until November 13, 1891, the bank remained credited in this account upon the books of the defendants, and the defendants remained charged upon the books of the bank, with the $10,000, and statements were transmitted between the bank and the defendants, from time to time, showing the state of the accounts. November 13th the defendants learned that Collins was financially embarrassed, and thereupon they charged the account of the bank with the amount of the note. November 15th the bank failed, and passed into the hands of the plaintiff as receiver. Between June 7, 1890, and November 15, 1891, Collins' individual

account at the bank was largely overdrawn, and he owed the bank, at the time of the failure, about $9,000.

Upon these facts we entertain no doubt that plaintiff was entitled to a verdict. If Collins had deposited $10,000 with the defendants in the name of the Cheyenne National Bank, to be held by them for the bank in the form of an ordinary banker's credit to a depositor, it being understood between him and them that it was the purpose of the transaction to give him credit with the bank as for so much money received by it from him, it is entirely plain that no one without the authority of the bank would have had any right to meddle with the fund. By a deposit in its name, or to its credit, the title to the fund would have vested in the bank, and the defendants would have been at all times under obligation to pay it over to the bank upon request. What took place between Collins and the defendant was, in substance, the making of a deposit under circumstances such as have been supposed. Instead of depositing money, Collins deposited his own note, and the defendants received it as the equivalent of $10,000. They understood Collins to be representing himself, and not the bank, in all that took place between him and them prior to July 23d. They knew that the purpose of the transaction was to give Collins a personal credit with the bank for $10,000. Having assisted him in representing to the bank that they had given to it an ordinary banker's credit, as stated in their notice of June 7th, they cannot be heard to deny it by setting up a private understanding between Collins and themselves to the contrary. It is of no consequence that the bank had charged the defendants, and credited Collins, with $10,000, before that sum had been deposited to its credit with the defendants. When it was informed by the defendants' notice of June 7th that the credit that day given to it was "for use J. W. Collins with you," it had a right to rely upon the truth of the statement, and to deal with Collins thereafter as entitled to credit for that amount. While it may be conjectured, in view of the character of Collins' relations with the bank, that it would have permitted him at any time to overdraw his account, there is no evidence that it did not rely upon the credit in its subsequent dealings with Collins, and the presumption is that the notice given by the defendants influenced the bank as they intended it should. The authorization to the defendants by Collins, in his official capacity as president of the bank, to apply the fund in their hands belonging to the bank in payment of his note, does not protect the defendants. It is not pretended that Collins had any express authority to apply the funds of the bank to the payment of his own note. He had no implied authority to do so. There are no presumptions in favor of such a delegation of power. He who assumes to rely upon the authority of an agent to bind his principal to the discharge of the agent's own obligation must prove actual authority if contest arises. No principle of the law of agency is better settled than that no person can act as the agent of another in making a contract for himself. West St. Louis Sav. Bank v. Shawnee Co. Bank, 95 U. S. 557; National Park Bank v. German-American Mut. Warehouse & Security Co., 116

N. Y. 281, 22 N. E. 567; Anderson v. Kissam, 35 Fed. 699. If Collins had used his note with the defendants to procure an advance to the bank for its benefit, and not for his own, and had given them such an authorization, very different questions would be presented from those which are now in the case.

Error is assigned of a ruling upon the trial refusing to allow one of the defendants, a witness, to answer the question: "What was the transaction between you and the bank respecting the opening of this account?" The question called for a conclusion, and not for facts, and was therefore correctly disallowed. He was permitted to give all the facts. The statements of Mr. Stebbins, made to the defendants in October, 1890, which they sought to put in evidence, were mere hearsay, and were correctly excluded. We conclude that there was no error in the rulings on the trial, and that the judgment should be affirmed.

NORTHERN PAC. R. CO. v. MACLAY et al.

(Circuit Court of Appeals, Ninth Circuit. April 2, 1894.)

No. 88.

PUBLIC LANDS—RAILROAD GRANTS—RESERVED LANDS.

The lands lying in the Bitter Root valley, Mont., above the Lo Lo fork, having been reserved from sale or other disposition until the president should decide whether they should be set aside as a reservation for the Flathead Indians (Treaty of July 16, 1855), were not public lands, and were therefore incapable of passing to the Northern Pacific Railroad Company under the act of July 2, 1864, which was a grant in praesenti, and could never attach to any lands that were not public at that date, though they were afterwards made public by the president's decision.

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

This was an action in the nature of ejectment brought by the Northern Pacific Railroad Company against Samuel Maclay and others. The circuit court rendered judgment for defendants, and plaintiff sued out this writ of error.

This is an action in the nature of ejectment, brought by plaintiff in error to recover from defendants in error the S. ½ of the S. ½ of section 11, township 11 N., range 20 W., in the Bitter Root valley, Mont. The facts, as agreed upon by counsel, are as follows:

"That the Northern Pacific Railroad Company is a corporation created by, and existing under, an act of congress of the United States entitled 'An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget sound, on the Pacific coast, by the northern route,' approved July 2, 1864. That the said railroad company duly accepted the terms, conditions, and impositions of said act of July 2, 1864, within two years after the approval thereof, and duly served such acceptance upon the president of the United States. That by the third section of said act there was granted to said plaintiff by congress every alternate section of public land, not mineral, designated by odd numbers, to the amount of 20 alternate sections per mile on each side of such line as said plaintiff should adopt, through the territories of the United States, 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 that by the sixth section

of said act it was provided 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, and 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. That plaintiff duly fixed the line of general route of its said road extending through the territory of Montana, February 21, 1872. That the lands described in said complaint were on and within 40 miles of the line of general route so fixed. That thereafter, to wit, on the 22d day of April, 1872, the commissioner of the general land office, under the direction of the secretary of the interior, ordered the odd-numbered sections of land on and within 40 miles of said road to be withdrawn from sale, entry, or pre-emption, and that a copy of said order was duly received at the United States district land office at Helena, Montana, on the 6th day of May, 1872. That the lands described in said complaint were within the limits of the said United States land district. That thereafter, to wit, on the 6th day of July, 1882, the line of said railroad was definitely fixed by said plaintiff, and a plat thereof filed in the office of the commissioner of the general land office, and that said premises were on, and within 40 miles of, the line of said road so definitely fixed as aforesaid. That said premises are agricultural land, and not mineral in character. That prior to the 27th day of August, 1883, the said plaintiff had duly completed its said road on, over, and along said line of definite location, as fixed as aforesaid, as required by said act of congress. That three commissioners were duly appointed by the president of the United States to examine said line, and said commissioners duly reported to the president that said railroad and telegraph line had been completed in a good, substantial, and workmanlike manner, as in all respects required by said act, and on the 27th day of August, 1883, said railroad and telegraph line were duly approved and accepted by the president of the United States. That said premises are part of the land situated in the Bitter Root valley mentioned in the treaty made with the Flathead Indians, July 16, 1855, and ratified by the senate March 8, 1859, and are above the Lo Lo fork.[1] That prior to November 14, 1871, the lands in the Bitter Root valley, above the Lo Lo fork, were carefully surveyed and examined, as provided in article 11 of said treaty, and that the lands described in said complaint were a portion of the lands so surveyed and examined, and to which reference was had in article 11 of said treaty, and that on said date, to wit, November 14, 1871, the president of the United States issued his proclamation as follows, to wit:

"'Executive Mansion, November 14, 1871.

"'The Bitter Root valley, above the Lo Lo fork, in the territory of Montana, having been carefully surveyed and examined, in accordance with the eleventh article of the treaty of July 16, 1855, concluded at Hell Gate, in the Bitter Root valley, between the United States and the Flathead, Kootenay, and Upper Pend d'Oreilles Indians, which was ratified by the senate March 8, 1859, has proved, in the judgment of the president, not to be better adapted to the wants of the Flathead tribe than the general reservation provided for in said treaty. It is therefore deemed unnecessary to set apart any portion of said Bitter Root valley as a separate reservation for Indians referred to in said treaty. It is therefore ordered and directed that all Indians residing in said Bitter Root valley be removed, as soon as practicable, to the reservation provided for in the second article of said treaty, and that a just and impartial appraisement be made of any substantial improvements made by said Indians upon any lands of the Bitter Root valley, such as fields in-

[1] The treaty has the following provision in respect to these lands: Article 11 thereof provided: "It is, moreover, provided that the Bitter Root valley, above the Lo Lo fork, shall be carefully surveyed and examined, and if it shall prove, in the judgment of the president, to be better adapted to the wants of the Flathead tribe than the general reservation provided for in this treaty, then such portions of it as may be necessary shall be set apart as a separate reservation for the said tribes. No portion of the Bitter Root valley above the Lo Lo fork shall be opened to settlement until such examination is had and the decision of the president made known."

closed and cultivated, and houses erected; that such appraisement shall distinguish between improvements made before the date of said treaty and such as have been subsequently made. It is further ordered that, after the removal herein directed shall have been made, the Bitter Root valley aforesaid shall be open to settlement. It is further ordered that if any of said Indians residing in the Bitter Root valley desire to become citizens, and reside upon the lands which they now occupy, not exceeding in quantity what is allowed under the homestead and pre-emption laws to all citizens, such persons shall be permitted to remain in said valley, upon making known to the superintendent of Indian affairs for Montana territory, by the 1st day of January, 1873, their intention to comply with these conditions.

"'U. S. Grant.'

"That on February 21, 1872, and on July 6, 1882, said land was public land, to which the United States had full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, except as herein set forth. That from the time of making the treaty, in July, 1855, the Indians continued to occupy and claim the land in the Bitter Root valley as Indian lands, and were so occupying and claiming them on November 14, 1871, when the president's proclamation aforesaid was issued, and continued to occupy said lands in the Bitter Root valley, roaming thereover, and claiming the same as Indian country, but not asserting claim thereto in severalty, on February 21, April 22, and May 6, 1872. That they continued in possession and claim as aforesaid, and were there in August, 1872, and one of their chiefs (Charlot) is yet there, with several hundreds of Indians under him. That since June, 1872, in pursuance to the act of congress, June 5, 1872, there have been issued 54 patents for parts of said Bitter Root lands above Lo Lo fork to various ones of said Indians; and 3,240 acres of the lands covered by those patents are within odd sections, and within 40 miles of said road, and are yet in the possession of, and claimed by, said Indians. That they never have accepted said patents, but refused to do so. That on the 3d day of October, 1884, said James R. Hinchman made a filing upon, and took possession of, the land (160 acres) described, and is the land in dispute in this suit, to wit, the south half of the south half, section eleven, T. 11, R. 20 W. That he settled upon it with his family on that day, claiming it as his homestead. That said land is of the value of over five thousand dollars. That he lived upon it, and improved and occupied the same, and made his final proof, showing his pre-emption right, December 5, 1887, and on the 6th day of November, 1889, the same was patented to him from the United States, and the same was being held, possessed, and claimed under that patent at the time this suit was brought. That Chief Charlot lives upon, claims, and occupies one odd section of said Bitter Root lands, and has done so ever since 1855."

F. M. Dudley and J. B. McNamee, for plaintiff in error.
Leslie & Craven and S. G. Murray, for defendants in error.

Before McKENNA and GILBERT, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge (after stating the facts). From the agreed statement of facts, it affirmatively appears that the lands in question, in the Bitter Root valley, above the Lo Lo fork, in the state of Montana, were not public lands of the United States at the date of the passage of the "Act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound on the Pacific coast by the northern route, approved July 2, 1864." And from the decisions of the supreme court of the United States in Wilcox v. Jackson, 13 Pet. 498; Leavenworth, L. & G. R. Co. v. U. S., 92 U. S. 733; Newhall v. Sanger, Id. 761; Bardon v. Railroad Co., 145 U. S. 535, 12 Sup. Ct. 856; of this

court in Amacker v. Railroad Co., 7 C. C. A. 518, 58 Fed. 851; and of the land office in Phelps v. Railroad Co., 1 Dec. Dep. Int. 384,—it is manifest that the act of congress granting lands to the railroad does not convey, and was not intended to convey, any lands that were not, at the time of the passage of the act, public lands of the United States. In Bardon v. Railroad Co., supra, the court, in interpreting the grant under consideration, said:

"The grant is of alternate sections of public land, and by 'public land,' as it has been long settled, is meant such land as is open to sale or other disposition under general laws. All land to which any claims or rights of others have attached does not fall within the designation of 'public land.'"

Mr. Justice Field, who delivered the opinion of the court, after referring to the Leavenworth Case, and to the fact that he had dissented from the opinion in that case, said:

"But the decision has been uniformly adhered to since its announcement; and this writer, after a much larger experience in the consideration of public land grants since that time, now readily concedes that the rule of construction adopted—that, in the absence of any express provision indicating otherwise, a grant of public lands only applies to lands which are at the time free from existing claims—is better and safer, both to the government and to private parties, than the rule which would pass the property subject to the liens and claims of others. The latter construction would open a wide field of litigation between the grantees and third parties."

In Amacker v. Railroad Co., supra, this court, with reference to the same grant, said:

"The character of the grant to the company is well defined. It is one in praesenti, but, as was said in St. Paul & P. R. Co. v. Northern Pac. R. Co., 139 U. S. 1, 11 Sup. Ct. 389: '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.' In considering, therefore, what lands ultimately passed by the grant, there are two periods principally to be regarded: One, the date of the granting act; the other, the filing of the map of definite location of the road. Lands to which claims had attached at either period did not pass, though they were free from the claim at the other period."

The judgment of the circuit court is affirmed.

LAST CHANCE MIN. CO. et al. v. TYLER MIN. CO.[1]

(Circuit Court of Appeals, Ninth Circuit. April 9, 1894.)

No. 123.

1. MINING CLAIMS—ABANDONMENT OF PART OF LOCATION.
When the vein passes out through one of the side lines of the claim, the locator may abandon all the ground beyond that point by drawing a new end line across the claim parallel to the original end line, although he has previously made a survey and application for a patent. Mining Co. v. Sweeney, 4 C. C. A. 329, 54 Fed. 284, followed.

2. SAME—PRIORITY OF LOCATION—JUDGMENT AS EVIDENCE.
In a suit to determine the right of possession as between two overlapping mining claims, the defendant withdrew its answer in open court, and judgment was entered for plaintiff, reciting the priority of its location. Defendant thereafter abandoned a portion of its claim, including

[1] Rehearing pending.

the portion embraced in the judgment. *Held* that, in a subsequent action between the same parties in respect to ground not embraced in that judgment, the judgment was not admissible as evidence of priority of location.

3. SAME—EJECTMENT—EVIDENCE — RECEIVER'S RECEIPT AND REGISTER'S CERTIFICATE.
In a suit to determine the right of possession as between two mining claims, defendant withdrew its answer, judgment was rendered against it, and thereafter it abandoned a portion of its location, including the ground in dispute, and amended its application for a patent accordingly. A receiver's receipt and register's certificate of entry were then issued for the remaining part of the location. *Held* that, as this ground was not involved in any controversy, the receiver and register of the land office had authority and jurisdiction to issue these documents, and the same were admissible as evidence of title in a subsequent action of ejectment. Mining Co. v. Rose, 114 U. S. 576, 5 Sup. Ct. 1055, distinguished.

4. SAME.
The validity of the receipt and certificate, and their effect as evidence of title, were not affected, as against third parties, by the fact that the locator, on abandoning a portion of his claim, did not have the government surveyor make a new survey, for which reason the land office suspended the issuance of a patent until an amended official survey was furnished.

5. SAME—PRIORITY OF LOCATION—HOW PROVED.
When, in following the dip of a vein, the owners of two claims come in conflict, priority of right is determined by priority of location; and, where a patent issued to one of the parties is silent as to the date of location, the same may be proved by testimony aliunde.

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

This was an action of ejectment by the Tyler Mining Company against the Last Chance Mining Company and others to recover possession of certain mining ground. At the first trial there was a verdict and judgment for defendant, but the judgment was reversed by this court. Mining Co. v. Sweeney, 4 C. C. A. 329, 54 Fed. 284. The case has again been tried, resulting in a verdict and judgment for plaintiff. Defendants bring error.

W. B. Heyburn, for plaintiffs in error.

John R. McBride and Albert Allen, for defendant in error.

Before McKENNA, Circuit Judge, and KNOWLES and HAWLEY, District Judges.

HAWLEY, District Judge. This is an action of ejectment brought by the defendant in error to recover the possession of certain mining ground, situated in Yreka mining district, Shoshone county, Idaho, claimed by the defendant in error. The case has been twice tried. The first trial resulted in a verdict in favor of the Last Chance Company. The judgment then rendered in the case was reversed by this court for "errors in the rulings of the court with reference to the conclusiveness of the judgment in the territorial court as to the priority of the Last Chance location." Mining Co. v. Sweeney, 4 C. C. A. 329, 54 Fed. 284. The case was thereafter tried upon its merits, and resulted in a verdict and judgment in favor of the Tyler Company.

In the discussion of this case we shall call the plaintiffs in error the "Last Chance," and the defendant in error the "Tyler." Many of the facts were fully stated in the former opinion of this court,

but it is necessary, in order to convey a correct understanding of the positions now taken by counsel for the Last Chance, to briefly restate some of them. The Tyler mining claim was located on the 20th day of September, 1885, claiming 1,500 feet in length and 600 feet in width. On the 19th day of April, 1887, the Tyler applied for a patent. The Last Chance in due time protested, and brought suit in the territorial court of Idaho to determine the right of possession to about one acre of surface ground in the triangular space represented by the diagram in the former opinion of this court. 4 C. C. A. 329, 54 Fed. 284. Before any verdict was rendered in that case, the Tyler withdrew its answer, and the Last Chance thereafter obtained a judgment for the surface ground within the triangle. After the Tyler withdrew its answer, it amended its application for a patent by leaving out from its description of the mining ground located by it the easterly 427 feet in length, and, there being no further contest, it entered the remainder of its claim, and received the receiver's receipt, and the register's certificate of entry from the proper land office, for the purchase price of the Tyler claim. The present action is for 1,072 feet of the westerly end of the Tyler ground, which was not in controversy in the suit in the territorial court. The judgment entered in the territorial court, after the Tyler had withdrawn its answer, recited the fact that the location of the Last Chance was made on the 17th day of September, 1885. Upon the second trial, in the United States circuit court, the Last Chance offered the judgment roll in the territorial court in evidence, and the court refused to admit the same for any purpose. It is claimed that such refusal was error.

The contention of counsel for the Last Chance is that, although the judgment in the territorial court is not conclusive of the fact as to the priority of the Last Chance location under the former decision of this court, it should have been admitted as prima facie or persuasive evidence of such fact; that it was also admissible for the purpose of proving an admission on the part of the Tyler of the allegation of the complaint of the Last Chance; that it was further admissible for the purpose of showing that, at the time the receiver's receipt and register's certificate of final entry of the Tyler were issued, an adverse suit against the application of the Tyler for a patent was pending and undetermined. It is true that the former opinion of this court was simply to the effect that the judgment was not conclusive as to the date of the Last Chance location, as that was the only question then presented; but the reasons given for the conclusion reached apply with equal force to the questions now presented. It was expressly stated that "the judgment was conclusive only as to the right of possession to the triangular piece of ground involved in that suit, no portion of which is in controversy" in this action.

The admissibility of the judgment for any purpose rests wholly upon the question as to the right of the Tyler to voluntarily abandon its claim to any part of its ground after it had made a survey and application for a patent to the entire ground embraced in its location. The right of the Tyler to draw a line leaving out over

427 feet of the easterly end of its claim, as described in its original application for a patent, whatever its purpose may have been in so doing, has been adjudicated, settled, and determined by the decision of this court. No fraud was committed by the Tyler in making the change in the boundaries. It did not take any ground that was not included in its original location. It did not include any ground that belonged to, or was claimed by, any one else. It did not interfere with any other location. It gained no additional rights to those it previously had. It simply waived and abandoned its rights to the easterly 427 feet of its location and, by so doing, it forfeited no rights it then had to the balance of the ground embraced within the limits of its location. The lode located by the Tyler in its true course lengthwise crossed the southerly side line of the location at a point distant 427 feet from the easterly end line of the Tyler location. It could not follow the lode lengthwise beyond the point where it crossed its side line. It abandoned its right to the surface ground beyond that point, and drew its easterly end line parallel with its location at that point, so as to only include the ground in which the lode extended lengthwise within the side lines of its location. No valid reason has been advanced by counsel, and we are not aware of any, why the end line of the claim could not be thus changed in order to comply with the laws of the United States requiring the end lines to be parallel. The law itself would make the end line at that point, so far as any extra lateral rights to follow the lode in its downward course were involved.

It is not shown, and was not attempted to be shown, that the Tyler made any admission in the territorial court in relation to the date of the location of the Last Chance claim, or of the priority of its location. The Tyler was not a party to the judgment, and is not bound in this action by any recitations made in the judgment as to the date of the Last Chance location. If any admission was made in the answer of the Tyler as to the date of such location, of its priority to the Tyler, that fact might have been admissible in this case. But no such proof was offered. The answer of the Tyler was not made a part of the judgment roll in the territorial court. In view of these facts, it is unnecessary to review the authorities cited by counsel as to the admissibility of judgments in other suits between the same or other parties as persuasive evidence of the facts therein involved, or of admissions therein made. It is enough to say that they have no application whatever to the facts of this case.

With reference to the question as to the admissibility of the judgment for the purpose of showing that the receipt and certificate of the Tyler were issued without authority of law, and to the other objections made against the admissibility and effect of the receipt and certificate as evidence, it may be said that it is wholly immaterial to the right of the Tyler to recover in this case whether the receipt and certificate were valid or invalid. The fact is that the Tyler introduced evidence, oral and documentary, as to the discovery, location, marking the lines of the location, notice, performance of necessary work, showing in every respect a full compliance with

the provisions of the mining law. Its title to the ground described in its complaint is undisputed, without reference to the receipt and certificate. We are, however, of opinion that the court did not err in admitting the receipt and certificate of entry, or in its instructions as to the effect thereof. The receipt and certificate were not issued until after the Tyler had withdrawn its answer, and abandoned its claim to that portion of the ground which was involved in the suit in the territorial court, no part of which is included in the mining ground for which the receipt and certificate were given. It therefore necessarily follows that the receiver and register of the land office had the power, authority, and jurisdiction to issue the same. In Rose v. Mining Co., 17 Nev. 26, 27 Pac. 1105; Mining Co. v. Rose, 114 U. S. 576, 5 Sup. Ct. 1055,—cited and relied upon by counsel for the Last Chance, a controversy was pending in the state court to determine the title to the identical ground for which the patent was issued, and it was, of course, held that the patent was absolutely null and void, because it was issued without authority of law. Here the receipt and certificate which entitle the Tyler to a patent were issued for certain mining ground that was not involved in any controversy then pending in any court. The facts in the cases are totally dissimilar. A careful examination of the Rose-Richmond Case will disclose the fact that it expressly recognizes the right of a party to waive or abandon his rights to a portion of the claim that might be involved in a similar controversy to the one presented in the suit between these parties in the territorial court. Mining Co. v. Rose, 114 U. S. 585, 5 Sup. Ct. 1055.

The other objections urged by counsel against the admissibility of the receipt and certificate of entry in evidence relate to certain alleged irregularities on the part of the Tyler not having a resurvey made of its ground after abandoning the 427 feet. A regular survey had been made in the first instance, by a government surveyor, of the entire ground embraced in the Tyler location. The Tyler, when it abandoned the 427 feet, did not have the government surveyor make a new survey, and the officers of the land office expressed the opinion that the Tyler should have the line officially surveyed, and gave notice by letter "that an amended survey of the claim as entered, approved by the United States surveyor, must be furnished." This action upon the part of the officers did not affect the validity of the receipt and certificate of entry that had been previously issued by them. It simply amounted to a question of the regularity of the procedure on the part of the land office. It was not a matter which deprived the officers of jurisdiction. The issuance of a patent was merely suspended until the amended survey was officially approved. The patent would then issue upon the receipt and certificate of entry already given. There was no cancellation of these documents, and as long as they remained uncanceled they were, in legal effect, equivalent to a patent, at least so far as the rights of third parties were concerned. The receipt and certificate of purchase cannot be collaterally assailed upon

such grounds. Hamilton v. Mining Co., 33 Fed. 566; Aurora Hill Con. Min. Co. v. 85 Min. Co., 34 Fed. 515; Benson Mining & Smelting Co. v. Alta Mining & Smelting Co., 145 U. S. 428, 12 Sup. Ct. 877, and authorities there cited. The court did not err in instructing the jury that "the defendant's (Tyler's) title to the surface ground of the premises described in this complaint is 1,072 feet along the Tyler mining claim established by the receipt of the receiver of the land office, dated April 22, 1889, and the accompanying certificate of entry, and that title relates back to the date of the original location, as may be found by the jury when the discovery was made and the claim designated by stakes and monuments on the ground; in other words, that title dates back to the location of the Tyler, there being no dispute as to the date of its location."

Objection is made that the notice of location of the Tyler claim was not recorded within the time required by the statutes of Idaho. Gen. Laws, p. 264, § 6. The statutes of Idaho provide that the notice placed upon the claim, or a substantial copy thereof, shall be recorded by the deputy appointed for the district within a specified date. The court permitted the Tyler to prove, against the objection of the Last Chance, that the notice of location of the Tyler was, on the 3d day of October, 1885, within the time specified in the statute, delivered to the deputy recorder of the district, with the request that it be recorded, and that the fees for recording the same were then paid. The deputy failed to make any indorsement upon the notice, but upon the 9th of October, 1885, it was duly recorded in the office of the county recorder. There is no controversy as to the facts. The contention of the Last Chance is that the recording of the notice could only be proved by the record or by an exemplification thereof. It is well settled that the leaving of a notice with the proper officer, with a request to have it filed and recorded, and the payment to him of the legal fees therefor, in the eye of the law constitutes a filing of the paper for record. The rights of a party, in this respect, cannot be defeated by the failure or neglect of the officer to perform his duty. But the question whether or not the notice was recorded in time was properly withdrawn from the consideration of the jury, upon the ground that the Tyler had what was equivalent to a title by the receipt and certificate, and this cured the irregularity, if there was any, in the recording of the notice of location.

Was the patent of the Last Chance conclusive as to the date of the location of the Last Chance claim? At the close of the testimony upon the part of the Tyler, counsel for the Last Chance "asked the court to pass on the fact of the patent for the Last Chance claim, as to its relation, and as to the matters and things conclusively adjudicated by it. The court at this time declined to pass upon this question, and stated that, under the decision of the appellate court, defendants would be required to prove their location, and that was a matter that might be controverted by testimony." The Last Chance thereupon, without objection, introduced witnesses who gave testimony tending to show the date of the discovery and location of the Last Chance claim, the staking of the claim, posting notice of

location, recording of notice, doing assessment work, survey for patent, etc. The Tyler introduced testimony in rebuttal upon these points, against the objections of the Last Chance. The testimony upon the part of the Last Chance tended to show that a valid location of the Last Chance claim was made on the 17th day of September, 1885, three days prior to the location of the Tyler. The testimony in rebuttal tended to show that no location of the Last Chance was made until after the Tyler was regularly located. The patent issued to the Last Chance was, of itself, evidence that the Last Chance lode had been discovered; that the location had been properly made; that it had been marked so that its boundaries could be readily traced; that the statutory requirements in respect to the posting of a notice and having it recorded had been complied with; that the necessary amount of work had been done; that the application for a patent, the notices given by the applicant, and all the other steps to acquire a patent, as required by law, had been regularly taken. Counsel for the Tyler admit that "the patent itself is evidence of all these facts, and, from its date upon its face, it is conclusive in a court of law of all these facts, because, without them, it could not lawfully issue. The patent is the final judgment and decree of the land department that the holder is the owner of the land it embraces, according to its terms, and in a court of law it is ironclad as title." It is therefore unnecessary to review the authorities upon this subject. The Tyler admits the validity of the Last Chance patent.

The controversy between the parties was as to the date when the location of the Last Chance was made. Was it prior or subsequent in time to the location of the Tyler claim? The patent does not, of itself, fix the date when the location was made. It is silent upon that subject. The respective claims adjoin each other on the surface. There is no conflict between them as to the surface ground. Both claims are valid, and both have the government title,—one, by patent; the other, by a receipt and certificate of entry from the United States land office, which, as before stated, is the substantial equivalent of a patent. The question of the priority of the locations is not involved in this case unless there was a controversy upon the facts as to whether the lode in question, in its true course lengthwise, passed through the ground of the Last Chance claim at nearly right angles. This court, in its former opinion, in answering the contention of counsel on this point, expressed its views of the law in relation to the rights of the respective parties upon the theory that the lode in question, in its true course lengthwise, crossed the side line of the Tyler claim, and passed through the Last Chance claim at nearly right angles. It is now claimed by the Tyler that the lode, in its course lengthwise, does not cross the side lines of the Last Chance at nearly right angles, as the dotted line of the foot wall of the lode on the diagram might seem to indicate; that the line, as thus drawn, followed the undulations of the ground on the surface, but that the underground developments clearly show that the location of the Last Chance claim was more along than across the lode.

The testimony upon this point is not contained in the record, and that question is not properly before us for review; but there is a map, which was made an exhibit in the case, which, upon this hearing, is filed in this court, on which are represented lines purporting to be a true representation of the testimony of the various witnesses as to the true course lengthwise of the lode through the Tyler and Last Chance claims. From these lines it appears that the location of the Last Chance was more along than across the lode. If this correctly represents the testimony that was given upon the trial, it was unnecessary for the court to instruct the jury as to the rights of the Last Chance upon the theory that the lode, in its true course lengthwise, crossed the side lines of the Last Chance at nearly right angles. If the true course of the lode lengthwise is more along than across the locations, then the mining law, to which we will hereafter have occasion to refer, determines the rights of the respective parties, independent of the date of their locations. The right of each party to follow the lode on its strike or true course lengthwise is terminated at the point where the lode crosses the side line of the Tyler and Last Chance locations; but each company would have the right to follow the lode, the top or apex of which is within its surface lines, on its dip, not upon its strike, upon a vertical plane drawn downward parallel to the end line, at the point where the strike of the lode ended; that is, at the point where the lode, in its lengthwise course, intersects the side lines of the claims. The Tyler would be entitled to all that portion of the lode that lies westerly of such vertical line drawn downward, and the Last Chance would be entitled to all that portion of the lode easterly of said line. But the court gave instructions to the jury to the effect that if they found from the evidence before them that the lode in its course lengthwise crossed the side lines of the Last Chance location at nearly right angles, and if they should also find, from other evidence, that "the Last Chance claim was the older, your verdict should be for the Last Chance Company; and, in this connection, I state to you that if you find that the Tyler was the older location, and find that it was following the ledge, as I have before explained to you, upon its dip and not upon its course, then you should find for the Tyler." Under this instruction, we are, perhaps, bound to assume that there was some evidence submitted to the jury which tended to show a state of facts that might have made it obligatory upon the jury to determine the question as to the priority of the locations in order to arrive at a proper verdict. Did the court err in allowing testimony as to the date of the Last Chance location? To what date does the title obtained by the patent relate? How is this question to be determined?

A patent to mineral land is to some extent different in its nature, character, and effect from a patent to agricultural land in this: that it does not give title to the ground vertically to the center of the earth. As a general rule, the mineral bearing veins and lodes depart from a perpendicular, in their course downward, so as to extend outside of the vertical side lines of the surface locations, and as it is the lodes and veins which constitute the principal value of mining locations,—without the discovery of which no valid location can be

made,—the law wisely provides that, upon compliance by the locators of mining claims with certain requirements mentioned in the statute, they "shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward, as above described, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges." Rev. St. U. S. § 2322.

The title given by the patent follows this provision of the statute. It includes the surface ground embraced within the surface limits of the location. The title to this is absolute. It also includes the veins and lodes, the tops or apices of which lie inside of such surface lines, in their course downward, which, as before stated, often depart from a perpendicular so as to extend outside of the vertical side lines of the surface locations, and the patent, when issued, conveys the title to such portions of the veins or lodes, as well as to the portions thereof that lie within the limits of the surface location.

In the grants of specific lands to railroads and other corporations or companies, when the patent issues, it relates back to the date of the grant, which is made certain by the granting act. When a patent is issued for a mining claim, it relates back to the time when a valid location was first made, if it has been regularly kept up, and the date of such location, if the question of priority is raised, must, in the very nature of things, be determined by proof independent of the statute, unless the patent itself fixes the date. It does not depend upon the question as to which party made the first application for a patent, or which obtained a patent first. It is true that the patent is conclusive of the fact that, at the time the application therefor was made, the applicant had a valid location, and had, in all respects, fully complied with the requirements of the mining laws; but it does not fix the time when the location was made. In order to determine this question, it is necessary to introduce evidence independent of the patent. And, in such cases, as is said in Shepley v. Cowan, 91 U. S. 338, the first in time in the commencement of proceedings for the acquisition of the title, when the same are regularly followed up, is deemed to be first in right. The law provides when and how adverse claims to an application for a patent may be made; but such controversies are usually confined to conflicting claims as to the surface ground. When there is no conflict on the surface, there is ordinarily no necessity of a protest being made. Where the law does not require a protest to be made and an adverse suit to be brought to determine the right of possession before the patent issues, and a patent is regularly issued and thereafter a controversy arises as to the time when the patent takes

effect, and it is claimed that it relates back to the date of the location of the claim, that date, if material to the issues raised, must be established by evidence, in the same manner as any other question of fact not settled by the patent itself.

The right to a patent once vested is equivalent, so far as the United States government is concerned, to a patent issued. When issued, the patent relates back to the inception of the right of the patentee. Stark v. Starr, 6 Wall. 403. But where it is sought to make a patent relate back of the date when the application for the patent was made, and attach itself to some prior right, the facts showing such prior right must be established by proof.

In Henshaw v. Bissell, 18 Wall. 266, the court said that in a controversy "between parties claiming under two patents, each of which reserves the rights of other parties, the inquiry must extend to the character of the original concessions. The controversy can only be settled by determining which of these two gave the better right to the demanded premises." In Champion Min. Co. v. Consolidated, etc., Min. Co., 75 Cal. 78, 16 Pac. 513, the district court, in the trial of the case, proceeded upon the theory that the issuance of the patent was conclusive as to the date of the location of a mining claim as it appeared in the papers and proceedings filed in the United States land office upon which the patent was based. Upon appeal, the supreme court expressed its opinion in regard to this question, although it was not necessary to the determination of the case. The principles announced are, in our opinion, correct, and are applicable to the facts of this case. The court said:

"Where an application for a patent to mining land has been filed in the United States land office, and notice thereof given as required by statute, and no adverse claim has been filed, and the proceedings have regularly culminated in a patent, it may be said generally that the proceedings are conclusive against a third person as to those things with respect to which he might have filed an adverse claim. But, with respect to the united ledge which was afterwards discovered to be a union of the Wyoming and the Phillip, there was nothing in the application for a patent to the Wyoming claim which called for any contest by the owners of the Phillip. The application of the Wyoming claim, if granted, would result in a patent for only the surface ground claimed, and the ledges whose apexes were within it. If it should turn out that a ledge within that ground united with another ledge, the property of an adjoining owner, the ownership of the united ledge would have to be determined upon the principle of priority of location. Moreover, at the time of the Wyoming application and patent, the union of the two ledges at great depth in the earth was entirely unknown, and not even suspected. The owners of the Phillip ledge, therefore, with respect to the present claim to the united ledge, would and could not have had any standing in the land department as adverse claimants to the Wyoming application. It is therefore somewhat difficult to see how the question of priority of location between the Phillip and Wyoming ledges could be adjudicated in a proceeding in which the location of the Phillip ledge was not involved at all; or how ex parte proof, offered in the Wyoming application for the satisfaction of the United States government, is admissible in the case in bar, where the contest is about something not appearing on the face of that application, or involved in that proceeding."

In Kahn v. Mining Co., 2 Utah, 188, the court said:

"As the location is the first step in the acquisition of mineral lands, and the foundation of the title thereto, the respondents, following the allegations

in their answer, put these location notices in evidence. They are not set out in the record, but, as chains of conveyances down to the patentees and respondents were put in evidence, it may be assumed that the respondents were not the locators, and, if not, then the connection between the patent and the location notice was not complete, even for the purposes of relation, until these connecting evidences were put in. Without them the respondents would have patent title, but it would not appear that that title was connected with the location notices."

It necessarily follows from this reasoning that it devolved upon the Last Chance to show the time when a valid location of the Last Chance was made, in order to connect its title by patent with the date when the location of its claim was made.

There is another class of cases, decided by the supreme court of the United States, which, by analogy, lead directly to the same conclusion. In Mining Co. v. Campbell, 135 U. S. 286, 10 Sup. Ct. 765, two parties had patents for the same mining ground,—one for a placer claim, the other for a lode claim. The question at issue was whether or not the fact that a patent had issued for the lode claim was not conclusive of the fact that the lode claim had been duly discovered, located, and recorded before the time of the application for a patent of the placer claim. The circuit court held that it was conclusive of the fact, and refused to allow any evidence tending to show a different state of facts. The supreme court reversed the case on account of this ruling, and, in so doing, declared that where two parties have patents for the same land, and the question is as to the superiority of title under the patents, and the decision depends upon extrinsic facts not shown by the patent, it is competent to establish it by proof of those facts. In Davis' Adm'r v. Weibbold, 139 U. S. 507, 11 Sup. Ct. 628, the same general principle is announced with reference to controversies between parties who have obtained patents for mineral land, and other parties having patents for the same land known as town-site patents. The supreme court in both of these opinions clearly point out the distinction which exists between this class of cases and those of French v. Fyan, 93 U. S. 169, Refining Co. v. Kemp, 104 U. S. 636, and Steel v. Refining Co., 106 U. S. 447, 1 Sup. Ct. 389, which are cited by counsel for the Last Chance as to the conclusiveness of patents, etc.

It may be conceded, as claimed by counsel, that the examination of witnesses covered a wider range than was necessary for the purpose of establishing the date when a valid location of the Last Chance claim was made; but the door to such an examination was opened by the Last Chance in its examination of witnesses, and the court thereafter allowed the Tyler in rebuttal to travel over the same ground covered by the Last Chance in its efforts to establish the date and the manner when and whereby it acquired title to the mining ground described in its patent. It is enough to say, upon this point, that the court frequently informed counsel and the jury that the testimony given by the witnesses in relation to this matter was only to be considered as admissible in so far as it tended to establish the date of the location of the Last Chance claim, and it repeated this admonition over and over again in its instructions to the jury. We are therefore of opinion that the jury were not,

and could not have been, misled by the latitude given by the court in the admission of testimony. It is argued that the weight of the evidence upon the question as to the priority of the respective locations is in favor of the Last Chance, and the remarks of the court in overruling a motion for a new trial are referred to as tending to sustain this argument. This question cannot be reviewed by this court. It is well settled that the overruling of a motion for a new trial is not a subject of exception under the practice established in the United States courts. We are, in our investigations, confined to the consideration of exceptions, taken at the trial, to the admission or rejection of evidence, and to the charge of the court and its refusal to charge. We have no concern with questions of fact, or of the weight to be given to the evidence which was properly admitted at the trial. Railroad Co. v. Charless, 2 C. C. A. 380, 51 Fed. 579, and authorities there cited.

The views we have expressed, taken in connection with the former opinion of this court, dispose of all the assignments of error properly presented by the record in this case. The judgment of the circuit court is affirmed, with costs.

GRIFFIN v. OVERMAN WHEEL CO.

(Circuit Court of Appeals, First Circuit. April 5, 1894.)

No. 82.

1. QUESTION FOR REVIEW ON APPEAL.
   The record recited that at the conclusion of plaintiff's evidence defendant asked the court to rule that there was no evidence that deceased was in the exercise of due care, and that the court so ruled, and thereupon ordered a verdict for defendant, to which ruling and order plaintiff excepted. *Held*, that the question for review was restricted to the precise proposition stated, namely, whether there was evidence to go to the jury that deceased was in the exercise of due care.
2. PRACTICE—OBJECTIONS INTERPOSED CANNOT BE ENLARGED TO DETRIMENT OF OTHER PARTY.
   The practice in the federal courts is thoroughly settled that when one party makes a motion, or interposes an objection, on grounds specifically stated, he cannot, at a subsequent stage of the case, shift or enlarge his position, unless perhaps when it clearly appears that by so doing no detriment could come to the other party.
3. DEATH BY WRONGFUL ACT — CONTRIBUTORY NEGLIGENCE — QUESTION FOR JURY.
   In an action under the employers' liability act of Massachusetts (Acts 1887, c. 270) for the death of a night watchman, who was found dead on the ground near a narrow, unrailed bridge running between two buildings, over which he customarily passed in his rounds, the jury are entitled to determine, by inference from the facts proved, the question whether he was in the exercise of due care, although, from the nature of the case, there could be no positive proof on the subject.
4. SAME—CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF.
   In such an action the federal courts should apply their own rule, that contributory negligence is a matter of defense, and they are not bound by the Massachusetts decisions to the contrary. Per Webb, J.

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

This was an action by Mary Griffin against the Overman Wheel Company to recover damages for the death of her husband, John Griffin. At the close of plaintiff's evidence the circuit court directed a verdict for defendant, which was done, and judgment entered accordingly. Plaintiff brings the case to this court on writ of error.

The action is founded on chapter 270 of the Acts of 1887, Acts and Resolves of Massachusetts, passed May 14, 1887, and the declaration is in three counts, under clause 1 of section 1 of said act, which is as follows: "Where, after the passage of this act, personal injury is caused to an employee, who is himself in the exercise of due care and diligence at the time: By reason of any defect in the condition of the ways, works, or machinery connected with or used in the business of the employer which arose from or had not been discovered or remedied owing to the negligence of the employer or of any person in the service of the employer, and intrusted by him with the duty of seeing that the ways, works, or machinery were in proper condition; * * * the employee, or, in case the injury results in death, the legal representatives of such employee, shall have the same right of compensation and remedies against the employer as if the employee had not been an employee of nor in the service of the employer, nor engaged in its work."

John Griffin was a night watchman at the defendant's factory, in Chicopee Falls, having entered its employ in February, 1891. It was his duty, as such, to make the rounds of a certain number of the defendant's buildings once every hour during the night, and to punch several buttons which were connected by electrical appliances with a watchman's clock or dial in the defendant's office, upon which a mark was registered every time a button was punched. Griffin had 17 of these buttons to punch, numbered consecutively from 31 to 47, inclusive. The route which Griffin followed in punching these buttons was as follows: He started in the engine room, so called, of mill No. 2. There he punched button No. 31; went from there to the basement of mill No. 2, where he punched button No. 32; from there to the front of the basement, and button No. 33; thence to the front of the second story, and button No. 34; thence to the center of the second story, and button No. 35; thence to the second story of the rubber mill, so called, a building about 15 feet north of mill No. 2, and connected with mill No. 2 by a bridge about 4½ feet wide and 15 feet from the ground. In this second story of the rubber mill, button No. 36 was located. On the night of the accident he was seen to start on his round at 1:30 o'clock a. m., punching button No. 31 in the engine room. He was not seen again until he was found, about two hours afterwards, lying on his back, on the ground, dead, between the rubber mill and mill No. 2, east of the bridge, with his head towards mill No. 2 and his feet towards the rubber mill, and his lantern by his side, crushed so that the oil ran out of it. There was a cut about two inches long upon the back of his head, in which there was sand and gravel; and his skull was fractured. The watchman's clock or dial in the office showed that on the 1:30 o'clock trip buttons Nos. 31, 32, 33, 34, and 35 had been punched, and button No. 36 had not.

The bridge had been completed about four weeks before the night of Griffin's death, and since that time it had been his custom, in making his rounds, to go from mill No. 2 to the rubber mill by way of the bridge. That was the direct and natural route, and the one which he always took, so far as the evidence showed. The buttons had been located with a view to his using the bridge in going from mill No. 2 to the rubber room. The electrician who put in the wires and buttons had been instructed to cover the most ground with the least number of buttons. If Griffin went from mill No. 2 to the rubber mill by any other route, he would have had to retrace his steps from the second story of mill No. 2 to the starting point, and would thus be put a great deal out of his way. The electrician had, by order of the defendant's superintendent, changed Griffin's route after the buttons were put in, and gave him instructions as to the route he was to follow in punching the buttons; telling him to punch the button in the enameling room (No. 35), and then to "punch the one in the rubber mill over the bridge" (No. 36).

The bridge in question sloped somewhat from mill No. 2 to the rubber mill. It was in evidence that the night on which Griffin met his death was cold,

dark, cloudy, and frosty, and that the bridge was in a slippery condition There were no railings or guards on either side of the bridge. About a week before the night of Griffin's death a small engine had been placed in the machine room on the ground floor of mill No. 2, from which there was an exhaust pipe, which came out of the ground floor of the mill, through the window of the basement, about 16 inches from the ground, and about 18 inches west of the bridge, and extended about 18 inches beyond the window. On the night in question the wind was blowing from the northwest, and the steam from this exhaust pipe completely enveloped the bridge for a space about eight feet square, so that, according to one witness, "it was pretty hard work for a man to go over that bridge that night with a lantern to find his way." It was in evidence that the bridge had never been known to be in such a condition as to steam and slipperiness before. There was medical testimony that a fall from the bridge would account for the marks of injury on Griffin, and for his death. At the conclusion of the plaintiff's testimony the defendant asked the court to rule that there was no evidence that Griffin was in the exercise of due care. The court so ruled, and the plaintiff excepted, and sued out a writ of error to this court. Plaintiff assigns for error that the court erred in ruling that there was no evidence that Griffin was in the exercise of due care.

James B. Carroll and James E. Cotter, for plaintiff in error.

The burden of establishing affirmatively freedom from contributory negligence may be successfully borne though there were no eyewitnesses of the accident, and even although the precise cause and manner of occurrence are unknown. If, in such a case, the surrounding facts and circumstances reasonably indicate or tend to establish that the accident might have occurred without negligence of the deceased, that inference becomes possible, in addition to that which involves a careless or willful disregard of personal safety, and so a question of fact may arise to be solved by a jury, and require a choice between possible but divergent inferences. Finch, J., in Tolman v. Railroad Co., 98 N. Y. 198–203.

Luther White and Edward S. White, for defendant in error.

Before PUTNAM, Circuit Judge, and NELSON and WEBB, District Judges.

PUTNAM, Circuit Judge. When the defendant in the court below moved that a verdict be directed in its favor, it was put in the following form, as appears by the record:

"The defendant offered no testimony, and at the conclusion of the plaintiff's testimony asked the court to rule that there was no evidence that the said John Griffin was in the exercise of due care."

John Griffin was the person on account of whose death the action was commenced. The record then proceeds:

"The judge so ruled, and ordered a verdict for the defendant, and thereupon a verdict was so returned; to which ruling and order the plaintiff excepts, and she prays that her exceptions may be allowed."

By the form of the defendant's request for this ruling it limited itself, for all the purposes of this appeal, to the precise proposition stated by it. The practice in the federal courts is thoroughly settled that when one party makes a motion, or interposes an objection, on grounds specifically stated, he cannot, at a subsequent stage of the case, shift or enlarge his position, unless perhaps when it clearly appears that by so doing no detriment could come to the other party. Therefore the party so moving or objecting is ordinarily required to put his finger on the very pith and marrow of what he claims, and

is ordinarily held to waive everything except what is so pointed out. Non constat, that if the defendant had expressed its motion generally, or if it had been expressed specifically with other reasons than those which were stated, the plaintiff might, with the leave of court, which is always easily obtained, have supplied any other deficiency. For this reason the only question before this court is whether the record shows there was evidence to go to the jury that Griffin was in the exercise of due care in connection with the injury which occurred to him.

It was suggested at the argument of the case that, even under the employers' liability act of Massachusetts, on which statute plaintiff relies, the federal courts will apply their general rule that the want of due care on the part of the plaintiff, in a case of an injury happening through negligence, is a matter of defense, and that the plaintiff is not ordinarily required, in the first place, to give evidence touching it. That question was not raised in the circuit court, and has not been brought before us in such form as renders us desirous of disposing of it, and we are not required to do so in the present case.

We do not deem it necessary to set out the evidence in the court below, or to analyze it in this opinion, and we consider it sufficient to say that the case falls within the practical application of the rules touching due care, and of the inferences to be drawn from the facts proven, which are accepted and approved in Maguire v. Railroad Co., 146 Mass. 379, 382, 15 N. E. 904; Thyng v. Railroad Co., 156 Mass. 13, 16, 30 N. E. 169; and Maher v. Railroad Co., 158 Mass. 36, 44, 32 N. E. 950.

We do not intend to suggest whether the propositions covered by these cases, and which we apply to the case at bar, are or not mere rules of evidence as to which we are bound by the decisions of the highest court of the state of Massachusetts, because, whether we are bound by them or not, they meet our approval, which is sufficient at present. We will only add that the circumstances of the various cases which we cite, as well as those of that at bar, essentially distinguish them from cases like that of the approach of a traveler to a railroad crossing, where, ordinarily, it is necessary to show the performance of some positive duty on the part of the person injured in order to make out due care.

Judgment of the circuit court reversed, and case remanded for further proceedings.

NELSON, District Judge, concurs in this opinion.

WEBB, District Judge (concurring). This case depends on the correctness of the ruling of the circuit court ordering a verdict for the defendant. As stated in the plaintiff's bill of exceptions:

"The defendant offered no testimony, and at the conclusion of the plaintiff's testimony asked the court to rule 'that there was no evidence that the said John Griffin was in the exercise of due care.' The judge so ruled, and ordered a verdict for the defendant, and thereupon a verdict was so rendered; to which ruling and order the plaintiff excepts, and prays that her exceptions may be allowed."

The only error assigned is this ruling and order of a verdict.

It is obvious that there is involved in this case thus presented a question of law as well as one of fact. If, in fact, the plaintiff had offered no evidence proper to go to the jury upon the due care and diligence of John Griffin, was the ruling correct? Contributory negligence on the part of a person injured is always fatal to his maintaining an action for the recovery of damages on account of the negligence of a defendant. There is, however, great conflict of courts in respect to the party upon whom the burden of proof rests. Many courts hold the plaintiff bound to prove affirmatively that he was in the exercise of proper care, and that no negligence on his part contributed to the injury; others maintain the rule that contributory negligence on the part of the person injured is matter of defense, and must be proved by the whole evidence, irrespective of the side by which it is produced. In the courts of the United States the rule that contributory negligence is a matter of defense is firmly settled. Railroad Co. v. Gladmon, 15 Wall. 401; Railroad Co. v. Horst, 93 U. S. 291; Hough v. Railway Co., 100 U. S. 213, 225; Railroad Co. v. Mares, 123 U. S. 710, 720, 721, 8 Sup. Ct. 321; Coasting Co. v. Tolson, 139 U. S. 551, 557, 11 Sup. Ct. 653; Railway Co. v. Volk, 151 U. S. 73, 77, 14 Sup. Ct. 239. The contrary rule prevails in the courts of Massachusetts, in which state this case arose. This, however, is not a matter wherein the federal courts are bound to follow the state decisions. But it is said this case arises under a state statute, and that the interpretation of that statute by the state court must be followed. That statute is, so far as the present inquiry is concerned, as follows:

"Where, after the passage of this act, personal injury is caused to an employee, who is himself in the exercise of due diligence at the time: By reason of any defect in the ways, works or machinery, connected with or used in the business of the employer, which arose from or had not been discovered or remedied owing to the negligence of the employer or of any person in the service of the employer, and entrusted by him with the duty of seeing that the ways, works or machinery, were in proper condition; * * * the employee, or in case the injury results in death, the legal representatives of such employee, shall have the same right of compensation and remedies against the employer as if the employee had not been an employee of nor in the service of the employer, nor engaged in its work."

The manifest purpose and intention of this legislation were to place servants and employes on the same footing with, and to give them the same protection in, respect to injuries caused by the negligence of their employers that persons not employes or servants had. The statute removed, or was designed to remove, some of the pre-existing limitations upon the remedy of an employe against his employer. Ryalls v. Mechanics' Mills, 150 Mass. 190, 22 N. E. 766. The words, "who is himself in the exercise of due care and diligence at the time," introduce no new limitation or restriction of the right to recover. They leave him just where other persons stand. If they were not found in the statute, there can be no doubt that every court would imply them. The implication would be compelled by the terms of the act that "such employee shall have the same right of compensation and remedies against the employer as if the employed had not been an employee of nor in the service of the employer, nor

engaged in its work." This "same right" was a right to compensation and remedy for injury caused by the negligence of another, subject to be defeated if the injured person's own negligence contributed to produce the injury. Since the passage of this act in 1887 numerous suits under it have been brought in the courts of the state. I do not find that in any of them the question of the effect of the words, "who is himself in the exercise of due care and diligence at the time," has challenged the consideration and interpretation of the court. The course of procedure, and the rule as to the burden of proof, prevailing in those courts in actions at common law have been followed without discussion or hesitation, as was to be expected. This court therefore is not embarrassed or controlled in the construction of the statute by any decision of the state court, and should, in view of the purpose of the act, give a construction consistent with its own rule that contributory negligence is matter of defense. Under such construction it follows that the court below erred in ordering a verdict for the defendant, and the cause should be remanded and a new trial had.

In view of the practical importance of the legal question, affording, as it does, a rule applicable to all cases that may come before this court under the employers' liability act of Massachusetts, it ought to be considered and determined, and, if found favorable to the plaintiff, the decision of this case should be based on it, rather than on the question whether any evidence was produced at the trial which could and ought to have been submitted to the jury. But, while thus giving precedence to the point of law, I do not differ from other members of the court in the view that there was evidence as to the care and diligence of Griffin that should have been passed upon by the jury.

UNION PAC. RY. CO. v. NOVAK.

(Circuit Court of Appeals, Ninth Circuit. April 2, 1894.)

No. 114.

1. SERVICE OF PROCESS—IRREGULARITIES.
   A marshal returned that he had made personal service on the agent of a foreign corporation, but he had in fact left the summons with a person in charge of the agent's office, who handed it to the agent on the following day. On the latter day the agent verbally admitted service, in a conversation with the marshal. *Held*, that the service, though irregular, was not illegal, and should not be set aside on motion.

2. SERVICE ON AGENT OF CORPORATION—AFFIDAVIT AS TO AGENCY.
   A person served as ticket agent of a railroad company made affidavit that he was not an agent of the railroad company, but was an agent of a union-depot company, and, as such, sold such tickets as the depot company furnished him. *Held*, that the reasonable inference was that, if the depot company gave him tickets of the railroad company, he would sell them; and, in the absence of a clearer statement of his position and duties, it was not error to hold that he was a ticket agent of the railroad company, upon whom service might be made.

3. EXPERT EVIDENCE—WHEN ADMISSIBLE—QUALIFICATION OF EXPERT.
   The question whether one brakeman was sufficient to check or control by hand brakes, only, the speed of a gravel train, consisting of a number

of cars, is a proper subject for expert evidence; and a witness' qualification to testify in regard thereto is prima facie established by evidence that he is an engineer by profession, and that for some time he was a conductor having charge of a similar gravel train.

4. SAME—PHYSICIANS—STATEMENTS OF PATIENT.
A physician testifying as to the extent of personal injuries may state what the patient said in describing his bodily condition, including the action or nonaction of internal organs, especially when the physician further testifies that he knew what the trouble was from symptoms disclosed by a bodily examination.

5. MASTER AND SERVANT—NEGLIGENCE—DEFECTIVE APPLIANCES.
A fireman on the locomotive of a gravel train was injured by reason of his train getting beyond control on a down grade, and colliding with another train. There was evidence that the automatic braking mechanism was defective and out of order, and that the single brakeman on the train was insufficient to control it by the hand brakes alone. *Held*, that it was proper to leave to the jury the question whether the proximate cause of the injury was the carelessness of plaintiff or his coservants, or the negligence of defendant in failing to provide proper brakes and appliances, and sufficient help.

6. TRIAL—INSTRUCTIONS.
An instruction given in answer to a question by a juror, and which does not contain all the qualifications which should be attached to the principle stated, does not constitute reversible error, when, in view of previous and subsequent explicit instructions, it is clear that the jury, as sensible men, could not have been misled by it.

7. CONTRIBUTORY NEGLIGENCE—BURDEN AND CHARACTER OF PROOF.
In the federal courts, and in the courts of the state of Washington, the burden of proving contributory negligence rests upon defendant, but it is not necessary that the evidence thereof shall be direct and positive; and, if the proximate cause of the injury is attributable to plaintiff's negligence, this is fatal to a recovery, whether the fact appears by inference from facts shown by evidence for plaintiff, or by direct evidence for defendant.

8. TRIAL—INSTRUCTIONS.
It is always within the discretion of the court to give its instructions in its own language, and, if the instructions so given correctly embody all the principles of law applicable to the case, there is no error in refusing requested instructions which are also correct and applicable.

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

This is an action brought by George J. Novak, defendant in error, but herein designated as plaintiff, to recover damages against the Union Pacific Railway, plaintiff in error, hereafter designated as defendant, for injuries received by him on the 21st of July, 1890. The complaint, with reference to the negligence of the defendant, and the injuries received by plaintiff, alleges that on July 21, 1890, while plaintiff was in the employ of defendant as a fireman upon one of its engines, hauling a long train of cars from a point east of Rockford, the engineer in charge of the locomotive lost control of said locomotive and said train of cars, "by reason of the negligence of defendant and the defective machinery, as hereinafter complained of, and that said locomotive and train of cars, at a great rate of speed, ran into a large number of cars standing on the main line of said railway at said town of Rockford, striking them with great force, and greatly damaging and breaking both said cars and said locomotive, and compelling plaintiff to jump from off said locomotive just as it came in contact with said cars, by reason whereof he was thrown down with great force and violence, and his left leg broken in four places, his arm and shoulder dislocated, and otherwise permanently injured internally, as to cause, among other things, paralysis of the bowels, whereby he is now, and will always remain, unable and unfit for labor or work of any kind whereby he can earn a livelihood, and will be

a cripple and disabled for life;" that the injuries he received were caused solely by the negligence of the defendant; "that the air cylinder and air-brake appliances upon said locomotive, and the tank attached thereto, provided for the purpose of controlling the brakes on said locomotive, tank, and the cars in said train, were out of repair, and would not work; that the shoes were also off and displaced from the steam brake attached to said locomotive, by reason of which said steam brake would not work, and could not be used to check the speed of said locomotive; that plaintiff was not an engineer, and had been but a short time engaged in working on and about locomotives, and firing same, and was unacquainted with the use and necessity of having said appliances so as to aid in checking the speed of a train, and was unacquainted with, and unconscious of, the danger to accident from want of said appliances, and of operating, or attempting to operate, a train without said appliances," and had never been informed or instructed thereabout by defendant; that said defendant negligently failed to provide said train with a conductor, and only provided one brakeman therefor, who would be, and was, wholly unable to check or control the speed of said train by means of the hand brakes upon said cars, without the aid of the air brake aforesaid.

The answer of the defendant specifically denies all the allegations of negligence alleged in the complaint, and affirmatively avers that, owing to the negligence and carelessness of plaintiff and his fellow servants, the train was allowed to run down the grade into Rockford at an excessive rate of speed, instead of being kept under control while approaching Rockford station, and prepared to stop in order to avoid other trains.

The facts material to the issues raised by the assignment of errors, not otherwise specifically stated in the opinion, are that at the time of the accident the plaintiff was 19 years of age; that he had been in the employ of the defendant for 11 months prior thereto as wiper of the engines in one of defendant's roundhouses, and was placed upon the locomotive engine No. 87, as fireman, about 16 days prior to the accident; that prior to that time he had made two or three trips as extra fireman; that the tank belonging to engine No. 87 was equipped with air brakes, but before the day of the accident this tank had been taken off, and another tank, without air brakes, was then being used; that this tank had only a hand brake upon it; that the steam brake on the engine was defective; that 2 out of 12 shoes were worn or missing, which reduced the braking power of the steam brake about one-third less than when all the shoes were in place; that the water brake upon the engine was not in working condition; that when the train started from Spokane there were five employes of defendant upon it, viz. Crowley (the conductor), Sissler (a brakeman), a man known as the "Swede" (a brakeman), Hill (the engineer), and plaintiff (the fireman); that, when the train reached Rockford, Crowley and the Swede got off, and remained at that station; that at that time the train consisted of 18 flat cars loaded with gravel, 10 of which were then unloaded, and 8 cars were left upon the main track, adjoining the west end of the depot platform; that Sissler, who was a brakeman, was put in charge of the train, and, with the engineer and fireman, returned to Freeman with the train, under instructions to take the 10 cars to Conductor McPherson, at Freeman, and then to couple onto the loads of gravel at the side track, and the loads which had been brought up the grade, and bring them to Rockford,—"to let them come, and that the main line would be clear;" that at Freeman the parties took the loads, as per instructions, and started to return to Rockford with 24 flat cars loaded with gravel; that the distance from Freeman to Rockford is about 8 miles, with a down grade; that the grade commences about one-fourth of a mile west of Freeman, at which point it is about 90 feet to the mile, and decreases, going into Rockford, to 53 feet to the mile; that about one mile from Freeman, after entering the down grade, and while running within the limit of 20 miles an hour, as allowed by the rules of defendant, the engineer called for brakes three times; that the second time he called for brakes he applied his steam brake, and set the tank brake; that the train then became beyond the control of the men, and ran away.

The plaintiff, among other things, testified as follows: "When we left Freeman, I presume about a mile and a half or so, the engineer whistled for

brakes. I seen the man who had charge of the train, and who was on the hind car, but I didn't see him make any attempt to set the brakes at that time. The engineer whistled for brakes again. I then seen the brakeman working on a brake, setting it. The engineer whistled for brakes again, and the brakeman stuck up his hand. * * * He whistled for brakes again, but we were going at a faster rate of speed then. The engineer then tried to set his steam brake, and he says: 'There is no use. Everything is gone. The steam brake is out of order, and we can't hold it.' I went and tried to set the tank brake, and that didn't work. So the engineer, he gets off the seat, and he tries to set it, and it did not work, so he told me * * *. He said, 'Get on the seat box, and look out for danger.' We kept whistling all the way down the hill, to warn the men ballasting the track where the gravel was. We came about two hundred yards of Rockford, and we seen Crowley trying to flag us. We were going then, I presume, at the rate of sixty miles an hour, if not more. Before we came to Rockford, there is a big curve going into Rockford; and we could not see them until we came around the curve, because there was a big pile of cord wood, about twelve or fifteen feet high, obstructing the view. So, when we came around the curve, we saw those cars on the main line; and we thought we were in danger, and I got ready to jump off. I jumped about thirty feet, I think, from the end of the platform, and I struck the ground; and it just rolled me like a bunch of rags, and I struck the platform. It threw me up into the air, and threw me on top of the platform, about eight feet from the end of it."

In reply to questions, he answered as follows: "Q. Did you hear John Crowley say anything that day about the direction of this train; generally, about the operation of these gravel trains hauling gravel between these points? A. Well, he came up to the engine, and he says to the engineer, 'They have pulled off one of my crews;' and he says, 'Mr. Sissler will take charge of this train.' Q. What running orders, if any, on that occasion, did you hear Mr. Sissler give, after that time, for the running of this train? A. He says: 'I got orders from Crowley for us to take these empties to Freeman; and engine 42 is there with loads, waiting for us. We will give them our empties, and take their loads, and also the loads on the side track.' And he says: 'Let them come. He will have the main track clear for us, and make the upper switch.'" In the course of his testimony, he gave an account of the injuries he received, which was substantially as alleged in the complaint.

Hill, the engineer, with reference to the accident, testified as follows: "My instructions from Crowley and Sissler were to take these ten cars to Freeman, and turn the empties over to Conductor McPherson. * * * I was to couple onto loads on the side track, and the loads which had been brought up that grade, and bring them to Rockford, and let them come, and he would have the main line clear. * * * After leaving Freeman, we pitched over the summit, and got perhaps a mile down the grade, and I whistled for brakes from Sissler. He was the only man there at the time, and I called for brakes, and he put up his hand in such a manner [indicating]; and I called three times for brakes, altogether. When he stuck up his hand, he was sitting on the brake mast on the last car; and whether he set any more brakes, of course, I cannot say, because, with the ballast train coming along at that speed, would naturally obstruct the view by the dust. I was about a mile and a half from Rockford when I called for brakes the last time. I was about three miles from Rockford when I saw Sissler for the last time. * * * When I came down to the curve, I saw Mr. Crowley with both hands up. I knew at once there was something wrong. I had an idea that the track was not clear, but I was coming down there at such speed that it struck me, then, if I reversed my engine, we would all go in a heap there, so I didn't reverse my engine. I had my driver brakes set, and also the hand brake on the tank. I didn't see the engine strike the cars. I jumped off on the platform. After I called for brakes the second time, I started then to put on the tank brake, and I had my driver brake set. The driver brake is the only brake, with the exception of the water brake, on the engine. The engine had an air pump, but no air cylinder on the tank. Of course, we didn't use the air brake. There was a water brake, but it wasn't in working con-

dition. I had been running over the road before. Crowley had control of the four trains running at this point. Sissler was in charge of the train that day."

With reference to the condition of the engine and cars, this witness testified as follows: "I noticed that some of the brakes on the cars looked pretty bad like,—without shoes, and such like. I noticed several times that some of these cars had no brakes. Some would have a brake rod off, and some a brake shoe. I think there were about half dozen. I don't think there were any air brakes on any of the flat cars at all. On my engine the left brake shoe was gone, and another was broken in two. It left us without any considerable power, and the brake rods were not very well equalized. I could apply the brake, but the holding power of the brakes, as compared with the brakes when their shoes were in good condition, was about one-third less. I reported the engine to the master mechanic on Friday evening, and the accident occurred on Monday. I made this report by telegram. I didn't receive any answer. Neither the master mechanic, nor any one else in charge of the repairs, made any reply, or said anything to me verbally about the engine."

The defendant claimed, and its testimony tended to show, that the injury was caused by the negligence of the engineer and the brakeman, in their failure to use ordinary care to prevent the train from getting beyond their control, and also claimed, among other things, that the fireman knew, or ought to have known, of the defects in the braking power of the train of cars, and that he assumed the risks created thereby. The jury found a verdict in favor of the plaintiff, and assessed the damages at $12,000.

W. W. Cotton and Zera Snow, for plaintiff in error.

Jesse Arthur, S. C. Hyde, W. S. Glass, and J. J. Regan, for defendant in error.

Before GILBERT, Circuit Judge, and KNOWLES and HAWLEY, District Judges.

HAWLEY, District Judge (after stating the facts as above). 1. It is argued that the court erred in overruling defendant's motion to set aside the service of summons, upon the ground that the same was not served upon the defendant. The marshal made return that he served the summons "on the 7th day of August, 1891, on said defendant, * * * by delivering to and leaving with Perry Griffin, agent of said defendant at the city of Spokane, * * * in said district, a certified copy thereof, together with a copy of the complaint, certified to by the clerk."

This return, upon its face, shows a sufficient service. But, in support of the motion to have the service set aside, two affidavits were presented: One by Perry Griffin, to the effect that, at the time the service was stated in the return to have been made, he was sick, and was not at his place of business; "that he was not personally served with said summons, nor was he notified of service of same until the day after its pretended service; that he is not an officer or agent of the Union Pacific Railroad Company, but is agent of the Union Depot Company, of Spokane Falls, and, as such agent, sells such tickets as said Union Depot Company furnish him for sale." The other by George Lang, which, after stating that he is in the employ of Perry Griffin, and that no personal service was made upon Griffin, says "that said marshal came into the office of the said Perry Griffin, and left the papers on the counter, and this affiant picked them up and examined them; and when the

said Perry Griffin was able to attend to his duties, and in his place of business, * * * this affiant handed said copy of complaint and summons to said Perry Griffin, who refused to accept the same."

The plaintiff presented, in reply thereto, the affidavit of C. H. Chamberlain, who was the deputy United States marshal who made the service, who said:

"On the 7th day of August, 1891, I went to the office of Perry Griffin, in the city of Spokane, * * * for the purpose of serving him with said summons, as an agent of said defendant. Said Griffin was at the time absent from his office, and I left said summons with the person in charge of said office for delivery to said Griffin. Afterwards, to wit, the 8th day of August, 1891, I met said Griffin on one of the streets of said city, and asked him if he had received said summons. He said that he saw it in one of the drawers in his office. I then asked him if he would admit service of said summons; that I had made return on said summons as having served him therewith, and that I didn't want any fooling about it; that, if he did not admit service thereof, that I would serve it again upon him personally, but if he would admit service I would not serve him again. And he agreed to admit service thereof, saying that that would be all right."

The attorney for defendant, when making the motion, specially appeared for that purpose. The court held the marshal's return to be valid, and a bill of exceptions was duly filed and allowed. Thereafter, the defendant appeared, and filed its answer.

It is at least doubtful whether the affidavits of Griffin and Lang were competent for the purpose of attacking the return; and it is also questionable whether the objection to the service could be raised by a simple motion, instead of a regular plea, where, as in this case, the return of the officer was regular upon its face. Harkness v. Hyde, 98 U. S. 476, and Amy v. Watertown, 130 U. S. 302, 9 Sup. Ct. 530, cited upon this point by defendant, were cases of an entirely different character. In the Harkness Case the officer made return showing that the service was made upon an Indian reservation, where, under the law, he had no jurisdiction to serve any process. In the Amy Case the law required the service of the process against a municipality to be made upon the mayor, and the return showed that the service was made upon the ex-mayor, whose term of office had expired. In both cases the facts appeared upon the face of the returns. In such cases, presenting only questions of law, the court had the right to dispose of the same upon motion. In the present case the facts tend to show that there was a technical defect in the service of the summons; but it is purely technical, and not jurisdictional, and does not appear upon the face of the return. The service was irregularly, not illegally, made. The officer, in making the return, subjected himself to criticism, if not to censure and condemnation, for his acts, for there is never any excuse for an officer to make any return that is not strictly in accordance with the facts.

If the question is to be considered upon its merits, we are of opinion that the court did not err in denying the motion to set the service aside. Under the statute of Washington, the service of summons against a railroad corporation is to be made by deliver-

ing a copy thereof, together with a certified copy of the complaint, to any station, freight, ticket, or other agent thereof within the state. 2 Hill's Ann. St. Wash. 173. The affidavit of Griffin, if competent, does not clearly and affirmatively show that he was not such an agent. It is evasive. He says that he is not an officer or agent of the defendant; but he adds that he is an agent of the Union Depot Company, and, as such agent, sells such tickets as said Union Depot Company furnishes for sale. The only reasonable inference to be drawn from the facts stated is that, if this company gave him tickets of the defendant to sell, he would, of course, sell them, and did sell them. In the absence of a positive, clear, and unequivocal statement of his position and duties as to the sale of the defendant's tickets, the court had the right to hold that he was a ticket agent of the defendant, upon whom service might, under the provisions of the statute of Washington, be made. The affidavit bears upon its face the appearance of having been made as a subterfuge, instead of presenting any meritorious ground to defeat the service of the summons. Forrest v. Railroad Co., 47 Fed. 2.

But it is claimed that no personal service of the summons was made upon the agent. No personal service was made on the 7th of August, 1891. The officer's return to that effect was false. It is not denied, however, that he received the papers the next day, and that upon inquiry he so notified the officer, and acknowledged service of the process. There is no denial of the service, except the technical one that the officer did not personally hand the summons to the agent. Under all the facts of this case, the action of the court in overruling defendant's motion, upon whatever ground it may have been based, was not erroneous.

2. During the trial the plaintiff called W. H. Butterfield, who was allowed to testify, as an expert, that "it was absolutely necessary to have two brakemen to set the brakes" on a train like the one upon which plaintiff was employed. This testimony was objected to by defendant upon the grounds (1) that the witness was not qualified to express an opinion; (2) because the testimony was incompetent. It is undoubtedly true that witnesses must ordinarily state facts, and not give their opinions. Expert and opinion evidence ought only to be received in cases of necessity, in regard to matters which require peculiar skill and knowledge, which are not common to men in general, and without which knowledge the jury would be unable, from the facts, to properly decide the matter. If the relation of the facts and their probable results can be determined without especial skill and knowledge, the facts themselves must be given in evidence, and the conclusions or inferences must be drawn by the jury.

Under the pleadings and the evidence in this case, it was competent for each party to give testimony as to whether or not the employment of only one brakeman was sufficient to check or control the speed of the train by means of the hand brakes upon the cars. This question, to be properly answered, required some skill and knowledge upon the part of the witnesses as to the character and locality of the brakes. and as to the number of brakemen re-

quired to manage the same, which could not fairly be said was within the experience and knowledge of men who had never been engaged in running and managing a train of cars.

In Railroad Co. v. Bailey, 11 Ohio St. 335, the court said:

"That the running and management of railroad locomotives and trains is so far an art outside of the experience and knowledge of ordinary jurors as to render the opinions of persons acquainted with the running and management of such locomotives and trains, as experts, admissible and proper testimony, in proper cases, is very clear on principle, and is so recognized in Quimby v. Railway Co., 23 Vt. 394, and Railway Co. v. Reedy, 17 Ill. 580. See, also, Railroad Co. v. Smith, 22 Ohio St. 227."

Butterfield, as to his qualifications, testified that he was an engineer by profession, and that he was at the time of the accident, and had been for some time previous thereto, a conductor working upon, and having charge of, a similar gravel train. This was at least prima facie sufficient to establish his qualification. Moreover, the question whether a witness is shown to be qualified to testify to any matter of opinion is always a preliminary question for the judge presiding at the trial, and his decision thereon is conclusive, and will not be reversed unless manifestly erroneous, as matter of law. Spring Co. v. Edgar, 99 U. S. 658; Manufacturing Co. v. Phelps, 130 U. S. 520, 9 Sup. Ct. 601; Railway Co. v. Warren, 137 U. S. 353, 11 Sup. Ct. 96; Coasting Co. v. Tolson, 139 U. S. 559, 11 Sup. Ct. 653; Towboat Co. v. Starrs, 69 Pa. St. 41; Perkins v. Stickney, 132 Mass. 217; Slocovich v. Insurance Co., 108 N. Y. 56, 14 N. E. 802; City of Ft. Wayne v. Coombs, 107 Ind. 84, 7 N. E. 743.

3. It is claimed that the court erred in allowing Dr. Harvey to testify as to certain facts told him by the plaintiff during the course of a medical examination made for the purpose of enabling him to give testimony in the case. Dr. Harvey, as an expert physician, testified with great clearness and minuteness as to the extent, nature, and character of the numerous injuries he found upon the person of the plaintiff, and gave his professional opinion as to their probable effect upon the plaintiff's physical condition in the future. In his entire testimony, which is quite lengthy, there are only two allusions made to anything that the plaintiff told him. The examination took place a short time before the trial. The effect of an injury to the spine, whether permanent or not, which was one of the many injuries which plaintiff received, depended, to some extent at least, upon the length of time that had occurred after the injury; and, in giving his testimony as to the effect of this injury, Dr. Harvey said, "I was told by the patient that he had been injured over two years since." There was certainly no prejudicial error in admitting this statement. It was a conceded fact in the case, proven by several witnesses, and not controverted by any.

As a result of the examination, the witness said, if the injury "was caused over two years ago, it is permanent. It becomes a serious matter, and increases with time. * * * It will be a physical impossibility for him to engage in any manual labor that requires

the use of that limb or the spine." Upon his cross-examination, after testifying to the fact that the examination which he made was strictly physical, the witness said: "I knew that his bowels didn't work, from symptoms of that character, and what he told me. He told me that his kidneys were out of order." This testimony does not come within the principle of the rule of exclusion of hearsay testimony, as laid down in the authorities cited by defendant, to the effect that the physician who makes the examination for the purpose of giving testimony in the case is not permitted to state what the patient told him in reference to the specific cause of the injury, which is, of course, one of the issues ordinarily presented at the trial for the jury to decide; but the rule is just as well settled that the physician may testify to what the patient said in describing his bodily condition, and the character and manifestations of his pains, when such statements become necessary to enable the physician to give his opinion as an expert, on account of the latent nature of the facts to be proved by it. The action or nonaction of the internal organs could not readily be seen. In such cases the statement of the injured party is ordinarily admissible, in order to enable the expert physician to determine the real nature of the trouble at the time of the examination. But, in addition to this matter, it appears from the evidence in this case that the physician knew what the trouble was from the plaintiff's symptoms, discovered by his own examination, as well as from what the plaintiff told him. The character of the examination made by the physician was very thorough, and was such as to render it entirely free from any suspicion that the statement was made by plaintiff for the sole purpose of manufacturing testimony for the trial, which is one of the principal mischiefs that the rule for the exclusion of the patient's statements was intended to guard against.

We are of opinion that the testimony given by the physician, including what the plaintiff told him, was clearly admissible.

In Barber v. Merriam, 11 Allen, 324, the court said:

"It is true that evidence of the statements of a party to his physician or surgeon, of his bodily ailments and symptoms, is, in its nature, hearsay, and is liable to some of the objections which lie against that kind of testimony. Its admissibility is an exception to the general rule of evidence, which has its origin in the necessity of the case. The existence of many bodily sensations and ailments which go to make up the symptoms of disease or injury can be known only to the person who experiences them. It is the statement and description of these which enter into, and form part of, the facts on which the opinion of an expert as to the conditions of health or disease is founded. As they can be proved only by the declarations of the party whose bodily condition is the subject of inquiry, such declarations must be admitted, or the proof of them will fail altogether. To the argument against their competency, founded on the danger of deception and fraud, the answer is that such representations are competent only when made to a person of science and medical knowledge, who has the means and opportunity of observing and ascertaining whether the statements and declarations correspond with the conditions and appearance of the persons making them, and the present, existing symptoms which the eye of experience and skill may discover."

In Railroad Co. v. Sutton, 42 Ill. 440, cited and relied upon by defendant, the court, in reference to the rule, says:

"A physician, when asked to give his opinion as to the cause of a patient's condition at a particular time, must necessarily, in forming his opinion, be, to some extent, guided by what the sick person may have told him, in detailing his pains and sufferings. This is unavoidable, and not only the opinion of the expert, founded in part upon such data, is receivable in evidence, but he may state what his patient said in describing his bodily condition, if said under circumstances which free it from all suspicion of being spoken with reference to future litigation, and give it the character of res gestae."

In Railroad Co. v. Newell, 104 Ind. 265, 3 N. E. 836, the court, after a lengthy discussion, and a reference to numerous authorities, held that a physician, as a basis for his opinion, may testify to statements made by a patient in relation to his symptoms and conditions, when received during, and necessary to, an examination with a view of enabling the physician to give his opinion as an expert, although such statements are made after the patient had commenced an action to recover damages for the injury. To the same effect, see Quaiffe v. Railway Co., 48 Wis. 513, 4 N. W. 658; Johnson v. Railroad Co., 47 Minn. 430, 50 N. W. 473; Railway Co. v. Snyder, 117 Ind. 435, 20 N. E. 284.

4. In reference to the merits of this case, it may be said that there are certain well-defined rules and clearly-settled principles of law relating to the duties, obligations, and liabilities of railroad corporations and their employes, which, in their application to the particular facts of this case, will enable us to virtually dispose of many of the assignments of error without specific notice of each assignment, or of the points specifically urged by counsel. The general rule exempting the railroad company, as the common master, from liability to one of its servants or employes for injuries occasioned by the negligence of a fellow servant in the same common employment, is substantially to the effect that, when the employe engages with the master for the performance of certain specified duties and services, he takes upon himself the natural and ordinary risks, hazards, and perils incident to the performance of such services. This necessarily includes the risks arising from the carelessness and negligence of others who are in the same common employment, because these are perils which the servant is as likely to know, and against which he can as effectually guard, as the master. They are perils incident to the service, which can be as distinctly foreseen by him as by the master. This general rule is too well settled to require any elucidation, or the citation of authorities in its support. But to this general rule there are certain well-defined qualifications or exceptions that should be constantly kept in mind in the application of the rule to the facts of any given case.

These exceptions arise from the obligation which the master owes to the servant not to expose him, while engaged in performing the business of the master, to hazards against which he might be guarded by reasonable diligence upon the part of the master. With reference to this obligation, the master is required by the law to observe all the care which prudence and the exigencies of the situation demand, in providing the servant with tools, machinery, and appliances, and all other instrumentalities connected

with the business in which the servant is employed, adequately safe for such uses. It is implied in the contract of employment between the parties that the servant risks the dangers which ordinarily attend, or are incident to, the business in which he engages; including, as before stated, the carelessness and negligence of other servants engaged in the same work or common employment, with whose habits, conduct, and capacity he has, in the course of his duties, an opportunity to become acquainted, and against whose negligence he is able to take such care and precaution as his judgment or inclination may suggest. But it is equally implied by the same contract that the master shall supply the means for the conduct of the business; and justice and public policy require that, in selecting such means, he shall not be wanting in ordinary care. His negligence in this respect, if any, is not a risk or hazard usually or necessarily attendant upon the business in which the servant is engaged, for the obvious reason that the servant who is to use the machinery, appliances, and instrumentalities provided by the master has ordinarily no connection with their purchase, or with their preservation or maintenance in suitable condition after they have been supplied. The leading cases upon this subject in the state courts are Ford v. Railroad Co., 110 Mass. 240, and Railroad Co. v. Moore, 29 Kan. 633.

This principle is fully recognized and clearly stated by the supreme court of the United States in Railroad Co. v. Baugh, 149 U. S. 386, 13 Sup. Ct. 914, as follows:

"A master employing a servant impliedly engages with him that the place in which he is to work, and the tools or machinery with which he is to work, or by which he is to be surrounded, shall be reasonably safe. It is the master who is to provide the place and the tools and the machinery; and, when he employs one to enter into his service, he impliedly says to him that there is no other danger in the place, the tools, and the machinery than such as is obvious and necessary. Of course, some places of work and some kinds of machinery are more dangerous than others; but that is something which inheres in the thing itself, which is a matter of necessity, and cannot be obviated. But, within such limits, the master who provides the place, the tools, and the machinery owes a positive duty to his employe in respect thereto. That positive duty does not go to the extent of a guaranty of safety, but it does require that reasonable precautions be taken to secure safety; and it matters not to the employe by whom that safety is secured, or the reasonable precautions therefor taken. He has the right to look to the master for the discharge of that duty; and if the master, instead of discharging it himself, sees fit to have it attended to by others, that does not change the measure of obligation to the employe, or the latter's right to insist that reasonable percaution shall be taken to secure safety in these respects. Therefore, it will be seen that the question turns rather on the character of the act, than on the relations of the employes to each other. If the act is one done in the discharge of some positive duty of the master to the servant, then negligence in the act is the negligence of the master; but, if it be not one in the discharge of such positive duty, then there should be some personal wrong on the part of the employer before he is held liable therefor. But, it may be asked, is not the duty of seeing that competent and fit persons are in charge of any particular work as positive as that of providing safe places and machinery? Undoubtedly it is, and requires the same vigilance in its discharge. But the latter duty is discharged when reasonable care has been taken in providing such safe place and machinery, and so the former is as fully discharged when reasonable precautions have been taken

to place fit and competent persons in charge. Neither duty carries with it an absolute guaranty. Each is satisfied with reasonable effort and precaution. * * * It would be easy to accumulate authorities on these propositions, for questions of this kind are constantly arising in the courts. It is enough, however, to refer to those in this court. In the cases of Hough v. Railway Co., 100 U. S. 213, and Railroad Co. v. Herbert, 116 U. S. 642, 6 Sup. Ct. 590, this court recognized the master's obligation to provide reasonably suitable place and machinery, and that a failure to discharge this duty exposed him to liability for injury caused thereby to the servant, and that it was immaterial how, or by whom, the master discharged that duty. The liability was not made to depend in any manner upon the grade of service of a coemploye, but upon the character of the act itself, and a breach of the positive obligation of the master. In both of them the general doctrine of the master's exemption from liability for injury to one servant through the negligence of a coemploye was recognized, and it was affirmed that the servant assumed all the risks ordinarily incident to his employment."

These general rules and principles were stated, and numerous authorities cited in their support, by this court, in the case of Railroad Co. v. Charless, 2 C. C. A. 380, 51 Fed. 562, and followed in Southern Pac. Co. v. Lafferty, 6 C. C. A. 474, 57 Fed. 536.

There is still another principle to be stated which is applicable to the facts of this case, and which was discussed by this court in the Lafferty Case, viz. that the master owes a duty to his servants, of employing a sufficient number to do the work assigned to be performed, so far as may be reasonably necessary to enable them to do it in safety, and the master must exercise ordinary care in order to relieve himself of liability in this respect. 1 Shear. & R. Neg. § 193; Flike v. Railroad Co., 53 N. Y. 549; Booth v. Railroad Co., 73 N. Y. 38.

Applying these principles to the facts of this case, it is apparent that the court did not err in overruling the defendant's motion to instruct the jury to find a verdict for the defendant. It was a question of fact, raised by conflicting evidence, for the jury to decide, whether the proximate cause of the injury was the result of the carelessness or negligence of the plaintiff, or his fellow servants in charge of the train, or whether it was caused by the negligence of the defendant in failing to provide suitable and proper appliances and brakes, or furnishing sufficient help, to properly control and manage the train. It is well settled by frequent decisions of the supreme court of the United States that no case should be withdrawn from the jury unless the conclusion from the facts necessarily followed, as matter of law, that no recovery could be had, upon any view which could be reasonably drawn from the facts which the evidence tended to establish. Kane v. Railway Co., 128 U. S. 91, 9 Sup. Ct. 16; Jones v. Railroad Co., 128 U. S. 443, 9 Sup. Ct. 118; Dunlap v. Railroad Co., 130 U. S. 649, 9 Sup. Ct. 647; Railway Co. v. Cox, 145 U. S. 606, 12 Sup. Ct. 905.

In Railway Co. v. Ives, 144 U. S. 417, 12 Sup. Ct. 679, the court said:

"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, also, Southern Pac. Co. v. Lafferty, 6 C. C. A. 474, 57 Fed. 536; Railroad Co. v. Powers, 149 U. S. 43, 13 Sup. Ct. 748.

5. There are several assignments of error in relation to certain portions of the charge given by the court to the jury, some of which will be specifically noticed; and, as to others, it is a sufficient answer to say that the charge of the court must be considered in its entirety, instead of separately. It is not to be expected that each instruction in the charge will contain all of the qualifications and exceptions to the rule therein stated. It is sufficient if the qualifications, exceptions, or modifications are elsewhere stated in such a manner as to make it clear and plain that the principles applicable to the case, and to the particular question involved in the instructions complained of, were fairly, fully, and correctly stated in the charge of the court, as a whole. There is no evidence tending in the slightest degree to show any negligence upon the part of the plaintiff in the discharge of his duties as fireman. The court charged the jury that the defendant was not liable for the neglect, if any, of Sissler, upon the train, in failing to apply the brakes on the cars in the train for the purpose of controlling the speed of the train, or stopping the same, and that if the jury found that one brakeman could have stopped the train by applying all the brakes upon the cars composing the train, and that the train could have been stopped by the use of such brakes, and that Sissler negligently failed to apply such brakes, and should find from the evidence that the negligence of Sissler, in failing to apply the brakes, was the sole cause of the injury to plaintiff, the plaintiff could not recover. The court further charged the jury that if it should find that the injury to plaintiff resulted from the negligence, if any, of Hill, the engineer, in failing to keep said train under control, and that Hill could have stopped the train by reversing his engine, and using no other appliances, and that it was safe for him to do so, under the circumstances under which the train was running, and that such neglect on the part of the engineer was the proximate and only cause of the injury to the plaintiff, then the plaintiff could not recover. The court emphasized these points by further charging the jury as follows:

"If you find from the evidence that the injury to the plaintiff resulted from the neglect, if any, of the engineer, or the neglect, if any, of Sissler, or both of them combined, in failing to keep the train under control, or in stopping the same, and that the said engineer, or said Sissler, or both of them, with the appliances at hand, could have controlled the train, under the circumstances under which it was running, or have stopped the same in time to have avoided the collision, and if you further find that the failure of said Sissler, or said engineer, or both of them, to keep said train under control, or to have stopped the same, was the sole, proximate, and immediate cause of the injury to the plaintiff, then I charge you that the plaintiff cannot recover in this action, and you must find for the defendant."

In the light of the charge of the court upon this point, it is manifest, from the verdict, that the jury must have found that in running, managing, controlling, or endeavoring to control, the train, the plaintiff, the engineer, Hill, and brakeman, Sissler, were free from fault, or at least that their negligence, or the negligence of

either of them, if any, was not the proximate cause of the injury, and that the defendant was negligent in furnishing said train, in not using ordinary and reasonable care in providing suitable appliances, machinery, and brakes, or in not having a conductor or another brakeman, on the train, and that the proximate cause of the injury to plaintiff was owing to the negligence of the defendant. But, in this connection, it is contended by the defendant that the court erred in giving other instructions, which were erroneous, and of such a character as to mislead the jury to the prejudice of defendant. The instructions complained of were given after the jury had retired to deliberate upon their verdict, and had returned into court with a request for further instructions relative to there being only one brakeman on the train, and with reference to the train of cars left standing on the main track. The court, in reply to these questions, instructed the jury as follows:

"As to whether the defendant was negligent in the particulars charged, it is charged that the failure to provide a conductor was negligence; that the company negligently failed to provide a conductor. Also, it alleges that there was only one brakeman. In regard to the cars that were standing on the main track beyond the station at Rockford, I stated to you that it was the duty, under the rules and regulations of the road, for the engineer to have brought his train to a stop at the station, provided the train was under control; or, if he was able to bring it to a stop, he should not pass the station without first bringing the train to a full stop. If you believe from the evidence that the engineer did not have control of the train, so that he was unable to stop it at the station, and that, necessarily, the train went by the station, then you have a right to take into question the situation, and determine whether it was negligence on the part of the company, through its agents at Rockford, in allowing these cars to remain there on the main track, and whether that negligence caused this injury, or whether that in connection with the other defects in the train, and the failure of the defendant to perform its duty in regard to the makeup altogether, was the cause of the injury. If the evidence should satisfy you that there was no necessity for this train to pass the station without coming to a stop there, and the engineer could have stopped, and through his negligence the cars dashed by into the cars beyond, then this complaint does not entitle the plaintiff to recover damages for the injury to him, if it was caused by the negligence of the engineer. That is not the ground of his complaint, and therefore he cannot recover damages in this case, if you find that that was the cause of the injury. I think, perhaps, I have made myself clear on that point. Primarily, taking into question the cars standing there on the track, it is a question whether the conductor [engineer] had control of the train, and could not have stopped it, or not. If he did, and went recklessly by, then the collision was due to his recklessness. If he could not help it, then it is for you to say whether, the cars being there, and the train dashing by into them, the defendant was negligent in this particular."

In giving this instruction the court inadvertently used the word "conductor," instead of "engineer." When its attention was called to this fact, the court said to the jury:

"I inadvertently used the word 'conductor,' when I meant 'engineer,' in referring to the handling of the train. Now, if there was a conductor on the train, or not, or if the other man was only a brakeman, without a conductor's authority or power, is one of the questions for you to pass upon, in this case. I do not mean to tell you whether there was a conductor on that train, or not. You must ascertain that fact."

Subsequently, when the jury again came into the court room for further instructions, one of the jurors asked the question, "Whether

or not we shall consider this man, Crowley, a coservant?" The court replied:

"That depends upon what the evidence shows to you the fact to be in regard to his situation there. If he had a situation to control the movements of the train, and control the action of the plaintiff and his coemployes about the road, and the operations of the trains, he would not be a coservant. But if he was a mere employe, like the rest of them, without authority to command,—that is, to control and to command the movements of the trains,—he would be a coservant."

Another juror then asked the court, "Would a conductor be a coservant?" The court replied, "Yes," and then said:

"The conductor on the same train in which the plaintiff was serving as a fireman— You ask if the conductor would be a coservant. I answered you wrong. A conductor of the same train on which the plaintiff was a fireman would be his vice principal, and not a coservant."

The contention of defendant is that the court, in one of its answers, left the question for the jury to determine whether Sissler was a conductor, and, if the jury should so find, then the court, in answer to the last question asked by a juror, conveyed the meaning to the jury that, as matter of law, Sissler would be a vice principal, for whose negligence the defendant would be responsible; that the remarks of the court were in conflict with other instructions; and that notwithstanding the regular charge of the court, previously and correctly given upon this subject, that the defendant was not responsible for Sissler's negligence, if any, the jury had the right to take the last expression of the court, and may have been guided and controlled by it. If it could be fairly and reasonably said that the remarks of the court in answer to the questions asked by the jurors were in direct conflict with his previous instructions, then the contention of defendant should be sustained, but an examination of the entire record convinces us that there is no such conflict. The remarks of the court, given upon the spur of the moment, were not elaborated upon, and made as perfectly clear as the principles which were enunciated in the charge. This is natural. The first reply was made to correct an inadvertence in the use of words, and at the same time, by so doing, to remove the impression, if any, that the jury might have had, from the inadvertent use of the word "conductor," that the court considered there was a conductor on the train. It may be conceded that the last answer did not contain the qualifications which should have been given upon the question as to whether or not a conductor on the same train on which the plaintiff was a fireman would be a vice principal of the defendant, within the rule announced by the supreme court in Railroad Co. v. Baugh, 149 U. S. 368, 13 Sup. Ct. 914, and by this court in Railroad Co. v. Smith, 59 Fed. 993. But the remarks of the court must be taken in connection with what was previously said by the court in reply to the question of another juror as to whether or not Crowley was a coservant.

And, in any event, it is evident that the jury, as sensible men, were not misled into the belief that Sissler, who had been tem-

porarily placed in charge of the train by Crowley, the conductor, was a vice principal of the defendant, for whose negligence, if any, the defendant would be responsible. With reference to the negligence of Sissler, whether called a conductor or brakeman, the jury were clearly, positively, and repeatedly charged and instructed that the defendant could not be held responsible for any careless or negligent act of Sissler. Even after the remarks complained of were made, the court, in answer to the question of a juror, "Shall we take into consideration the manner in which the employes on this train performed their duties,—whether or not they could have held the train under control?" answered "Yes," and said, "If you fix the responsibility on the engineer, or on Sissler, as I instructed you before, the plaintiff could not recover."

From all the instructions given by the court upon the question of Sissler's negligence, it becomes plain that the jury could not have been misled upon this subject by the remarks of the court objected to. As was said by Judge Brewer in Crew v. Railway Co., 20 Fed. 94:

"The question, in all such cases, is not whether some technical error may not have crept into the instructions, but whether, taking the case as a whole, it is apparent that the law was presented fairly and correctly to the jury."

6. It is argued that the court erred in charging the jury upon the question of defendant's negligence in leaving the cars on the main track at Rockford. The charge of the court was substantially the same as contained in the instruction given in reply to the question of a juror, heretofore copied, and need not be again repeated. The same objection is made to each.

We are of opinioin that the court did not err in giving this charge. There was testimony given in the case which called for an instruction upon this point. The fact that Crowley, who was a conductor having the charge, management, and control of the four gravel trains, including the one upon which the plaintiff was employed, gave directions to Hill, the engineer, and Sissler, the brakeman, to let their train come, and the road would be clear, in connection with the other facts and circumstances, justified the giving of the instruction, and the principles contained therein were proper for the jury to consider. The only criticism bearing upon the question of error in said instruction is that, standing alone, and read by itself, it would seem to limit the jury to the sole consideration of the question whether the engineer could have stopped the train at Rockford before passing the station, and that it does not, of itself, submit the question to the jury whether Sissler, the brakeman, could not have so controlled the train as to have enabled the engineer to stop it; and upon this point it is claimed that the jury might have found that the engineer could not have stopped the train, but that Sissler could. This criticism is disposed of by what we have already said in answering the argument of defendant to the other instructions given by the court in reply to questions asked by the jurors, which makes it equally clear that the jury could not have been misled by the failure of the court to have

mentioned Sissler's negligence again in this instruction, although it would have been proper so to do. The giving of an erroneous instruction, which was not prejudicial to the objecting party, is never deemed to be sufficient to justify a reversal of the case. Railway Co. v. Ives, 144 U. S. 409, 12 Sup. Ct. 679.

7. Upon the question of the burden of proof to show contributory negligence upon the part of the plaintiff, the court charged the jury as follows:

"A defense has been interposed here, in the answer, charging him with neglect and carelessness which contributed in producing the injury. This would be a complete bar, if it is shown; but the burden is upon the defendant to show that by positive evidence, sufficient to outweigh all the evidence to the contrary. Unless that is so shown, no carelessness or neglect of duty on the part of the plaintiff could be a bar to his recovery. If the defendant was negligent in the particulars specified, which neglect was the direct and proximate cause of the injury, any contributory negligence on the part of the fellow servants or coemployes of the plaintiff would not affect his right to recover damages."

If this charge is reasonably susceptible of the construction claimed by defendant,—that it devolved upon the defendant to affirmatively prove, by positive evidence, that plaintiff was guilty of contributory negligence, independent of the evidence that was given upon the part of plaintiff,—then the instruction is erroneous. The principle of law is well settled that if the proximate and sole cause of the injury is to be attributed to plaintiff's contributory negligence, or the negligence of his fellow servants or coemployes, this would be fatal to his right to recover; and it makes no difference how or when that fact appears during the trial,—whether by inference from the facts testified to upon the part of plaintiff, or by affirmative evidence introduced by the defendant. It is wholly immaterial who proves the fact, so long as it is proven. The use of the word "positive" in the instruction was unfortunate. The same mistake was made in another portion of the charge of the court, which required the plaintiff to bring "affirmative evidence, of a positive character," as to the negligence of the defendant, "sufficient to outweigh all evidence to the contrary as to those facts." Wherever the facts are of such a character that a jury might reasonably infer therefrom that the defendant was guilty of negligence, or that the plaintiff contributed by his own negligence to the accident which caused the injury, it becomes a question for the jury to decide. It has never been required that evidence of negligence should be direct and positive. In the very nature of the case, the plaintiff must labor under difficulties, in proving the fact of negligence; and, as the fact is always a relative one, it is susceptible of proof by circumstances bearing more or less directly upon the fact of negligence,—a kind of evidence which might not be satisfactory in other cases, open to clearer proof. This is in accord with the general principle of the law of evidence which holds that to be sufficient evidence which, in its nature, satisfies an unprejudiced mind. 1 Shear. & R. Neg. § 58, and authorities there cited.

But the charge of the court is not, under the facts, susceptible of the construction sought to be placed upon it by the defendant.

It is manifest, however unfortunate certain words or phrases in the charge are, that, when it is carefully considered, it simply means, and the jury must so have understood it, that the burden was not upon the plaintiff, in making out his case, to prove that he and his coemployes were entirely free from fault; that the question of contributory negligence was an affirmative defense; that the burden is upon the defendant to establish it by "evidence sufficient to outweigh all the evidence to the contrary;" and that, unless the contributory negligence "is so shown," it would not bar the right "to his recovery."

The question as to whether the burden of proof rests upon defendant or upon plaintiff, in actions of this character, upon the issue of contributory negligence, has been the subject of frequent discussion in all of the state courts; and there never has been, and probably never will be, any uniformity in the decisions in the state courts. Id. §§ 107, 108. It is sufficient to state that in a majority of the states, including the state of Washington (Railroad Co. v. O'Brien, 1 Wash. 599, 21 Pac. 32; Spurrier v. Railway Co., 3 Wash. 659, 29 Pac. 346), the burden of proving contributory negligence rests upon the defendant; and this is the rule almost universally followed in the United States circuit courts, and is approved by the decisions of the supreme court of the United States. Railroad Co. v. Gladmon, 15 Wall. 401; Railroad Co. v. Horst, 93 U. S. 291; Hough v. Railway Co., 100 U. S. 214; Railroad Co. v. Mares, 123 U. S. 721, 8 Sup. Ct. 321.

8. With reference to the refusal of the court to give the instructions asked for by defendant, it is only necessary to say that the court is never compelled or required, by the rules and practice of the national courts, to give instructions in the language used by counsel, simply because the instructions asked for contain correct principles of law that are applicable to the facts of the case. It is always within the discretion of the court to give its charge in its own language, and such is the usual and better practice. If the instructions so given correctly embody all the principles of law applicable to the case, then the appellate court will not consider the question whether the instructions asked for by counsel were, or were not, in all essential particulars, correct.

In Railroad Co. v. Horst, 93 U. S. 295, the court said:

"It is the settled law in this court that if the charge given by the court below covers the entire case, and submits it properly to the jury, such court may refuse to instruct further. It may use its own language, and present the case in its own way. If the results mentioned are reached, the mode and manner are immaterial. The court has then done all that it is bound to do, and may thus leave the case to the consideration of the jury. Neither party has the right to ask anything more."

Keeping in mind these general principles, it is clear to us that the court did not err in declining to give the various instructions asked for by defendant's counsel.

9. After a thorough examination of the evidence, the instructions of the court, the various assignments of error, the arguments of counsel, and the authorities cited by them, we are of opinion

that no error was committed by the court which was prejudicial to the defendant. The instructions given by the court were in the main in accordance with the general principles we have announced, and in all other respects were as favorable to the defendant as the law would warrant, and the facts justify.

The judgment of the circuit court is affirmed, with costs.

LITTAUR v. NARRAGANSETT PIER R. CO.

(Circuit Court, D. Rhode Island. May 28, 1894.)

No. 2,389.

RAILROAD COMPANIES—ACCIDENTS AT CROSSINGS—CONTRIBUTORY NEGLIGENCE.

One who drives a spirited horse across a railroad crossing without stopping to listen for a train, and is injured thereby, cannot recover for the injury, even though the view of the track was so obstructed by trees as to conceal the approaching train, and even though he checked his horse's speed, and listened for a train, since, if he had stopped his horse altogether, he might have heard the train.

Action by William Littaur against the Narragansett Pier Railroad Company. Plaintiff obtained a verdict. Defendant moves for a new trial.

R. Gardner and R. B. Comstock, for plaintiff.

B. W. Case and W. F. Angell, for defendant.

CARPENTER, District Judge. This is a motion for a new trial of an action at law, in which a verdict has been rendered for the plaintiff. The action is to recover damages for the negligence of the servants of the defendant, whereby the plaintiff was struck by an engine near Narragansett Pier, and injured. The testimony for the plaintiff is that he was driving a spirited horse on the road which crosses the railway; that at a point about five hundred feet from the crossing the road makes a turn nearly at right angles, and thence leads westward to the crossing; that the train approached from the north; that on the north side of the road are trees, not on the land of the defendant, which obstruct the view of a train approaching from the north,—the line of trees being, not continuous, but broken only by short intervals, and extending to a point within about 40 feet from the crossing; that he made the turn in the road, and drove westward, towards the track; that he checked the speed of his horse, and listened, after making the turn, and heard no sound of a train; that he looked for a train, as opportunity offered, through the intervals between the clumps of trees, and saw no train; that he looked towards the crossing, and that the flagman who is usually there when the trains are about to pass was absent; that the westward end of the lines of trees is so near the track that there would be danger in stopping the horse at that point to look up the track, from the fact that, at a point so near a train, it would be difficult to turn the horse without overturning the carriage; and that he drove forward, and came in collision with the

train at the crossing. On this statement, I think the verdict cannot be sustained. The duty of the plaintiff was to stop, to look, and to listen. If the view of the track was imperfect and interrupted, the duty to obtain all the information which could come through the ear remained equally peremptory. The horse was brought to a slow pace, so that there was very little sound from his feet or from the wagon; but, if he had been brought to a full stop, there would have been no disturbing noise, which the plaintiff could control, and I think he was bound to exhaust this source of information. The train was proceeding rapidly, and he was driving rapidly. They met at the crossing. It seems clear that they were so near to each other at any point of the 500 feet of road that there is a chance that he would have heard the train. Having neglected this method of informing himself, which he might safely have used, he has failed to use due diligence, and cannot, on this evidence, recover. The motion for a new trial will be granted.

WESTERN & A. R. CO. v. ROBERSON.

(Circuit Court of Appeals, Sixth Circuit. April 3, 1894.)

No. 44.

1. CITIZENSHIP OF CORPORATION—JURISDICTION.
   A railroad built by the state of Georgia, and extended under license (Act Tenn. 1837–38, c. 221) into the state of Tennessee, was leased by a Tennessee corporation under an act of the state of Georgia (Nov. 12, 1889), which provided that the lessee of the road should, from the time of the acceptance of the lease, become a corporation of the state of Georgia. *Held*, that the lessee was, for the purposes of jurisdiction, a citizen of Georgia, and could be sued as such for a tort committed upon that part of the leased road which was situated in the state of Tennessee.

2. JUDICIAL NOTICE—PUBLIC ACTS.
   A federal court will take judicial notice of the acts providing for the construction, operation, and leasing of a state railroad, as such acts are regarded as public acts.

3. NEGLIGENCE—DESIGNATION OF RAILROAD CROSSING.
   The designation of a railroad crossing by a sign in plain view of passing trains is sufficient under the statute (Code Tenn. Mill. & V. §§ 1298–1300) to make a railroad responsible for an accident at such crossing, where the engine driver failed to blow the whistle and ring the bell, although in the case at issue the sign was some 50 feet from the crossing, was not lettered on the side towards the railroad, and some of the letters had become obliterated.

4. CONTRIBUTORY NEGLIGENCE—MITIGATION OF DAMAGES.
   The contributory negligence of a person injured, upon failure of the engine driver to observe the statutory precautions, will not (Railroad Co. v. Burke, 6 Cold. 51) bar a recovery, but the jury must consider such contributory negligence in mitigation of damages.

5. TRIAL—ARGUMENTATIVE CHARGES.
   The fact that a charge misstated the argument of counsel, or was argumentative, is immaterial, when not misleading, and correct in the statement of the law.

6. MENTAL AND BODILY SUFFERING—QUESTION FOR JURY.
   The question whether deceased suffered mental or bodily pain, where death was instantaneous, is a question for the jury, where such pain is, under the statute (Code Tenn. Mill. & V. § 3134) an element for which damages can be recovered.

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

This was an action by Mary M. Roberson against the Western & Atlantic Railroad Company to recover damages for the death of her husband. There was a verdict and judgment for plaintiff, and defendant sued out this writ of error.

Chas. D. Porter and Clark & Brown, for plaintiff in error.

Andrews & Barton, for defendant in error.

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

LURTON, Circuit Judge. The defendant in error is the widow of Jesse C. Roberson, who was struck and killed by a passenger train of the Western & Atlantic Railroad Company. The deceased was at the time attempting to cross the track in a top buggy at a public road crossing in Hamilton county, Tenn., near Chicamauga station. The suit was brought by defendant in error, as widow of the deceased, to recover damages for the death of her husband, under a statute of the state of Tennessee, which gives a right of action to the widow or next of kin in such cases where the death was caused by "the wrongful act, omission or killing by another." Code (Mill. & V.), §§ 3130, 3132. There was a jury, and a verdict for plaintiff.

There were several counts in the declaration, but the case turned entirely upon the cause of action stated in the second count, and it is unnecessary to consider any other. That count was based upon the alleged failure of the railroad company to observe the statutory precaution prescribed by section 1298, Code Tenn. (Mill. & V.) subsecs. 1, 2, and sections 1299, 1300, same Code. The statutory provisions cited are as follows:

"1298. In order to prevent accidents upon railroads, the following precautions shall be observed: (1) The overseers of every public road, crossed by a railroad, shall place at each crossing a sign, marked: 'Look out for the cars when you hear the whistle or bell;' and the county court shall appropriate money to defray the expenses of said signs; and no engine driver shall be compelled to blow the whistle or ring the bell at any crossing unless it is so designated. (2) On approaching every crossing, so distinguished, the whistle or bell of the locomotive shall be sounded at the distance of one-fourth of a mile from the crossing, and at short intervals till the train has passed the crossing.

"1299. Every railroad company that fails to observe these precautions, or cause them to be observed by its agents and servants, shall be responsible for all damages to persons or property, occasioned by, or resulting from any accident or collision that may occur.

"1300. No railroad company that observes, or causes to be observed, these precautions, shall be responsible for any damages done to person or property on its road. The proof that it has observed said precautions shall be upon the company."

Before considering the case upon its merits, a preliminary question, involving the jurisdiction of the court, must be stated and decided. The declaration alleges that plaintiff is a citizen of Tennessee, and that the defendant company is a citizen of the state of Georgia, "being a body politic and corporate, chartered and cre-

ated by the laws of the state of Georgia." The defendant company filed a plea of not guilty, and went to trial upon that plea.

One of the grounds presented to the circuit court for a new trial was that, upon the evidence submitted, the court did not have jurisdiction. This motion was supported by the introduction of the act incorporating the Western & Atlantic Railroad Company, and the act incorporating the Nashville, Chattanooga & St. Louis Railway Company. The contention was and is that the latter company was a Tennessee corporation, operating the Western & Atlantic Railroad as lessee, and that the law of Georgia constituting the lessee of the Georgia road a corporation of the state of Georgia did not affect the citizenship of the Tennessee company when operating that part of the Georgia road lying within the state of Tennessee. The several acts of the legislatures of Georgia and Tennessee providing for the construction, operation, and leasing of the Georgia road are of the class now generally regarded as public acts. Of such acts the United States courts take judicial cognizance. They therefore need not be pleaded or put in evidence. Unity v. Burrage, 103 U. S. 455; Case v. Kelly, 133 U. S. 27, 10 Sup. Ct. 216; Gormley v. Bunyan, 138 U. S. 635, 11 Sup. Ct. 453. We think there was no error in permitting these statutes to be read and considered by the court upon the motion for a new trial.

Prior to 1850, the state of Georgia, as sole owner, constructed a line of railroad between Chattanooga, in the state of Tennessee, and Atlanta, in the state of Georgia. This road was known and designated in the legislation of that state as the "Western & Atlantic Railroad." To reach the Tennessee river it became necessary to construct a few miles of the road within the state of Tennessee. The Tennessee legislature, in 1838, authorized the extension by an act which provided "that the state of Georgia shall be allowed the right of way for the extension and construction of her said railroad, from the Georgia line to the Tennessee river, and that she shall be entitled to all privileges, rights and immunities (except the subscription on the part of Tennessee), and be subject to the same restrictions as far as they are applicable, as are granted, made and prescribed for the benefit, government and direction of the Hiwassee Railroad Company." Acts Tenn. 1837–38, c. 221. It is very clear that this was a mere license extended by Tennessee, authorizing the construction and operation of the Georgia road between the Tennessee state line and the Tennessee river at Chattanooga. The Tennessee act in no way undertook to create a Tennessee corporation, or to adopt a Georgia corporation. Goodlett v. Railroad Co., 122 U. S. 391, 7 Sup. Ct. 1254.

A former lease having expired, the Georgia legislature, by an act passed November 12, 1889, made provision for releasing the road, and its operation by the lessee. The only part of that act essential to present consideration is section 8, which is as follows:

"Sec. 8. Be it further enacted, that the governor shall appoint five citizens of this state, of high character, two of whom are experts in railroad management, who, after making oath that they are neither directly or personally connected or interested in the present or future lease of said road, ex-

cept as citizens of this state, shall proceed, sixty days before the expiration of the present lease, to examine the road and its houses, workshops, depots and rolling stock, and all other appurtenances of every character, and shall make out in writing, a schedule or inventory of the same, carefully describing and setting forth the true condition of the road and its rolling stock and appurtenances, and property of every character, with the value thereof, which shall be recorded in the office of the secretary of state, and filed in the executive office, and a copy furnished the lessees under this act; and as soon as the terms of the lease are agreed upon between the governor and lessee or lessees, and the name or names of the company, or corporation, or parties leasing the road and its appurtenances, has been entered on the minutes of the executive department as the persons or corporations proposing to take said lease, and the acceptance of the proposition by the governor shall also have been recorded, and a receipt given to the state by the lessees under this act for all the property turned over to them, the persons, associations or corporations accepted as lessees under this act, if not already a corporation created under the laws of Georgia, shall, from the time of such acceptance, and until after the final adjustment of all matters springing out of this lease contract, become a body politic and corporate under the laws of this state, under the name and style of the Western & Atlantic Railroad Company, which body corporate shall be operated only from the time of their taking possession of said road as lessees; and it shall have the power to sue and be sued, on all contracts made by said company, in any county through which the road runs, after the execution of said lease, or for any cause of action which may accrue to said company, and to which it may become liable. After said lease is executed, it shall have power to make all rules, by laws and regulations for the government of said company, and for the working and management of said road, which are necessary and usual with railroad companies in this state, and which are not in conflict with the constitution and laws of this state or the United States. The principal office and place of business of said company shall be in this state: provided, that nothing in this act shall be construed as an amendment of the charter of any corporation which may lease said road: provided further, that if said lessee is a corporation already incorporated under the laws of Georgia, it shall operate said railroad as the 'Western & Atlantic Railroad,' and such lessee may be sued on any contract or cause of action arising out of said lease for the operation of said road, in any county through which said road runs."

Under that act the Georgia road was leased for a long term to the Nashville, Chattanooga & St. Louis Railway Company, a Tennessee corporation, owning and operating a line of railway extending from the city of Nashville, in Tennessee, to the city of Chattanooga, in the same state. That company as lessee, took possession under the Georgia lease act, and under that act it, as lessee, became an incorporation of the state of Georgia under the name and style of the Western & Atlantic Railroad Company; that being the corporate name designated in the section of the Georgia act above set out.

The train which struck and killed the deceased was in charge of and operated by the agents and employes of the Georgia corporation. This was the allegation of the declaration, and there was evidence tending to establish the truth of the allegation. There was no reversible error in the action of the court in overruling the motion for a new trial based upon the insufficiency of the evidence to establish the actual operation of the road by the corporation made defendant to this suit. The question of the legal identity of the Tennessee corporation with the corporation sued presents a more serious issue. The Georgia act under which the state's road was leased, and by which the lessee was made

a corporation, has been construed by the highest court of that state. The Nashville & Chattanooga Railroad Company was sued in a Georgia state court for a tort alleged to have been committed by it while operating the Western & Atlantic Railroad as lessee. That corporation appeared, and pleaded the general issue. Upon the conclusion of the plaintiffs' evidence defendant's counsel moved for a nonsuit upon the ground that the suit should have been against the Western & Atlantic Railroad Company. The trial judge ruled that the Nashville & Chattanooga Railroad Company was in fact the landlord as lessee, and was therefore the real, substantial defendant; but that it had been sued under a wrong name, and that an amendment would be permitted as a case of misnomer. Upon appeal the Georgia supreme court reversed the ruling. 16 S. E. 347. The syllabus of the case was prepared by the court, and was as follows:

"(1) The act of November 12, 1889, providing for the lease of the Western & Atlantic Railroad, declares that 'the persons, associations, or corporations accepted as lessees under the act, if not already a corporation created under the laws of Georgia, shall, from the time of such acceptance, and until after the final adjustment of all matters springing out of this lease contract, become a body politic and corporate under the laws of this state, under the name and style of the Western & Atlantic Railroad Company, which body corporate shall be operated only from the time of their taking possession of said road as lessees; and it shall have the power to sue and be sued on all contracts made by said company in any county through which the road runs, after the execution of said lease, or for any cause of action which may accrue to said company, and to which it may become liable.' When, therefore, the Nashville, Chattanooga & St. Louis Railway Company became the lessee under this act, a new corporation under the laws of Georgia was created, under the name and style of the Western & Atlantic Railroad Company; and for any tort committed in the operation of its railroad that corporation, and not the Nashville, Chattanooga & St. Louis Railway Company, is liable. In such case section 3407 of the Code does not apply, and an action against the Nashville, Chattanooga & St. Louis Railway Company for the tort is not maintainable, though the declaration alleges that 'the defendant operates as lessee the Western & Atlantic Railroad;' the act requiring that the Western & Atlantic Railroad shall be sued.

"(2) Where an action for a tort was brought against the Nashville, Chattanooga & St. Louis Railway Company, and the proof showed that the injury complained of was by the Western & Atlantic Railroad Company, the court, on motion, should have granted a nonsuit.

"(3) Where one railroad corporation is sued for a tort, the declaration cannot be amended by substituting another as defendant under the guise of correcting a misnomer."

It is clear that the Georgia legislature did not intend or purpose to simply license the Nashville & Chattanooga Railroad Company to extend its operations to the state of Georgia.

The varying circumstances under which a railroad company chartered by one state may do business in another were thus classified by Mr. Justice Gray, in Gerling v. Railroad Co. (decided Feb. 5, 1894, and not yet officially reported) 14 Sup. Ct. 533:

"A railroad corporation created by the laws of one state may carry on business in another either by virtue of being created a corporation by the laws of the latter state also, as in Railroad Co. v. Vance, 96 U. S. 450; Memphis & C. R. Co. v. Alabama, 107 U. S. 581, 2 Sup. Ct. 432; Clark v. Barnard, 108 U. S. 436, 2 Sup. Ct. 878; Stone v. Trust Co., 116 U. S. 307, 6 Sup. Ct. 334,

388, 1191; and Graham v. Railroad Co., 118 U. S. 161, 6 Sup. Ct. 1009; or by virtue of a license, permission, or authority, granted by the laws of the latter state, to act in that state under its charter from the former state. Railroad Co. v. Harris, 12 Wall. 65; Railroad Co. v. Koontz, 104 U. S. 5; Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co., 118 U. S. 290, 6 Sup. Ct. 1094; Marye v. Railroad Co., 127 U. S. 117, 8 Sup. Ct. 1037. In the first alternative it cannot remove into the circuit court of the United States a suit brought against it in a court of the latter state by a citizen of that state, because it is a citizen of the same state with him. Memphis & C. R. Co. v. Alabama, above cited. In the second alternative, it can remove a suit, because it is a citizen of a different state from the plaintiff. Railroad Co. v. Koontz, above cited."

Do the facts of this case bring it within the first alternative put by Justice Gray? Has the Nashville & Chattanooga Railroad Company been created a corporation of the state of Georgia also? If so, then the decision in Memphis & C. R. Co. v. Alabama would seem to apply. We agree with the supreme court of Georgia as to the effect of the Georgia act of incorporation. That act, in our judgment, was intended, in case the lessee was not already a Georgia corporation, to create a new and distinct Georgia corporation. The language of the Georgia act is explicit:

"The persons, associations, or corporations accepted as lessees under this act, if not already a corporation created under the laws of Georgia, shall * * * become a body politic and corporate under the laws of this state, under the name and style of the Western & Atlantic Railroad Company. * * * And it shall have the power to sue and be sued, * * * in any county through which the road runs, after the execution of said lease. * * * It shall have power to make all rules and by-laws and regulations for the government of said company, and for the working and management of said road, which are necessary and usual with railroad companies in this state, and which are not in conflict with the constitution and laws of this state or the United States. The principal office and place of business of said company shall be in this state: provided, that nothing in this act shall be construed as an amendment of the charter of any corporation which may lease said road."

The last two provisions, by which the company created by the act is required to have its principal office in the state, and providing against the act being construed as a mere amendment to the charter of a company created by another state, seem to us conclusive as to the intent to create a new, distinct, and independent corporation. The case, on its facts, in this respect, is much like that of Railroad Co. v. Vance, 96 U. S. 450. The Indianapolis & St. Louis Railroad Company was a corporation of the state of Indiana. The St. Louis, Alton & Terre Haute Railroad Company was an Illinois corporation, owning a railway extending from Terre Haute, in the state of Indiana, across the state of Illinois, to the Mississippi river. The latter company leased its road to the Indiana company. There being some doubt as to the validity of the lease, the Illinois legislature passed an act confirming it. The second section of that confirmatory act provided that:

"The said lessees, their associates, successors and assigns, shall be a railroad corporation in this state, under the said style of 'The Indianapolis & St. Louis Railroad Company,' and shall possess the same or as large powers as are possessed by said lessor corporation, and such other powers as are usual to railroad corporations."

Mr. Justice Harlan, speaking for the court, as to the effect of the provision above cited, said:

"The Indiana & St. Louis Railroad Company, as lessee of the St. Louis, Alton & Terre Haute Railroad Company, was thus created, by apt words, a corporation in Illinois. The fact that it bears the same name as that given to the company incorporated by Indiana cannot change the fact that it is a distinct corporation, having a separate existence, derived from the legislation of another state."

Comment was made in that case, as in this, that the new corporation, as such, had no shareholders, and no formal organization. A corporation is, after all, nothing more nor less than a fiction of the law. We see no reason why the ordinary constituency of a corporation, such as shareholders, directors, and officers, may not be dispensed with by a legislature untrammeled by constitutional restrictions, by the substitution of another entity, fictitious though it be, as the necessary constituency of the new corporation. The shareholders in the old corporation become, for the purposes of the new creation, shareholders in the new. The directors and officers of the old entity become, for the formal purposes of the new creation and its operation, the directors and officers of the new organization. This identity of ultimate constituency does not necessarily operate to defeat the legislative purpose to make a new corporation. The old organization quoad hoc is the new corporation. Yet for the purposes of the new, as to its contracts, obligations, liabilities, and property, there is no such blending of the two as to make them, in contemplation of law, identical. Certainly, for purposes of jurisdiction, the Georgia corporation has not lost its Georgia citizenship when the obligation or liability involved concerns alone the exercise of its Georgia functions, and the operation of the road acquired, managed, and controlled by virtue alone of its existence as a Georgia corporation.

The question here involved is not, in all respects, like any case heretofore decided to which we have been referred. The plaintiff elected to sue the Georgia corporation. The wrong complained of was the wrong of the Georgia corporation. That Georgia corporation is operating, by virtue of a Georgia charter, a railroad owned by the state of Georgia, a part of which extends into Tennessee. The Tennessee part of the line was constructed, and its operation permitted, by a license from the state of Tennessee. That license authorized any company, corporation, or lessee to whom the state of Georgia might commit its road to operate and manage it by virtue of the commission from the state of Georgia. That the corporators of the Georgia corporation are citizens of Tennessee is wholly immaterial. The Georgia corporation is conclusively presumed to be a citizen of the state of its creation, and the fact that its shareholders or corporators are citizens of Tennessee does not affect the citizenship of the corporation.

The Western & Atlantic Railroad Company, the corporation sued, is exclusively a Georgia corporation, never having been made a Tennessee corporation. Neither has the state of Georgia made the Tennessee corporation, as such, a corporation of the state of Georgia.

It was competent for that state to have done so. If it had, we should have had a case like that of Railroad Co. v. Harris, 12 Wall. 65, and cases of that class. Neither is it a case of consolidation of a corporation of one state with a corporation of another state, under like authority from each state, as in Muller v. Dows, 94 U. S. 444; or Railway Co. v. Whitton, 13 Wall. 270, nor is the case like that of Memphis & C. R. Co. v. Alabama, 107 U. S. 581, 2 Sup. Ct. 432. In the last-named case there were not two companies, one existing by the laws of Alabama and another under the laws of Tennessee. Each state, acting separately, created the same corporation. In Alabama it existed only by the fact of its Alabama creation; in Tennessee only as a Tennessee corporation. Here we have two distinct creations. They have no connection or identity other than in the accidental fact that the constituent elements of each are the same. Whatever the responsibility of each for the other, the distinctness of each for jurisdictional purposes exists. The facts present a case more like that shown in Nashua & L. R. Corp. v. Boston & L. R. Corp., 136 U. S. 356, 10 Sup. Ct. 1004. The state of New Hampshire created a corporation to construct and operate a railroad from Nashua to the Massachusetts line, under the corporate name and style of the Nashua & Lowell Railroad Company. A portion of the same persons named as incorporators were subsequently incorporated in Massachusetts, under the same corporate name, to construct and operate a railroad from Lowell, Mass., to a point of junction with the line of the New Hampshire road. Subsequently each state passed an act uniting the two corporations, and constituting the shareholders in each stockholders in both. For many years the two roads were managed as one road, by one board of directors, and one set of officers. Common stock was issued for the whole line. A bill was filed in the United States circuit court for the district of Massachusetts by this railroad company, claiming to be a corporation of the state of New Hampshire. The defendants were citizens of the state of Massachusetts. The point was made that the complainant company was a citizen of Massachusetts by reason of the facts stated above. The opinion of the court was by Mr. Justice Field, who held:

"That the New Hampshire corporation, being a citizen of that state, was entitled to go into the circuit court of Massachusetts, and bring its bill there against a citizen of Massachusetts; and that its union or consolidation with another corporation of the same name, organized under the laws of Massachusetts, did not extinguish or modify its character as a citizen of New Hampshire, or give it any such additional citizenship in Massachusetts as to defeat its right to go into that court."

Our conclusion is that for the purposes of jurisdiction the defendant company is a citizen of Georgia, and that it is wholly immaterial that the corporators of that company are citizens of Tennessee, or that the lessee so incorporated by the state of Georgia, was a corporation of the state of Tennessee. As to the Georgia state road, and its operation, the lessee in possession was and is a citizen of Georgia, and may be sued as such.

We come now to consider the other assignments of error, prin-

cipally predicated upon the charge to the jury, or the refusal to charge as requested. The charge on the subject of the proper designation of a road crossing to make applicable the provisions of the Tennessee Code, heretofore set out, was excepted to—First, "because the court did not state to the jury the letters prescribed by the statute to distinguish the sign board, and assumed that the sign board was at the crossing, which was a disputed fact;" and, second, "because it imposes on defendant an obligation not imposed by law."

The fact that there was a sign board which contained the warning prescribed by statute was not a disputed fact. There was a controversy as to whether the sign board should be lettered on the side next the railroad; the contention of defendant being that, unless it was so lettered, the engineer was not bound to notice it. This was a question of law, to be decided by the court, who said to the jury that the object of the sign board was to warn the public; "that the board was talking, so to speak, to the people traveling that highway;" and that it was not addressed to the trainmen. He, then, in substance, said that, if such a board had been so placed at that crossing, and was there at the time of the accident, then it was the duty of the company to know that it was a road crossing, and that it was properly designated as required by law. That the board was in plain sight of the passing train was not a disputed fact. That it was possibly something near 50 feet away from the railway track is wholly unimportant. If it had been placed by the overseer so near to the crossing as to give one traveling the road notice that he was in the immediate vicinity of the crossing, and yet was in plain sight of passing trains, it was a substantial compliance with a law intended to protect the public, and to be, therefore, reasonably construed. No request for other or more specific instruction was made.

Looking to the undisputed facts of the case, the court might well have said to the jury that this crossing was one sufficiently designated under the statute. It was, therefore, not error for the court to assume in the charge that the board was sufficiently near to the crossing, and that the obliteration of some of the letters thereon had not destroyed the efficacy of the warning as a substantial compliance with the statute.

On the subject of negative and positive evidence the court charged the jury as follows:

"I don't think negative and positive testimony is exactly defined in the argument of the defendant's counsel as being something that is affirmed by one and denied by another; that that which merely assumes an affirmative character or a negative character is to be regarded as negative or positive testimony in the eyes of the law. Now, if some person were to swear that two of the jurors here on the trial of this case had gotten into a personal difficulty, that would be affirmative testimony; but then, suppose some one who was present at the time, and all the jury were called, and there was no such thing occurred, that would be negative. It would be a negative proposition to the other; still it would not be of a lower character of testimony than that of the party who stated that they did fight, because the other persons were present, and, if there was a fight, they would have seen it, and would have remembered it, and that no fight occurred.

"Take the clock again: If a man were to come in and affirm that he heard

the clock strike, and if another were to come in and affirm that at the same time he was there, and he was looking at the clock, noticing the fact that it was about to strike, and that it did not strike, why, then, that would not be negative testimony; that would be affirmative testimony. It would be a conflict between the two persons as to a fact; but the character of the testimony of the last witness would be just as strong, just as positive, just as affirmative, in other words, as the other; so that the affirming or denial of a thing which happened is not the boundary line which divides this character of testimony. Now, the case in hand: If a witness swears that the bell rang and the whistle was sounded, that is affirmative. If the other witnesses come in, and say they were there, and, if the whistle sounded, they did not hear it; if the bell rang, they did not hear it,—that is negative; and the testimony of the witness who swears he did hear it is better than the one who says he did not hear it,—that is, letting the testimony stop at that point. But then, suppose the witness goes further, and says he was there, he saw the danger, he was listening for the whistle, he was listening for the bell, he saw that all depended on whether these things were done, if the man escaped, and that the whistle did not sound or the bell ring, that man's testimony is not negative of the character of which I spoke, because he is there and his attention is directed to the thing to which he is swearing. He took notice of it, his attention was called to it at the time; and so far as his statement is concerned (so far as the quality or character is concerned), it is as strong as the other. It is simply a conflict. They were both there, were both looking, both listening; and one says it did ring, and the other says it did not."

The assignment of error on this part of the charge is: (1) "That it misstates the position of the counsel."

Precisely how far the appellant was affected by what the court said as to the position of counsel in argument does not appear. The court and the counsel evidently did not agree. If the court has correctly stated the law, appellant is not affected by reason of any misunderstanding as to just what position counsel had taken.

It is next objected that the charge is erroneous in statement of the distinction between the two classes of evidence; that it was argumentative and misleading. We think the charge, taken as a whole, a clear and sound exposition of the law. That it was argumentative is no objection. It was clearly not misleading.

The third error assigned is as to so much of the charge as instructed the jury that they might, in arriving at a verdict, allow damages for the mental and bodily suffering of the deceased. Under the Tennessee statute giving the right of action, the recovery is for the pecuniary loss sustained by those for whose use the action is given, and also for the mental and bodily suffering to the deceased. Code Tenn. (Mill. & V.) § 3134. The contention is that the jury should not, in this case, have been so instructed, because the death of deceased was instantaneous. If the proof did, as contended, show an instantaneous death, it would not follow that the deceased suffered no mental or bodily pain and agony. There is, ex necessatati, some interval between the blow and death, during which the mind may be conscious of impending death, and endure for an instant the agony of death. Whether there was or not such momentary suffering would be a question of fact, and for the jury. If there was, then, under the statute, that suffering, however short, is a matter for consideration and compensation. The evidence relied upon by counsel as showing what is called an "instantaneous death" does not support the assignment. There is

no satisfactory evidence as to how long the deceased survived his injury. The assignment, for this reason, must be overruled.

With regard to the effect of contributory negligence the court charged the jury, in substance, that under the common-law counts of the declaration any negligence of the deceased contributing to his injury would bar a recovery. He further charged, with regard to the duty of one about to cross a railroad track, that it was the duty of the intestate, "on approaching this railroad track, to stop and look and listen, to use and observe all proper care and caution to see whether a train was approaching or not, and, if it was coming, to await its passage." He added "that, in respect to the common-law count in the declaration, I think you have nothing to do, and so instruct you." The learned trial judge doubtless meant that under the evidence the deceased had not stopped and looked and listened before crossing, and that, therefore, his negligence in that respect would bar any recovery upon the common-law liability of the railroad company. This was followed by his charge upon the count declaring upon the statutory requirements of the state. On this subject he said:

"So, then, it comes down to this one question: Has there been a violation of the statutory requirements of the state controlling railroads in such cases as the one we have under consideration? The law of the state provides certain things that shall be done in such cases. If these are not done, why, then the plaintiff is entitled to recover without regard to the negligence of the intestate or person injured. Now, the federal courts are bound to follow the decisions of the supreme court of the state in construing the statutes of the state. The statutes controlling this branch of the case are those of the state of Tennessee, and this court is compelled to follow the decision of the supreme court in its construction of those statutes. It is not compelled to follow it on questions of evidence, and things of that sort, which may arise in the trial of the case. In settling those things the courts of the United States have their own rules on all questions of general commercial law and the like, and on questions of the general control and management of railroads, and they are only bound in so far as the construction of the state statutes goes to follow the decisions of the state supreme court. In that respect this case comes to you in a very narrow compass."

After a general charge upon the measure of damages, the court added:

"Then, again, as I have stated to you, and as it has been decided by the supreme court of this state, it was the duty of intestate to look out, when he approached that road, and to listen, and see whether the train was coming or not; and, if he failed to do that,—if you believe from the proof that he failed to do this,—then he was guilty of negligence, and you have a right to mitigate and reduce the amount of damages such a sum as you may think proper by reason of his negligence, and allow the plaintiff such an amount as you think she ought to recover by reason of the death of the intestate. If the intestate did not stop and look and listen,—if he failed to do this,—you will reduce the amount of damages such an amount as you think ought to be done on account of his negligence, and then return such a verdict as you think the whole case warrants. As I have stated, if you think the railroad has complied with the statutory requirements, and gave the signal as required, then there can be no recovery against it."

The paragraph last set out was excepted to on the following grounds: (1) "Because it leaves to the jury as a right in the jury to consider plaintiff's contributory negligence, and does not direct

the jury that it is the defendant's right and the jury's duty to consider such contributory negligence in mitigation of damages." (2) "Because it submits to the jury the fact of contributory negligence, while such fact was undisputed."

Under the Tennessee statute before cited, every railroad company that fails to observe the precautions prescribed therein, is made responsible "for all damages to person or property, occasioned by or resulting from any accident or collision that may occur." Code Tenn. § 1299. The uniform construction put upon this statute by the supreme court of Tennessee has been that the liability of the company, where the precautions were not observed, is an absolute statutory liability, and that the action is, therefore, not barred by the contributory negligence of the person injured, but that such contributory negligence should operate only to reduce and mitigate the damages recoverable. The earliest case reported under which the statute under consideration was construed was that of Railroad Co. v. Burke, 6 Cold. 51. As to the effect of the negligence of the plaintiff, the court said:

"The negligence of Burke, contributing to the accident, is not a bar to the action, and this by virtue of sections 1164, etc., of the Code. Generally, the negligence of the person injured by collision upon the track is not a bar to an action by him for damages, unless the railroad company show by proof that all the precautions prescribed by the Code were performed to prevent the accident." "Negligence of the person injured, which caused or contributed to cause the accident or collision, or without which the accident or collision would not have occurred, may be taken into consideration by the jury in determining the amount of damages proper to be given for the injury. Such construction the clauses of the Code will bear, and must be given."

That case has been repeatedly followed. We cite a few instances only: Railroad Co. v. Nowlin, 1 Lea, 523; Railroad Co. v. Rush, 15 Lea, 145; Railway Co. v. Foster, 88 Tenn. 671, 13 S. W. 694, and 14 S. W. 428.

In Railroad Co. v. Rush, cited above, the opinion was by Cooper, J., who thus states the result of the previous decisions of the court concerning the circumstances under which the statute is applicable:

"This court has held that the requirements of the statute are mandatory in all cases clearly falling within its provisions, if a compliance with the requirements be possible, although it may appear that their observance would not have prevented the accident. But in view of the stringent terms of the act, and the manifest object of the legislature, the court has not extended its provisions to every case which might be embraced in its general language. We have held that the provisions apply only to the injury of persons or property by actual collision on the roadway proper, and not to the injury of passengers caused by obstruction in the roadbed. Railroad Co. v. McKenna, 7 Lea, 313; Railroad Co. v. Reidmond, 11 Lea, 205; Holder v. Railroad Co., Id. 176. They have also been held not to apply to the servants and employes of the railroad company about its depot and yards. Railroad Co. v. Robertson, 9 Heisk. 276; Haley v. Railroad Co., 7 Baxt. 239. Nor to a stranger when the company is making up and switching trains within its yards. Cox v. Railroad Co., 2 Leg. Rep. 168. And in one of the earliest cases in which these sections of the Code were construed, the court announced as one of its conclusions: 'That sections 1166, 1167, and 1168 have reference and application, so far as they relate to action for damages, to the general public, rather than to the agents and servants employed in the running of trains;' and added: 'An action will not lie in behalf of an agent or servant of that kind, whose negligence or willful act caused, or contributed to cause, the accident or collision occasioning his in-

jury.' Railroad Co. v. Burke, 6 Cold. 45. This last clause, it seems to me, strikes the true note. The statute was intended for the benefit of the general public, not for the servants of the company, and clearly not for a servant whose negligence causes, or contributed to cause, the accident. The legislature surely never intended that a railroad company, by a mere noncompliance with certain precautionary forms, made obligatory as to strangers, whether their observance would have prevented the act or not, should become liable to an employe whose plain dereliction of duty caused the accident. In such a case, to use the language of Judge McFarland in Railroad Co. v. Robertson, ut supra, the liability of the company to its agent for injuries resulting from the misconduct or negligence of that agent, must be determined, not by statute, but by common-law principles."

The congress has in plain terms prescribed that "the laws of the several states, except where the constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply." Rev. St. § 721. This Tennessee statute applies to the operation of railroads within the state. "The statute is founded on a policy of double aspect,—one to guard and protect the safety of the general public, and the other to compensate the injured person,—and has its sanction in the police power of the government." Railroad Co. v. Burke, supra. Under the well-settled rule repeatedly announced by the supreme court of the United States, we do not feel that the question of the construction of this Tennessee statute as to the effect of the negligence of the deceased upon the plaintiff's right of action is an open one. In Leffingwell v. Warren, 2 Black, 599, the court said:

"The construction given to a statute of a state by the highest tribunal of such state is regarded as a part of the statute, and is as binding upon courts of the United States as the text."

To the same effect many cases could be cited. Bucher v. Railroad Co., 125 U. S. 582, 8 Sup. Ct. 974, is a review of the cases, and affords an instance where the court followed the decisions of a state court construing a statute, notwithstanding the fact that the state decisions did not meet the approval of that court. Adopting, therefore, the construction of the Tennessee statute announced by the Tennessee court, we see no error in the charge of the circuit court as to the effect of the negligence of the deceased upon the plaintiff's right of action. The only effect of his contributory negligence is in reduction of damages. That the court did not leave it to the option of the jury as to whether the damages should be reduced if deceased was guilty of negligence is, we think, clear, if all that he said on the subject be taken together. The direction "that, if the intestate did not stop and look and listen,—if he failed to do this,—you will reduce the amount of damages such an amount as you think ought to be done on account of his negligence, and then return such a verdict as you think the whole case warrants," is not subject to misconception or doubt. The case of Railroad Co. v. Nowlin, 1 Lea, is not in point. There the jury were told that they "can" or "may" take the negligence of the plaintiff into consideration. Here they were told "you will" do so. The latter was imperative, and not misleading. Under the facts of the case,

as presented by this record, we are not prepared to say that a much stronger charge as to the effect of contributory negligence would not have been appropriate. The defendant, however, made no request for stronger or more imperative language, and there is no affirmative error in what the court did say. Under such circumstances the court will not reverse. Express Co. v. Kountze, 8 Wall. 353.

The other assignments refer to paragraphs in the charge supposed to contain error. Looking to the charge as a whole, we think it was a sound exposition of the law, and the other assignments of error are overruled.

The judgment will be affirmed.

BYRNE v. KANSAS CITY, FT. S. & M. R. CO. et al.

(Circuit Court of Appeals, Sixth Circuit. April 3, 1894.)

No. 138.

1. NEGLIGENCE—SERVANT NOT UNDER CONTROL OF MASTER.
A railroad company is not responsible for negligence in the operation of an engine, when, at the time of the accident, the engine and the crew by which it was operated were rented to and under the control of another company.

2. SAME—TRAIN CROSSING HORSE-CAR LINE.
The requirement (Code Tenn. Mill. & V. § 1304) that the trains on one railway shall come to a full stop before crossing the line of another railway has no application to the crossing by a steam commercial railway of an ordinary horse-car line.

3. SAME—PEDESTRIAN ON TRACK.
A railroad company is not responsible for an accident (Code Tenn. Mill. & V. § 1298, subsec. 4) when the person injured appeared upon the road so short a time before he was struck that it was impossible to sound the alarm whistle, put down the brakes, and use any other means than those which were used to stop the train.

4. CONTRIBUTORY NEGLIGENCE—MITIGATION OF DAMAGES.
A right of action (Code Tenn. Mill. & V. §§ 1298–1300) founded on a failure to ring the bell of a locomotive at short intervals on leaving a city *held* not barred by the contributory negligence of the person injured, but same must be considered by the jury in mitigation of damages. Railroad Co. v. Acuff, 20 S. W. 348, 92 Tenn. 26, followed.

5. FEDERAL COURT—CONSTRUCTION OF STATE STATUTE.
A rule that contributory negligence shall not be a complete bar to a statutory action for negligence (Code Tenn. Mill. & V. §§ 1298–1300) is binding upon a federal court when such rule grows out of the language of the statute, and the construction of that language by the supreme court of the state.

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

This was a writ of error from the circuit court of the United States for the western district of Tennessee, sued out by the plaintiff below, Francis J. Byrne, administrator of George Nason, deceased. The action was brought for the wrongful death of the plaintiff's intestate against the Kansas City, Ft. Scott & Memphis Railroad

Company and the Kansas City & Memphis Railway & Bridge Company. 55 Fed. 44.

The amended declaration averred that plaintiff's intestate was run over and killed by a train of the defendant the Kansas City, Ft. Scott & Memphis Railroad Company, running on the track of the Kansas City & Memphis Railway & Bridge Company, at a place where it crosses Pennsylvania avenue, a street of the city of Memphis. That the death was caused by the negligence of the defendants in not keeping the crossing at Pennsylvania avenue in good repair, as the bridge company had agreed with the city of Memphis to do; in not keeping the bell of the engine constantly ringing while said engine was passing through the city; in not keeping a lookout ahead; in not sounding the alarm whistle; and in not putting down the brakes to stop the engine before Nason was struck,—all in violation of the laws of Tennessee. Further wrongful conduct was averred in that the engine did not come to a full stop before crossing the street railroad which was being operated on Pennsylvania avenue, in violation, as charged, of the statutes of the state.

The facts developed by the evidence were as follows: Pennsylvania avenue runs north and south. The bridge company owns a track of about 2½ miles, connecting the bridge with the railways which run into Memphis. The track runs east and west, and crosses Pennsylvania avenue at right angles. From the east side of Pennsylvania avenue it curves rather abruptly to the south, the curve being about 10 feet in 100 from a straight line. The bridge company owns no engines of its own, but it rented the one in question from the Kansas City, Ft. Scott & Memphis Railroad Company. The accident occurred upon Sunday, June 26, 1892, about 6 o'clock in the evening, in broad daylight. The engine was running west, on business of the bridge company, with its tender in front. It was a switch engine, and, as is generally the case in such engines, the tender slopes downward towards the back. Coal had been piled up on the tender so as to somewhat obstruct the view of the engineer. There was a flagman at the Pennsylvania crossing at the time of the accident. Nason, the deceased, was a colored man, 86 years of age. A few minutes before the accident he had crossed the track, and entered into conversation with the flagman and a boy about 12 years of age, who was sitting there with the flagman. In the course of the conversation he expressed a desire to die; said that he was not happy, and that if he did die he could not be in a worse place than he was then. The flagman's house was at the southeast corner of the crossing. Nason, who lived in a house at the northwest corner of the crossing, about 30 feet from the track, started towards his home. There was a double railway track on the crossing. The engine was backing down on the north track. The flagman saw the engine, and put out his red signal, and then discovered Nason walking towards the track, and called out to him. So also did the young boy who was with the flagman. As the locomotive ran onto Pennsylvania avenue, Nason was on the south track. Without halting he walked onto the north track immediately in front of the engine. Before stepping on the track, he turned his head to look either at the engine or at those who were shouting at him. He was run down, and thrown some 20 or 30 feet beyond the west line of Pennsylvania avenue. Two witnesses of the plaintiff swear that they were sitting within 30 or 40 feet of the crossing, and that the engine bell did not ring. The engineer and the fireman upon the engine, and the flagman and the boy who was at the crossing, all swear that the bell did ring. The engineer testified that the whistle had been blown about a block away from the Pennsylvania crossing. The engine did not stop before it crossed the street-car track. The engineer did not see the man until he was about to step upon the track, 10 feet away from the tender. He then reversed his engine, and did everything he could to stop, but was unable to prevent the accident. The trial judge first directed a verdict for the railway company on the ground that it was not responsible for the negligence of the engineer and fireman, because at the time of the accident they were rented with the engine to the bridge company. After full argument he also directed a verdict for the bridge company on the ground that, while the bridge company was negligent in certain respects, the accident was also due to the gross negligence of the deceased, which barred recovery.

Francis J. Byrne, in pro. per.

E. F. Adams and C. H. Trimble (Wallace Pratt, of counsel), for defendants in error.

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

TAFT, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

The first question for our consideration is whether the contract by which the Kansas City Company rented its engine to the bridge company relieves it of responsibility for negligence in the operation of the engine while in the service of the bridge company. It appears from the statement of Nettleton, who was both the superintendent of the bridge company and of the terminals of the Kansas City Railroad Company at Memphis, that the bridge company rented the engine from the railway company at $10 a day, and also paid the railway company the expense of the fuel and supplies used in the running of the engine, and the wages of the engineer and fireman, who were carried on the pay rolls of the railway company. The bridge is used by several different railway companies. The switch engine pushes all trains over it, and thus gives assistance to the regular engines of the railway companies on the heavy grades of the approaches. The engineer and fireman were subject to the orders of Nettleton as superintendent of the bridge company. As he expressed it, the bridge company rented the crew, along with the engine, from the railway company.

On this state of facts we are clearly of the opinion that the court was right in holding that the railway company was not responsible for the acts of the engineer and fireman in running the engine which killed Nason. They were, it is true, general servants of the railway company, but at the time of the accident they were engaged in the work of the bridge company, were subject to the orders of the bridge company's officers, and in what they did or failed to do were acting for the bridge company. The question is one of agency. The result is determined by the answer to the further questions, whose work was the servant doing? and under whose control was he doing it? The railway company had simply lent its general servants to become special or particular servants of the bridge company, had for the time parted with control over them, and was not responsible for their acts while in the service and under the control of their temporary master.

The latest authority in support of this conclusion is Donovan v. Construction Syndicate, a decision by the court of appeals of England, reported in 1 Q. B. [1893] 629. In that case the defendants contracted to lend to a firm, who were engaged in loading a ship at their wharf, a crane, with a man in charge of it. He received directions from the firm or their servants as to the working of the crane, and the defendants had no control in the matter. The plaintiff, who was a servant of the wharfingers, was struck by the crane, and injured, by reason of the negligence of the man in charge of

it, and sued the defendants on the ground that the negligence was the act of their servant. It was held that, though the man in charge of the crane remained the general servant of the defendants, yet, as they had parted with the power of controlling him in the work in which he was engaged, they were not liable for his negligence while so employed. Judgments were delivered in this case by Lord Esher, Master of the Rolls, and Lindley and Bowen, Lord Justices.

Lord Esher said:

"In this case the crane and the man to work it were lent by the defendants to Jones & Co. for a consideration, and to be used in the manner I have described. For some purposes, no doubt, the man was the servant of the defendants. Probably, if he had let the crane get out of order by his neglect, and, in consequence, any one was injured thereby, the defendants might be liable; but the accident in this case did not happen from that cause, but from the manner of working the crane. The man was bound to work the crane according to the orders, and under the entire and absolute control, of Jones & Co. That being so, whose servant was the man in charge of the crane as to the working of it? It is true that the defendants selected the man and paid his wages, and these are circumstances which, if nothing else intervened, would be strong to show that he was the servant of the defendants. So, indeed, he was as to a great many things; but as to the working of the crane he was no longer their servant, but bound to work under the orders of Jones & Co.; and, if they saw the man misconducting himself in working the crane, or disobeying their orders, they would have a right to discharge him from that employment. This conclusion hardly requires authority, but there is authority for it, without going back to an earlier date, in the case of Rourke v. Colliery Co., 2 C. P. Div. 205."

Lindley, Lord Justice, said:

"The key to the whole case is that Jones & Co. were loading the ship, and not the defendants. The crane was being used for Jones & Co.'s purposes, and not for those of the defendants, and the former must, for that particular job, be considered as Wand's [the man in charge of the crane] masters."

Lord Justice Bowen said:

"The law on the matter now before us seems to me to be perfectly clear. The question is not who procured the doing of the unlawful act, but depends on the doctrine of the liability of a master for the acts of his servant done in the course of his employment. We have only to consider in whose employment the man was at the time when the acts complained of were done in this sense: that by the employer is meant the persons who had a right at the moment to control the doing of the act. That was the test laid down by Crompton, J., nearly forty years ago, in Sadler v. Henlock, 4 El. & Bl. 570, in the form of the question, 'Did the defendants retain the power of controlling the work?' Here the defendants certainly parted with some control over the man, and the question arises whether they parted with the power of controlling the operation on which the man was engaged. There are two ways in which a contractor may employ his men and his machines. He may contract to do the work, and, the end being prescribed, the means of arriving at it may be left to him; or he may contract in a different manner, and, not doing the work himself, may place his servants and plant under the control of another,—that is, he may lend them,—and in that case he does not retain control over the work. * * * In the present case the defendants parted for a time with control over the work of the man in charge of the crane, and their responsibility for his acts ceased for a time."

In Rourke v. Colliery Co., 2 C. P. Div. 205, the defendants, the owners of the colliery, had begun to sink a pit or shaft, and had

erected and employed men to drive a steam engine near its mouth. After doing some work on the shaft, they entered into an agreement with one Whittle to carry on the work for them; Whittle to find all the labor necessary, and the defendants to provide and place at his disposal and under his control the necessary engine power, ropes, etc., with the engineer, who was paid by the defendants. The plaintiff, who was one of the men employed and paid by Whittle, while working at the bottom of the shaft, was injured by the negligence of the engineer. It was held by the court of appeals, consisting of Chief Justice Cockburn, Lord Justice Mellish, and Baggallay and Bramwell, Justices of Appeal, that, though the engineer was the general servant of the defendants, yet, because he was under the orders and control of Whittle at the time of the accident, he was at that time the servant of Whittle, and not of the defendants, who were, therefore, not liable for his negligence.

The same view was taken by the supreme court of Tennessee in the case of Powell v. Construction Co., 88 Tenn. 692, 13 S. W. 691, in which Judge Lurton delivered an elaborate opinion for the court. In that case the construction company undertook to build a railroad from Memphis to Jackson, and sublet to a subcontractor the laying of part of the track. The construction company agreed to furnish push cars, locomotive, flats, and engineer and fireman and one brakeman, to be used and controlled by the subcontractor in doing this work. The inference from the contract was that the engineer, fireman, and brakeman were to be paid by the construction company. The plaintiff was injured by reason of the negligence of the fireman furnished by the construction company in running the engine. It was held that in so doing the fireman, though paid by the construction company, was the servant of the subcontractor, and that the construction company could not be held liable for his negligence. Judge Lurton quotes with approval, from Chief Justice Cockburn's judgment in Rourke v. Colliery Co., this language:

"When one person lends his servant to another for a particular employment, the servant, for anything done in that particular employment, must be dealt with as the servant of the man to whom he is lent, although he remains the general servant of the person who lent him."

In Miller v. Railroad Co., 76 Iowa, 655, 39 N. W. 188, a contractor agreed to lay defendant's track at the rate of a certain number of miles per month, defendant "to furnish the motive power and cars, and operate the construction trains." One of the contractor's employes was killed by the too rapid running of the construction train. It was held that the defendant railway company was not liable, because, from the nature and terms of the contract, it did not have control of the construction trains, though the trainmen were retained on its pay roll, and received their wages from it.

In Railroad Co. v. Norwood, 62 Miss. 565, a different view of the law was taken. There a railroad company employed M., a contractor, to do certain work upon its road, and paid him therefor a stipulated price, and furnished him a construction train, and engineer to run the same. Subject to certain regulations as to speed,

the control, management, and direction of the construction train was given wholly to the contractor. The engineer was selected by the company, and it alone had the right to discharge him, though bound to do so upon the complaint of M., and to supply his place. The company paid the engineer's wages, and charged the same to M., and deducted the amount thereof from the sum due him for his work. The railroad company was held liable to the owner of a mule killed by the negligent running of the construction train. The conclusion of the court was made to rest on what are known as the Carriage Cases,—Laugher v. Pointer, 5 Barn. & C. 547, and Quarman v. Burnett, 6 Mees. & W. 499. The supreme court of Texas, in Burton v. Railroad Co., 61 Tex. 526, reached the same conclusion on the same authorities. These Carriage Cases were clearly distinguished from the case at bar and like cases by Lord Justice Bowen in Donovan v. Construction Syndicate, ubi supra, in the following language:

"The principal part of the argument for the plaintiff was founded on what may be called the Carriage Cases,—Laugher v. Pointer, and Quarman v. Burnett,—but they really have nothing to do with the point presented in this appeal. If a man lets out a carriage on hire to another, he in no sense places the coachman under the control of the hirer, except that the latter may indicate the destination to which he wishes to be driven. The coachman does not become the servant of the person he is driving, and, if the coachman acts wrongfully, the hirer can only complain to the owner of the carriage. If the hirer actively interferes with the driving, and an injury occurs to any one, the hirer may be liable, not as the master, but as the procurer and cause of the wrongful act complained of. In the present case the defendants parted for a time with control over the work of the man in charge of the crane and their responsibility for his acts ceased for the time."

This explanation of the Carriage Cases is also clearly stated by Mr. Justice Field in Little v. Hackett, 116 U. S. 366, 372, 380, 6 Sup. Ct. 391. It is manifest, therefore, that they have no application whenever it appears that the master has parted to another for a time with control over his servant, to be used in the work of that other.

We think that the weight of reason and authority is in favor of the ruling of the learned judge below, and the judgment for the Kansas City, Ft. Scott & Memphis Railroad Company is affirmed.

The second question is whether the bridge company was obliged to stop its engine before crossing the street-railway track upon Pennsylvania avenue, under section 1304 of the Code of Tennessee. That section provides that every engine or train shall be brought to a full stop before crossing a railroad which intersects the road upon which it runs. If a stop was required by the statute in this case, it might be argued that the deceased had the right to rely on its doing so; and therefore that he was not negligent in crossing the track without looking for a train or locomotive, or, at least, that the question was one for the jury. The court below was of the opinion that section 1304 did require the engine to stop before crossing a street railway. We are unable to concur in this view. The evidence is that this was a street railway, from which we infer, in the absence of evidence to the contrary, that it was a horse rail-

way. It has been decided by the supreme court of Tennessee in Katzenberger v. Lawo, 90 Tenn. 235, 16 S. W. 611, that:

"A dummy line, over which trains are drawn by a small steam engine for transportation of passengers only, whether operated within or without the limits of a municipality, is a railroad, within the meaning of the statutes prescribing certain precautions for prevention of accidents on railroads."

And it was held that it did not affect the application of those statutes that the dummy was running longitudinally upon the streets of the city, for the very cogent reason that under such circumstances the danger of accidents is obviously increased. The decision just cited was based upon that in the case of Railway Co. v. Doyle, 88 Tenn. 747, 13 S. W. 936, in which it was held that a dummy railroad, constructed by authority upon a public road or street, and operated for the transportation of passengers only, by means of a steam engine and coaches, constituted an additional burden upon the ultimate fee in the road or street, for which the owner of that fee was entitled to compensation as for the taking of his property for a public use. In the latter case the supreme court of the state expressly distinguish between a dummy railroad operated by steam and an ordinary street railroad, the motive power of which is horses, and classify the dummy railroad with commercial railways, and differentiate it from an ordinary horse-car line. It follows, therefore, that the statute of Tennessee, which requires that the trains on one railway shall come to a full stop before crossing the line of another railway, has no application to the crossing by a steam commercial railway of an ordinary horse-car line.

The third question in the case is whether there was such contributory negligence on the part of the deceased as to bar his recovery in this action. We fully concur with the learned trial judge in the view that there was conclusive evidence of the grossest negligence on Nason's part, by reason of which he stepped to his death. Indeed, there are some circumstances tending to show that his death was voluntary, but they are not of that conclusive character which would justify a court in predicating a peremptory charge thereon. Were this a suit for common-law negligence alone, there is no doubt that the action of the court in taking this case from the jury and directing a verdict for the bridge company would have to be affirmed. But the difficulty in the case arises from certain statutory requirements affecting the operation of railways in Tennessee, the construction of which, by the supreme court of that state, gives them a peculiar effect in actions for damages for personal injury. Those statutes are contained in section 1298 et seq. of Mill. & V. Code.

Section 1298: In order to prevent accidents upon railroads, the following precautions shall be observed:

1st. The overseers of every public road, crossed by a railroad, shall place at each crossing a sign, marked: "Look out for the cars when you hear the whistle or bell," and the county court shall appropriate money to defray the expenses of said signs; and no engine driver shall be compelled to blow the whistle or ring the bell at any crossing, unless it is so designated.

2nd. On approaching every crossing so distinguished the whistle or bell of

the locomotive shall be sounded at the distance of one-fourth of a mile from the crossing, and at short intervals, till the train has passed the crossing.

3rd. On approaching a city or town, the bell or whistle shall be sounded when the train is at the distance of one mile, and at short intervals till it reaches its depot or station; and on leaving a town or city, the bell or whistle shall be sounded when the train starts and at intervals till it has left the corporate limits.

4th. Every railroad company shall keep the engineer, fireman or some other person upon the locomotive always upon the lookout ahead; and when any person, animal or other obstruction appears upon the road, the alarm-whistle shall be sounded, the brakes put down and every possible means employed to stop the train and prevent an accident.

Section 1299: Every railroad company that fails to observe these precautions, or cause them to be observed by its agents and servants, shall be responsible for all damages to persons or property, occasioned by or resulting from any accident or collision that may occur.

Section 1300: No railroad company that observes or causes to be observed these precautions, shall be responsible for any damages done to persons or property on its road. The proof that it has observed said precautions shall be upon the company.

The learned judge held that the fourth subsection of section 1298, above quoted, did not apply to this case, because Nason appeared upon the road so short a time before he was struck that it was impossible to sound the alarm whistle, put down the brakes, and use any other means than were used to stop the train. We concur in this view. It is quite true that there was evidence to show that the engineer and the fireman were prevented from having a full lookout ahead by reason of the coal upon the tender, but it also appears that the engineer saw Nason before he stepped upon the track, or within striking distance of it. Until Nason did so, subsection 4 did not apply. When he did so, it was impossible for the engineer to do anything other than to reverse his engine and attempt to stop it. If the engineer had been on the lookout ahead as he came on to the crossing, without any obstruction by any of the coal in the tender, he would have seen nothing except Nason walking towards the track. In Railway Co. v. Howard, 90 Tenn. 144–149, 19 S. W. 116, it was held that the engineer of a railroad was not guilty of violating the statute if he failed to take steps to stop his train whenever a wagon was seen approaching its track. It was held that it was only when the obstruction appeared on the track, or within striking distance of it, that the statute imposed the requirement of putting on the brakes, reversing the engine, etc. In the case of Railroad Co. v. Reidmond, 11 Lea, 205, it was held that to constitute an obstruction within the meaning of this statute, prescribing the duties of the railroad company when a person, animal, or other obstruction appears upon the road, the animal must be in a position to be struck or directly injured by the engine while moving on the rails, and that the statute does not apply when the animal or person appears on some other part of the company's right of way, but that the duty and liability of the company in such a case are regulated by the principles of the common law.

Under the third subsection, the bearing of which upon this case does not seem to have engaged the attention of the learned trial

judge, there is much more difficulty in supporting the peremptory charge for the defendant. This engine was leaving the city of Memphis. Subsection 3 requires that when a train is leaving a city the bell or whistle shall be sounded when the train starts, and at intervals until it has left the corporate limits. By reference to the first paragraph of the subsection, "at intervals" has been construed by the supreme court of the state to mean "short intervals." Railroad Co. v. Gardner, 1 Lea, 688–690. Now, there was positive evidence from three witnesses, who were near enough to hear the bell if it did ring, that it did not ring as the crossing was approached. The preponderance of the evidence was that the bell did ring all the time. But there was a conflict of evidence. There was evidence, therefore, tending to show that the precautions enjoined upon railroad companies in subsection 3 of the statute were not observed, and the question which remains to be considered is whether a right of action founded on such failure to observe precautions is barred by the contributory negligence of the injured person. If the decisions of the supreme court of Tennessee are controlling in this forum upon this point, then there can be no doubt that contributory negligence is not a bar to the action under section 1299 for failure to comply with any of the subsections of section 1298, and that the court below erred in taking the case from the jury. The last expression of the supreme court of Tennessee is to be found in the case of Railroad Co. v. Acuff (decided in 1893) 92 Tenn. 26, 20 S. W. 348. That was a suit against the railroad company for the failure to observe the fourth subsection of 1298. The deceased, for whose killing the plaintiff brought the action, was a deaf and dumb man, who was run down by a construction train. The court below was requested to charge the jury as follows:

"If the jury shall find that the deceased was deaf and dumb, and shall further find that on the morning of the killing he was warned of unusual danger from walking the track, by reason of the irregular running of a construction train, or for any other cause, and advised to take the dirt road, and still deceased, regardless of the warning, chose to walk on the railroad track, knowing that he could hear no signal, this would be such negligence as would bar recovery, and you should so find."

The court refused to give this instruction because counsel asked that it be applied to both counts of the declaration. Said Judge Caldwell, speaking for the supreme court:

"The reason given sustains the action of the court. The declaration contained two counts,—one for negligence at common law, and the other for failure to observe statutory precautions for prevention of accidents when obstructions appear upon the track. Contributory negligence might have defeated the common-law action, but not that based upon the statute. As to the latter, it could be considered only in mitigation of damages."

The same rule has been laid down in a great number of cases, where the actions were founded on a failure to observe the statutory precautions in cases described in subsections 2, 3, and 4 of section 1298. Railroad Co. v. Wilson, 90 Tenn. 271, 16 S. W. 613; Railway Co. v. Howard, 90 Tenn. 144, 19 S. W. 116; Patton v. Railway Co., 89 Tenn. 370, 15 S. W. 919; Railroad Co. v. Foster, 88 Tenn.

672, 13 S. W. 694, and 14 S. W. 428; Railroad Co. v. Smith, 9 Lea, 474; Railroad Co. v. Scales, 2 Lea, 688; Railroad Co. v. Gardner, 1 Lea, 691; Railroad Co. v. Nowlin, Id. 523; Railroad Co. v. Walker, 11 Heisk. 383; Hill v. Railroad Co., 9 Heisk. 823; Railroad Co. v. Smith, 6 Heisk. 174; Railroad Co. v. Conner, 2 Baxt. 382; Railroad Co. v. Burke, 6 Cold. 45.

The last-named case was decided in 1869, and by an unbroken line of authorities the rule as above stated has been enforced from that time down to the latest utterance of the court in 1893. The case of Railway Co. v. Howard, supra, was quite like the one at bar. There the deceased was driving a wagon across the track at a road crossing within the corporate limits of the town of Paris. The proof showed that all the statutory precautions were observed, and every possible means employed, by the company to prevent the accident, with a single exception, to wit, that it did not appear that the bell or whistle was sounded at short intervals continuously throughout the last mile before reaching the depot. The deceased was said to have been guilty of gross contributory negligence in failing to look and listen for approaching trains before driving upon the track; but the railway company was nevertheless held liable in damages for killing the deceased, the jury being required to consider deceased's contributory negligence in mitigation of damages.

The question whether we are bound by the decision of the supreme court of Tennessee as to the effect of contributory negligence in statutory actions depends on the basis given by that court for its conclusion. If the statute is held to be merely declaratory of the common law both in its requirements and in the liability imposed for failure to observe it, and the plea of contributory negligence is allowed only in mitigation of damages, because, in the view of the supreme court of Tennessee, that is the only effect it could have in an action for common-law negligence, we conceive that the effect of contributory negligence in such a case would be a question of general common law, with respect to which we might exercise an independent judgment. But if the rule of the state supreme court grows out of the peculiar liability imposed by the statute as distinguished from that imposed for negligence at common law, then it is the legitimate effect of a construction of a state statute by the highest tribunal of the state, and we are, of course, bound by it. That the rule as to contributory negligence in statutory actions is not the result of an assimilation of common-law principles to statutory negligence is most clearly brought out in Railroad Co. v. Acuff, 92 Tenn. 26, 20 S. W. 348, above cited. There it will be seen that the court held that a certain state of facts might constitute gross negligence, and a complete bar to the action for common-law negligence, but that it was not such a bar to the statutory action. Now, it is true that it has several times been decided by the supreme court of Tennessee that the precautions enjoined by the statute upon railway companies are only such precautions as the rules of common-law negligence would require them to observe. Horne v. Railroad Co., 1 Cold. 72–76; Railroad Co. v. Pratt, 85 Tenn. 9–14, 1 S. W.

618. But it is apparent that, while the precautions to be taken are those which the common law would enjoin, the liabilities incurred for not taking them are quite different. Thus it has been held by the supreme court of the state that, if an accident occurs, a liability to the injured person is imposed upon the railway company for failure to comply with the statutory precautions, even if such failure did not cause the accident. Railroad Co. v. Walker, 11 Heisk. 383; Railroad Co. v. Burke, 6 Cold. 45. In the last case the sections of the statute we have been considering received a full construction by the supreme court of the state, which construction has never since been departed from. The court said:

"The railroad company is responsible for the damages occasioned by or resulting from the accident or collision, unless it shows that the precautions prescribed by these sections were performed, and although it may appear that the accident or collision would have occurred had the precaution been performed. Cases of hardship and absurdity may occur upon such construction of the clauses of the Code, but the language is explicit and certain, and the construction is inevitable. These sections are not invalid for want of constitutional or sovereign power in the legislature to enact the law expressed by them. The statute is founded on a policy of double aspect,—one to guard and protect the safety of the general public, and the other to compensate the injured person,—which has sanction in what is called the police power of the government. Corporate bodies are subject, as natural persons, to general laws enacted to protect and promote the quiet, comfort, health, and safety of the people, unless exempt by reason of plain implication from the nature of the privileges or franchises granted by their charter. In the absence of such exemptions, railroad corporations are subject, as would be natural persons in like occupation, to laws prescribing extraordinary vigilance, skill, exertions, and other precautions to be observed by their servants or agents in the running of trains, for the purpose of preventing accidents or collisions, and subjecting their companies to damages occasioned by or resulting from any accident or collision, unless they show that the prescribed precautions were performed. * * * Generally the negligence of a person injured by collision upon the track is not a bar to an action by him for damages, unless the railroad company show by proof that all the precautions prescribed by the Code were performed to prevent the accident. A person injured by a collision or accident caused by his own willful act cannot, by virtue of the sections 1166, 1167 [now 1298, 1299], etc., maintain an action for damages done him, occasioned by or resulting from the collision or accident. * * * Negligence of the person injured, which caused or contributed to cause the accident or collision, or without which the accident or collision would not have occurred, may be taken into consideration by the jury in determining the amount of damages proper to be given for the injury. Such construction the clause of the Code will bear, and must be given."

In Railroad Co. v. Gardner, 1 Lea, 688, referring to the subsections of 1298 and to 1299 above quoted, Judge Freeman says: "It was intended to enforce the strict performance of these duties by fixing arbitrarily upon the company a liability in case of their neglect."

It is sufficiently apparent from the statute and its construction by the court, whose construction of it is authoritative, that the statute is penal in character, and that the ordinary rules which obtain in common-law negligence cases have no application to the defenses which may be set up to actions brought in accordance with its provisions. The cardinal principle in negligence cases at common law is that no recovery can be had unless the negligence complained of causes the injury. As we have seen, to justify a recovery under the

statute there need be no causal relation whatever between the failure of the company to take the precautions required and the injury. All that is required is that the injury be caused by a collision or accident happening at the time when the precautions should have been, but were not, observed. In this construction of the statute it may be a little difficult to understand how the supreme court of Tennessee could, by reason of the contributory negligence of the sufferer, logically mitigate the damages to be recovered by him when the statute in terms gives to the person injured all the damages suffered by him. But the supreme court of Tennessee have thus mitigated the severity of the statute by construction, and it is not for us to question the power or propriety of doing so. The construction has prevailed for 25 years without disturbance by the legislature, and is a part of the law of the state as much as if expressly incorporated in the statutes.

That federal courts will always follow the construction given by the state supreme courts to the statutes of their respective states is too well settled to need discussion. Burgess v. Seligman, 107 U. S. 20, 2 Sup. Ct. 10; Bucher v. Railroad Co., 125 U. S. 555, 8 Sup. Ct. 974. The last case is a much stronger one than the one at bar. There the question was whether a passenger upon a railroad could be prevented from recovering damages for an injury occasioned by the negligence of the company by reason of the fact that when injured he was traveling in violation of the Lord's day act of Massachusetts. Under a similar statute passed by the state of Maryland, the supreme court of the United States, in Philadelphia, W. & B. R. Co. v. Philadelphia, etc., Towboat Co., 23 How. 209, had decided that it was no defense, in a suit brought by the owners of a vessel against a railway company for an injury caused by collision with piles negligently left by the railway company concealed in navigable waters, that the injury occurred when the vessel was violating the Sunday law of the state of Maryland. Nevertheless, in view of the fact that by repeated decisions, and for a number of years, the supreme judicial court of Massachusetts had held that one receiving an injury while engaged in violation of the Lord's day act could maintain no action for damages therefor, the supreme court of the United States held that in administering the common law of Massachusetts with reference to the effect of the Lord's day act it would follow those decisions, and reach a result contrary to its own opinion as expressed in the previous Maryland case. It is to be observed that the main question at issue in the Bucher Case was not that of the construction of the Lord's day act of Massachusetts, for that needed no construction. It merely imposed a penalty for traveling on Sunday. The question was one of the common law, namely, what effect should it have upon the right of one injured by the tort of another that the injured person at the time of the injury was committing a misdemeanor? If, on such a question, decisions of the state courts become rules of decision for the federal courts, then clearly 25 years of repeated decisions by the supreme court of Tennessee as to the effect of the defense of contributory negligence to statutory ac-

tions, based on the language of the statute giving the right of action, must furnish the sole guide to federal courts in hearing and deciding such causes. See Railroad Co. v. Roberson (decided by this court at this same session) 61 Fed. 592.

It is quite true that the use of contributory negligence to mitigate the damages recoverable under these statutes was probably adopted by analogy to the somewhat peculiar rule of the Tennessee courts in cases of common-law negligence. In Railroad Co. v. Fleming, 14 Lea, 128, Judge Cooper explains the position of the Tennessee courts on contributory negligence as follows:

"The intrinsic difficulty of the subject on contributory negligence has led to three distinct lines of decisions. In England and a majority of the states of the Union the negligence of the plaintiff which contributes to the injury is held to be an absolute bar to the action. In the states of Illinois and Georgia the doctrine of comparative negligence has been adopted; that is, if, on comparing the negligence of the plaintiff with that of the defendant, the former is found to be slight and the latter gross, the plaintiff may recover. In this state we hold that, although the injured party may contribute to the injury by his own carelessness or wrongful conduct, yet, if the act or negligence of the party inflicting the injury was the proximate cause of the injury, the latter will be liable in damages, the negligence or wrongful conduct of the party injured being taken into consideration, by way of mitigation, in estimating the damages. In other words, if defendant was guilty of a wrong by which plaintiff is injured, and plaintiff was also in some degree negligent, or contributed to the injury, it should go in mitigation of damages, but cannot justify or excuse the wrong. Railroad Co. v. Fain, 12 Lea, 35. At the same time we hold that if a party, by his own gross negligence, bring an injury upon himself, or proximately contribute to such injury, he cannot recover; neither can he recover in cases of mutual negligence."

But certainly this principle with reference to contributory negligence which prevails in the courts of Tennessee has not been applied to the statutes which we are discussing as it would be applied to cases of common-law negligence, because, if so, then, under the distinction referred to by Judge Cooper in Fleming's Case, the gross contributory negligence of the plaintiff, if the proximate cause of the injury, would entirely defeat the action under the statute. This it has been held not to do, because of the imperative language of the statute. We are thus brought back to the proposition that the rule of law in Tennessee which prevents the defense of contributory negligence from being a complete bar to the action under the statute grows out of the language of the statute itself, and the construction of that language by the supreme court of Tennessee. Therefore it follows that the duty of the trial judge in the court below was to follow the decisions of the state court with reference to the defenses under this statute, and that the gross negligence of Nason was not a complete bar to the action, but should have been considered by the jury in mitigation of damages.

The supreme court of Tennessee have been very stringent in requiring that trial judges should instruct the jury, in cases under this statute, that they must reduce damages for contributory negligence. Railroad Co. v. Nowlin, 1 Lea, 523. In this case, should the same facts appear, the court should tell the jury that on the undisputed facts the deceased was guilty of gross contributory negli-

gence, and that, if they should find the company had sustained the burden of showing that the bell was ringing as the engine approached and made the crossing, plaintiff could not recover, however negligent, in other respects, the bridge company might have been. The court should also say to the jury that they must, if they find that the bell was not rung, reduce the damages to be awarded the plaintiff by reason of his intestate's gross negligence, and that, if the jury should see fit, they may carry the reduction to the extent of making the damages merely nominal. In several cases, the supreme court of Tennessee have sustained verdicts in suits under this statute, where contributory negligence was shown, in sums which were little more than nominal. Of course, if Nason's death was the result of his own willful act, which some of the evidence tended to show, no recovery could be had, under the case of Railroad Co. v. Burke, 6 Cold. 45, already cited, and that question should also be left to the jury.

For the reasons given, the judgment of the court below is reversed as to the bridge company, and a new trial ordered against that defendant.

As already stated, the judgment in favor of the Kansas City, Ft. Scott & Memphis Railroad Company is affirmed.

NORTON v. ATCHISON, T. & S. F. R. CO.

(Circuit Court, S. D. California. May 7, 1894.)

No. 570.

SERVICE OF PROCESS—FOREIGN RAILROAD COMPANIES.

A foreign railroad company which runs its trains over the tracks of other companies, forming with it a "system" or "route" into California, and there solicits and obtains freight and passenger business through the general manager of one of the subordinate companies and his assistants, may be legally served by service upon him, as the "managing and business agent" in the state (Code Civ. Proc. Cal. § 411) of such foreign company, although it has never directly designated him as its agent. Stout v. Railroad Co., 8 Fed. 794, distinguished.

This was an action brought in the superior court of San Diego county, Cal., by C. V. Norton, against the Atchison, Topeka & Santa Fe Railroad Company, to recover the value of certain horses killed in course of transportation. Defendant removed the case to this court, and afterwards moved to quash the service of summons.

Works & Works, for plaintiff.

W. J. Hunsaker, for defendant.

ROSS, District Judge. This is a motion by the defendant, appearing specially for the purpose, to quash the service of summons. Defendant is a railroad corporation organized and existing under and by virtue of the laws of the state of Kansas. The plaintiff, a citizen of the state of California, and resident of San Diego county, of that state, brought the action in the superior court of that county to recover the value of certain horses alleged to have been delivered by

plaintiff to the defendant at Hiawatha, in the state of Kansas, to be transported by defendant to Escondido, in San Diego county, Cal., and which, it is alleged, were killed in transit by reason of negligence on the part of the defendant. The record shows that the summons issued in the action was first served on "K. H. Wade, general manager of the Atchison, Topeka & Santa Fe R. R. Co., defendant named therein." The defendant having failed to appear in the action, its default was entered, and a judgment taken against it. Subsequently, on defendant's motion, and upon evidence pro and con, the superior court set aside the judgment and default, and quashed the service of summons; and on appeal by the plaintiff to the supreme court of the state that action was affirmed. 97 Cal. 389, 30 Pac. 585, and 32 Pac. 452. Thereafter, the summons was served on K. H. Wade, as "managing and business agent of said defendant," a motion to quash which service, made on behalf of the defendant, is now for disposition; the case having, on defendant's motion, been transferred to this court. The motion is based on certain affidavits, the principal one of which is that of Mr. Wade; and, in resisting it, the plaintiff introduced certain documentary evidence, as also certain oral testimony.

The defendant being a Kansas corporation, no jurisdiction over it in an action for damages can be obtained in this state, unless it has some representative here upon whom process may be legally served. It is not claimed that the defendant has complied with the provisions of the act of the state of California entitled "An act in relation to foreign corporations," approved April 1, 1872 (St. 1871–72, 826), by the first section of which it is provided that every corporation theretofore created by the laws of any other state, and doing business in this state, shall, within 120 days after the passage of the act, and any corporation thereafter created and doing business in this state shall, within 60 days from the time of commencing to do business in this state, designate some person residing in the county in which the principal place of business of the corporation in this state is, upon whom process issued by authority or under any law of the state may be served, and within the time aforesaid shall file such designation in the office of the secretary of state, upon whom it shall be lawful to serve any process issued as aforesaid. The second section of that act prescribes, as the penalty for failure to make the designation required, a denial of the benefit of the statutes of California limiting the time for the commencement of civil actions; and its third section declares that every corporation created by the laws of any other state, which shall comply with the provisions of its first section, shall be entitled to the benefit of the statutes of California limiting the time for the commencement of civil actions. By section 411 of the Code of Civil Procedure of California it is provided that summons must be served by delivering a copy thereof as follows:

"* * * (2) If the suit is against a foreign corporation, or a non-resident joint stock company or association doing business and having a managing or business agent, cashier, or secretary within this state: to such agent, cashier or secretary * * *."

On the part of the plaintiff, it is contended that Mr. Wade is the "managing and business agent of the defendant" in this state. If so, the service in question is obviously valid.

Corporations necessarily act through agents, and, if the defendant does business in this state at all, it necessarily does it through some agent or agents. Of course, if the Atchison, Topeka & Santa Fe Railroad Company does not do any business in California, there is an end to the question, and the motion to quash the summons must be granted. But the evidence submitted on the motion shows, what is also a matter of common knowledge, that that company does a large passenger and freight traffic in southern California. One of the advertising folders that was shown by the witness Hines to have been issued by the defendant company expressly declares:

"The California line of the Santa Fe is composed of the following roads: Atchison, Topeka & Santa Fe Railroad, Chicago to Albuquerque; Atlantic & Pacific Railroad, Albuquerque to Barstow and Mojave; and Southern California Railway, Barstow to destination. Connection 's made at Mojave with Southern Pacific Company for San Francisco; and the St. Louis & San Francisco Railway, St. Louis to Burrton, forms the connecting link from St. Louis. All of the above, except the Southern Pacific Company, belong to what is known as the 'Santa Fe System.' "

In this, as in other folders and advertisements introduced in evidence, the defendant solicits business for the Santa Fe Route, which includes, as the defendant itself states, the Southern California Railway Company, whose road extends from Barstow to various southern California points, including Los Angeles and San Diego. Of this last-mentioned road, the evidence shows, Mr. Wade is the general manager, and Mr. Thompson and Mr. Hines the general passenger and freight agents, respectively. It is undoubtedly true that none of them are officers of the defendant Atchison, Topeka & Santa Fe Railroad Company; but whether they can be legally and justly regarded as agents of that company is to be determined by all the facts and circumstances of the case, and not by the mere fact that none of them have been named as such agent. Both the testimony of Mr. Hines and the affidavit of Mr. Wade corroborate the public declarations of the defendant company that what is known as the "Santa Fe System" or "Route" is composed, together with its connections, of the Atchison, Topeka & Santa Fe Railroad, extending from Chicago to Albuquerque; the Atlantic & Pacific Railroad, extending from Albuquerque to Barstow and Mojave; and the Southern California Railway, extending from Barstow to various southern California points. In the folder issued by the defendant company in November, 1893, and introduced in evidence, in which the defendant solicits business for the "Santa Fe Route," it announces as follows: "The greatest railroad in the world. 9,346 miles of track. The only railroad with its own tracks between Chicago, St. Louis, and California."

The testimony is that the 9,346 miles of track which the defendant advertises as "its own tracks" include the tracks of the Southern California Railway Company, of which company, the evidence shows, the president of the defendant company is also president. The evi-

dence further shows that the defendant sends its own trains through from Chicago to southern California points, in charge of its own employes, along the lines of road of the Atchison, Topeka & Santa Fe Company, Atlantic & Pacific Company, and the Southern California Railway Company, and over the same route through trains are sent from southern California points to Chicago. It shows, further, than the general passenger and freight agents of the Southern California Railway Company, together with their assistants, subject to the supervision and control of Mr. Wade, solicit and handle the traffic for the Santa Fe Route in southern California; and, as that route undeniably includes the defendant company, it seems to me little less than absurd to say that defendant does not do business in southern California. And, if it does transact business here, how else does it conduct it than through those agents who solicit and handle the traffic, all of whom, according to the testimony of Mr. Hines, are subject to the management of Mr. Wade? In view of these facts and circumstances, it seems to me very clear that the latter is the managing agent of the defendant's business in this state, and must be so regarded by the court, notwithstanding the fact that he is not so named, and notwithstanding the further fact that the companies composing the Santa Fe Route are separate and distinct corporations, keeping separate and distinct books of accounts. Nothing was decided by the supreme court of California, on the appeal hereinbefore alluded to, in conflict with these views. That tribunal, in its decision, adhered to its long-established rule that, on a question of fact, it would not interfere with the decision of the trial court, where the evidence is substantially conflicting. It did add that, as there presented, "a clear preponderance of the evidence seems to sustain the decision" of the lower court. But, on the hearing of the motion pending here, material testimony was given which did not there appear. It hardly need be said that in respect to a matter of fact a decision based upon one state of facts has no application where the facts are different.

The case of Stout v. Railroad Co., 8 Fed. 794, relied on by the defendant, is not in point. That case turned upon the statute of Nebraska, where the case arose, which provided that foreign railroad corporations should, by extending their lines of railroad into that state, and by filing copies of their articles of incorporation with the secretary of state, become domestic corporations, with all the powers and franchises of other state corporations. The Sioux City & Pacific Railroad Company, which was an Iowa corporation, extended its line of road into Nebraska, under that statute, and filed a copy of its articles of incorporation with the secretary of state of Nebraska. The court held that it thereby became a Nebraska corporation, in respect to all of its transactions within that state, notwithstanding the fact that the whole line was under one management, that the principal offices were in Iowa, and that the station agent upon whom process was served made his reports to the general office in Iowa. "This the legislature of Nebraska," said the court, "is presumed to have known when it enacted the statute declaring that if an Iowa railroad company extends its line

into this state, and files its articles of incorporation, it 'shall be a legal corporation of the state.' Act Feb. 14, 1873 (Gen. St. 206)." The plain effect of this statute, continued the court, "is to constitute the Sioux City & Pacific Railroad Company, at least for jurisdictional purposes, a Nebraska corporation, in respect to all its transactions within this state, and the agents of the company conducting its business in Nebraska are the agents of the Nebraska corporation; otherwise, the statute could have no effect whatever. If the officers and agents of this corporation engaged in the transaction of its business in Nebraska are to be regarded as the officers and agents of the Iowa corporation, it follows that the statute has made it a Nebraska corporation in name only, and not in fact." The court further said in that case that "it is not impossible that the Iowa corporation might have kept an office and agent in Nebraska at the time this suit was commenced; but, upon the proofs adduced upon this hearing, I conclude that the person served was an agent of the Nebraska corporation, and not of the Iowa corporation. At all events, it has not been shown that he was the agent of the Iowa corporation, in such a sense that service upon him in Nebraska would be a sufficient service upon that company." There is nothing in that case in any way inconsistent with the ruling in the present case.

Motion to quash the service of summons denied.

LILLIENTHAL v. SOUTHERN CAL. RY. CO.

(Circuit Court, S. D. California. April 23, 1894.)

No. 295.

1. COSTS—WITNESS FEES AND MILEAGE—VOLUNTARY ATTENDANCE.
   Fees and mileage of witnesses who attend voluntarily, without subpoena, whether coming from without or within the district, are not taxable under Rev. St. § 848. Haines v. McLaughlin, 12 Sawy. 126, 29 Fed. 70, followed.

2. SAME.
   The right of taxation under such circumstances is not given by the act of August 3, 1892, which merely provides a special rule in respect to mileage in certain western states and territories.

3. SAME—MAPS USED AT TRIAL.
   The expense of maps necessarily introduced at the trial is taxable.

This was an action by Jesse W. Lillienthal against the Southern California Railway Company. Judgment was rendered for plaintiff, and defendant now appeals from the clerk's taxation of costs in respect to the fees and mileage of certain witnesses, who attended without subpoena.

Graves, O'Melveny & Shankland and Rothchild & Ach, for plaintiff.

W. J. Hunsaker and C. N. Sterry, for defendant.

ROSS, District Judge. This was an action at law in which the plaintiff recovered judgment, after which a memorandum of costs and disbursements was filed on his behalf, embracing, among other

items, a charge for one day's attendance of the witness Preble, together with 100 miles travel from Mojave, in this judicial district, and return, aggregating $11.50; and one day's attendance of the witness Blakeman, together with 141 miles travel from Barstow, in this judicial district, and return, aggregating $15.60; and one day's attendance of the witness Lake, together with 141 miles travel from Barstow, and return, aggregating $15.60; and one day's attendance of the witness O'Shaughnessy, together with 482 miles travel, from San Francisco, without this judicial district, and return, aggregating $49.70; and one day's attendance of the witness Bugbee, and 742 miles travel from Redding, in the state of California, and without this judicial district, and return, aggregating $75.70; and an item for maps necessarily introduced in evidence in the trial of the case, $14.30. These items, against the objections of the defendant, were taxed by the clerk, and from his action in that respect the defendant has appealed to the court.

For none of the witnesses above mentioned was a subpoena issued in the case, and their attendance upon the court at the trial was therefore voluntary. That being so, the defendant contends that it is not chargeable with any fees for their attendance, whether residing within or without this judicial district, and cites in support of its position two decisions of the late circuit judge for this circuit. The first is Spaulding v. Tucker, 2 Sawy. 50, Fed. Cas. No. 13,221, in which Judge Sawyer held, among other things, that the losing party cannot be taxed with the traveling fees of witnesses residing either within or beyond the reach of a subpoena who voluntarily attend the trial at the request of the prevailing party; and in the subsequent case of Haines v. McLaughlin, 12 Sawy. 126, 29 Fed. 70, he adhered to the same ruling, when asked to reconsider, upon the authority of the case of U. S. v. Sanborn, 28 Fed. 299, the ruling theretofore announced by him.

The provisions of the statute upon which the rulings of Judge Sawyer were based are as follows:

"The following and no other compensation shall be taxed and allowed * * * witnesses * * * in the several states and territories, except in cases otherwise expressly provided by law * * *." Section 823, Rev. St. "Witnesses' Fees. Sec. 848. For each day's attendance in court, or before any officer pursuant to law, one dollar and fifty cents, and five cents a mile for going from his place of residence to the place of trial or hearing, and five cents a mile for returning. When a witness is subpoenaed in more than one case between the same parties, at the same court, only one travel fee and one per diem compensation shall be allowed for attendance, * * *."

Judge Sawyer held, as did other judges in cases referred to in his opinion, that the words "pursuant to law," used in section 848 of the Revised Statutes, mean upon service of process, and not voluntarily upon the request of the party without process; and that a witness who attends without being served with process is not entitled to fees for travel. The contrary was held by Mr. Justice Gray and Circuit Judge Colt in U. S. v. Sanborn, supra, and in a number of other cases referred to in the opinion of Justice Gray in that case. It is unfortunate that there is no decision of

the supreme court settling the point for all the circuits and districts. Without regard to my individual views, I think I ought to adhere to the construction put upon the statute so long ago by the circuit judge for this circuit, and which, so far as I am advised, has prevailed here ever since.

Counsel for plaintiff, however, further rely upon an act of congress passed August 3, 1892 (27 Stat. 347), in respect to the mileage to be allowed jurors and witnesses in certain states, including California, and in certain territories, which reads:

"That jurors and witnesses in United States courts in the states of Wyoming, Montana, Washington, Oregon, California, Nevada, Idaho and Colorado, and in the territories of New Mexico, Arizona and Utah, shall be entitled to and receive fifteen cents for each mile necessarily traveled over any stage line or by private conveyance, and five cents for each mile over any railway in going to and returning from said courts; provided, that no constructive or double mileage fees shall be allowed by reason of any person being summoned both as witness and juror, or as witness in two or more cases pending in the same court and triable at the same term thereof."

This statute does not undertake to declare the circumstances under which the fees of witnesses may be taxed as costs. Indeed, it does not provide for a witness fee at all, but only provides a special rule in respect to the amount of mileage to which witnesses and jurors shall be entitled in the states and territories therein named. The fees of witnesses, for their services as such, and the circumstances under which they are legally entitled to any compensation as witnesses, remain provided for by sections 823 and 848 of the Revised Statutes. The mileage allowed by the act of August 3, 1892, to witnesses is manifestly to witnesses who by law are entitled to witness fees. It was never intended to allow it to one not entitled to a witness fee. Following, therefore, the construction placed in this circuit upon sections 823 and 848 of the Revised Statutes, it is clear that the provisions of the act of August 3, 1892, are insufficient upon which to base the allowance of the fees of the witnesses in question.

That the charge for maps necessarily introduced in evidence in the trial of the case was a proper one was decided by this court in the case of Hewitt v. Story.[1]

An order will be entered in accordance with these views.

WESTERN UNION TEL. CO. v. COOK et al.

(Circuit Court of Appeals, Ninth Circuit. April 2, 1894.)

No. 128.

1. FEDERAL COURTS—FOLLOWING STATE DECISIONS.

The question as to the validity of contracts exempting telegraph companies from liability for mistakes, delays, or nondelivery in the transmission of messages, unless they are repeated, is one of general law, as to which federal courts are not bound (Rev. St. § 721) to follow state decisions.

[1] No opinion filed in case cited.

2. TELEGRAPH COMPANIES—MISTAKES IN TELEGRAMS—CONTRACT LIMITING LIABILITY—PUBLIC POLICY—BURDEN OF PROOF.
In California, telegraph companies are not common carriers (Civ. Code, § 2168), but they are required to exercise "great care and diligence" in the transmission and delivery of messages (section 2162). *Held*, that a contract exempting the company from liability beyond the sum paid for transmission, unless the message is repeated, is void, as against public policy, in so far as it would relieve the company from liability for want of the degree of care and diligence required by the statute; and therefore, in case of mistake, the burden is on the company to show that there was no want of such care and diligence. Hart v. Telegraph Co., 6 Pac. 637, 66 Cal. 579, disapproved.

3. SAME—DEGREE OF CARE—EVIDENCE.
Evidence that the receipt and transmission of messages were intrusted to a man whose only experience in telegraphy was gained 30 years previously, when he was employed upon a telegraph line for three years in some capacity, not stated, is insufficient to show that the company exercised great care and diligence, and is strong evidence of gross negligence.

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

This was an action by Joseph E. Cook and L. E. Langley, partners under the firm name of Cook & Langley, against the Western Union Telegraph Company, to recover damages occasioned by mistake in the transmission of a telegram. In the circuit court the jury returned a verdict for plaintiff, and judgment was entered accordingly. Defendant brings the case here on writ of error.

Geo. H. Fearons and R. B. Carpenter (P. G. Galpin, of counsel), for plaintiff in error.

Joseph D. Redding (W. H. L. Barnes, of counsel), for defendants in error.

Before GILBERT, Circuit Judge, and ROSS and HANFORD, District Judges.

ROSS, District Judge. On July 28, 1891, the defendant in error delivered for transmission to the plaintiff in error, at its San Francisco office, the following telegram: "C. W. Gammon, Walnut Grove: Don't buy any more pears. Selling east one twenty-five." The message was sent by the company's main line to Sacramento, and from there, by a branch wire, to Walnut Grove, which is a station on the Sacramento river, in Sacramento county. The message was promptly transmitted and delivered as written, except that the word "pears" was changed to the word "peaches." For the transmission and delivery of the telegram, the defendants in error paid, and the company received, 25 cents; and acting upon the telegram, as delivered to him, Gammon, who was an employe of the defendants in error engaged in buying fruits, continued to buy pears, to the amount of 4,968 boxes, upon which the proof showed defendants in error lost $4,513.60, for which they recovered a verdict in the court below, upon which, with costs, a judgment was entered against the company. The case is brought here by writ of error, and the only questions presented for consideration relate to the action of the trial court in giving and refusing to give certain instructions to the jury.

The evidence showed that the telegram in question was written by the defendants in error upon a printed form prepared by the company, which contained the following terms and conditions, among others:

"To guard against mistakes or delays, the sender of a message should order it repeated; that is, telegraphed back to the originating office for comparison. For this, one-half the regular rate is charged in addition. It is agreed between the sender of the following message and this company that said company shall not be liable for mistakes or delays in the transmission and delivery, or for nondelivery, of any unrepeated message, whether happening by negligence of its servants or otherwise, beyond the amount received for sending the same; nor for mistakes or delays in the transmission or delivery, or for nondelivery, of any unrepeated message, beyond fifty times the sum received for sending the same, unless specially insured; nor, in any case, for delays arising from unavoidable interruption in the working of its lines, or for errors in cipher or obscure messages. * * *"

The court below instructed the jury:

"If you further believe from the evidence that the plaintiffs, at the time of signing and sending of said dispatch, knew, or had ample means of knowing, the terms printed on said dispatch, and agreed to said terms, and the message in question was not directed by the plaintiffs to be repeated, and the defendant used suitable instruments and machines, employed skilful operators, who, in the transmission of said message, used ordinary care and diligence, and were not guilty of any actual or willful negligence in the premises, then the plaintiffs cannot recover anything beyond the price paid for the message, and interest thereon. If, on the other hand, you believe from the evidence that the mistake made in this dispatch was due to the gross negligence of the defendant, either in not providing suitable instruments and lines, and competent operators, or to the gross negligence of the operator who sent the dispatch, or who received it at Walnut Grove, which shows a want of the care required by law, and that that negligence was gross, then the plaintiffs may have a verdict for the amount of damages actually sustained by them,—the amount which I have already given. If you believe from the evidence that the plaintiffs have shown that they paid for, and sent by the lines of the defendant corporation, a message which was delivered by the agent of the defendant to the agent of the plaintiffs at Walnut Grove, and which telegram, when delivered, was not in the words given to the defendant, and paid for, to be sent, and if you further believe from the evidence that thereby the plaintiffs have suffered loss, then the burden of proof is on the defendant to show that it was not guilty of willful misconduct or gross negligence in sending and delivering said telegram as it did. And if the jury believe from the evidence that the defendant has not shown that it was not guilty of such conduct or such negligence, in the transmission and delivery of such message, then the jury must find a verdict in favor of the plaintiffs for the amount of the loss which the evidence shows the plaintiffs have sustained in the premises."

By the last instruction quoted, the jury was told, in substance, that the delivery of the telegram in its altered form threw the burden upon the company of proving that the mistake was not occasioned by its willful misconduct or gross negligence, in order to prevent a recovery by the then plaintiffs of the damages actually sustained by them. Undoubtedly, proof of the delivery of the telegram in a form different from that in which it was sent was prima facie proof of negligence. Rittenhouse v. Telegraph Line, 44 N. Y. 263; Baldwin v. Telegraph Co., 45 N. Y. 744; Bartlett v. Telegraph Co., 62 Me. 209; Telegraph Co. v. Carew, 15 Mich. 525; Telegraph Co. v. Tyler, 74 Ill. 168; Sweatland v. Telegraph Co., 27 Iowa, 433;

Telegraph Co. v. Gildersleve, 29 Md. 232; Telegraph Co. v. Crall, 38 Kan. 679, 17 Pac. 309; Telegraph Co. v. Griswold, 37 Ohio St. 301; Candee v. Telegraph Co., 34 Wis. 471; La Grange v. Telegraph Co., 25 La. Ann. 383; Telegraph Co. v. Fontaine, 58 Ga. 433; Shear. & R. Neg. (4th Ed.) §§ 542, 556; 2 Thomp. Neg. pp. 841–843. And, but for the stipulation in respect to the repetition of the message, proof of its delivery in the altered form would have thrown upon the company the burden of showing that the mistake was not occasioned by any fault or negligence on its part, or on the part of any of its agents, in order to escape responsibility for the actual damages caused by the mistake. But it is just as clear, we think, that if the stipulation limiting the responsibility of the company, unless the message be repeated, to the amount paid for sending it, be valid to any extent, and the presumption of negligence raised by proof of the delivery of the telegram in its changed form be overcome by proof on the part of the company that it exercised the requisite degree of care and diligence in the transmission and delivery of the telegram, the burden would then be cast on the party seeking to recover the actual damages sustained to prove the facts upon which the company's additional liability arises. It is important, therefore, to inquire as to the validity of the stipulation purporting to limit the liability of the company to the amount paid for sending the telegram, unless the sender directs, and pays for, its repetition. In California, it is declared by statute that a telegraph company is not a common carrier, and the degree of care and diligence exacted of such a company is "great care and diligence." Section 2162 of the Civil Code of California provides:

"A carrier of messages for reward must use great care and diligence in the transmission and delivery of messages."

And section 2168 of the same Code is as follows:

"Every person who offers to the public to carry persons, property, or messages, excepting only telegraph messages, is a common carrier of whatever he thus offers to carry."

After referring to these provisions of the state statute, the supreme court of California, in the case of Hart v. Telegraph Co., 66 Cal. 579, 6 Pac. 637, said:

"If great care and diligence—which terms, of course, include the employment of proper instruments and competent operators—be exercised by the company in the transmission and delivery of a message, the degree of care prescribed by the statute is complied with."

The court further held in that case that a similar stipulation to that involved in the present case is a reasonable precaution to be taken by the company, and binding upon all who assent to it, so as to exempt the company from liability beyond the amount stipulated, for any cause except willful misconduct or gross negligence on the part of the company, and, further, that, in an action to recover damages beyond the amount stipulated, the burden of proof is on the plaintiff to show such willful misconduct or gross negligence.

It is contended on the part of the plaintiff in error that in the present case this court is bound to follow the ruling of the highest court of California in these respects. It is declared by section 721 of the Revised Statutes that:

"The laws of the several states, except where the constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply."

This statute has been many times under consideration by the supreme court. One of the latest cases in which it was discussed is Railroad Co. v. Baugh, 149 U. S. 368, 13 Sup. Ct. 914, in which many of the earlier cases are referred to. The rule is that if the matter in question be one of general law, unaffected by statute, the federal courts, while leaning towards an agreement with the state courts, must exercise an independent judgment. If of local law, the decisions of the highest court of the state in which the question arises will be followed, without regard to the views of the federal court. No one questions that this is so to the extent that the rights of the parties to this suit depend upon the provisions of the state statute cited, and the effect to be attributed to them. It is said, however, for the defendants in error, that the statute of California in no respect fixes the measure of liability, or where the burden of proof rests. It is true it is silent in respect to the burden of proof, but it does declare that telegraph companies are not common carriers, and further fixes the degree of care that they shall exercise as "great care and diligence." This is obviously the measure of their liability under that statute. Every telegraph company that operates within the limits of the state of California does so without the liabilities imposed by law upon common carriers, for the statute of the state says, in effect, that such companies shall not be here so regarded, but is liable for "great care and diligence" in the transmission and delivery of messages, for the same reason, namely, because the state statute so declares.

The words "great care and diligence" the supreme court of the state said in Hart v. Telegraph Co., supra, "of course, include the employment of proper instruments and competent operators;" and the court there further decided that, if great care and diligence "be exercised by the company in the transmission and delivery of a message, the degree of care prescribed by the statute is complied with." The meaning and effect of that statute, as declared by the highest court of the state, is, by force of section 721 of the Revised Statutes, and upon well-settled principles, binding upon this court; but not so upon points depending upon general principles of law, within which category comes the question as to the validity of the contract exempting the company from liability beyond the amount paid for the telegram unless the sender orders, and pays for, its repetition. In the decisions of the courts of the various states there is much conflict upon that question, some holding that such a stipulation is without consideration, and also void because against public policy; others, that, while not altogether invalid, it ought not to be held to exonerate the company from

damages caused by defective instruments, or a want of skill or ordinary care on the part of its operators; and others, still, that it is a reasonable precaution, and binding upon all who assent to it, so as to exempt the company from liability beyond the amount stipulated for any cause except willful misconduct or gross negligence on the part of the company. Many of the cases will be found referred to in Hart v. Telegraph Co., supra, and in notes to the cases of White v. Telegraph Co., 14 Fed. 718, and Telegraph Co. v. Blanchard, 45 Am. Rep. 486.

As respects the question of consideration, we agree with the supreme court of California, in the Hart Case, that "it is enough to say that, if the stipulation is one that can be made, it is a part of the contract, and is supported by the same consideration that supports the contract for the transmission of the message." But, in regard to the extent that such a stipulation contravenes reason and public policy, there is, as has been said, much conflict in the decisions of the courts of the country. No decision that has come under our observation holds that the right of a telegraph company to contract for the limitation of its liability is without limit; and we are of opinion, after mature consideration, that it would be against reason and public policy to hold that it is permissible for such a company to stipulate for immunity from liability for a failure to exercise the care and diligence that the statute under which it operates declares it shall exercise. That being, in the present case, "great care and diligence," the failure on the part of the plaintiff in error to exercise that degree of care and diligence would render it liable for the damages sustained by the sender, nowithstanding the stipulation in question. There is certainly no hardship, but much sound reason, in requiring a telegraph company to exercise great care and diligence in the transmission and delivery of messages which it contracts to transmit and deliver, and for which it is paid. At the same time the nature of the employment is so peculiar, the risks attending it so extraordinary, that it is not unreasonable to uphold such stipulations, to the extent of limiting the liability of the company for losses not occasioned by its want of the care and diligence exacted by the law under which it operates.

If these views be correct,—and we are of opinion that they embody the true logic and sense of the question,—it is quite manifest that the instructions given to the jury by the trial court were more favorable to the plaintiff in error than they should have been, and hence it has no good ground of complaint; for the court first instructed the jury, in substance, that if the company used suitable instruments, and employed skillful operators, who, in the transmission of the message, used ordinary care and diligence, and were not guilty of any actual or willful negligence, the plaintiffs could not recover anything beyond the price paid for the message, and interest thereon.

Next, and on the other hand, if the mistake was due to the gross negligence of the company, "either in not providing suitable instruments and lines, and competent operators, or to the gross negli-

gence of the operator who sent the dispatch, or who received it at Walnut Grove, which shows a want of the care required by law, and that the negligence was gross," the plaintiffs may recover the actual damages sustained by them. And then, that the delivery of the telegram, in its altered form, threw the burden of proof on the company to show that it was not guilty of willful misconduct or gross negligence in sending and delivering it, in order to exonerate it from the damages actually sustained by the plaintiffs. Proof of the delivery of the telegram in its altered form threw upon the company the burden of showing that it had exercised the degree of care and diligence required of it by the law under which it was operating; that is to say, great care and diligence. The instruction regarding the burden of proof was therefore more favorable to the company than it should have been. And, by the first and second instructions referred to, the jury was told that a less degree of care and diligence than is required of the company by the law under which it operated would relieve it of the liability for the damages actually sustained by the plaintiffs. Of this, also, the company has no just cause of complaint. It also results from what has been said that the court below did not err in refusing to instruct the jury to return a verdict for the plaintiff for the sum of 25 cents, with interest thereon from the date of its payment to the company by the plaintiffs. The complaint alleged that the damages suffered by the plaintiffs occurred "through the error and gross negligence" of the defendant company. The latter denied, by its answer, any negligence on its part, and averred that it used great care and diligence in the transmission of the message, and that the mistake was not caused by the incapacity or negligence of any of its operators or agents, but in some way or manner unknown to the company.

The evidence strongly tended to show, not only that the company did not use great care in the transmission of the message, but was grossly negligent, in that it had not a competent operator at Walnut Grove,—the place to which the telegram in question was sent. Its agent there was a Mr. Brown, who was a merchant and rancher, but who knew nothing about telegraphy, and who could neither send nor receive a message. Into his store the wires of the company were carried, and there was its office. In Brown's employ, as clerk and general utility man, was a Mr. Barrett, who, 30 years before, had been employed by a telegraph company operating lines between Boston and Halifax. To this man the duties of telegraph operator at Walnut Grove were deputed by Brown, with the consent of the defendant company. Between the time of Barrett's employment in Massachusetts, and his undertaking the duties of operator at Walnut Grove, he had no experience in, or connection with, the business of telegraphy. Barrett was a witness on the trial, and when asked by counsel for the company the question, "How long have you been engaged in the telegraph business?" answered, "It covers a space of 36 years." On cross-examination this witness admitted that he had had no connec-

tion with the business of telegraphy for more than 30 years, at the time he was employed as operator at Walnut Grove, and that his former connection with that business covered a period of about three years, during which time he was employed in some capacity, not stated, on a line between Boston and Halifax. The evidence of the employment of such a man to transmit messages intrusted to a telegraph company not only fails to show the exercise of great care, but is strong evidence of gross negligence, on its part.

We discover no error in the record prejudicial to the plaintiff in error, and the judgment is accordingly affirmed.

WARN v. DAVIS OIL CO.[1]

(District Court, S. D. New York. May 14, 1894.)

1. NEGLIGENCE—EXPLOSION—PRESUMPTION
   An explosion in a building, unaccompanied by any explanation by the owner, or by evidence of care on his part, furnishes a presumption of negligence, and places on the owner the burden of showing reasonable care taken to avoid the accident.
2. SAME — UNEXPLAINED EXPLOSION — EVIDENCE REBUTTING PRESUMPTION OF NEGLIGENCE.
   Where an unexplained explosion took place in defendant's factory, and defendant offered evidence showing a business not especially dangerous, when prosecuted with reasonable care, and that there were suitable regulations, arrangements, and equipment, and reasonable care exercised, and no neglect by defendant to enforce such regulations, *held*, that the evidence sufficiently rebutted the presumption of negligence arising from the explosion.

This was a libel by David J. Warn against the Davis Oil Company for damages to libelant's canal boat, S. F. Phelps, from an explosion in defendant's factory, near the dock at which the canal boat was lying.

Stewart & Macklin, for libelant.
Goodrich, Deady & Goodrich, for defendant.

BROWN, District Judge. On the 30th of January, 1894, as the libelant's canal boat, S. F. Phelps, lay at the dock in Gowanus canal, foot of Seventh street, Brooklyn, an explosion occurred in the defendants' building a few feet distant, causing injury to the libelant's boat, for which the above libel was filed.

In the court of appeals of this state, it was held in the case of Cosulich v. Oil Co., 122 N. Y. 118, 25 N. E. 259, that an explosion in a building, unaccompanied by any explanation by the owner, or by any evidence of care on his part, furnishes no presumption of negligence; and this was reaffirmed in Reiss v. Steam Co., 128 N. Y. 103, 28 N. E. 24. The opposite conclusion, as held by Judge Wallace, in the case of Rose v. Transportation Co., 11 Fed. 438, seems to me the more sensible and just, and more in accordance with legal principles and analogies. The same ruling was made on appeal in the circuit

[1] Reported by E. G. Benedict, Esq., of the New York bar.

court, in the case of The Sydney, 27 Fed. 119, 123. This ruling is based upon the principle (of wide application in the law of torts) that injuries which do not ordinarily happen when reasonable and proper care is taken to avoid them, afford a presumption of negligence, and place upon the defendant the burden of proof that ordinary and reasonable care was taken to avoid the accident; and also upon the principle of evidence, that he who has peculiarly within his power the means of producing evidence of reasonable care, shall be required to produce it.

The evidence offered in behalf of the defendants in this case was sufficient, in my judgment, to rebut the prima facie inference of negligence on their part. The building in question was used for the refining of grease. Four large tanks were employed, the tops of which rose from 14 to 18 feet above the floor and extended nearly to the top of the ceiling of the second story. On the day of this accident, which happened about 11:40 a. m., only one tank was in actual use. The process was to put into the tank a large quantity of grease, through a six-inch pipe from troughs on the floor above; and then to introduce and mix with it, at different times, chromate of potash and sulphuric acid; and the mass being agitated and warmed by steam coils was bleached by the oxygen set free by the chemicals. Some hydrocarbons were generated by this process; and this was the only substance which, combined with air, was likely to produce any explosive mixture. The process of manufacturing was a usual one. It had been carried on at this place in the same manner for a number of years, and no explosion had ever before occurred. There were but few workmen required in the place. Smoking within the building was prohibited, and no movable lights were allowed in the premises during the process of refining, which was carried on only in the daytime. There were gas fixtures supplying a jet of gas near the floor, opposite each tank, and about five or six feet distant from them, but many feet below the upper rims of the tanks. In the winter time these jets were lighted when needed for work early in the morning. Their frequent use without accident shows that they were unattended by danger.

It is not certain whether the explosion occurred in the upper floor of the building, where possibly some hydrocarbon mixed with air might have come through the six-inch pipe, or whether it was in the tank itself in the story below. It must, seemingly, have come from some light, or burning substance. There is no direct evidence that any person with a light or cigar, or anything else capable of lighting explosive matter, was present at that particular time; nor was any fire found in the building by the foreman who went through it a few minutes before. One of the libelant's witnesses testifies to seeing a light pass across one of the windows; but this was too long a time before the accident to account for it. If some one was going about the place with a light, it was not the defendants' officers; and whoever it was, was violating the defendants' rules; and so far as appears, without any connection with the transaction of the defendants' business, or by the defendants' permission or authority. The cause of the accident is, in fact, unexplained. Either an acci-

dental fire, or some violation of the rules by workmen in smoking, or carrying a light, seem the only imaginable causes. If the latter was the cause, the defendants are not responsible for such an unauthorized act of a workman, any more than a householder would be responsible for the damage to a neighboring house through a fire caused by his servant's carelessness. The evidence offered by the defendants, shows a business not specially dangerous when prosecuted with reasonable care; that there were suitable regulations, arrangements, and equipment, and reasonable care exercised; and that there was no neglect by the defendants to enforce such regulations. I think this sufficiently rebuts the prima facie presumption of negligence; and on this ground the libel should be dismissed; but without costs.

THE TIMOR.[1]

NORDLINGER et al. v. NELSON et al.

(District Court, S. D. New York. April 6, 1894.)

1. SHIPPING — CARRIAGE OF GOODS — SHORTAGE IN WEIGHT — "WEIGHT UNKNOWN."
   When beans, delivered in rat-eaten bags, and libelant's proportion of sweepings together weighed within ¼ of 1 per cent of the recitals in the bills of lading of the weight shipped, this is sufficient proof on which to found a claim for shortage in weight as against the clause in bill of lading, "Weight unknown."
2. SAME—CONVERSION—CONSIGNEE BOUND TO ACCEPT SWEEPINGS.
   A consignee cannot refuse to accept a tender of his proportion of sweepings, and then claim the value of an equivalent amount of cargo, as for a conversion, when the sweepings are confiscated by customs officers. He is bound to accept the tender, and claim for the difference in quality or quantity.
3. DAMAGES—EXPENSE OF RECONDITIONING CARGO—SALE NOT WITHIN REASONABLE TIME—INTEREST.
   Where, after the lapse of a reasonable time for reconditioning damaged cargo, the market was the same as at the time when the goods should have been delivered in sound condition, nothing was allowed for loss of market, but only the necessary and proper charges connected with reconditioning the cargo, with interest.

This was a libel by Nordlinger and others against Nelson, Donkin & Co. for damages to a quantity of beans, part of the cargo of the ship Timor. A decree was rendered for libelants (46 Fed. 859), and a reference to a commissioner ordered as to damages. Defendants filed exceptions to the commissioner's report.

Libelants' beans were imported in bags, claimed to be of a standard size, designed to hold 100 pounds each. The weight of the beans was stated in the bills of lading which, however, contained the clause, "Weight unknown." On discharge, the bags were found to be badly rat-eaten, and many of the beans had escaped, in consequence of which a large number of bags were re-receipted for as "slack." The loose beans were gathered up, cleaned, and tendered in new bags to consignees, in proportion to the number of slack bags delivered to them respectively. The weight of the beans delivered in original bags, plus the proportion of sweepings tendered, equaled the weight recited in the bills of lading, less ¼ of 1 per cent., assumed to have been lost in han-

[1] Reported by E. G. Benedict, Esq., of the New York bar.

dling. Libelants claimed for loss in weight of beans delivered, but offered no strict proof of the weight shipped. The commissioner held these facts sufficient to show the accuracy of the recitals as to weight shipped.

Libelants refused to accept the bags of sweepings tendered to them on account of "slack" bags delivered, because not in original packages, and not in good condition, whereupon, being unmarked and not regularly entered under bills of lading at the custom house, they were seized by the customs officers, and sold for nonpayment of duties. The consignees could have obtained these proceeds on application; the ship could not. The commissioner held that libelants were not bound to receive the bags of sweepings, because not in good condition, and awarded damages for nondelivery of the difference between the number of pounds delivered in original bags and the weight recited in the bills of lading to have been shipped.

At the expiration of a period sufficient to have enabled libelants to recondition their damaged cargo for sale, the market had declined, but, before the cargo was sold, advanced again to the point where it was when the steamer arrived. Libelants failed to take advantage of this rise, and subsequently sold the beans at a lower market rate. The commissioner allowed for loss of market the difference between the price when the vessel arrived and what would have been obtained after allowing a reasonable time to recondition the damaged bags.

Wing, Shoudy & Putnam, for libelants.
Convers & Kirlin, for defendants.

BROWN, District Judge. 1. I concur in the commissioner's finding that the actual loss of only ¼ of 1 per cent. in the recovery and cleaning of the sweepings of the beans, is no more than what may be regarded as a necessary loss, incidental to the spilling of the beans through the ship's fault; and that this very small difference in weight becomes, therefore, a sufficient confirmation and proof of the correctness of the weight stated in the bill of lading, in connection with the other proof.

2. The facts do not show any conversion by the ship of the libelants' beans; the sweepings remained the property of the consignees; the libelants were bound to receive their proportion of them, as a part of their consignment, and to enter them as their own property. Damages was all they could recover; not the full value of the beans, as upon a conversion, or a lawful abandonment. The Baltimore, 8 Wall. 377; The Thomas P. Way, 28 Fed. 526; Warren v. Stoddart, 105 U. S. 224; Dolph v. Machinery Co., 28 Fed. 558; Pettie v. Tow-Boat Co., 1 C. C. A. 314, 49 Fed. 467; Railroad Co. v. Washburn, 50 Fed. 336. I do not perceive sufficient evidence of any fault in the defendants in their tender to the libelants. The loss arising from the libelants' refusal to accept their proportion of the sweepings must, therefore, be borne by them, and not by the defendants.

3. The consignees were entitled to a reasonable time for reconditioning their beans, and to recover damages for all necessary and proper charges and expenses connected therewith; and after the lapse of such reasonable time, had there been no opportunity to sell at the market rates prevailing at the time when the goods ought to have been delivered in good order, the consignees would be entitled to recover the difference as a further item of loss; but as the commissioner finds that in June, about two months after

the time of the delivery of the sound goods, the market price was the same as at the time when the goods should have been delivered in a sound condition; and as the intervening two months was a reasonable and ample time for reconditioning all the sweepings, I must hold, on these facts, that the libelants are not entitled to recover anything on account of the loss sustained through a subsequent sale, after a fall in the market value of these goods.

4. The libelants are entitled to interest on the damages, which may be readjusted on the above principles.

TEXAS & P. RY. CO. v. MINNICK.

(Circuit Court of Appeals, Fifth Circuit. April 10, 1894.)

No. 196.

TRIAL—PROVINCE OF COURT.

The question of negligence should not be submitted to a jury in an action to recover for the death of an employe, where there is no evidence of any negligence other than that known to the employe before the occurrence of the accident, and which was assumed by him as incident to the risk of the employment.

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

This was an action by Maggie Minnick, for herself and as next friend of her children, against the Texas & Pacific Railway Company to recover damages for causing the death of her husband, W. W. Minnick. There was a verdict for plaintiff, but the judgment entered thereon was reversed by this court for error in the instructions. 6 C. C. A. 387, 57 Fed. 368. A new trial was had, and verdict and judgment again rendered for plaintiff. Defendant again brings the case here on writ of error.

T. J. Freeman and F. H. Prendergast, for plaintiff in error.

W. H. Pope, W. C. Lane, E. H. Farrar, B. F. Jonas, and E. B. Kruttschnitt, for defendant in error.

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

McCORMICK, Circuit Judge. This case was before us at our last term, and was reversed and remanded. 6 C. C. A. 387, 57 Fed. 362. It has been again tried in the circuit court, the trial resulting in a judgment against the defendant below, to reverse which it brings this writ of error.

The plaintiff in error makes the following assignment of errors:

"First. The court erred in refusing the following charge, asked by the defendant: 'The plaintiff cannot recover in this cause (1) because Minnick assumed the risk of being injured by any peculiarity in the construction of defendant's engines; (2) because he is presumed to have known of the fact that there was no watchman at the bridge, and assumed the risk of being injured by reason of there being no bridge watchman.'

"Second. The court erred in charging the jury as follows: 'If the jury believe that a defective and dangerous engine set fire to a bridge on the line of the

railway of defendant, and thereby rendered the said bridge unsafe and dangerous, and unfit for the purpose for which it was used by defendant, and thereby caused the death of W. W. Minnick; and you further believe that defendant knew that said bridge 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 by reason of such failure on the part of defendant the said Minnick was killed—then you will find for plaintiff, unless you find for defendant under some other instruction.' Said charge was error, because there was no evidence that said engine that it is claimed set fire to the bridge was defective or dangerous, or unfit for the purposes for which it was used, and the charge was also error because there was no evidence that defendant knew that said engine was defective and dangerous, or unfit for the purposes for which it was used, or that defendant could have learned said facts by ordinary care.

"Third. The court erred in charging the jury as follows: 'Or if the jury believe from the evidence that one of the bridges on said line of railway of defendant company was defective and dangerous, and unfit for the purpose for which it was being used by defendant company, by reason of its being in a bad condition; and the jury further believe that the defendant knew of such defective and unfit condition of said bridge, or could have known of its condition by the exercise of reasonable care and prudence, and failed in this duty of precaution and care; and that said defective and dangerous condition of said bridge was the proximate cause of the death of said Minnick,—he was in the service of said defendant, engaged in operating an engine over the said line of railroad of defendant company as a locomotive engineer; and that the 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 plaintiff, unless you will find for defendant under some other portion of these instructions.' This charge was error, because there was no evidence that the bridge in question was defective and dangerous, or unfit for the purposes for which it was being used. The said charge was not justified or called for by the evidence in the case.

"Fourth. The defendant requested the following instruction: 'No. 1. There is no law that compels the defendant 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 the bridge, he assumed the risk of being injured by reason of the fact that there were no track walkers or watchmen at the bridge; or if, by ordinary care, said Minnick could have learned that there were no track walkers or watchmen at the bridge, he cannot recover on the ground of the want of bridge watchmen.' The court qualified this charge by adding thereto as follows, and then gave it: 'But this would not preclude a recovery by plaintiff if you believe, from all the evidence, that defendant failed to use ordinary care to keep its bridge in proper condition for its engines and trains to pass over the same.' The court erred in not giving the charge as requested, because it was held on the former appeal of this case that said charge, without the qualifications, correctly presented the law of the case. The qualification to said charge was error, because there was no evidence that defendant failed to use ordinary care to keep its bridges in proper condition for trains to pass over.

"Fifth. The defendant requested the following instruction: 'No. 7. The fact that defendant had no watchmen at the bridge where the wreck occurred would not render the company liable if the deceased, Minnick, knew, or by ordinary care could have known, there were no watchmen at the bridge. And in this case, there being no evidence that Minnick did not know there were no watchmen at the bridge, under the circumstances of this case Minnick is presumed to have known the fact, and therefore the plaintiff cannot recover on the ground that there were no watchmen at the bridge.' The court qualified this charge as follows, and then gave it: 'But it would not preclude a recovery by plaintiff if you believe, from all the evidence, that defendant failed to use ordinary care to see that its bridges were in proper condition for its engines and trains to pass over the same.' The court erred in refusing to

give said charge without qualification, because said charge presented the law of the case correctly, and because it was decided on the former appeal of this case that plaintiff could not recover if Minnick knew there was no watchman at the bridge. The court also erred in the qualification of said charge, because there was no evidence of any defect in said bridge that the exercise of ordinary care would not have discovered.

"Sixth. The court erred in overruling defendant's motion for a new trial, because the evidence shows without contradiction that W. W. Minnick had run an engine over the bridge in question for 11 years, and there was no evidence to show that he was ignorant of the fact that there was no watchman at the bridge; and the court charged the jury that, if Minnick knew there was no watchman at the bridge, he could not recover, and, in the absence of evidence going to show he did not know it, he is presumed to have known it, and therefore the verdict is contrary to the charge of the court and to the justice of the case.

"Seventh. The court erred in overruling defendant's motion for a new trial for the following reasons. Because the verdict is contrary to the charge of the court (special charge No. 2). The uncontradicted evidence showed that the defendant kept no watchman at the bridge, and it was their custom not to keep watchmen at their bridges, and there was no evidence that Minnick did not know that a watchman was not kept at the bridge. And the court charged that, if it was the custom not to keep a watchman at the bridge, then Minnick would be presumed to know of the custom. Said verdict was, therefore, contrary to the charge.

"Eighth. The court charged the jury there was 'no evidence that the engine that it is claimed set fire to the bridge was out of repair, but it is claimed that the engine was defective in manner of original construction by having thereon a Brown smokestack;' and also charged that Minnick is presumed to have taken the risk of being injured by reason of any peculiarity in the construction of engines used by the defendant, and the evidence showed no other defect in the engine except that it had a Brown smokestack, and threw less fire through the smokestack, and more through the ash pan, than ordinary engines. And the court charged, in fourth special charge, that such facts would not constitute such negligence as would make defendant liable. Therefore the verdict of the jury is contrary to the charge of the court, and the court erred in overruling defendant's motion for a new trial, based on above grounds. Wherefore the Texas & Pacific Railway Company pray that the judgment rendered in the above cause in the circuit court on October 15, 1893, for the sum of fifteen thousand dollars, be reversed."

It appears that on the trial the judge gave as his general charge the same instructions as on the first trial, a full copy of which is given in the report of our decision, above cited. When this case was before us at the last term, the only assigned errors which we were called upon to consider were those alleged to have been committed in the refusal to give the charges requested. We held that there was no error in refusing to give the first, second, and third instructions asked, because the first two were substantially embraced in the general charge, and the third, as requested, was too narrow in its scope. We held that the fifth and sixth of the requested charges should have been given as requested. Those charges were substantially to the effect that if the engineer, Minnick, knew the peculiar construction of the engines used by the defendant, and knew there were no track walkers or watchmen at the bridge in question, he assumed the risk of being injured by reason of these facts.

It is stated in the brief submitted by the attorneys for the defendants in error that they claim in their pleadings that plaintiff in error is liable on two grounds: (1) That a defective engine of plain-

tiff in error set fire to the bridge at which Minnick lost his life; (2) that, however the bridge may have been fired, it had been burning such a length of time that plaintiff in error was guilty of negligence in not discovering it. It is patent on the face of the pleadings and the proof that the only defect suggested or claimed to have existed in the engine used by the defendant company was the peculiar construction of the smokestack, designated by the witnesses as the Brown stack. The pleadings alleged generally that the engine complained of was dangerous, defective, and out of repair, but there was no proof tending to show any want of repair in this engine, or any defect in it or any element of danger in it other than such as arose from its being constructed with a Brown stack. It is evident from the statement of counsel in their brief of the claim of the defendants in error, above noticed, and from their pleadings and proof, that it was not and is not claimed that the bridge in question was otherwise defective or dangerous than as it was made so by the fire that was consuming it at the time of the accident. The bridge was not burning when Haggerty's engine, the one complained of, passed over it, after dark, the evening before the accident. There is no evidence tending to prove, and it is not alleged, that the customary watch was not well kept. An employe assumes the risks ordinarily incidental to his employer's business, and to the employer's known manner of having it performed, where there is no unknown defect of machinery or other unknown hazards. Railroad Co. v. Seley (March 5, 1894) 14 Sup. Ct. 530, and cases therein cited.

William Minnick was a man 40 years old. He was a good locomotive engineer. He had been running as such in the employ of the defendant company, on this division of its railroad, for more than 10 years. He knew the kind of engines used by the defendant. The engine he was driving, and had been driving for some time, had a Brown stack. There is no evidence tending to prove that he had complained of its kind, or of the kind or condition as to construction of the smokestack of his or of any other engines used by defendant, or that he had been promised that they would be disused, and others substituted. He knew, or with the exercise of the ordinary care incumbent on him in his employment would have known, and must therefore be presumed to have known, the customary daily watch that was kept on the track and bridges, and that there was no track walker kept on this part of the track, or watchman kept at this bridge. He knew and understood the features and workings of the engines, and the character and extent of the watch that was kept on this bridge. He therefore, according to the settled rule just given, assumed the risk of being injured by the use of such machinery on the track and bridges thus watched. He assumed the risks incidental to the precise state of facts and service out of which the plaintiffs by their pleadings and proof attempt to deduce the liability of the defendant company for his tragic death. The appalling calamity that deprived the defendants in error of their family head must stir to its depths all the pity that is in the soul

of those who try this case; and the heroism displayed by the engineer to save the lives of his passengers quickens all that is noble in the human nature of those who learn his story. The fog was so dense that he was right on the bridge before he saw that it was burning. It was only 12 feet to the ground, which was swampy and soft. He had but an instant. He could have jumped, and thus probably have saved his own life. He used that precious instant in doing all he could to save the lives of others. He set the reverse lever two notches back of the center in reverse motion. He set the air brakes to their full force. He turned sand on the track to the engine's full capacity. He could do no more, but his time to jump had passed. He went down with his engine, was buried under it, out of sight, at least three feet in the earth, crushed beyond description. He is not a fit judge in human affairs who is not touched with a feeling of our infirmity. But, in dispensing justice, we must find and measure right by rule. Where experience and adjudication have fixed the rule applicable to presented conditions, we must observe it and enforce it. The trial judge recognized the rule applicable to this case by giving the first and seventh of the requested charges, so far as they were written, when requested. He evidently saw and felt the force of that rule as expressed in those requests. The plain effect was to practically withdraw the case from the jury, and direct a verdict for the defendant. This he seemed loath to do. The judge must not invade the province of the jury. Where the line of demarcation is doubtful, the doubt must be solved in favor of the jury. It may have been the influence of these imperative considerations that led the judge to add to these charges the limitation that they would not preclude recovery by plaintiffs if the jury believe from all the evidence that defendant failed to use ordinary care to keep its bridges in proper condition for its engines and trains to pass over the same. As the supreme court has said in Railroad Co. v. Everett (not yet officially reported) 14 Sup. Ct. 474, in reference to a kindred subject: "It is not easy, in a subject of this kind, to lay down unbending rules, and conflicting cases can readily be found." But where the boundary line is plain, the judge may not yield his function to the jury. As we have already stated, in our view of the proof, there was no evidence in the case to which the rule embraced in these requests did not apply, and, taken with other requested charges given, did not control. What we have advanced reaches also that portion of the general charge embraced in the assignment of errors. In our view of the proof, there was no evidence that the bridge in question was defective and dangerous, or unfit for the purposes for which it was being used, except as it was made so by the fire that was consuming it. All the proof on the subject of that fire is clearly covered by the principle of the requested charges. Probably in no class of cases is it more difficult or more necessary for learned trial judges to so charge a jury of laymen as not to "darken counsel by words without knowledge" than in suits against railroad corporations to recover damages for injuries resulting in death.

For the reasons we have suggested, without further elaboration,

we conclude that the first five of the errors assigned point out action of the circuit court in which there was material error. The other three we do not consider. It follows that the judgment of the circuit court must be reversed, and it is therefore ordered that the judgment of the circuit court is reversed, and the cause is remanded to that court, to be proceeded with in accordance with the views expressed in this opinion.

UNITED STATES v. SIMMONS.[1]

(District Court, D. Connecticut. May 3, 1894.)

POST OFFICE—NONMAILABLE MATTER—POSTAL CARDS REFLECTING INJURIOUSLY ON THE CHARACTER OF ANOTHER.

Postal cards containing such allegations as "You have promised, and do not perform," and, "I see, very plainly, you do not intend to pay any attention to my letters, or your agreements," are nonmailable matter, within 25 Stat. 496, prohibiting the mailing of a postal card, etc., which contains language obviously intended to reflect injuriously on the character or conduct of the person to whom it is addressed.

This was an indictment in three counts, under the act of September 26, 1888 (25 Stat. 496), for depositing postal cards of an alleged nonmailable character in the mails. The postal cards in question were each mailed at West Winsted, Conn., by the defendant, who was a collection attorney, to one C. H. Cables, who was a house carpenter, whose home was also at West Winsted, but who was employed at his trade, also, in the adjoining towns, wherever work offered, and were as follows, viz.:

C. H. Cables, Esq., Southington, Conn.:

Jan. 13, 1893.

Why do I not hear from you? I see, plainly, I shall be obliged to press this matter. I must hear from you by Wednesday night. Shall wait no longer.

Respt., John F. Simmons.

C. H. Cables, Esq., Southington Conn.:

West Winsted, Ct., July 11, 1893.

Why do you not let me know what you intend to do about balance due S. T. Dickerman? I want it settled, in some way, soon. You have promised, but do not perform. Let me hear from you without delay.

Respt., John F. Simmons.

C. H. Cables, Esq., Terryville, Conn.:

West Winsted, Ct., Nov. 7, 1893.

I see, very plainly, that you do not intend to pay any attention to my letters, or your agreements. I propose to get Bal. due on that claim. I shall wait no longer, but will see what can be done.

Respt., John F. Simmons.

Geo. P. McLean, for the United States.

L. E. Stanton, for defendant.

After argument, the court, TOWNSEND, District Judge, held that the language used on the postals was not of such a "threatening character" as to be within the first paragraph of the statute as to

[1] Reported by E. E. Marvin.

such language, but that the expression in the latter postal card "I see * * * you do not intend to pay any attention to * * * your agreements," was obviously intended to reflect upon the character and conduct of the person addressed, and was therefore within the last paragraph of the statute. The demurrer was therefore overruled.

In re YEE LUNG.

(District Court, N. D. California. May 10, 1894.)

No. 10,935.

CHINESE MERCHANTS—EVIDENCE.

When a Chinaman seeks readmission into the United States on the ground that he has already been engaged as a merchant therein, he must furnish such evidence of that fact as is required by Act Cong. Nov. 3, 1893, notwithstanding that he may have departed from the country before that act was passed.

On Habeas Corpus. Report of special referee and examiner, recommending the discharge of Yee Lung. Report set aside, and not confirmed, and Yee Lung remanded.

Thos. D. Riordan, for Yee Lung.
Charles A. Garter, for the United States.

MORROW, District Judge. The petitioner, Yee Ick, alleges that his brother, Yee Lung, is restrained of his liberty by the master of the steamship Belgic on the ground, as claimed by the said master, that said passenger is a subject of the emperor of China, and not entitled to land, and come into the United States, under the provisions of the act of congress of May 6, 1882, entitled "An act to execute certain treaty stipulations relating to Chinese," and the acts amendatory thereof and supplemental thereto. The petition alleges that said Yee Lung is not a laborer, and does not come within the restrictions of said act, but, on the contrary, that he is a merchant; that he departed from the United States temporarily in 1892, and for more than one year prior to his departure was a merchant, and a member of the firm of Lai Sang Lung & Co., engaged in business on Third street, in Sacramento City in this state. William M. Lowell testifies: That he is a resident of Sacramento. Was engaged on the police force for the last seven or eight years, up to the last two or three weeks. Knows Yee Lung. Has known him for about four or five years. He was in the general merchandise business in Sacramento City. The name of the firm was Chan Lung, or something like that. It was on Third street, I and J, No. 910. Knew him as a member of that firm for about two years before he went to China. Always understood, from the Chinamen, that Yee Lung was a member of the firm. Saw him working and handling goods there. Saw him behind the counter, acting as a partner would act. Cannot tell what amount of stock they carried. Shelves looked pretty well filled. Knew another of the partners, but have forgotten his name. Happened to know this man by seeing him around the store. Had no business transactions with

him. J. L. Sullivan: At present employed in the United States mint. Formerly a resident of Sacramento City. Was connected with the police department. Knew Yee Lung. First knew him in a store on Third street. Does not remember the name of the store. Had seen Yee Lung, four or five years, attending to the business of the firm. Had heard it said that he was a partner, but did not know it of his own personal knowledge. The firm carried on a general merchandise business. Yee Lung testified in his own behalf that he does not speak English. He was questioned about a certificate of identification which he appears to have taken with him to China, and concerning his acquaintance with the witnesses Lowell and Sullivan. The foregoing testimony was taken by the commissioner on Saturday, April 28, 1894. The examination was resumed on Tuesday, May 1, 1894, when the testimony of a witness named Yee Young was taken. There is some indication in the record that this is the Chinaman who is seeking to land and come into the United States, and the same person who appeared as Yee Lung on the previous Saturday. He testified that he went to China, on the steamer Gaelic, September 6, 1892. Prior to that time, he was in the general merchandise firm of Ly Sung Lung, 910 Third street, Sacramento City. The capital of the firm was $3,000. His interest was $1,000. There were three partners. The other two partners were Yee Fong Wah and Yee Way Yung. He was the treasurer of the firm. The firm was established in 1889. Had a sign, first on a piece of paper, afterwards on a board. Yee Way Yung testified that he knows Yee Lung, who is his partner in the business of provisions and general merchandise. Firm name is Ly Sung Lung. Not conducting the business now; only keeping track of customers, to collect outstanding accounts. The place 910 Third street, Sacramento City, is now vacant. Have outstanding accounts amounting to something over $5,000. The name of the firm is a good omen, and means "good luck." Three other Chinese witnesses testify to substantially the same effect as the last witness, except as to the import of Chinese firm names. Harry Huff, the official Chinese interpreter of this court, testified that Chinese merchants in the United States do not, as a usual thing, have firm names containing the names of the partners. The names are lucky omens. It will be observed that the name "Lung," in the firm name of "Ly Sung Lung," does not purport to represent any part of the name of the Chinaman, Yee Lung, who is seeking to land, and come into the United States, but is simply a part of the combination of words representing a supposed name or title importing "good luck." Moreover, the name of the firm in the petition is "Lai Sang Lung & Co.," while the testimony is that the name of the firm is "Ly Sung Lung." This discrepancy is not explained.

I do not, therefore, find it established by the testimony of two credible witnesses, other than Chinese, as required by section 2 of the act of November 3, 1893, that Yee Lung was engaged, in this country, in buying and selling merchandise at a fixed place of business for one year previous to his departure from the United States. Nor do I find, by the same character of testimony, that Yee Lung,

during the period named, conducted the business of a merchant in his own name. Nor is it established, in like manner, that the Chinaman named did not engage in the performance of any manual labor, except such as was necessary in the conduct of his business as such merchant. The fact that Yee Lung departed from the United States in September, 1892, and prior to the passage of the act of November 3, 1893, does not, in my opinion, make any difference in the character of the testimony required to show the right of a Chinese merchant to enter the United States. The last-named act applies as well to those who departed from the United States prior to its passage as it does to those who departed after that date. Let Yee Lung be remanded to the custody from whence he was taken.

In re LOO YUE SOON.

(District Court, N. D. California. May 9, 1894.)

No. 10,978.

On Habeas Corpus. Report of special referee and examiner, recommending discharge of Loo Yue Soon. Report set aside, and not confirmed, and Loo Yue Soon remanded. See preceding case of In re Yee Lung, 61 Fed. 641.

Charles L. Weller, for Loo Yue Soon.
Charles A. Garter, U. S. Atty.

MORROW, District Judge. This is a petition in the usual form, presented by Luck Chu Kee, a Chinaman, on behalf of a countryman, Loo Yue Soon. It appears that the latter was a passenger, and is detained on board the steamship Peru, by the master, on the ground that Loo Yue Soon is not entitled to land, and come into the United States, under the acts of congress relating to Chinese immigration. It is alleged that Loo Yue Soon is a merchant, and a member of the firm of Cum Lung & Co., No. 727 Sacramento street, San Francisco; that he went to China on the steamer Rio de Janeiro, January 14, 1893. The petitioner, Luck Chu Kee, claims to be a partner of the detained passenger, and signs his name to the petition, in English, as "Luck Chu Kee;" but in the testimony his name appears as "Jew Kee," and in the list of partners, which he gives in his testimony, his name is given as "Look Jew Kee." The Chinaman on whose behalf the petition for habeas corpus is presented also appears under different names. He is identified in the testimony relating to the partners as "Loo Yone Soon." If these discrepancies are merely errors arising in the transcribing of the stenographer's notes, they should, of course, be disregarded, but the testimony is otherwise unsatisfactory. Loo Yue Soon testifies that he does not speak English. Belongs to the store of Cum Lung, general merchandise, 727 Sacramento street. Has been a member since 1881. Went to China, January 14, 1893, on the steamship Rio de Janeiro. Has 25 partners. His inter-

est is $1,000; capital of the firm, $26,200. Was a salesman, buying and selling. Engaged in no other business during the year previous to his departure for China. Is married, and has a wife in China, and has also the name of "Loo Shew Lee." H. H. Adams, an attorney at law, with J. N. E. Wilson in the mining business, thinks he knows Loo Yue Soon. Saw him two or three times at the store, and at the office of Wilson & Bert. Thinks Loo Yue Soon was a partner, but does not name any firm with which he thinks he was connected, and does not identify any fixed place of business, where Loo Yue Soon conducted business in his own name or otherwise. H. C. Warren, with Wilson & Bert, testifies that he has seen Loo Yue Soon at the office of Wilson & Bert, and he thinks he has seen him in Chinatown. Saw him under the same circumstances as the preceding witness. Jew Kee, who signs the petition as "Luck Chu Kee," claims to be a partner of Loo Yue Soon; produces a partnership book and gives the names of 25 partners; his own name, as "Look Jew Kee," and the name of the Chinaman whose landing is the subject of the present inquiry as "Loo Yone Soon." The list of partners was written in English in the book a little over a month ago. The names of the partners, and the amount of the capital invested by each, was written about twelve years ago. Firm name is "Cum Lung & Co." "Cum" means "gold." "Lung" means "business." The addition of "& Co." is English.

I do not find it established by the testimony of two credible witnesses, other than Chinese, as required by section 2 of the act of November 3, 1893, that Loo Yue Soon was engaged in this country in buying and selling merchandise, at a fixed place of business, for one year previous to his departure from the United States. Nor do I find, by the same character of testimony, that Loo Yue Soon, during the period named, conducted the business of a merchant in his own name. Nor is it established in like manner that the Chinaman named did not engage in the performance of any manual labor, except such as was necessary in the conduct of his business as such merchant.

My attention is called to the fact that Loo Yue Soon departed from the United States prior to the passage of the act of November 3, 1893; and it is claimed, therefore, that he is not required to furnish the testimony required by that act. It is contended that the act applies only to such Chinese persons as shall depart from the United States after the passage of the act. I find nothing in the language of the statute to justify such an interpretation of its provisions. The whole of the act appears to have gone into operation on the date of its approval, and I must hold that section 2 applies as well to those who departed from the United States prior to its passage as it does to those who departed after that date. Let Loo Yue Soon be remanded to the custody from whence he was taken.

In re HOLZMAISTER.

(Circuit Court, S. D. New York. May 11, 1894.)

CUSTOMS DUTIES—CLASSIFICATION—"SCHMASCHEN" GLOVES.

Ladies' gloves, 14 inches or less in extreme length, manufactured from the skins of stillborn or immature kids, imported from Germany, described on the invoice as "schmaschen, low quality," costing from 14.50 to 15.25 marks per dozen, were properly dutiable as "schmaschen" gloves at $1.75 per dozen pairs, under Schedule N, par. 458, of the tariff act of October 1, 1890, and not as "ladies' kid," at $3.25 per dozen pairs, under the same schedule and paragraph, and were not liable to the additional duty of $5 per dozen pairs, imposed by the first proviso of the said paragraph, and assessed upon them by the collector, in addition to the duty of $3.25 per dozen pairs.

Appeal by the collector of customs for the port of New York from a decision of the board of United States general appraisers reversing the decision of the collector of said port upon the classification for customs duties of certain ladies' gloves imported into said port in the month of October, 1892, upon which gloves the said collector assessed duties at the rate of $3.25 per dozen pairs as "ladies' kid," and $5 per dozen pairs additional under Schedule N, par. 458, of the tariff act of October 1, 1890, and the first proviso in said paragraph contained, which, omitting provisions not involved in this action, is as follows:

"458. * * * Ladies' and children's schmaschen of said length or under, one dollar and seventy-five cents per dozen. * * * Ladies' and children's kid of said length or under, three dollars and twenty-five cents per dozen: * * * provided, that all gloves represented to be of a kind or grade below their actual kind or grade shall pay an additional duty of $5 per dozen pairs: provided, further, that none of the articles named in this paragraph shall pay a less rate of duty than fifty percentum ad valorem."

Against this classification and imposition of the additional duty as above, the importer protested, claiming (1) that the merchandise was commercially "schmaschen" gloves, and dutiable at $1.75 per dozen pairs, under said paragraph 458 of the tariff act, (2) or, under the same paragraph, at 50 per cent. ad valorem, and (3) that the character of the gloves was not misrepresented; and that the additional duty did not apply. The case came before the board of United States general appraisers, on the application of the importer, under the so-called "Customs Administrative Act" of June, 1890, and testimony was taken in behalf of the importer, and also by the government, before the said board, which testimony was contradictory, as to the trade meaning, at the time of the passage of the tariff act, of the word "schmaschen," as applied to gloves in the markets of this country, although the weight of testimony appeared to be that the term as used in the trade applied chiefly to gloves made from the skins of stillborn lambs, but that the designation "kid schmaschen" was recognized in the trade as applying to gloves made from the skins of stillborn kids. The evidence was almost, if not quite, unanimous that the gloves involved in the present importation were produced from the skins of stillborn or immature kids. On this testimony the board of United States general ap-

praisers found as facts (1) that "schmaschen" does not exclude gloves of kid origin; (2) that the gloves in question were not commercially known as "kid" gloves; (3) that they are "schmaschen" gloves,—and the board thereupon sustained the protest of the importer, and overruled the assessment of duty by the collector. The government appealed the case into the circuit court by petition under the said customs administrative act, and further evidence was taken in the circuit court before one of the general appraisers appointed by the court as referee. The government produced the testimony of a number of glove manufacturers and trade witnesses tending to show that the term "schmaschen" gloves in the trade referred chiefly, if not entirely, to gloves made from the skins of stillborn or immature lambs, although these witnesses admitted that a small proportion of "kid slinks" or immature kids might come and be included in a lot of "schmaschen" gloves. The trade testimony offered on both sides was to the effect that the kid glove of commerce was made from the skins of young kids, most of the witnesses considering that the kid should be from one month to six weeks old, while others thought the minimum age of the kid might be a week. The importer produced before the referee the testimony of a large number of trade witnesses, all of whom testified that the merchandise in question would be considered as coming within what the trade recognized as "schmaschen" gloves; that this term, in the trade, included gloves made from the skins of stillborn kids as well as from the skins of immature lambs, although all the witnesses admitted that the proportion of lamb "schmaschens" was greatly in excess of the kid "schmaschens," several witnesses admitting on cross-examination that 95 per cent. of "schmaschens" were of lamb origin, while one or two of the importer's witnesses contended that they had seen as high as 25 or 30 per cent. of "kid slinks" in a lot of "schmaschens." None of the importer's trade witnesses would admit that the importation in question would be known in the trade as "kid gloves" of any kind, but they all called the merchandise "kid schmaschens." Every one of the importer's witnesses, however, admitted on cross-examination that he would not accept a delivery of the 371½ dozen gloves covered by the invoice in question as a good delivery of "schmaschen" gloves. The witnesses all admit that the trade expected to receive, for "schmaschens," gloves of stillborn lamb origin, but that a small proportion of so-called "kid schmaschens" would be received without affecting a lot composed chiefly of lambskins. It also appeared uncontradicted in the testimony that the meaning of the word "schmaschen" in the German language, irrespective of trade designations, included the skins of all stillborn animals used in the making of gloves. On the trial in the circuit court it was urged by the United States attorney that the term "schmaschen" gloves in the trade signified, chiefly and primarily, gloves made from the skins of stillborn or immature lambs, and that the "kid slink" or "kid schmaschen" was an exception, and did not control the meaning of the word "schmaschen" in the trade, which appeared to cover commercially only gloves of lamb origin; and that, as a consequence, the gloves in this

importation not being commercially "schmaschen" gloves, but being admittedly made of the skins of immature kids, had been represented upon the invoice on which the importer's entry was made as of a kind or grade below their actual kind or grade, and consequently came within the purview of the proviso imposing the additional duty of $5 per dozen pairs. The importer's counsel contended that the term "schmaschen," in trade, included kid "schmaschens," which were made from the skins of stillborn or immature kids, although such kid "schmaschens" were admittedly far less numerous than the "schmaschens" made from immature lambskins; and that, in any event, the term "schmaschen," as understood in the German language, was broad enough to cover gloves both of kid and lamb origin. The court reserved its decision, and subsequently handed down the following brief opinion affirming the decision of the board of general appraisers, and sustaining the contention of the importer.

Henry C. Platt, U. S. Atty., and James T. Van Rensselaer, Asst. U. S. Atty., for the collector and the United States.

Sullivan & Cromwell (Edward B. Hill, of counsel), for the importer.

WHEELER, District Judge (after stating the facts). Although "schmaschen" gloves are so often of lamb origin that this term is indicative of that origin, it is not universally so, nor far enough so to exclude kid origin. This leaves room for calling these gloves of kid origin "schmaschen" gloves without exposing them to an additional high duty for representing them to be of too low a grade. The judgment of the board of appraisers is affirmed.

In re NEW YORK DAILY NEWS.

(Circuit Court, S. D. New York. May 11, 1894.)

CUSTOMS DUTIES—CLASSIFICATION—"PERIODICALS."

Illustrated supplements, printed in Germany, and in the German language, consisting of an eight-page pictorial sheet, containing short stories, poems, selections of German humor, and other current literature, and numerous illustrations appropriate thereto, being a publication issued in large numbers in Germany under the title "Lustige Blaetter," and distributed in large editions to various German newspapers in different German cities,—the supplement in question being the same publication in an editon thereof printed purposely for the German New York Sunday News, and having a distinctive title, "New Yorker Lustige Blaetter," with an illustrated heading representing the harbor of New York, the Statue of Liberty, and the Brooklyn Bridge, etc., no date appearing anywhere upon these illustrated supplements, but they being numbered consecutively throughout the year, Nos. 1 to 52, and it appearing upon each number, in the German language, that the same was published by the New York Daily News, at 31 and 32 Park Row, New York City; these supplements being imported in lots usually of several thousand copies, including commonly two numbers, and being, after importation issued regularly as a gratis supplement to the Sunday edition of the New York Daily News,—*held*, that these publications were not "periodicals," and duty free, under paragraph 657 of the free list of the tariff act of October 1, 1890, but were properly dutiable, as classified by the collector of the port of New York, at 25 per cent. ad valorem, as printed matter, under schedule M, par. 423, of said tariff act.

Appeal by the collector of the port of New York from a decision of the board of United States general appraisers reversing the decision of the said collector as to the dutiable character of certain illustrated supplements printed in Germany in the German language, and imported by the New York Daily News Company, which merchandise was classified for duty by the said collector as "printed matter," at 25 per cent. ad valorem, under schedule M, par. 423, of the tariff act of October 1, 1890, which is as follows:

"423. Books, including blank books of all kinds, pamphlets and engravings, bound or unbound, photographs, etchings, maps, charts, and all printed matter not specially provided for in this act, twenty-five per centum ad valorem."

Against this classification the importing corporation protested, claiming that the merchandise was "periodicals," and duty free, under the free list (paragraph 657) of said tariff act, which is as follows:

"657. Newspapers and periodicals; but the term 'periodicals' as herein used shall be understood to embrace only unbound or paper covered publications, containing current literature of the day and issued regularly at stated periods, as weekly, monthly, or quarterly."

The local appraiser reported to the collector that the merchandise was pictorial sheets intended to be given away with the German edition of the New York Daily News. No testimony was taken by the board of general appraisers, and that board, in its decision, found, in substance, that the publication was an eight-page pictorial paper, "New Yorker Lustige Blaetter;" that these papers contained stories, poems, selections of German humor, and other current literature; that they were issued weekly; that they were to be used as supplements to the German edition of the New York Sunday News. As conclusion of law, the board found that they were "periodicals," within paragraph 657 of the tariff act, and duty free, thereby sustaining the protest of the importers. The collector, thereupon, by petition, appealed the case into the circuit court, under the provisions of the customs administrative act of June 10, 1890; and the board of United States general appraisers made its return to the court, sending up therewith samples of the printed matter in question. An order for the taking of further evidence in the circuit court was obtained on the part of the government, and testimony was accordingly taken before a referee appointed by the court. From this testimony, it appeared that the supplements in question were printed in Munich, Germany; there being in that city a German publication called "Lustige Blaetter," which appeared there in very large editions, furnished to different German newspapers as a supplement, with various and different headings and devices, appropriate to the newspapers issued in German cities; that this "New Yorker Lustige Blaetter" was specially printed in Munich, Germany, for the New York Daily News, and was furnished with a special heading, representing the Brooklyn Bridge, and the Statue of Liberty in New York Harbor; that upon these supplements appeared the statement, in German, that they were issued or printed or published (according to the translation of the German

words used) by the New York Daily News at 31 and 32 Park row, New York City; that these supplements were numbered regularly during the year, from 1 to 52, but contained no date upon any of the numbers. The German edition of the New York Sunday News, published weekly, contained an advertisement each week referring its readers to the gratis supplement by such and such a number. It was also shown that these comic German extras were received in invoices containing usually two numbers, in large lots, of many thousand copies, and were, after importation, issued regularly, by numbers, with the Sunday edition of the New York German Daily News.

On the trial in the circuit court, it was contended on behalf of the government that the uncontradicted evidence showed that the comic extra was merely printed in Munich for the New York Sunday News, with special headings, and the statement that the extra was published in New York City, and that the publication had never been, and was not, regularly issued in Germany, so as to bring it within paragraph 657 of the free list of the tariff act, but that it became a periodical only when issued with the weekly edition of the German Sunday News in New York City. The importers' counsel insisted that the publication was regularly issued in Germany in weekly numbers furnished regularly to many newspapers in that country, and also to the importers in question, and that it was, when imported, a periodical, entitled to free entry, under paragraph 657 of the free list. After deliberation the court handed down the following opinion, sustaining the claim of the collector and of the United States, and reversing the decision of the board of general appraisers.

Henry C. Platt, U. S. Atty., and James T. Van Rensselaer, Asst. U. S. Atty., for the collector and the United States.

Stephen G. Clarke, for the importers.

WHEELER, District Judge (after stating the facts). A periodical is published in Germany. A part of the Sunday editions is printed in German, with a heading for the place of publication of the New York Daily News in New York. This is imported by the New York Daily News in bulk, and issued as a supplement to the New York Daily News Sunday edition, without date. The board of general appraisers have classified this importation as periodical, free, and the collector has appealed. Periodicals are made free with a proviso, among other things, that they are to be issued regularly, at stated periods, as weekly, monthly, or quarterly. Those imported are not issued at all as periodicals before importation. They are like patent insides or outsides of newspapers, sold partly printed, to be completed for publication. They appear to be, therefore, printed matter, dutiable at 25 per cent., under paragraph 423 of the act of 1890, rather than a periodical, under paragraph 657. The judgment of the board of appraisers is reversed.

EMPIRE STATE NAIL CO. v. AMERICAN S. L. BUTTON CO. et al

(Circuit Court, D. Rhode Island. May 26, 1894.)

No. 2,423.

1. PATENT—DECISION OF PATENT OFFICE.
   A decision of the patent office awarding a patent after an interference contest in which the novelty of the invention is questioned does not rank as a judicial determination of that question, upon which a preliminary injunction may be based.

2. SAME—RES JUDICATA.
   A decree enjoining the infringement of a patent in a suit, where the only defense interposed is the claim that the defendants own the patent, does not raise the presumption of the validity of the patent in a second suit, in which its validity is directly in issue.

Suit by the Empire State Nail Company against the American S. L. Button Company and others for injunction. Complainant moves for a preliminary injunction.

W. R. Perce and Alan D. Kenyon, for complainant.

W. B. Vincent, for respondents.

CARPENTER, District Judge. This is a motion for a preliminary injunction under a bill in equity to restrain an alleged infringement of letters patent No. 370,614, issued September 27, 1887, to Thomas F. N. Finch, for furniture nails. The grounds on which the motion is based are: First, the decision of the patent office on the question of priority of invention; and, Secondly, the decree of the circuit court for the southern district of New York in the suit brought by this complainant against Edward H. Faulkner and others. The respondents Bailey and Talbot were the patentees of the device in question under letters patent No. 248,269, and were put in interference with Finch, under whom the complainant claims; and the contest was ended by an award of priority to Finch. In that proceeding these respondents made the point that no patent should issue, because the device had been in public use for two years, and this issue was also decided against them. The patent here in suit then issued. The decision of the patent office, which was confirmed on appeal, making the observation that there is no provision of law for the raising and decision of this question in the patent office, still goes on to decide the question on the ground that it is within the inherent power of the commissioner to look into the question when raised, for the purpose of enlightening his conscience in the matter of the issue of the patent. The examiners in chief add that the proceeding at most is merely to determine whether a patent shall issue, and that the rights of the parties remain unaffected to test the matter in the courts, where a decision may be reached "which shall have the binding force of an adjudication, determining the rights of the parties." This statement expresses, as well as I could hope to express it, my opinion that this decision is not to rank as a judicial determination, on which I could properly rely in ordering a preliminary injunction.

The Faulkner suit was brought to enjoin those respondents from

selling certain buttons which they had purchased from the respondents in this suit, and these respondents undertook and carried on the defense of that suit. A plea was filed that the respondents here are the owners of the patent here in suit, and issue was joined, and on hearing determined for the complainants and a decree was thereupon entered, from which an appeal is now pending. I have no doubt that the respondents here, as the evidence is on this motion, must be held to have been the real respondents in the Faulkner suit. They are therefore bound by the issue of that suit as to the specific acts charged in that suit. The complainants here contend that they are also bound by the finding in that suit so far as it relates to the validity of the patent, and therefore cannot be heard to dispute it. I find, however, that the reason why a former judgment may properly be used as the basis for a preliminary injunction is because the issue in the pending bill has once been made and argued and decided, and therefore the prevailing party is presumptively in the right. If the decree be by consent, although it equally binds the property there in dispute, still it may not be cited in another action as raising any presumption on the question formerly determined by the decree. In the case at bar the validity of the patent is disputed, and that question was not in issue in the Faulkner suit. No testimony thereon was taken, and it was not argued. The decree, indeed, was made establishing the patent, but that decree was founded on the constructive admission of the equity of the bill, which is implied in filing the plea. This admission is only for the purpose of the suit, and does not bind the respondents otherwise. For the purpose, therefore, of informing the court here on the solution of the issue here raised as to the validity of the patent, it seems to me the decree in the Faulkner suit has no more weight than would be given to a decree entered by consent. The motion will be dismissed.

DENNING et al. v. BRAY et al.

(Circuit Court of Appeals, Second Circuit. May 29, 1894.)

No. 114.

PATENTS—INTEREST OF PARTNERS.

An agreement provided that any invention in a specific article made by either one of the parties thereto should be owned jointly, and recited the object of the agreement to be the building up of a good business in the article patented. *Held*, that whatever right each acquired under this agreement in a patented invention of the other was only such as would accrue to him as a member of a partnership, and upon the termination of the partnership the interest of each in the invention of the other would cease.

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

This was a suit by Morris P. Bray and Oscar Lublin against Edwin J. Denning and others for infringement of letters patent No. 440,246, granted to Morris P. Bray for a dress stay. There was a decree for the complainants (56 Fed. 1019), and the defendants appeal.

William A. Jenner, for appellants.
Charles E. Mitchell, for appellees.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. The patent is for a dress stay. It was issued November 11, 1890, on application dated July 29, 1890, to the inventor, Morris P. Bray. By a written assignment, dated May 2, 1891, and recorded in the patent office June 4, 1891, Bray transferred to Oscar Lublin one-half of all his right, title, and interest in said patent. The defendants, E. J. Denning & Co., are dealers in dry goods, notions, and fancy articles, and as such have sold dress stays which are concededly within the claims of the patent. The stays so sold were made by the firm of Stewart, Howe & May. As the record title to the patent is in the complainants, its validity in no way assailed, and infringement conceded, defendants can justify their dealing in the articles only by showing that they had the right to sell them. This they seek to do by proving that Stewart, Howe & May manufactured the articles under a license from one John Kendrick; and upon the defendants rests the burden of showing that Kendrick, though not an owner of record, had the right to license manufacture under the patent. The contention that John Kendrick is the equitable owner of an undivided one-half interest in the patent in suit is based upon a written agreement between Bray and himself dated November 1, 1889. Kendrick testifies also to an earlier agreement between them, which he says was executed May 12, 1888, and produces a draft or copy thereof signed and sealed by himself. Bray denies ever having signed this earlier agreement. Of each of these men (Bray and Kendrick), it may be said that his narrative of his own transactions, his letters to his various associates (a correspondence with which the record is filled ad nauseum), and his individual conceptions of fair dealing, as evidenced by his conduct, must impress whoever studies the case with the conviction that his unsupported testimony is entitled to but little weight. As to this alleged first agreement, therefore, the evidence standing oath against oath, and both witnesses being of doubtful veracity, defendants have failed to sustain the burden they assumed. The making of the agreement of November 1, 1889, however, is conceded, and some antecedent circumstances are sufficiently proved. Some time in 1888, Bray and Kendrick, who had been jointly interested in some corset patents, and had frequently traveled together as salesmen, began to discuss the desirability of going into the business of making and selling dress stays. In October, 1888, Bray applied for a patent on a garment stay consisting of two steels in parallel pockets, combined with a cord at the edge of the stays, the cord being introduced in the process of weaving. Patent was issued therefor on January 22, 1889 (396,533), to Bray, assignor of one-half to Kendrick, and upon this patent the invention covered by the patent in suit is concededly an improvement. The various discussions between Bray and Kendrick as to going into

the dress-stay business found final expression in the agreement of November 1, 1889, which was recorded in the patent office October 30, 1890. It is as follows:

"Whereas, Morris P. Bray, of Ansonia, Conn., and John Kendrick, of St. Louis, Mo., are jointly owners of letters patent dated January 22, 1889 (No. 396,533); and whereas, it is mutually agreed by and between said Bray and Kendrick to share and share alike in said letters patent, and all other inventions to be made appertaining to dress or garment stays (outside of corset stays), it is hereby agreed as follows: Witnesseth, the said Bray and said Kendrick, for and in consideration of one dollar each to the other paid, the receipt of which is hereby acknowledged, hereby agree not to sell any part of said letters patent dated January 22, 1889 (No. 396,533), nor to license any other parties to make said dress stays under said patent, or to make or sell, or cause to be made or sold, any of said stays, excepting as shall be sold or made, or caused to be made and sold, jointly by said Bray and Kendrick. It is hereby further agreed that neither party shall make any new invention on dress stays, or cause to be made any new improvements in dress stays, independent of the other party, and that any and all inventions and improvements, either mechanical or design, shall be owned jointly and mutually by said Bray and said Kendrick. The object of this agreement is to create and build up a good business on dress stays, said business to be owned and shared mutually and equally by said Bray and said Kendrick. It is hereby further agreed that, in case any new invention is made by either said Bray or said Kendrick which the parties to this agreeement should not wish to adopt, the party making the invention shall not negotiate for its sale or use to any other parties without the written consent of the other party. In witness whereof, we have this 1st day of November, 1889, set our hands and seals.

"Morris P. Bray. [Seal.]
"John Kendrick. [Seal.]

"Witness: Geo. M. Treat."

The learned judge who tried the case at circuit construed this agreement as providing that whatever rights either might, by its terms, acquire in future inventions of the other, should be "qualified down to the requirements of the business" they were undertaking to build up, and that when that business ceased each patent for an improvement should remain the property of the individual inventor, unqualified by any further interest of the other therein. We are of the same opinion. The provisions of the agreement, undoubtedly, secured to each an equitable interest in any patent for an improvement taken out by the other, but precisely what that interest was must be determined by a consideration of the whole document. The object to be accomplished by the agreement is expressly stated to be the creation and building up of a good business in dress stays, which business was to be owned and shared mutually and equally by both. All provisions in the contract which are at all susceptible of a double meaning must be so construed as to harmonize with this fundamental object. Manifestly, the underlying consideration for the contributions of each to the common purpose is the profit anticipated from the creation and sharing in such business; and a court will not be astute so to construe it that, in the event of the consideration failing, the unexpended contributions of either should still remain the property of the other. Assuming that Kendrick had invented and applied for patents on several valuable "improvements" within a month after the making of the agreement, and then died before the business contem-

plated had been created or built up,—before even a single stay had been sold or contracted for,—could it be reasonably contended that it was the intention of the parties that the new patents should issue one-half to Bray? Or was it the intent of the agreement to give to both such an ownership of patents for the inventions of each as would enable each noninventor to create and build up a business by licensing outsiders, independently of the other? There seems but one answer to these questions, and the language used by the contracting parties, when taken as a whole, expresses what appears to have been their intent. As to the patent already owned in common (that of 1889), each agrees not to sell his share, nor to give any license to make stays thereunder, nor to make or sell, or cause to be made or sold, any of said stays, except jointly. As to new inventions, each agreed not to make improvements independent of the other, and that all inventions and improvements, either mechanical or design, shall be owned jointly and mutually by them; but they do not provide for any assignment of patents to be issued for such inventions or improvements, and state that the object of the agreement is the creation and building up of the business in which, by the agreement, they became partners. As to inventions of either which both may not "wish to adopt,"—that is, to put into their mutual business,—they secure themselves against possible competition from outsiders by a clause providing that the party making the invention shall not negotiate for its sale or use without the written consent of the other. Whatever right each acquired under this agreement in a patented invention of the other was therefore only such as would accrue to him as a member of the partnership, to which, during its existence, and for its business use, the invention was contributed by the other. Otherwise than as a member of the partnership, or for purposes other than those which that partnership was formed to accomplish, he acquired no interest, legal or equitable, in such patents; and upon the termination of the partnership the interest of each in the inventions of the other would cease and determine.

This construction of the agreement renders it unnecessary to review the long narrative of subsequent events,—the arrangements which Bray and Kendrick made with Lublin; the formation of the firm known as the "Twin Dress-Stay Company;" its dissolution, and the papers executed upon such dissolution. Appellants' counsel concedes in his brief that the agreement of November 1, 1889, created between Bray and Kendrick a partnership relation, with no stated term, and terminable at will. It is plain, upon the evidence, that it was so terminated long ago, and the mutual business of the partners abandoned by both. There is nothing to overcome the prima facie proof of invention by Bray, which the letters patent afford; and, the partnership business to which it was temporarily appropriated having terminated, all equitable interest of his former partner therein ceased. Defendants having failed to make out the defense of license, the decree of the circuit court was correct, and judgment is affirmed, with costs.

ELECTRIC RY. CO. OF THE UNITED STATES v. JAMAICA & B. R. CO.

(Circuit Court, E. D. New York. May 3, 1894.)

1. PATENTS—ANTICIPATION—CANCELLATION—ESTOPPEL.

Complainant applied for a patent for an improvement in electric railways. He was informed by the patent office that his application showed, but did not claim, the same invention covered by a pending application; and upon its suggestion he added claims covering the same. An interference was then declared, and it was decided in his favor. It was afterwards held that these additional claims covered magneto machines, as well as dynamo machines, and that they were consequently anticipated by an existing British patent; whereupon complainant canceled them, and a patent was issued on the original claims. The canceled claims, which were made to conform to the broad construction which the patent office placed on the patent, embodied substantially the same combination as the claims which were allowed. *Held*, that their cancellation, showing his acquiescence in the holding of anticipation, did not estop complainant to insist upon his own narrower construction of the original claims as embracing only dynamo machines, in order to avoid anticipation of them, also, by the same patent that caused the rejection of the additional claims.

2. SAME—PRIOR STATE OF ART—ELECTRIC RAILWAYS.

Letters patent No. 407,188, granted July 16, 1889, to Stephen D. Field, for improvements in electric railways, claimed "the combination of a stationary dynamo-electric generator, driven by a suitable motor; a circuit of conductors composed, in part, of an insulated or detached section of the line of rails of a railroad track; a wheeled vehicle movable upon or along said insulated section of track; an electro-magnetic motor mounted upon said vehicle for propelling the same, and included in said circuit of conductors; and a circuit controlling device placed upon said vehicle." *Held* that, in view of the prior state of the art, as shown by British and French patents and the experiments of American inventors, the only improvement involved in Field's combination was the selection of a generator producing a sufficient current to operate the railway, and this did not constitute invention.

3. SAME—SUFFICIENCY OF CAVEAT.

One Stephen D. Field filed a caveat in the patent office intended to cover a proposed improvement in electric railways, which consisted substantially of a stationary dynamo-electric machine whose wires connected with rails which, together with the wheels of the vehicles which were to run thereon, served as conductors of the current to a secondary dynamo-electric machine placed on the vehicle itself, and geared to its axles. Thereafter, on July 16, 1889, letters patent No. 407,188 were issued to him for such improvement; but in the patent, instead of using the rails as conductors, and the wheels as collectors, he made use of a third rail and an additional collector. *Held* that, in view of this deviation, and of the fact that the caveat does not describe either generator or motor, it is not such a complete and exact description of the invention as will entitle the patent to priority as of the date of the caveat.

4. SAME—ASSIGNMENT—ESTOPPEL.

Pending an interference declared by the patent office between applications for patents filed by Stephen D. Field and by Thomas A. Edison, complainant corporation was formed for the purpose of developing under one management the inventions of these two parties, and both patents were assigned to it. After a time the stockholders representing the Edison interest refused to advance any more money to further the ends of the corporation; and it was finally agreed that each party should resume what it had put into the enterprise. The complainant assigned all its rights in Edison's patents to the General Electric Company, representing the Edison interest; and that company transferred to complainant all the stock received by it as its share of complainant's assets. *Held*, that this

was a mere transfer of stock in complainant corporation, and was not such a sale to it of the Field patent, or any interest therein, as would estop the General Electric Company to question the validity of such patent.

This was a suit by the Electric Railway Company of the United States against the Jamaica & Brooklyn Railroad Company for infringement of a patent.

Edmund Wetmore and E. M. Marble, for complainant.

Frederic H. Betts, H. W. Seely, and Eaton & Lewis, for defendant.

TOWNSEND, District Judge. This is a final hearing on a bill in equity alleging infringement of letters patent No. 407,188, granted July 16, 1889, to Stephen D. Field, for improvements in electric railways, and assigned to the complainant. The defenses are: Denial of infringement, anticipation by prior patents printed publications and prior inventions, insufficient description and specification, want of patentable novelty, and abandonment.

The evidence of infringement applies to the first claim only of said patent, which is as follows:

"The combination, substantially as hereinbefore set forth, of a stationary dynamo-electric generator, driven by a suitable motor; a circuit of conductors, composed in part of an insulated or detached section of the line of rails of a railroad track; a wheeled vehicle, movable upon or along said insulated section of track; an electro-magnetic motor mounted upon said vehicle for propelling the same, and included in said circuit of conductors; and a circuit-controlling device placed upon said vehicle."

It does not seem desirable at this point to review the history of the development of the use of electricity as a motive power. Such consideration of the state of the art as bears directly upon the questions decided will be presented in connection with the discussion of the elements of said claim and the defenses thereto. Except as to one of the details of construction covered by said claim, infringement is proved. The complainant admits that every element of the combination existed in the art at the date of the alleged invention, and that all had been employed in a variety of combinations. It further admits that, prior to Field's application for a patent, a printed publication, disclosing substantially the same combination, was filed in the library of the patent office; and that, prior to his practical application of his alleged invention, others had successfully operated electric railways embodying to a greater or less degree the elements of said combination. It is further admitted, or satisfactorily appears from the evidence, that, prior to Field's application, other patents had been granted, or other applications filed, which either fully described said alleged invention, or described every element except the specific circuit controller, or the particular kind of electric generator alleged to have been specifically claimed in said patent; and that practical circuit controllers were well known in the art long prior to said alleged invention. As to the generator, it is admitted that none of the improvements which resulted in the production of a machine were due in any way to the patentee, and that all he did in this respect was to select from among such well-known generators that species of

generator which was capable of doing the work he desired to do. These statements are made in this connection, not for the purpose of showing that there was no invention on the part of the patentee, but because it appears therefrom, in connection with details hereafter to be considered, that Field was in no sense a primary inventor of an electric railway. The most that can be said of his patent is that, at a time when the art pertaining to the question of the practical application of electricity to the propulsion of vehicles had reached a stage of development which suggested greater adaptability to such uses, he filed in the archives of the patent office a caveat which, it is claimed, first described a successful union of the well-known essential elements in the art of electric railways. If, in said caveat, he did thus first state a complete conception of his combination, he is clearly entitled to a patent therefor, assuming such conception to embody invention, and not to be a mere carrying forward of other conceptions resulting in an improvement in degree.

The first claim of complainant's patent contains the following elements:

"(1) A stationary dynamo-electric generator driven by a suitable motor; (2) a circuit of conductors, composed in part of an insulated or detached section of the line of rails of the railroad track; (3) a wheeled vehicle, moving upon or along said insulated section of track; (4) an electro-magnetic motor, mounted upon said vehicle, for propelling the same, and included in said circuit of conductors; and (5) a circuit-controlling device placed upon said vehicle."

The parties are in conflict as to the meaning and scope of the term "dynamo-electric generator." It does not seem material here to review the mass of expert testimony upon this question. The experts for defendant claim that in May, 1879, the date when Field filed his caveat, the term had no special significance. It was applied by some writers to all mechanical generators of electricity, including self-excited machines or separately-excited machines, machines having permanent magnets or those having artificial magnets. Other writers confined the use of the term to those machines having a core of soft iron or steel, wound with wire, and which were artificially magnetized by having a current of electricity sent through the wire, as distinguished from the original and older machines, employing a permanent or ordinary magnet. It must be admitted that the nomenclature selected by Field is unfortunate, and possibly misleading, for even the expert for complainant, in attempting to explain the term "dynamo-electric," at first gave it such a meaning as would exclude the machine used by the defendant, and relieve it from the charge of infringement. Assuming, however, that the patentee intended to designate some machine composed of electro-magnets as distinguished from permanent magnets, it appears that no details of construction are indicated, and no principle of operation suggested, whereby a person skilled in the art would be guided in the selection of such a dynamo-electric machine as would be efficient to accomplish the desired result. The language used in the claim is "a stationary dynamo-electric

generator;" the specification says "a dynamo-electric or other suitable stationary generator." It furthermore does not seem important that the patentee is claimed to have been the first to observe the capacity of dynamo-electric machines to automatically regulate themselves for changes in currents, because such self-regulating capacity is not peculiar to dynamo-electric generators, but may be possessed by any generator; because such capacity in dynamo-electric machines was known to electricians before the application for this patent was filed; because the specifications fail to indicate that the patentee had any idea of such capacity; because his alleged prior observations and experiments in this line were not applied to the running of a railway; because it appears that Thomas A. Edison was the first to apply a machine possessing such capacity to the running of an electric railway; and, finally, because complainant's expert admits that said earlier observations and experiments of the patentee in San Francisco did not mark any important advance in the art, or show any material difference between the arrangement of his machines and that of prior ones for similar purposes, and that the greater transmission of power was primarily due to his having larger machines. The facts stated in this connection will hereafter be referred to in connection with other matters, as bearing upon the question whether the patentee contributed anything to the art of electric railway propulsion, or by his statement so taught the world how such alleged conception could be utilized as to entitle him to claim the exclusive right to such conception. They seem to show that the only reason why a dynamo-electric generator was suggested was because it was well known that the permanent magnet could not be made to generate as much force as the artificial magnet. In other words, the use of this term by the patentee merely served to suggest that by a selection from a certain class of well-known machines a greater power would be obtained than had been obtained from the machines theretofore used.

Before proceeding to the consideration of the general claim of anticipation, it seems desirable to review the history in the patent office of said patent, especially as to its bearing upon the fifth element of the combination claimed,—the circuit controller. On May 21, 1879, said Field filed in the patent office a caveat, the substantial portions of which are as follows:

"I propose to propel cars along tracks by means of electricity in substantially the following manner, referring to the accompanying drawings: I will station a dynamo-electric machine, A, at some convenient point along the track, and connect the positive and negative wires, b, c, of the machine with two rails, so that the rails will serve as conductors. All the wheels, d, e, on one side of the car, I will insulate from their axles. On board of the car I will place a secondary dynamo-electric machine, f, and gear it to one or both of the axles of the car. Now, if a current be sent from the primary dynamo-electric machine at the central station along the rails or along a supplemental conductor attached to the rails, the secondary machine on board the car will be actuated, and its power transmitted to the axles of the car for propelling it along the track. By using a suitable current reverser on the car, the direction of the current can be changed at will, so as to run the car in either direction."

"Having thus described my invention, as far as at present completed, what I claim and desire to secure by caveat is the above-described or similar method of propelling cars on tracks."

On March 10, 1880, Field filed an application for the patent in suit. In the specification he states that "an electro-magnetic motor of any well-known and suitable construction is mounted upon the said car," and that the necessary electric power to operate said motor is to be supplied by "a dynamo-electric or other suitable stationary generator of electricity." The first claim includes the stationary dynamo-electric generator in express terms. This claim was rejected upon citation of anticipations by an English patent to Bellet & De Rouvre. Thereupon counsel for Field attempted to distinguish the English patent on the single ground that it did not call for the insulated section of track covered by Field's first claim. The rejection being still insisted on, said claim was amended by the addition of "a circuit-controlling device, placed upon said vehicle," and was again rejected on said reference; and afterwards, on further references, on the ground that, "if the reference is sufficiently explicit to enable one skilled in the art to construct the devices entire, there would be no invention in putting a circuit breaker on the engine." After reconsideration, appeal, allowance, amendments, and notice of interference, on July 21, 1881, a specification, practically the same as that of the patent in suit, was filed, having five claims, the first being the same as that now in suit. The fourth and fifth claims were inserted July 21, 1881, upon the suggestion of the patent office that the application showed, but did not claim, an invention shown and claimed in another pending application; and the statement that, if such amended claims should be filed by Field, he would be made a party to an interference with said other applicant. Said claims were as follows:

"(4) The combination, substantially as hereinbefore set forth, of a railway track, one or more stationary dynamo-electric generators; electrical conductors extending from said generator or generators along the line of said track, and consisting wholly or in part of the rails thereof; vehicles movable along said track; electro-dynamo motors fixed upon said vehicles for imparting motion thereto; and wheels supporting said vehicles upon the track, and also serving to maintain continuous electrical connection between said generator and motors. (5) The combination, substantially as hereinbefore set forth, of one or more stationary dynamo-electric generators; one or more prime motors for driving the same; a conducting circuit, formed wholly or in part of insulated lines of rails of a railway track; a wheeled vehicle movable upon or along said lines of rails; one or more electro-dynamic motors for impelling said vehicle, one pole of said motor or motors being electrically connected with the stationary generator through one line of conductors, and the other with the line of conductors, for completing an electric current between the stationary generator."

Thereupon an interference was declared between Ernest W. Siemens, Thomas A. Edison, and said Field upon the question of priority of invention as to the subject-matter of the fourth and fifth claims, which was decided in favor of Field. In 1886, another interference was declared between Field, said Siemens, and George F. Green upon the priority of invention as to the subject-matter of said first claim, and this also was decided in favor of Field. But

in the said decision of the commissioner of patents he stated that he was impressed with the similarity between the invention claimed by Field and that set forth in a British patent to Clark, No. 1,386, and had, therefore, directed "the case of Field to be returned to the primary examiner, who will consider whether the invention covered therein is patentable in view of Clark's patent, taken in connection with the other state of the art." He subsequently stated that he had referred the application to a special committee, to advise him "whether the Clark patent was an anticipation of the Field application, or of any part thereof, without reference to the condition of the state of the art generally;" and that, as a result of the report of said committee, and of his examination of the Clark patent with the aid of said report, he found that the first three claims of Field's application were not anticipated thereby, while the fourth and fifth claims were anticipated thereby. He then added:

"I therefore remand Field's application to the primary examiner, with instructions to reject claims 4 and 5 therein, and thereby enable Field to take such steps as he may see proper, either to appeal, amend, or cancel."

Thereupon, on April 1, 1889, counsel for Field canceled said fourth and fifth claims.

Defendant contends that said claims cover practically the same combination as the first claim, except that they do not contain the "insulated section of track" or the "circuit-controlling device." It is not material here to consider the question of the track section. And defendant argues that the patentee, having acquiesced in the action of the patent office, and erased said claims as anticipated by Clark, cannot now contend that the same elements in the first claim are not so anticipated. Complainant claims that, although the other elements of the combination covered by the first claim are contained in the fourth and fifth claims, the broad construction put by the patent office upon said claims so as to embrace a magneto-machine, the structure contained in the Clark patent, and to therefore reject said claims, does not prevent the patentee, after having acquiesced in said rejection, to claim a narrower construction as to the first claim, covering only a dynamo machine. Complainant, for this reason, and because said fourth and fifth claims were inserted at the request of the patent office in order to raise an interference, denies that the patentee is estopped to claim a construction of the first claim, justified in view of the state of the art, but different from the construction put upon the claims which have been erased. It is admitted that such construction could not have been claimed if said claims had not been erased. The first claim of the patent in suit, as it now stands, had been allowed when, on July 12, 1881, the patent office notified the patentee, as already stated, that his application showed, but did not claim, a certain invention claimed in a pending application, and that, if he should insert such claims, he would be made a party to an interference, but not otherwise. Thereupon, for the single purpose of contesting the question of priority involved in said interference, claims 4 and 5 were added. As already stated, Field prevailed as to priority, but was afterwards defeated as to patentable

novelty, in view of the Clark patent, on said fourth and fifth claims. Whatever effect these acts, or the original claim of counsel before the patent office, upon the rejection of a similar claim or citation of the Bellet & De Rouvre patent, that said claim differed from the anticipation in calling for an insulated section of track, may have, as showing the construction placed by the patentee upon the character or scope of his alleged invention, it does not seem that these acts alone should estop the inventor from claiming such construction of said first claim as would otherwise be warranted in view of his specification and of the state of the art. The patentee, having exercised his right to erase these claims, and being estopped thereby to claim such advantages of construction as he might otherwise have asserted thereunder, cannot be also estopped to assert other and independent rights claimed to exist under said first claim, which was not in issue in said interference. The declaration of an interference by the patent office merely raises a question of priority, not patentability. The patent office virtually said: "The question of patentability is already decided in your favor as to claims 1, 2, and 3. The question of priority is also settled in your favor as to what you claim, but not as to what you may claim under our construction of your specification." While these fourth and fifth claims stood for the purposes of the interference, the party may have been estopped to claim a broad construction of the same thing in one claim, and a narrow construction in another. But I do not understand that, by such acquiescence for the purposes of an interference, the party is deprived of the right to stand on his original construction of his former claim, after the interference has terminated, and the claims involved therein have been erased. Christie v. Seybold, 5 C. C. A. 35, 55 Fed. 69.

The evidence and brief of defendant present an elaborate and forcible discussion of the history of the development of the art of electrical propulsion, from Jacobi's boat, in 1838, down to and including the complete practical working railways of Siemens in 1879, Edison in 1880, and Field in 1881. This evidence is introduced chiefly on the following grounds, namely: It being admitted that Field neither invented nor modified a single element of his combination, but it being claimed that he first selected an efficient generator and motor, and first added an efficient circuit controller, defendant claims that the state of the art shows either that such generators and motors are so disclosed in the earlier patents and publications as to negative the claim of novelty, or that such generators and motors are so analogous as to negative invention, or that other patents, publications, and completed working inventions, completely anticipate the actual invention of Field. In this latter connection, the construction of the caveat and its legal effect will be considered. British patent No. 8,644, granted to Henry Pinkus in 1840, describes an apparatus for propelling railway carriages by electro-magnetic, voltaic, frictional, or other source of electrical motive power. It was also provided with a device for stopping, starting, and reversing the locomotive. Its bearing upon the question of anticipation will be discussed in connection with other patents. The expert for com-

plainant shows that in the then state of the art no generator of electricity was known which would yield a sufficient current for the practical operation of this apparatus for the propulsion of railway carriages. But he admits that the electrical machine which Pinkus proposed to use was an operative one to a limited extent, and that the Pinkus patent contains the combination of all the elements of the first claim of the patent in suit, including a circuit controller, except the dynamo-electric generator. It is to be noted that, while Pinkus specifically refers to certain generators of electricity, he does not confine himself to these, but leaves the selection of the best form to be determined, in view of the state of the art. British patent No. 514, granted to H. W. Cook, in 1862, for an apparatus for propelling carriages by means of electricity, appears to be an impracticable device. The contrary is not shown as to the British patent to Bellet & De Rouvre, described in Les Mondes. They, however, show a circuit controller, and the same other elements in combination, as in the patent in suit. The criticisms of complainant's expert are substantially the same as were made of the Pinkus patent. The Dugmore & Millward, Guyard, and Wesson patents are only important as showing what is practically admitted,—that at the date of the Cook patent methods for connecting stationary sources of electricity with moving vehicles were well known in the art. British patent No. 1,386, granted to William Clark, in 1864, for electro-magnetic apparatus, and its application as a stationary or locomotive driving power, is an important one in this connection. It will be remembered that the patent office decided that this patent fully anticipated all the features of the fourth and fifth claims, and of the first claim and the combination covered thereby, except the circuit controller, and that the fourth and fifth claims, which, for the purposes of the present inquiry, may be considered substantially the same as the first except as to such controller, were thereupon erased. This Clark patent described an improvement upon previous generators of electricity capable of use as a stationary means of power or on a locomotive. He described a dynamo-electric machine, in this sense: that it was one in which the electric current was produced by the rotation of a coil of wire in proximity to a magnet. It is, perhaps, only necessary to say as to this patent that the claim of defendant, and the decision of the patent office that it anticipated Field, are supported by the testimony of complainant's expert, who admits that Clark described the same thing as is described in the first claim of the patent in suit, minus the circuit controller. The explanation by counsel for complainant of this admission by their expert, Pope, that the Clark invention was the equivalent of the Field invention minus the circuit controllers, is that Pope meant it was the equivalent, upon the broad construction of the patent office which made the Field patent include any kind of dynamo-electric generator,—that is, any kind of generator except one operated by permanent magnets. Counsel for complainant further shows that Pope claims that the motor of the Clark patent is utterly inadequate to perform the work of the motor of the Field patent. There is considerable expert testimony to the effect that the patent office was mistaken in

its finding that the Clark patent did not contain a circuit controller, and that a certain key shown in the drawings was capable of operation as such. This point does not seem to be material, and the presence of such controller is not proved.

The French republic, on September 17, 1878, granted to Francois Alexander Boue, and on December 18, 1878, to Jean Chretien, patents for electrical apparatus for the propulsion of vehicles on rails or canals and rivers. Complainant contends that the Boue patent does not anticipate Field, because—First, Boue described a magneto as distinguished from an electro-magnet machine; second, he used a ground circuit; third, he does not distinctly state that his current reverser is on the car. As to the first claim, complainant's expert repeatedly refutes it by his direct testimony that Boue by the term "magneto-electrique" meant to describe, and did describe, "dynamo-electric" generators, that the generator and motor proposed by Boue are of the same character as those of the patent in suit, and that both the Boue and Chretien patents contain Field's motor and generator. If, as is suggested, Mr. Pope was misled in one instance where the term was mistranslated,—a suggestion which seems most improbable in regard to perhaps the most important patent in the case, and he has not been recalled to say so,—the court must accept his statement as it stands, supported by the evidence of the experts for defendant. Furthermore, there is no suggestion that Pope was misled by any mistranslation of the term "magneto-electrique" in the Chretien patent, and he testifies that it describes a "dynamo-electric generator." But, even if Boue merely described a permanent magnet machine, Mr. Pope admits that the results recorded in said patent justify Boue's assumption that his apparatus would be capable of propelling, upon a railway track, a vehicle of sufficient size to be of actual commercial value. The third claim is sustained by the evidence. Boue suggests how to stop the carriage, or to cause it to go backwards, but does not state how a circuit controller is to be constructed, or where located. That Boue used a ground circuit, and his contrivance was therefore impracticable, is refuted by undisputed evidence of practical operation of railroads in this country, where the ground only is depended on. Counsel for complainant has corrected said claim, and Pope admits that it would not necessarily involve invention to substitute a rail circuit for an earth circuit. Mr. Pope's criticism that the rails are not bonded in Boue's patent is immaterial, inasmuch as it is admitted that bonding of rails is old in the art, and is not essential to successful operation. That Boue connects his motor with the wheels of the car by gear wheels instead of a belt, which would be better, in Mr. Pope's opinion, is immaterial; for Field states in his specification that in practice he prefers to make use of such gear wheels; because the substitution of one for the other would not involve invention, in view of the art; because there is no evidence that defendant uses a belt; and, if gear wheels are excluded from the Field patent, it does not appear that defendant has infringed. Mr. Pope further says that he sees no reason why the traveling contact which Boue describes should not perform its in-

tended function satisfactorily. The objection that the Chretien patent only describes a magneto-electric machine has been already disposed of. The only other criticism applied distinctly to it by complainant is that, while it describes a circuit controller on the car, which will stop or start it, or vary its speed, no provision is made for reversing the motion of the car.

Much space has been devoted by defendant to an account of the experiments of George F. Green, of Kalamazoo, Mich. He claims to have begun to experiment with small electric motors and cars as early as 1856, and to have been constantly engaged in such experiments until 1875, when he built an electric railway, with a track more than 200 feet long, and on which he ran a car loaded with about a hundred pounds of weight by means of a battery connected with the car and rails, in the same way as was afterwards described by Chretien and Field. The car was provided with a circuit controller, which both stopped and reversed the motion of the car. Afterwards, in 1879, he constructed and ran a car carrying four persons, and provided with a circuit controller. On August 19, 1879, he filed an application for a patent, and, after various vicissitudes, not necessary to be here considered, he, in 1891, obtained a patent for a stationary source of electricity, combined with a line of conductors extending to and from the car, including the rails, and energizing an electric motor on the car. The chief objection to Green's apparatus is that it was not operated by a dynamo-electric machine, but always by a battery, as the generator of electricity, although, in his application for a patent, he stated that any known and suitable source of electricity might be employed. It is further claimed that Green merely embodied his invention in a model, prior to the date of the invention of Field. On October 9, 1879, there was received at the patent-office library at Washington, a German periodical, containing a full description, with illustrations, of an electro-dynamic locomotive and train, operated on and after May 28, 1879, in the Industrial Exhibition at Berlin, known as the "Siemens Electrical Railway." It is unnecessary to explain the construction of this railway, as it is admitted that said publication disclosed the same, or substantially the same, system or combination as is set forth in the first claim of the patent in suit, and that said railway was both practicable and successful. Several witnesses testify that, as early as May 18, 1879, Thomas A. Edison made sketches and working drawings showing the necessary details for the construction of an electric locomotive with a stationary dynamo-electric generator, and a circuit controller on the car. This was followed, in the spring of 1880, by the construction of a railway which was successfully operated for some months.

This general review of the state of the art has not included a discussion of the differences in details of construction which distinguish the alleged anticipations, nor of the various kinds of circuit controllers or generators of electricity, because, after a careful examination of these details, it has seemed that a comparison between them is not material in view of the conclusions reached. It appears that at least as far back as 1864 the general idea of a sys-

tem of electrical propulsion comprising a stationary generator of electricity, a circuit of conductors, a motor on said vehicle, and a switch, or circuit controller, was well understood in the art. This is shown by the Pinkus, Cook, Clark, and other patents already considered. With the exception of the experiments of Green, there is no evidence of any material advance in the art of electrical railway propulsion after 1864 until about 1878. The reason for this condition of affairs is to be found in the fact that, while the principle was well understood, and its operative application demonstrated, no means had been discovered whereby the power produced by the steam engine or other source of power could be economically converted into electrical power. Consequently it was commercially cheaper to use the whole of such power directly, rather than the comparatively small percentage indirectly received through the medium of electricity. But it is agreed that the invention of what is known as the "Gramme armature," and its development between 1873 and 1878, obviated the difficulties previously experienced, and gave a new impulse to the electrical transmission of power. It is unnecessary to explain its structure or mode of operation further than that it was a type of dynamo-electric machine capable of use as a generator or motor, and producing a uniform and constant current of electricity. The efficiency of these generators was greatly increased, about 1878, by a construction wherein the coils of the armature were made of large wire of low resistance. A new impulse was thereby given to the system of electrical transmission. Thereupon Boue, Chretien, Field, Siemens, and Edison entered the field, each claiming to be the inventor of a combination whereby the electric railway might be made commercially practicable. Boue and Chretien anticipated the earliest date claimed for Field's conception of his invention.

Let us now inquire what is claimed or shown on behalf of Field's claim, first as to patentable novelty, and later as to priority. Perhaps all the evidence that is necessarily material to the determination of these questions may be found in the admissions of counsel for complainant, or of their expert, or in the statements of the patentee himself. Counsel admits, as already stated, that Field was not the inventor of a single element of the combination claimed by him. Every element thereof, singly and in various combinations, existed, and was well known in the art. He did not invent any improvement in electrical apparatus, unless he may be said to have invented the combination claimed. On this point, Mr. Pope testifies as follows:

"288 X-Q. None of the improvements in electro-magnetic or magneto-electric or dynamo-electric generators of electricity made between 1840 and 1880, and the result of which was to produce a machine capable of use on an electric railway, were due in any way to Mr. Field, were they? A. Not that I am aware of."

Let us now inquire what Field did. As to the generator, I quote from the cross-examination of Pope, the expert, when referring to the Pinkus patent:

"The improvement made by Mr. Field in this particular I understand to have been the selection from among the generators in existence at that date of a species of generator which was capable of doing the work he desired to do, and which had been brought into existence by the efforts of other inventors and improvers since the date of Pinkus' patent. 290 X-Q. Then, in that respect, he did precisely what had been described in the French patent of Boue, the French patent of Chretien, and the Organ for the Fortschritte, didn't he? A. So far as regards that one element of the combination, without referring to anything else, that is what he did. 291 X-Q. But that and the motor are the only elements in which you find Field to differ from Pinkus and Cook, are they not? A. Yes; I think I have already said that. 292 X-Q. And the Boue and Chretien French patents and the Organ for the Fortschritte all contain Field's motor as well as his generator? A. Yes." "37 X-Q. Do you find from the testimony in this case that there is any material difference in Field's arrangement of his machines over the way in which such machines had before been arranged for similar purposes? A. No."

It is further shown by Pope that at the date of Field's application there were some dynamo-electric machines which had a comparatively high resistance, and were therefore unsuitable for the purposes contemplated, while others of lower internal resistance would be suitable. He was then asked:

"187 X-Q. Then you consider the direction in the patent to use a 'dynamo-electric machine' as a direction to use one of low internal resistance in its armature, do you? A. The patent does not specifically direct the constructor to do this. It merely directs him to take a 'dynamo-electric machine,' and among these machines were at that date to be found those of different resistances, more or less suitable for the purpose. The patent does not tell him to select one of the lowest resistance he can find, but the general knowledge of the art at that date was undoubtedly quite sufficient to teach him to do this."

Mr. Pope further says:

"The specification of the patent in suit does not state specifically what kind of a dynamo-electric generator is to be used. * * * The generator shown in figure 5 of the drawings, and referred to by the letter G, is merely a typical, conventional, or diagrammatical representation of a generator, and obviously is not intended to represent any particular variety of dynamo-electric machine."

As to the scope of the circuit-controlling device claimed by the patentee, Mr. Pope was asked:

"157 X-Q. You understand that the circuit-controlling device contemplated by the first claim of the patent in suit is any device by which the motor can be started and stopped, do you not? A. Yes. 158 X-Q. You don't confine it to a device which is useful also to reverse the direction of rotation of the motor, do you? A. No; I do not think that it necessarily includes a reversing device, although in practice it would usually do so."

It will be remembered that practically the only thing in the first claim which the patent office found not anticipated was the circuit-controlling device. Irrespective of the alleged admissions of the patentee by reason of his action in the patent office, Mr. Pope's testimony is as follows:

"310 X-Q. If you added a circuit controller to the Clark patent, supposing again that it was not there already, you will have the same combination as is set forth in the first claim of the patent in suit, except that, as you understand the claim, Field has substituted the generator and motor of Boue, Chretien, and Siemens for those of Clark? A. It would amount to that substantially. 311 X-Q. Does it not amount to that exactly? A. Certainly.

If you substitute for Clark's magneto machine a suitable dynamo, for his inoperative motor a suitable operative motor, and apply to the motor a proper circuit controller for starting and stopping it, then you have the elements set out in the first claim of the patent. 312 X-Q. Have you any objection to giving a direct answer to the question as it was put? A. I see no objection to giving a direct answer. My answer is, 'Yes.'"

As to whether the addition of such a device as Mr. Pope has described above would involve invention, Mr. Pope was asked:

"307 X-Q. In your opinion, would the addition of a circuit controller to Clark's apparatus, assuming that it has not one already, be an act of invention? A. I do not see why it might not be. 308 X-Q. You think so, in spite of the fact that the Pinkus patent and the Cook patent are provided with circuit controllers for the same purpose? A. It is probable that the mere idea of placing a circuit controller upon the Clark motor would exhibit little or no invention, in view of the fact that circuit controllers had been employed by Pinkus and by Cook. But the application of a circuit controller to the particular apparatus of Clark in such a way as to enable the desired control to be exercised might involve some adaptation or change in the construction or arrangement of the circuit controller, which might involve some degree of invention. 309 X-Q. But simply putting a switch on the car to open and close the circuit would not, in your opinion, involve the making of an invention, would it? A. In view of the state of the art, I think it doubtful."

The attempt, on rebuttal, to show that there was some peculiarity in the Field motor on the car, is defeated by Pope's own testimony in chief and his admissions on cross-examination. This claim was not pressed in complainant's final argument. I do not deem it material.

These declarations of counsel and expert, in the light of the history of the art, and in view of the impulse given to it by electrical inventors prior to Field's alleged invention, show, assuming Field to anticipate the Siemens publications, that the answer to the claim of anticipations by these prior patents is that the generators therein described differ from that of the patent in suit, and are not sufficient for the purposes for which they were intended, or that certain of said patents do not describe a circuit controller on the car. This second point may, it seems, be dismissed without further consideration, either because certain of said patents do describe more efficient circuit controllers than Field described, because it would not necessarily require invention to merely shift the location of a reverser from the stationary source of power to the car; or because of the lack of patentable novelty in adding a Field circuit controller to said devices, as admitted by Mr. Pope. Briggs v. Ice Co., 60 Fed. 87, 89.

Let us now inquire what is the generator of the patent in suit. Field has nowhere described it. He has not even limited himself by the general term "dynamo-electric." His specification states that the generator is "a dynamo-electric or other suitable stationary generator of electricity." Under this term may fairly be included, as was done by the patent office, the generators of Clark or of Pinkus. In fact, Mr. Pope, in the interference proceedings, testified as follows, concerning the Field patent:

"The specification says: 'An electro-magnetic motor, K, of any well-known and suitable construction, is mounted upon the said car.' The motor shown

differs in no respect from the ordinary dynamo-electric machine, which was perfectly well known at that date, and which makes a very useful and effective form of motor; but many forms of the motor were known, any one of which would fall within the description of an electro-magnetic motor, which, as I have said, I understand to include any motor operated by electro-magnetism."

It has already been shown by the admissions of Pope that Field did not indicate any particular variety of dynamo-electric machine, but that the selection of a suitable one would occur to any person skilled in the art. If this be so, it would seem to negative any claim by Field that he had contributed anything to the art by such suggestion, or that he had himself made any invention by such substitution.

This case has thus far been discussed upon the assumption that the patentee sufficiently disclosed his alleged invention, and that it constituted a practical, successful combination. The questions raised have been considered only in the light of the evidence furnished by the complainant. But, if the evidence of the experts introduced by the defendant be considered, it will be found that they not only confirm the defenses which have seemed to me sustained by the admitted facts, but that they add other defenses which deserve consideration. Thus they charge that the patent in suit is so defective by reason of its failure to state essential details of construction, and its statements of defective and impracticable details of construction, that the apparatus, as shown, would be incapable of successful operation; and in this charge they are supported by the evidence of Mr. Pope, who admits that the apparatus, as shown and described, seems to be inoperative. The patentee never constructed a railway in accordance with the description contained in his patent, and there is no evidence that any commercial railway was ever so constructed. They further claim that none of the obstacles encountered in the practical operation of railways were overcome by anything described by the patentee, but all by the inventions of others, and that the success of the Field railway was due to the departure in construction from the description in the specification, and the adoption of the ideas embodied in said other inventions. They further testify that the Boue patent shows and describes, in combination, everything set forth in said first claim, and that defendant's railway more nearly resembles the railway of Boue than that of the patent in suit. It is not necessary to the decision of this case to sustain these and other similar claims asserted by defendant. But, in connection with the Field caveat, to be hereafter considered, they are relevant to the question whether, if invention was required to effect a practical operative combination, the patentee was the one who first conceived the ideas essential to the accomplishment of the successful result. They also support the contention that the description of the invention is so vague and indefinite as to be insufficient to enable those skilled in the art to construct it, without experiment, so as to attain the desired result. Howard v. Stove Works, 150 U. S. 164, 14 Sup. Ct. 68.

The reference to a generator in the application for a patent does

not define any particular kind of generator, or add anything to what was already known in the art. It may be applied to the generators of Pinkus and Clark, or to that of Boue, or of Chretien, or to any other electrically energized generator. But the most conclusive answer to the whole argument of complainant seems to be that, upon the admitted facts, there was no invention in the substitution of a later type of generators for the earlier types of generators. This question will be further considered later. And, finally, if there could be any invention in such substitution, and it was fully disclosed in the patent in suit, then it had already been disclosed by the patents to Boue and Chretien. But it is said that all the other devices were impracticable, and that Field's combination presented the first practical solution of the problem of electrical railway operation, and therefore must have involved invention. It further appears that the first embodiment of said alleged invention, in 1881, was entirely successful in operation, and that the second embodiment, in 1883, proved to be a complete commercial success; and it does not appear that the railroads of Boue and Chretien were ever put in practical operation. In this connection will be considered the railway of Siemens, which was successfully run in 1879, and of Edison, which commenced to operate in 1880. This argument, based upon the admitted practical success of the apparatus of the patent in suit, is most forcibly presented by counsel for complainant. The importance of the electrical railway, its extensive adoption throughout this country, and the fact that all these railroads use substantially the system covered by the claim in suit, show that the question of priority as to this subject is of the greatest moment to the parties whose interests are involved in this litigation, and impose a grave responsibility upon the court in its disposition of the case. "Under such circumstances, courts have not been reluctant to sustain a patent to the man who has taken the final step which has turned a failure into success." Mr. Justice Brown, in the Barbed-Wire Cases, 143 U. S., at 282, 12 Sup. Ct. 443, 450; Loom Co. v. Higgins, 105 U. S. 580; Consolidated Safety Valve Co. v. Crosby, etc., Co., 113 U. S. 157, 5 Sup. Ct. 513; Manufacturing Co. v. Adams, 151 U. S. 139, 14 Sup. Ct. 295. For the purposes of this inquiry it will be assumed that the patentee was the first to describe a conception of a successful, practical electric railway. Upon this assumption the following considerations are presented:

The objection is taken to the prior patents that they are for mere paper machines, not capable of successful practical operation. But where, as in this case, the objections only relate to details of construction, not affecting the substance of the invention, such patents are not rendered inefficient as defenses by such alleged imperfections. Pickering v. McCullough, 104 U. S. 310, 319. It is a significant fact, upon the questions of pioneership and success, that Boue and Chretien, in 1878, Field and Siemens, in 1879, and Edison, in 1880, all described or constructed electric railways upon principles substantially the same, and that these principles did not materially differ from those described by earlier inventors, and

well known in the art, except in the substitution of the new and more efficient types of generators, and that such measure of success as these alleged inventors achieved was confessedly chiefly due to the increased efficiency of said generators. Assuming the utility of said improved appliances, it may be questioned whether, so far as the element of invention is concerned, they show anything more than such an application of these new generators to new purposes as would have occurred to any person skilled in the art, as it did occur apparently almost simultaneously to the said five persons. That it marked an advance in the art, of incalculable value, cannot be denied; but it is at least a question whether the chief credit for such advance should not be given to the inventor of the generators whereby these results became possible, rather than to those who adapted these new generators to new but analogous uses. Given the perfected Gramme generator and the prior art, and the successful electrical railway is a necessary result. And, if the first person who happened to suggest the combination is entitled to a patent therefor, it must be because such suggestion involved invention. It does not seem that the mere prior statement of such necessary development of the art should be allowed to encircle the brow of an alleged inventor with the laurels of a pioneer, or that the conceded success of such a combination should be allowed to obscure the causes contributing to such success. The decisions of the court, sustaining patents on the ground of successful results, have been rendered in cases where the need had been long apparent, and various persons had vainly sought to accomplish the desired result.

A consideration of this whole case raises these questions: Did this patentee invent anything? Did he discover any new and useful improvement? Did his combination show any new arrangement of the well-known elements? All these questions the counsel and expert for complainant have already answered in the negative. They have failed to show any evidence of invention except a successful result, achieved by the patentee and others as soon as the necessary appliances became available. Upon the whole case presented I am forced to the conclusion that the patentee was not the inventor of the combination covered by the first claim.

But, further, defendant strenuously claims that Field's patent is anticipated by the Siemens publications, which were filed in the patent office October 9, 1879. Field filed his caveat May 21, 1879, and his application for the patent in suit March 10, 1880. It is claimed that the caveat discloses the invention, and that the patent, therefore, relates back to May 21, 1879. Let us again examine the language of said caveat:

"I will station a dynamo-electric machine, A, at some convenient point along the track, and connect the positive and negative wires, b, c, of the machine with two rails, so that the rails will serve as conductors. All the wheels, d, e, on one side of the car, I will insulate from their axles. On board the car I will place a secondary dynamo-electric machine, f, and gear it to one or both of the axles of the car. Now, if a current be sent from the primary dynamo-electric machine at the central station along the rails, or

along a supplemental conductor attached to the rails, the secondary machine on board the car will be actuated, and its power transmitted to the axles of the car for propelling it along the track."

"By using a suitable current reverser on the car, the direction of the current can be changed at will, so as to run the car in either direction."

The patent office has held that "the caveat clearly describes the matter in controversy." It will be noticed that no details are here given by which one skilled in the art could be assisted in the selection of generator or motor, or the construction of a current controller or reverser. No current reverser is described, although that is the only thing which the patent office held to distinguish the claim from the prior art. In this connection the following citation from Mr. Pope's testimony will be found material:

"358 X-Q. Would it, in your opinion, in 1878, have involved ingenuity or skill amounting to invention to add to the apparatus shown or described in the Boue patent—assuming that it does not already exist there—a circuit making and breaking switch on the vehicle for starting and stopping the vehicle? A. There might not have been invention in the mere conception of doing this, taking into consideration what had been described and shown in some of the prior patents in evidence in this case, but the particular construction and adaptation of the circuit-controlling device to the particular machinery used then for carrying out the particular object in view might have involved invention. 359 X-Q. Do you mean that it might involve invention to make a special form of circuit controller; such, for instance, as is shown and described in the patent in suit? A. Yes."

In using the car rails alone to form the circuit by means of the car wheels as collectors, the caveat substantially differs from the system described in the patent, and adopted by the patentee in practice. Both in the patent and in his experiments the patentee adopted for his circuit the system described in the Siemens publications, of a third rail and an additional current collector; so that if these details, in which his construction differs from that of Chretien, are essential, they are anticipated by the Siemens publications. The caveat does not set forth a single characteristic which distinguishes the combination from the Chretien patent. Section 4902, Rev. St. U. S., provides that:

"Any citizen of the United States who makes any new invention or discovery, and desires further time to mature the same, may * * * file in the patent office a caveat setting forth the design thereof, and of its distinguishing characteristics, and praying protection of his right until he shall have matured his invention."

Its purpose is to secure an opportunity to have questions of priority between rival inventors determined before the issue of a patent. The same particularity of description is not required as in an application for a patent, but it must be as complete and exact as the inventor is able to give, and sufficiently precise to enable the examiners to determine whether an invention described in a subsequent application is probably the same. Rob. Pat. § 441. The conclusion reached seems to dispense with the necessity of considering the cases cited by counsel as to the effect of the filing of this caveat upon the question of priority of invention. The general rule is well settled that, as between rival inventors, one having conceived an invention, and using due diligence in adapting or perfecting it, may

lay the foundation of a claim to priority by a sufficient model or drawing, and thus become entitled to claim the date of the original conception, thus shown, as the date of his invention. Loom Co. v. Higgins, 105 U. S. 580. See, also, Clark Thread Co. v. Willimantic Linen Co., 140 U. S. 481, 11 Sup. Ct. 846. And for the purposes of the question presented in this case the claim of complainant may be assumed to be correct,—that such prior conceiver, under such circumstances, will prevail over a later conceiver, who first gave to the world the complete embodiment of the invention. The question here is whether this caveat, which purported to describe Field's invention "so far as at present completed," is such a sufficient exhibition of his alleged invention, such a clothing of the conception in substantial form, such evidence that an invention was then actually made, as to be entitled to take precedence of the Siemens publication. Irrespective of the claim that the details subsequently set forth were borrowed from other inventors, the fact that Field found it necessary to the practical operation of his railway to depart from the construction originally claimed suggests that the patent, and, a fortiori, the caveat, did not present such a complete embodiment of the conception as would be sufficient to anticipate the one who had first constructed a working apparatus. Christie v. Seybold, 5 C. C. A. 33, 55 Fed. 69, and cases cited; Manufacturing Co. v. Renchard, 9 Fed. 293, 297, opinion by Mr. Justice Matthews. If it were necessary to the decision of this case, I should feel obliged to decide the question as to the sufficiency of the caveat in the negative, upon the authority of the above cases. The question of priority and reduction to practice is fully discussed, and the law applicable thereto is aptly and exhaustively stated, by Judge Taft in Christie v. Seybold, supra.

There are several other matters discussed in the elaborate presentation of this case, which, in view of the conclusions reached, it has not seemed necessary further to consider.

The argument that the first claim of the patent in suit is limited to a railway operated in detached sections is supported by the statement of counsel for complainant in attempting to get rid of anticipations in the patent office; by the opinion of Benjamin F. Thurston, to whom the construction of the patent was referred; and by the opinion of the United States supreme court in Electric Railroad Signal Co. v. Hall Railway Signal Co., 114 U. S. 87, 5 Sup. Ct. 1069. Some phases of the history of the patent in suit in the patent office have not been fully discussed, because the evidence upon the questions involved has received independent consideration, so far as it seemed pertinent to the decision of this case.

Let the test of the patent law be applied to the facts, and let it be assumed that the problem of a commercially successful electric railway was presented for solution on May 29, 1879, to one skilled in the art. He has before him the operative railway of Green, whose only defect was its voltaic battery as a generator; the patent of Clark, covering a complete device; the patent of Pinkus, describing an apparatus confessedly not inoperative, the patents of Boue and Chretien not shown to be inoperative, and a model constructed substantially in

accordance with which was successfully operated at the hearing. Can it be doubted, when it is manifest that the only difficulty in the way of success is one, not of operation, but of economic transmission of power, that it would have occurred to him, either to take one of the newly-invented generators, the characteristic feature of which was known to be greater efficiency by reason of the economical transmission of power, and to have substituted it for the battery of Green, or the antiquated generators of Cook and others, or to have done what, so far as the caveat shows, is all that Field did, to have taken Chretien's device as the statement of a successful invention, and, proceeding with that as the underlying invention, to have subsequently perfected its details, either on the lines already marked out by Chretien or upon different lines, such as are shown by Siemens? That in so doing what Field did he would not have invented any new device in, or arrangement of, the elements of the combination, is admitted as matter of fact. That such mere carrying forward, or new or more extended application of the original thought, or substitution of something better or more efficient, causing an improvement in degree only, does not constitute invention, is established as a matter of law. The rule applied to such cases is stated in Robinson on Patents (section 78, 237), and is supported by the following, among other, decisions: Smith v. Nichols, 21 Wall. 112; Atlantic Works v. Brady, 107 U. S. 192, 2 Sup. Ct. 225; Hollister v. Manufacturing Co., 113 U. S. 59, 5 Sup. Ct. 717; Aron v. Railway Co., 132 U. S. 85, 10 Sup. Ct. 24; Burt v. Evory, 133 U. S. 349, 10 Sup. Ct. 394; Trimmer Co. v. Stevens, 137 U. S. 423, 11 Sup. Ct. 150; Manufacturing Co. v. Cary, 147 U. S. 623, 13 Sup. Ct. 472; Ex parte Faure, 52 O. G. 752, 754. "All that Hall did was to adapt the application of old devices to a new use, and this involved hardly more than mechanical skill." Mr. Justice Jackson in Knapp v. Morss, 150 U. S. 228, 14 Sup. Ct. 81; citing Aron v. Railway Co., supra.

The patentee demands the enforcement of the contract for the statutory monopoly of 17 years, implied by his patent. The public denies the validity of the contract, on the ground of the lack of the alleged consideration. In such a case the court may put itself as nearly as possible in the situation of the parties, for the purpose of determining the object the respective parties had in view, and their respective rights and obligations thereunder. In this situation, the court, by a review of the state of the art, may ascertain what the public already had, what it still required, what the patentee sought to accomplish, what was the measure of his success, and what was the character of the means by which it was achieved. If it appears on the part of the public that it has only received from the patentee such improvement in means or result as the public might have procured by presenting its wants to a skillful mechanic, provided with the appliances and knowledge and skill connected with the exercise of the art, then there is no reason why the patentee should be permitted to demand a monopoly as the price of a combination which would naturally have been disclosed in the ordinary development of the art. But if the results of the skill of the

artisan still show the barrier of impracticability between the end sought and the result attained, an interval between theory and practice, a limitation upon further development, while the alleged inventor, by the exercise of a discriminating faculty, distinguishes difficulties, and estimates their proportions, and breaks down the barrier, or bridges the interval, or stretches beyond the limitation, by an instrumentality which, in the very facts of its construction and operation, by the adaptation of its mechanism to the end sought, suggests design, then he has contributed something of creative thought, he has invented this new instrumentality, his contract is valid, and his monopoly should be sustained. Applying these tests to this case, where do we find the flash of creative thought, where the conceptions, where the contribution of an invention to the public? Not in the elements of arrangement of the combination, for they were furnished by the prior art; not in the details of construction or distinguishing characteristics of the combination, for they were not disclosed in the caveat, and everything which distinguishes this patent from the prior art was described by Siemens before the application was filed; not in the first practical operation, for, as to that, Edison and Siemens were first.

The complainant strenuously claims that the defendant is estopped to deny the validity of said patent. For the purpose of considering this question, it becomes necessary to explain the present relations of the parties to the suit, and the relations formerly existing between the parties now represented by the complainant and those now represented by the Edison General Electric Company. The defendant in this case is the Jamaica & Brooklyn Railroad Company, but it appears by the record that it is a customer of the Edison General Electric Company, and that said latter company is defending this suit. The complainant, the Electric Railway Company of the United States, was organized on or about May 5, 1883, for the purpose of developing the inventions of Stephen D. Field and Thomas A. Edison having for their object electrical propulsion on railways, and for the manufacture, use, and sale of machines and appliances in connection therewith. Previous to such organization, the interference proceedings heretofore referred to had been going on in the patent office between said parties, and the object of this organization was to form a pool for the combination of the two interests on an equal basis. The contract under which this arrangement was to be carried out had been, on April 26, 1883, executed by Messrs. Field and Edison and their associates, and provided for the formation of said corporation, and for the assignment to it of all inventions then owned or controlled by the parties, and of all future inventions of said Field and of said Edison made prior to January 12, 1886, exclusively applicable to electrical propulsion on railways, except for elevated railroads in the city of New York, and for the prosecution of said pending interferences by said corporations. The contract further provided that the business of said corporation should consist in the development of said inventions; the manufacture, use, and sale of appliances in

connection therewith; the disposition of rights thereunder; and that the corporation should have nine directors,—four to be named by the Field party, four by the Edison party, and one by a majority of the directors. Under this arrangement the interferences already referred to were prosecuted by said corporation, this complainant, until after April 1, 1889, when, the patent office having rejected the Field fourth and fifth claims, on the ground that they were anticipated by the Clark patent, said claims were canceled by counsel for Field. The Field patent issued July 16, 1889. In May, 1889, the Edison interest, having secured a majority of the stock of the complainant corporation, elected a majority of the board of directors, who elected such executive officers as they desired. Thereafter the Edison interest refused to furnish money to promote the interests of the complainant corporation, and to hold or attend meetings, until a suit was brought by the Field interest for the appointment of a receiver for said corporation. It is perhaps immaterial to inquire as to the causes which operated to produce this change in the relations of the parties. The complainant asserts that the Edison interest refused, in 1889, to further co-operate with the Field interest, because it had in the mean time absorbed a number of rival corporations owning patents, and thought it would be more profitable to develop an electrical railway system under said patents, of which it owned the whole, rather than under the Field patent, of which it owned but half. The defendant asserts that as one of the reasons which led to such formation of said corporation was the conflicting claim of Edison and Field to the invention set forth in the fourth and fifth claims of the Field application, the stock received by each interest was the consideration for, and represented its contribution to, said corporation. When the counsel for Field erased and abandoned said claims, the question arose whether it would be more profitable to the defendant to put up money to litigate said patent, or to try to buy out the Field interest, and use said patent in connection with the other patents owned by the Edison interest. The defendant further claims that, having consulted Mr. Benjamin F. Thurston, and having received an opinion from him unfavorable to the patent, it made an agreement with the Field interest that each should give back what it received and receive back what it put in; and that the rejection and cancellation of said claims, and the conclusions set forth by Mr. Thurston, were the controlling reasons which actuated the Edison interest in terminating its relations with the Field interest. But, whatever may have been the operating cause, the fact is that on April 29, 1890, the complainant, for value received, transferred to the Edison General Electric Company, then representing the Edison interest, all the inventions, patents, and rights which it had received from the Edison Electric Light Company or from Thomas A. Edison under the various agreements existing between the parties, and the said Edison General Electric Company agreed, to transfer to such person or corporation as the complainant might designate, the shares of stock which it, the said Edison Company, had received as its share of the assets of the complainant, and that

it would cancel certain debentures, and assume a certain claim of Thomas A. Edison under one of said agreements. The transaction practically amounted to a retransfer to the Edison interest of the Edison inventions which it had put into the complainant corporation, and a surrender by said Edison interest of whatever interest and rights they had received therefor. There was no assignment of any interest in the Field patent, except such as may be implied from said transaction. Upon these facts, complainant claims that the Edison General Electric Company is estopped by said agreement to deny the scope or validity of the patent in suit. The complainant further contends that said company is, by its conduct, estopped to defend this suit.

As has already been stated, the complainant corporation was organized for the utilization and production of inventions and appliances for the propulsion of railway cars by electricity. But it appears that in 1889, not only was the Edison interest refusing to aid the complainant company in the business for which it was created, but the Edison General Electric Company was itself engaged in the manufacture and sale of such appliances, and had acquired control of the Sprague Electric Railway & Motor Company, a large customer of said Edison Company; and that the electric railways introduced by said Sprague Company, and for which said Edison Company was furnishing material, would infringe the Field patent if it were sustained with as broad a construction as was hoped for. It further appears that the Edison interest had under consideration the question as to the advisability of purchasing the Field patent, and as to whether it was worth acquiring at the large price asked for it by the Field interest, and that, in this connection, the Thurston opinion was obtained; and that the Edison interest, by its refusal to aid the complainant to carry out the objects for which it was organized, or to attend its meetings, compelled the complainant corporation to make said transfer agreement of April 29, 1890. And complainant claims that these facts show dishonest and fraudulent conduct on the part of said Edison General Electric Company, and bring them within the rule which forbids a party to occupy inconsistent positions. They strenuously urge that the Edison interest, being in privity with the Edison General Electric Company, alleged to be the actual defendant herein, has affirmed the validity of the patent in suit, the priority of the invention of Field, and the patentability of its subject-matter; and that, having assumed one position as applicants in the patent office, they cannot assume another position as defendants in the courts. It may be assumed that the conduct of the parties representing the Edison interest towards the complainant company was inequitable and unjustifiable; that it was in gross violation of the understanding of the parties to the original contract, and was a perversion of the purposes for which the complainant corporation was organized; and that the Edison interest, having been disappointed in the result of the Field application, resorted to oppressive means to get rid of what had proved to be a bad bargain. The earnestness with which this claim of estoppel has been presented in various aspects in the

brief and arguments of counsel for complainant, and its vital importance to the determination of the issues in this case, seemed to demand, and have received, most careful consideration. The result of these considerations seems to show that there are insuperable obstacles in the way of the claim that, by reason of these facts, the Jamaica & Brooklyn Railroad Company is estopped to deny the validity of the Field patent. The case presented does not involve the question of the right of a vendor who, having obtained a valuable consideration by representations as to the validity of a patent, attempts to dispute its validity, to the damage of the transferee. Assuming that the Edison Electric Company, which is defending the suit against its customer, is the real defendant, this is not a suit by a vendee against a vendor, but a suit by a corporation, which has rescinded a sale or transfer to it of certain patents and rights, against another corporation, whose only connection with this case arises from the fact that its stockholders were stockholders of the complainant corporation at the time the acts complained of occurred, and, as stockholders, participated in such acts. The disposition of the questions presented depends upon the rights and liabilities of stockholders of a corporation arising out of their ownership and the disposition of their shares of stock in said corporation. The general rule that the assignor of a patented invention is estopped to deny the validity of the patent as against his assignee is well settled. Rob. Pat. p. 555, § 787; Purifier Co. v. Guilder, 9 Fed. 155; Curran v. Burdsall, 20 Fed. 835; Barrel Co. v. Laraway, 28 Fed. 141; Woodward v. Machine Co., 60 Fed. 283. It may be suggested at the outset that whatever rights the minority stockholders may have had they had against the corporation, not against any body of stockholders. The minority stockholders, having originally invoked the aid of the law to compel the complainant to act, afterwards concluded to protect their interests by a dissolution of the original arrangement, and a resumption by each interest of what it had originally contributed. When that agreement was consummated, each corporation stood upon its rights to protect its own interests. There was no agreement on the part of the Edison interest that by such surrender and transfer it should be deprived of any rights which it originally had, or would have had, to defend its own patents, provided no such consolidation had been effected. Even if the parties who represented the Edison interest were actuated by dishonorable motives, this does not affect their standing in this case, provided they committed no wrongful act. This question is fully discussed, and the principle to be applied thereto is clearly stated, by Judge Wallace in Ervin v. Navigation Co., 20 Fed. 577. A party is not debarred from the vindication of a legal right because he is actuated by an improper motive. Phelps v. Nowlen, 72 N. Y. 39. The inquiry must be in each case, in law or in equity, with reference to the plaintiff's right of action, and not to his ulterior motives and purposes. Clinton v. Myers, 46 N. Y. 515. And, even if the acts of the corporation, or its omission to act, could have been charged against them as holders of a majority of the stock, such charge should have been pressed under appro-

priate proceedings, in connection with the receivership application, or, at least, while they remained members of the complainant corporation. By the abandonment of said proceedings, and the execution of said agreement, the Field interest elected to protect their rights by a dissolution of the previously existing corporate relations, and they cannot now go behind said agreement, or extend its operation to matters not embraced therein by reason of said prior relations. But I do not decide this question upon these grounds, but upon the well-settled distinction between the legal status of the corporate entity and its stockholders, and between the ownership of stock in a corporation and the ownership of the property of the corporation.

Complainant claims, in effect, that the defendant company may be estopped by the individual acts of its stockholders, done while they were stockholders, and officers of the complainant corporation. Complainant's counsel insists that the settlement between the stockholders of the complainant amounted to a sale by the defendant to the complainant of an interest in the patent in suit. I do not so hold. The stockholders of the complainant corporation, called the "Edison interest," neither prosecuted the application for the patent nor conducted the interferences on behalf of the patentee in the patent office. They neither owned said patent when it issued, nor did they sell it to the complainant corporation. Whatever was done was done by the complainant itself. The retransfer of the stock of the Edison interest to the stockholders representing the Field interest operated as a rescission of the original agreement, not as a sale of the Field patent. That a stockholder has no title whatever to corporate property is well settled. Thus, in Preservers' Co. v. Norris, 43 Fed. 711, a manufacturing corporation sold its business to its principal stockholders, who thereupon sold it to a third person, with an agreement not to enter into the same business, directly or indirectly. This agreement was not signed by the corporation. It was held that the corporation was not bound. Judge Thayer, in his opinion, says:

"It is familiar law that a corporation has a personality of its own, distinct from that of its stockholders; that it is not affected in the most remote degree by contracts by its stockholders with third parties, whether they own much or little of its capital stock, and is not bound to discharge any personal obligations assumed by its stockholders."

It is clear that the ownership of a patent by a corporation confers no right on its individual stockholders to the use of the patent. The right in such cases is a mere corporate one, and cannot be transferred by the stockholders to another corporation. Hapgood v. Hewitt, 119 U. S. 226, 7 Sup. Ct. 193; Locke v. Lane & Bodley Co., 35 Fed. 289. "The fact that Comegys held stock in the company gave him no title to its property, and the attachment of his stock did not in the least incumber the property of the company, or prevent the assignment of the letters patent by it." Mr. Justice Woods, in Gottfried v. Miller, 104 U. S. 521, 528. The distinction above pointed out is further recognized and applied in Pullman's Palace-Car Co. v. Missouri Pac. R. Co., 115 U. S. 587, 6 Sup. Ct. 194, where

a contract with the Missouri Pacific required it to haul Pullman cars on all roads owned or controlled by it. The supreme court held that the St. Louis, Iron Mountain & Southern Company was not controlled by the Missouri Pacific under this contract, although the Missouri Pacific owned all, or nearly all, of its stock. See, also, Porter v. Steel Co., 120 U. S. 649, 670, 7 Sup. Ct. 1206. And in the very recent case of Humphreys v. McKissock, 140 U. S. 304, 11 Sup. Ct. 779, where several railroads combined to construct an elevator, each to contribute an equal sum towards its cost, and each to receive corresponding certificates of stock in a corporation organized to take title to the elevator, and to construct it, it was held that the interest of each railroad company therein was as a stockholder in the elevator corporation which constructed it, and that no company had any interest in the property of said elevator corporation. Mr. Justice Field, delivering the opinion of the court, reversing the decree, said:

"Both the commissioner and the court * * * seem to have confounded the ownership of stock in a corporation with ownership of its property. But nothing is more distinct than the two rights. The ownership of one confers no ownership of the other. The property of a corporation is not subject to the control of individual members, whether acting separately or jointly. They can neither incumber nor transfer that property, nor authorize others to do so. The corporation—the artificial being created—holds the property, and alone can mortgage or transfer it."

Counsel for complainant finally claims that there is an estoppel based upon public policy, because Edison contended that Field was the inventor of the subject-matter set forth in the patent in suit. But Mr. Edison did not so claim, for he contended therein that he was a first inventor as to the only point in issue between himself and Field, namely, Field's fourth and fifth claims, which the patent office decided were void. He was never in interference with Field as to the claim now in suit. Such an application of the doctrine of estoppel, based upon that most uncertain and unsatisfactory ground of public policy, ought to be limited, rather than extended, in patent causes. There is necessarily involved on the other side the general consideration of public policy arising out of the right of the public to the enjoyment of the monopoly claimed under the invalid patent. As is said by Mr. Justice Shiras, in Haughey v. Lee, 151 U. S. 282, 14 Sup. Ct. 331:

"Whether or not there is any inconsistency in trying at one time to get a patent for a supposed invention, and in afterwards alleging, as against a rival successful in obtaining a patent, that there is no novelty in the invention, it cannot be said to constitute an estoppel. Besides, the defense of want of patentable invention in a patent operates not merely to exonerate the defendant, but to relieve the public from an asserted monopoly."

In view of these considerations, the defendant is not estopped to deny the validity of the first claim of the patent in suit. Let a decree be entered dismissing the bill.

JONES v. HOLMAN et al.

(Circuit Court, E. D. Pennsylvania. January 30, 1894.)

No. 15.

This was a suit by Joshua R. Jones against William A. Holman and others for infringement of letters patent No. 432,411, for an invention relating to easel albums. Plaintiff obtained a decree, the case being fully reported in 58 Fed. 973. The defendants thereupon filed a petition for a rehearing.

A. B. Stoughton, for complainant.
Hector T. Fenton, for defendant.

DALLAS, Circuit Judge. The defendants' petition for a rehearing, having been argued upon the merits, has been fully considered, but will be disposed of without going into the case at length.

The three claims involved were all adjudged (plainly, it was supposed) to be valid. The exhibit Weiderer Picture Frame No. 4 was not overlooked. It is true that neither the first nor the third claim includes an inclined stand, but they each include a "stand" which is wholly absent from the Weiderer frame. That device discloses nothing resembling a stand, inclined or otherwise, capable of serving as a resting place for the back or edge of the book to roll upon as its cover turns on the fulcrum rod. However much this frame may be supposed to resemble the plaintiff's device, now, when both are seen together, it is obvious, I think, that they are not, in the sense of the patent law, substantially identical or conflicting. The Weiderer contrivance was not designed, and could not be successfully used, to accomplish the object proposed and attained by the patented combination, as set forth in either of the claims in question. The defendants' device, which is especially dealt with in the opinion filed, is the one which was chiefly referred to upon the argument; and, that having been held to be an infringing one, it was not deemed requisite to discuss any other. The reasons for my conclusion that the defendants had infringed, and the ground upon which that finding rests, have been sufficiently stated. I cannot agree that, in the defendants' arrangement, what is called in this petition "the cross-bar of a hinge brace" essentially differs from the corresponding part shown and described in the patent in suit, or that it does not perform the same function. There is nothing suggested by the present petition which had not already been considered, or which, in my opinion, should change the result heretofore announced. Rehearing refused.

MERRITT v. MIDDLETON et al.

(Circuit Court of Appeals, Second Circuit. April 19, 1894.)

No. 90.

PATENTS—INVENTION—EYEGLASS HOLDERS.

The Clawson patent, No. 175,821, for an eyeglass holder, consisting of a combination of a hook with a pin, identical with the device shown in the

British patent to Montleart & Tent, No. 1,788, of 1863, when inverted, except that the hook, instead of projecting outwardly, is an "inwardly closing" hook, made as suggested by the snap hook in the Merritt patent, No. 58,867, is void for lack of patentable invention. 55 Fed. 976, affirmed.

This was a suit by Samuel F. Merritt against John D. Middleton and Reuben S. Middleton for alleged infringement of United States letters patent No. 175,821, for improvements in eyeglass holders, issued April 11, 1876, to I. Neal Clawson, and assigned to complainant. The circuit court dismissed the bill (55 Fed. 976). Complainant appealed.

Philip J. O'Reilly, for appellant.
Willis Fowler, for appellees.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. The patentee's device, which is made of a single piece of wire, will be best shown by the following cut, being Fig. 3 of the patent:

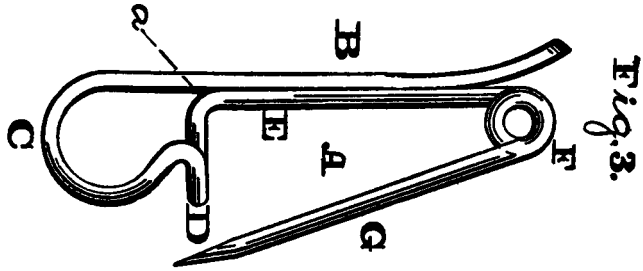


Fig. 3.

His claim is for—

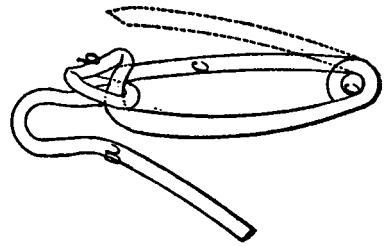
"The inwardly-closing hook, B, bottom bend, C, and bar, E, with the contact point, a, closing the upper space of the bend, in combination with the single laterally-extending open eye, D, and with the coil, F, and pin, G, all constructed and arranged to operate as specified."

In use, the bridge or the handle of a pair of eyeglasses is slipped over the hook, B, and passes down into the bottom bend, C, from which the glasses hang suspended when not in use. The hook has sufficient elasticity (secured in part, as the specification states, by the open eye, D) to admit of the glasses being readily passed between the hook, B, and the bar, E, while there is yet such close contact between the bar and the hook that, once hung in the bend, the glasses will be retained there, unless purposely withdrawn. The spring coil, F, assists in securing this contact, and at the same time gives to the pin, G, an outwardly-projecting tendency, which will facilitate its insertion in the garment to which it is to be fastened. The pin hooks into the open eye, D, as a brooch or safety pin does. The circuit court held the patent void for lack of patentable invention.

In the British patent to Montleart & Tent (No. 1,788, of 1863) there is shown a hook for suspending dresses or parts of dresses, fabrics, curtains, etc., which consists of the combination of a hook

with a pin, constructed somewhat like a brooch pin. One form of this device is here shown:

FIG. 1.



And this figure is thus described:

"In the accompanying drawing, Fig. 1 shows the fastening constructed of one piece of metal, brass or iron wire being used for the purpose. The wire is first bent to form the hook, a; it is then curled over vertically, and back to a horizontal direction, to form a rest or catch, b (for the spring pin, c^1), and it is then carried down to a suitable distance, thereby forming a stem, and is curled round at c to insure elasticity for the spring pin, c^1, which is produced by continuing the wire upwards to the rest or catch, b, and pointing it at its extremity. In order to hold a curtain by means of this construction of fastening, the pins, c^1, of any given number of these fastenings, are passed through the fabric in a vertical direction at or near its edge, and the hooks, a, are inserted in the loops of the curtain-rod rings; or, if the rods are of small diameter, the hooks may be hung upon the rods themselves."

The British patentees further state that "by reversing the fastening, and inserting the pin in any fixed fabric, the hook will project, and be ready to receive any light articles which may be suspended therefrom." The most cursory examination of this hook shows that, if reversed, and made of wire of the proper size and finish, it could be used as an eyeglass holder, and that it has the spring coil, the pin, the open eye, the bar, the bottom bend, and the hook of the patent in suit, except that the hook is an outwardly-projecting instead of an inwardly-closing hook, and thus there is no "contact point" provided for closing the upper space of the bend, so as to prevent the eyeglasses from flying out. But the use of a "contact point" to secure that advantage is shown in United States letters patent to Merritt, No. 58,867. His device shows a long hook, bent over upon itself; the straight part, which he calls the "shank," occupying relatively the same position as complainant's bar. Merritt's specification designates this as a "snap-hook; A being the shank, and B the hook; the end of the latter being so bent as to spring against the former, and thus prevent any casual dropping off from the hooks of any article hung thereon." With the Montleart & Tent hook before him, and the necessity apparent of securing the eyeglasses in some way against dropping off the hook, and with the suggestion contained in the Merritt patent that this could be done by springing the end of the hook back upon its shank, it is difficult to understand how the idea of improving it by making the hook "inwardly-closing" instead of "outwardly-projecting" could have failed to occur naturally and spontaneously not only to a skilled mechanic, but to any person of ordinary intelligence.

The decree of the circuit court is affirmed, with costs.

OSBORNE STEAM-ENGINEERING CO. v. LAMB et al.

(Circuit Court, N. D. Illinois. August 10, 1893.)

PATENTS FOR INVENTIONS—INFRINGEMENT—STEAM-HEATING PIPES.

Letters patent No. 269,224, issued December 19, 1882, to Eugene F. Osborne, for improvement in steam piping for heating, consisting in a change in the place where the steam supply pipe is connected with the seal tank, is not infringed by a system of steam heating consisting of the old single-pipe system, without any seal tank, even though the incidental depression of a pipe under a doorway should cause it to be occasionally filled with water, since that would not constitute a water seal between radiators, within the meaning of the patent.

Suit by the Osborne Steam-Engineering Company against F. W. Lamb, Albert C. Lamb, William A. Green, and William M. Crilly, to restrain the alleged infringement of a patent.

Samuel E. Hibben and Banning, Banning & Payson, for complainant.

Coborn & Thacher, for defendants.

JENKINS, Circuit Judge. The bill is filed to restrain an alleged infringement of patent No. 269,224, issued December 19, 1882, to Eugene F. Osborne, for "steam piping for buildings." The defenses are the invalidity of the patent, and noninfringement. The first claim of the patent is alone involved. A prior patent, No. 212,320, was issued to Mr. Osborne, February 18, 1879, for "improvement in steam piping for heating, cooking," etc. The patent in suit is stated to be an improvement upon the system covered by the first patent. In the first patent, according to the drawings, the seal tank is connected with the steam supply main, or with the boiler, at a point back of any connections leading to a radiator. It was found, in practice, that when the pipes forming the supply and return mains of the equalized circuit were laterally extended to a great distance, and the supply was vertically but little higher than the return main, the water from the latter was liable to rise into the former, and shut off the radiator feed. This difficulty was sought to be obviated by conducting the steam supply pipe first to the radiators, and then to the equalizing tank, whereby the pressure in the tank is less than that in the supply main. The principal—and, I believe, the only—difference in the two patents is that in the first the steam supply pipe is connected with the seal tank before the steam to supply the radiators is taken from that pipe; in the second patent, it is connected after the supply to the radiators. In the first patent the specifications and claims—whatever the drawings may show—do not limit the connection between the steam supply and the tank at a point before the connection with the radiators. The inventor sought to obtain, and claimed by his first patent to have obtained, a substantially equable pressure throughout the entire division between the supply and the return pipes. It may be questioned whether the change of location of parts of the apparatus has done more than to vary the degree in the results produced, and whether the first patent would not cover the particular location of the parts designated in the second patent. Without stopping to consider this question, or the

question of estoppel arising upon the license to the defendants, I am of the opinion that the bill must be dismissed upon the ground that the defendants have not infringed. In the defendants' apparatus, complained of, there is no condensed water return main, and can be no water sealing in any return main, which forms part of the combination of the Osborne system. The steam-heating system placed by the defendants was the old single-pipe system, known long before the Osborne patents. The incidental depression of a pipe under a doorway, which would cause it to be occasionally filled with water, would not, in my judgment, constitute a water seal between radiators, within the contemplation of the Osborne patent. Upon the ground of noninfringement, therefore, the bill must be dismissed.

CORNELL v. BATAILLE.

(Circuit Court of Appeals, Second Circuit. April 19, 1894.)

No. 100.

1. PATENTS—INFRINGMENT—FOLDING GATES.
   A patent for a folding gate, consisting of upright pickets and cross and connecting braces pivoted to the pickets and arranged to slide vertically within or upon the pickets, whereby the latter are adapted to slide on a base support without changing their parallelism or their vertical position, the pickets being the characteristic feature, is not infringed by a gate of lattice work pivoted at the intersections like lazy tongs, with a single central upright support. 56 Fed. 840, affirmed.

2. SAME.
   The Maddox & Humphries patent, No. 213,119, for a folding gate, construed, and held not infringed. 56 Fed. 840, affirmed.

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

This was a suit by John M. Cornell against Achille Bataille, for alleged infringement of the first claim of letters patent No. 213,119, issued March 11, 1879, to Maddox & Humphries, for improvements in folding gates. The circuit court dismissed the bill (56 Fed. 840). Complainant appealed.

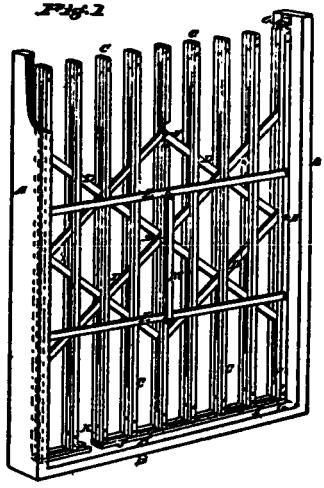
Charles N. Judson and Willis Fowler, for appellant.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

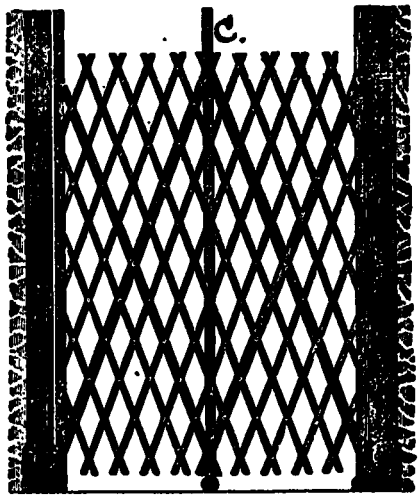
LACOMBE, Circuit Judge. The patent relates to a folding gate capable of moving to and fro, in a straight line, across a gateway, so that, when folded up, it will shut in upon itself, close against the jamb, and leave the gateway substantially free. The claim is for:

"(1) A gate for hallways and other places, consisting of a series of upright pickets, and a series of cross and connecting braces or bars pivoted to the pickets at two or more central points, and having upper and lower points of connection, arranged to slide vertically within or upon the pickets, whereby the latter are adapted to slide upon a base support across the gate opening without changing their parallelism or their positions vertically, substantially as described."

The following drawing, being Fig. 1 of the patent, shows the kind of gate more readily than would an extended description:



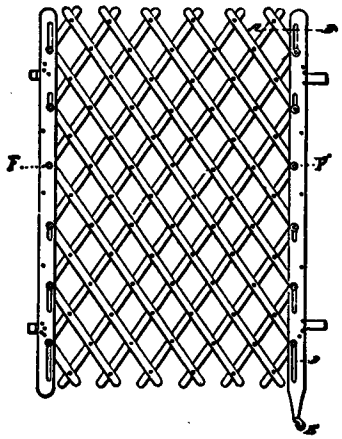
The defendant has also a patent for a folding gate, No. 358,956, dated March 8, 1887. The particular gate complained of is slightly modified from his patent, and is shown below:



The modification consists in having the central and outer-end uprights supported from the base, instead of being hung from a transverse rod above. The circuit judge held that such a gate did not infringe the first claim of complainant's patent. To determine that question, it is first necessary to settle what construction is to be put upon the patent. An examination of the art shows that the invention of Maddox & Humphries was not of that primary, pioneer, or fundamental character which admits of a broad and comprehen-

sive interpretation of its claims. Folding gates were old. Some of them consisted mainly of upright bars or rods, called "pickets," connected together so as to admit of their being moved back against the door jamb, or extended therefrom. Others consisted mainly of diagonal intersecting rods, so arranged as to form the movable latticework known as a "lazy tongs." In some instances the support for the outer end rested on a base; in others, it was suspended from above. The defendant contends that the patent in suit must be restricted to a gate in which the pickets are the characteristic feature, and that it is not infringed by his own gate, in which the latticework or lazy tongs is the characteristic feature. In both gates—in fact, apparently, in all folding gates—the upright next the inner jamb is in no proper sense a picket at all. It is fastened rigidly, has no movement of its own, and is practically only the permanent support, upon which the mechanically operating combination of lazy tongs, cross braces, bars, pickets, or what not, is bottomed. It has no different function from that of the gate post itself, into which, in the older varieties of lazy-tongs gates (Merritt, 6,957; Bresee, 60,678), the inner end of the latticework was inserted. Lattice or lazy-tongs gates had also, before the patent in suit, been provided with an upright at the outer end, so pivoted to the lazy tongs that at one point the pivot had no vertical motion, while at the other points the vertical motion induced by the operation of the gate was provided for by allowing the pivots to play in slots in the upright. Such devices are shown in Frazee, 172,852, and in Snead, 67,143; the following sketch being Fig. 1 of the last-cited patent:

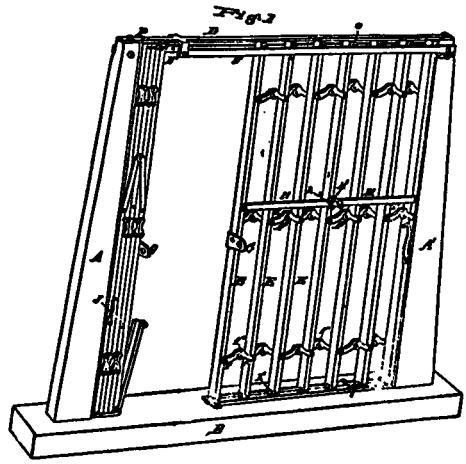
Fig. 1



The fixed pivots in the jamb upright and in the movable or sliding upright, F, F^1, are in the same horizontal plane; and inspection of the movement of a lazy tongs when in operation shows that if it is to be fastened to objects which are themselves to have no vertical motion, and is also to be given free play, the fixed pivots (i. e. fixed, in the sense of having no vertical motion) must be located in the same horizontal plane. Looking at the Snead gate, it is manifest

that, the greater the space it has to close, the weaker it will be; having nothing to support it when open, except at the ends. The gate of defendant meets this difficulty by means of a central support to which the lazy tongs are pivoted by a fixed pivot, in the same horizontal plane as the fixed pivots at the jamb and outer movable upright, while the other connections between the lazy tongs and the central upright are made to slide vertically, thus avoiding any vertical motion in the upright itself. In the complainant's gate the central upright or pivot is arranged in like manner, the plane of fixed pivots being located centrally in complainant's gate, and at the bottom in defendant's. In this device of a central upright support for a folding gate arranged to be pivoted to the latticework in the same way as the outer upright, namely, with the fixed pivot in the same horizontal plane as is the pivot which fastens the latticework to the jamb upright, it is hard to see any patentable invention. It is not necessary, however, to pass upon that point. The complainant has no claim for that single simple improvement, and a brief review of the history of his application shows that the claim here relied on is only for a combination, which his assignors have specifically described, and to which description they must, in view of the state of the art, be closely confined.

In 1877, Maddox, one of the patentees of the patent in suit, took out a patent for a folding gate, No. 191,984, shown below:



It consisted of a series of sliding vertical bars, linked together, in two or more lines of connection, by knuckle joints, with stops; the whole being arranged to be drawn out from the wall so as to fill up the space in the hallway, and fold up close together again against the wall, into a small compass. In the specification of the patent in suit, it is stated that the invention of the patentees, Maddox & Humphries, "has for its object to improve the gate for hallways and other places for which the patent [last above referred to] was granted to Maddox, [which patent] consists in a series of vertical pickets or bars connected * * * by knuckle joints with

stops." In the specification as given in their original application, they state that their improvement consists in "combining a series of cross and connecting braces with the sliding pickets, instead of employing the knuckle joints, for the purpose of strengthening and bracing the gate during its movements, * * * and in adapting the pickets to be held parallel to each other during their movements in opening and closing the gate." The original application was rejected on reference to the Maddox gate, and, in part, on reference to patent to Powell, 138,527. This last-named patent shows a folding gate consisting of a single row of lazy tongs, with a series of upright rods at each intersection of the arms composing the lazy tongs; the function of the uprights being to act as a support to the gate, when extended, and also to obstruct the open space between the gate and the ground. Powell's pickets, however, were not so affixed to the gate as to be vertically immovable during the operation of opening and closing. In reply to this rejection, Maddox & Humphries called the attention of the patent office to the defect of the Maddox gate, viz. that the knuckle joints were effective to hold the pickets apart only when the gate is opened to its fullest extent,—the pickets at other times falling against each other, or spreading apart,—and pointed out how their improvement of cross braces connected with every picket of the series so as to keep them parallel at all times, and without vertical motion, overcame that defect, explaining that the brace bar, H, of the Maddox patent, could not perform the functions of their "cross and connecting braces" because [although connected with the jamb picket and outer picket] it was not connected with the intermediate pickets. In reply to the reference to Powell, they say:

"In Maddox & Humphries' gate the main feature consists in the vertical sliding pickets, the other devices being subordinate, and adapted as one means for moving the pickets. In Powell's gate the main feature is the lazy tongs, the vertical rods * * * being subordinate, and used to prevent the gate from bowing when extended, and incidentally to partially obstruct the space under the extended gate. * * * The rods [of Powell] are not sliding pickets, but incidental devices for supporting the gate on a broad base when extended. Maddox & Humphries construct their gate mainly of sliding pickets, so arranged as to slide on the ground in a horizontal plane," etc.

The applicants also changed the specification touching the statement of their improvement from the form above quoted to the following:

"Our improvements * * * consist—First, in so combining a series of cross and connecting braces or bars with the pickets—instead of employing knuckle joints—as to strengthen and support the gate, and adapt it to slide upon its support without changing the vertical position of the pickets, and at the same time preserving their parallelism when the gate is opening and closing."

Manifestly, the "gate" which is here spoken of as "sliding upon its support" is the picket gate depicted in the drawings annexed to the original Maddox patent, and to the patent for the improvement of Maddox & Humphries. Inspection of the defendant's gate shows that it is essentially not a picket gate, but a lazy-tongs gate, with a single central support, and therefore it does not infringe. Decree of circuit court is affirmed.

HARRISON v. MAYNARD, MERRILL & CO.

(Circuit Court of Appeals, Second Circuit. May 29, 1894.)

No. 137.

COPYRIGHT—INFRINGEMENT—RESTRICTION ON SALES BY PURCHASERS.

The owner of a copyright, who has transferred the title to copyrighted books under an agreement restricting their use, cannot restrain, by virtue of the copyright statutes, sales of said books in violation of the agreement; he is confined to his remedies for the breach of contract.

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

This was a suit by Maynard, Merrill & Co., a corporation, against William Beverley Harrison, for infringement of copyright. The circuit court granted an injunction pendente lite. Defendant appealed.

Rowland Cox, for appellant.

Payson Merrill, for appellee.

Before WALLACE and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. The complainant, Maynard, Merrill & Co., a corporation duly created under the laws of the state of New York, and having its principal office in the city of New York, was, in June, 1893, the owner of the copyright of a book entitled "Introductory Language Work," of which Alonzo Reed was the author, and which had been duly copyrighted by him in July, 1891, under the laws of the United States respecting copyrights. The complainant is a book publisher, and has been in the habit of sending the printed and unbound sheets of this book, and of other books which it published, to George W. Alexander's book bindery, in the city of New York, to be stored there until it gave Mr. Alexander an order to bind a specified quantity, who would sometimes bind a lot in anticipation of such orders. On June 21, 1893, a destructive fire occurred in this bindery, the result of which was, as the complainant supposed, to destroy the commercial value of all the property which it had in the building. One of its employes, at its request, examined the debris, and reported that there was nothing of value which the complainant could use in the manufacture or sale of books. Alexander thereupon sold the entire debris, which had fallen into the cellar, to one Fitzgerald, who resold it, without moving it, to some Italian dealers in waste paper, and, in order to prevent them from using the paper and books for other purposes than paper stock, incorporated the following provision in the contract of sale: "It is understood that all paper taken out of the building is to be utilized as paper stock, and all books to be sold as paper stock only, and not placed on the market as anything else." The cellar was cleared of this class of material, and subsequently a quantity of damaged copies of "Introductory Language Work" appeared in the market, as owned and offered for sale by the defendant, William Beverley Harrison, a dealer in second-hand books, and a citizen of the state of New York, and residing in the city of New

York. The leaves of the books were discolored and stained by smoke and water, but the covers had a respectable appearance, and the complainant supposed that the unbound sheets which had escaped the fire had been rebound by Harrison, or under his direction, or with his privity, and that he was selling such newly-bound books, as well as some bound books which had escaped serious injury; and thereupon brought a bill in equity before the United States circuit court, to restrain his alleged infringement of its copyright. The bill counted entirely upon the right of the complainant under the copyright statutes of the United States. Upon its motion, the court granted an injunction pendente lite.

Harrison denies, in his affidavit, that he purchased any sheets or loose covers of the book. He further says (rather vaguely) that he "learned that certain dealers had come into possession of the salvage from the fire at said Alexander's place; that affiant visited the premises where said salvage was stored, and from them purchased a number of bound and completely finished volumes, some of which were the publications of the complainant." He further says that he "purchased the said books in the regular course of trade, without any knowledge of any understanding or arrangement, if any there was, between complainant and others; and that he accepted the same, as he believes, according to the established usage of the trade, believing them to be books which had been put upon the market as salvage, as damaged books are bought and sold." The affidavits show that the complainant, which was the owner of the copyright, permitted Alexander to sell absolutely all its copyrighted books in his cellar, and that his vendee obtained the entire legal title to these damaged volumes. They were sold again, together with other paper and books, under express restrictions against their use for any other purposes than for the manufacture of paper. Harrison says that he bought the books in question without knowledge of this restriction. Whether he had notice of facts which should have put a purchaser upon inquiry to ascertain whether he was being made a party to a violation of contract, cannot be determined upon the affidavits. The question, as it arises upon the bill and the affidavits, is: Can the owner of a copyright restrain, by virtue of the copyright statutes, the sale of a copy of the copyrighted book, the title to which he has transferred, but which is being sold in violation of an agreement entered into between himself and the purchaser; or are the remedies of the original owner confined to remedies for a breach of contract? So long as the owner of a copyright retains the title to the copies of the book which he has the exclusive right to vend by virtue of the copyright, he can impose restrictions upon the manner in which and upon the persons to whom the copies can be sold. Having the exclusive right to vend, he has the right to appoint to whom the book shall be sold. If his agents, to whom he has intrusted the possession of his books, violate his instructions, and fraudulently sell to a person with knowledge or notice of the fraud, such fraud will be an infringement of the copyright, with which the original owner has never parted, and can be restrained by virtue of the statutes of the United States. Thus, if the owner of a copyrighted book intrusts copies

of the book to an agent or employe for sale only by subscription and for delivery to the subscribers, and the agent fraudulently sells to nonsubscribers, who have knowledge or notice of the fraud, such sale is an infringement of the original owner's copyright, who can disregard the pretended sale, and have the benefit of all the remedies which the statutes or the law furnish. This right to enjoy the benefit of the copyright statutes results from the fact that the owner has never parted with the title to the book or the copyright, although he parted with the possession of the book. But the right to restrain the sale of a particular copy of the book by virtue of the copyright statutes has gone when the owner of the copyright and of that copy has parted with all his title to it, and has conferred an absolute title to the copy upon a purchaser, although with an agreement for a restricted use. The exclusive right to vend the particular copy no longer remains in the owner of the copyright by the copyright statutes. The new purchaser cannot reprint the copy. He cannot print or publish a new edition of the book; but, the copy having been absolutely sold to him, the ordinary incidents of ownership in personal property, among which is the right of alienation, attach to it. If he has agreed that he will not sell it for certain purposes or to certain persons, and violates his agreement, and sells to an innocent purchaser, he can be punished for a violation of his agreement; but neither is guilty, under the copyright statutes, of an infringement. If the new purchaser participates in the fraud, he may also share in the punishment. Clemens v. Estes, 22 Fed. 899.

The distinction between the remedy of the owner of a copyright and the books published under its protection, who has retained the title to the books and the copyright, and has been defrauded by an unauthorized sale to a purchaser with notice, and the remedy of a copyright owner who has parted with his title to a copy of the copyrighted book, and has been injured by the failure of the purchaser to comply with his contract in regard to its use, is stated by Judge Hammond in Publishing Co. v. Smythe, 27 Fed. 914, as follows:

"The owner of the copyright may not be able to transfer the entire property in one of his copies, and retain for himself an incidental power to authorize a sale of that copy, or, rather, the power of prohibition on the owner that he shall not sell it, holding that much, as a modicum of his former estate, to be protected by the copyright statute; and yet he may be entirely able, so long as he retains the ownership of a particular copy for himself, to find abundant protection under the copyright statute for his then incidental power of controlling its sale. This copyright incident of control over the sale, if I may call it so, as contradistinguished from the power of sale incident to ownership in all property,—copyrighted articles, like any other,—is a thing that belongs alone to the owner of the copyright itself, and as to him only so long as and to the extent that he owns the particular copies involved. Whenever he parts with that ownership, the ordinary incident of alienation attaches to the particular copy parted with in favor of the transferee, and he cannot be deprived of it. This latter incident supersedes the other,—swallows it up, so to speak,—and the two cannot coexist in any owner of the copy except he be the owner at the same time of the copyright; and, in the nature of the thing, they cannot be separated so that one may remain in the owner of the copyright as a limitation upon or denial of the other in the owner of the copy."

The case of Murray v. Heath, 1 Barn. & Adol. 804, which is somewhat relied upon by the defendant's counsel, does not throw a strong

light upon a case arising under the statutes of the United States. The question was whether the sale of the engravings was, under the circumstances of the case, a violation of the English statutes,—which prohibited a piratical publication of the engravings of another,—or was a breach of ntract. The court was of opinion that the statutes were not applicable. The other cases which were cited on the argument, are not applicable to the facts of this case, although they are instructive upon the rights of copyright owners under copyright statutes, or of the rights of owners of manuscripts. Stephens v. Cady, 14 How. 529; Stevens v. Gladding, 17 How. 447; Parton v. Prang, 3 Cliff. 537, Fed. Cas. No. 10,784; Bartlette v. Crittenden, 4 McLean, 300, Fed. Cas. No. 1,082; Prince Albert v. Strange, 2 De Gex & S. 652; Taylor v. Pillow, L. R. 7 Eq. Cas. 418; Howitt v. Hall, 10 Wkly. Rep. 381; Hudson v. Patten, 1 Root, 133. The discussion by Judge Hammond upon the general subject in Publishing Co. v. Smythe, supra, is most valuable, and any one who has occasion to examine this subject will find that the territory has been thoroughly explored.

Our conclusion is that, upon the facts stated in the bill and in the affidavits, the complainant has no remedy under the copyright statutes of the United States, and, as both the parties are deemed to be citizens of the state of New York, the complainant is without remedy in the circuit court for the southern district of New York. The order of the circuit court for a preliminary injunction is reversed and set aside, with costs.

THE PUBLIC BATH NO. 13.

TEBO et al. v. MAYOR, ETC., OF CITY OF NEW YORK et al.

SAME v. THE PUBLIC BATH NO. 13.

(District Court, S. D. New York. April 10, 1894.)

1. ADMIRALTY JURISDICTION—FLOATING BATH HOUSE.
   A bath house built on boats, and designed for navigation and transportation, is within admiralty jurisdiction.

2. SALVAGE—SUBJECT-MATTER.
   Use in trade and commerce, of the property saved, is not essential to salvage.

3. SAME—LIABILITY OF BAILEE.
   A bailee in possession of a floating bath for repairs disobeyed the owner's directions as to its fastenings for security from storms, and increased its weight and exposure. *Held*, that he took the risk of its going adrift, and was bound to indemnify the owner for salvage thereupon.

4. SAME — SUIT IN PERSONAM — "REQUEST" FOR SERVICE WITHIN ADMIRALTY RULE 19.
   A floating bath house, the property of a city, but in possession of a bailee for repairs, having gone adrift with no one on board, was picked up by a tug. *Held*, that as it was equally of the highest interest to the bailee and to the city to have it rescued, and as the right to proceed in rem against public property was doubtful, the request necessary, under S. Ct. admiralty rule 19, to sustain a suit in personam, might be implied, as respects both owner and bailee.

5. SAME.
   Query, whether any part of admiralty rule 19 is applicable where the res is exempt from arrest as public property.

This was a libel in personam by William M. Tebo and others against the mayor, aldermen, and commonalty of the city of New York for salvage of Public Floating Bath No. 13, the property of the city, which, while lying in Gowanus bay for the purpose of being repaired by the Greenpoint Towage & Lighterage Company, on August 24, 1893, parted its moorings in a storm, and was swept adrift into the bay, where it was picked up by libelants' tug, and moored to an adjacent dock. On petition of respondent, the Greenpoint Towage & Lighterage Company was brought in as a party. Thereafter libelants filed a libel in rem against the bath house. By direction of the court, the suits in personam and in rem were tried together.

Goodrich, Deady & Goodrich, for libelants.

William H. Clark, Corp. Counsel, and Dean & Ward, for the mayor and the bath house.

Hyland & Zabriskie, for Greenpoint Towage & Lighterage Co.

BROWN, District Judge. This bath house, unlike the bath houses built for permanent mooring, was built upon several boats as a substructure; the boats were designed to float, to uphold, and to transport the Bath, wherever and whenever desired. The design included both navigation and transportation. The bath house was in effect the permanent cargo of the boats. It was not permanently moored, as in Cope v. Dry-Dock Co., 119 U. S. 625, 7 Sup. Ct. 336; but on the contrary was designed for navigation and transportation; and that is why boats were used as the substructure. It is, therefore, within the jurisdiction of this court. See The Hezekiah Baldwin, 8 Ben. 556, Fed Cas. No. 6,449; The Pioneer, 30 Fed. 206. The grounds of the decisions in those cases are applicable here. Use in trade and commerce is not essential to salvage; if that were material, there could be no salvage allowed upon yachts, or other water craft used for pleasure, which is absurd.

2. The structure was in the possession of the defendant company for repair. It had been made fast under the direction of an expert in the city's employ, in a manner found sufficient to weather the winter storms, which equal, and often exceed, this storm in severity. The company's employes had been warned not to loosen those lines; but they cast them off after the lighter Success came alongside the Bath, and ran lines to spiles from the Success alone, without any side lines from the Bath to prevent her from swaying. The Johannes, 10 Blatchf. 478, Fed. Cas. No. 7,332. In disobeying directions, and in adding more weight and exposure, and in substituting new lines and new ways of fastening, the company took the risk of going adrift. They would, therefore, be bound to indemnify the city for any responsibility for the salvage claim, in rem or in personam.

3. The company, as bailee, if present when the Bath went adrift, would have been bound to request the Tebo, or any other tug at hand, to endeavor to rescue the bath house, for a reasonable compensation, and prevent injury to herself or other vessels. The bath house was a valuable structure. It is a bailee's duty to protect the

property in his charge, and he is answerable to the owner for the performance of that duty. It was, therefore, equally of the highest interest to the company as bailee, and to the city as owner, to have the Bath rescued and secured as soon as possible. In fact, the watchman on duty for the night had actually gone ashore to seek assistance only shortly before, and after the structure had got adrift. Under such circumstances, where there is no one present to represent the owners, general or special, at the time of need, and the watchman is in quest of aid, and where the right to proceed in rem is doubtful, the "request" provided for by S. Ct. admiralty rule 19 may, I think, be properly implied by law as respects both personal defendants; while the "benefit" both to the company and to the city from the service is manifest. I have much doubt, moreover, whether any part of S. Ct. admiralty rule 19 is applicable to a case in which the res is exempt from arrest, as public property; though I do not undertake to determine this latter question now. The rule ought to be applied consistently as a whole. The first part of the rule authorizes proceedings in rem; and if an exceptional exemption from arrest for a salvage service should be held to exclude the first clause of the rule, it would seem that such a case should be deemed altogether outside of the intent of the rule, so that the whole rule should be deemed inapplicable. No construction of the rule should be adopted, if it can be avoided, which would leave the salvor remediless; it would be the worst policy possible to discourage any salvage help to city property in time of need, by denying any legal right, or any mode of remedy, to recover salvage compensation.

4. Under all the circumstances, $350 will, I think, be a reasonable compensation for this service, which I think the company is legally bound to pay. For that sum, with costs, a decree may be taken against the company. As against the other defendants, the proceedings are suspended, until a return of execution against the company. The Alert, 44 Fed. 685.

THE ERNEST M. MUNN.

LOWNDES v. THE ERNEST M. MUNN.

(District Court, D. Connecticut. May 24, 1894.)

No. 1,009.

1. SALVAGE—COMPENSATION.

A steam barge worth $2,500, laden with a cargo worth $600, was found derelict and in peril in Long Island sound, and was towed to port by the salvors, who were in an oyster steamer. The time consumed was 6½ hours; the distance towed was 3½ miles; and the rescue was made with danger to the life of one of the salvors and some danger to the oyster steamer, which was worth about $15,000. *Held*, that the salvors were entitled to $800 compensation.

2. SAME—DURESS.

Where the owner of a vessel in the possession of a salvor takes possession by force, threatens the salvor with violence, and induces him to accept less than his claim for salvage, such settlement is not binding on the salvor.

Libel by Stanley H. Lowndes against the barge Ernest M. Munn for salvage.

Seymour & Knapp, for libelant.
Hyland & Zabriskie and A. L. Shipman, for claimant.

TOWNSEND, District Judge. This is a libel in rem for salvage. At about 7 o'clock on the morning of November 28, 1893, the libelant, Stanley H. Lowndes, with a crew of six men, started in his oyster steamer, the J. Howard Lowndes, from Norwalk harbor, to go to work on his oyster beds in Long Island sound. When they got outside they saw the steam barge Ernest M. Munn adrift, about a mile and a quarter from the east end of Copp Island. They went up to her, bow on, and one of the crew jumped aboard. She had been abandoned. Her heavy hawsers had parted, and she was waterlogged. There had been a hard southeast storm through the night, and the water was very rough that morning. The salvors first attempted to tow her in an easterly direction, but the sea was so rough, and she was so heavy, with her cargo of coal and the water in the hold, that they could not make any progress. They then got her alongside, but she rolled and heaved so heavily that they could not control her, and were in danger of being swamped. Finally they succeeded in towing her very slowly with the sea, by a line from her bow, inside of the Norwalk Islands, where the water was smooth, and from there took her down to Five Mile river, reaching there at about half past 1 in the afternoon, and made her fast to the dock. It is agreed that the value of the barge saved was $2,500, and of the cargo $600, and that the total net freight to destination was $83.08. The libelant's oyster steamer was worth about $15,000.

The first question presented is as to the amount of salvage which should properly be allowed, in view of the conditions existing in this case. The barge was derelict and in peril in Long Island sound. She would probably not have drifted ashore for two hours. If she had done so, she probably, although not certainly, would have gone on the rocks of the Norwalk Islands. The time consumed in the salvage service was about 6½ hours. The distance towed was about 3½ miles. The services rendered were meritorious and successful. They involved danger to the life of the sailor who jumped aboard the barge, and some danger to the salving steamer. Seven men were engaged in the salvage service from 7:30 in the morning till 1:30 in the afternoon. One good day's work, with good weather, was worth $100 to the libelant, Lowndes. An examination of the salvage cases shows a great diversity in the proportional amounts awarded, by reason of the widely varying conditions. It seems to me that, in cases most nearly resembling the one at bar, the amount of the award has generally approximated 25 per cent. of the value of the property saved. I think such award should be allowed in this case, unless the court is bound to enforce a certain alleged agreement hereafter to be considered.

On the second day after the occurrences heretofore stated, the claimant, Calahan, the owner of the barge, came to Five Mile river, and offered to give the salvors $500 and such additional sum as could be obtained from the insurance company for a release of the barge. The salvors refused to settle for less than $800. On the

following Sunday he returned early in the morning with a tugboat, and came up alongside the barge. No one except the claimant was in sight on his tugboat. The libelant, Stanley Lowndes, and several other persons, saw her coming, and ran aboard the barge. The claimant stepped onto the barge, and, when said libelant ordered him off, he reached down to untie the line by which she was made fast. Thereupon Lowndes leveled a gun at the claimant, and again ordered him to get off, saying: "You get off, or I will kill you." The claimant then called out, "Come on, boys," and a crowd of from 11 to 18 men rushed out from the engine room and cook room of claimant's tugboat, made threatening demonstrations, and offered to fight with libelant, Lowndes, and his companions. The claimant said, "We have come to get the boat;" and he challenged Lowndes to go ashore and fight, to settle the question as to whether the amount to be paid should be $500 or $800. Under these circumstances, the claimant insisting that he was going to take the barge, boasting that he had $1,500 with him, and that he would give $600 to take the barge, the libelant, after a consultation with the engineer, said: "If you want to take this barge out of here to-day, you give $600, and I will give you a receipt." Thereupon the money was paid to the engineer, and the boat was released. The claimant understood this payment to be in full of all claims. He took the barge to Wilson's point, in said district, and left her there. The libelant, Lowndes, immediately thereafter libeled her, and brought her back to Five Mile river. The claimant had originally deceived the salvors in order to persuade them to reduce the amount of their claim for salvage, and when he found that they would not accept his offers, as aforesaid, he gave them to understand that he would go to New York, and see what he could do towards procuring an additional sum from the insurance company for a release of the barge. From the appearance and conduct of the parties and their witnesses upon the hearing, I conclude that the testimony of the salvors is substantially true, and that the claimant, with his gang of men, came from New York on said Sunday morning with the express purpose of obtaining possession of the barge and a settlement of said claims, by threats and intimidations, provided he could not effect his object by other means. It does not seem to me that the court would be justified in enforcing a settlement made under such conditions as existed in this case. The following citations show that a court will scrutinize salvage agreements, and will not enforce them when they are inequitable or oppressive: Dr. Lushington, in The Helen and George, 1 Swab. 368; The Wellington, 48 Fed. 475; The Agnes I. Grace, 2 C. C. A. 581, 586, 51 Fed. 958; The Schiedam, 48 Fed. 923; The Alert, 56 Fed. 721, 724; Macl. Shipp. 651; 2 Pars. Adm. 306, 307. I think the claim of the salvors for $800 was a reasonable and just one, and should be allowed. Let a decree be entered in favor of said salvors for the balance of $200, with costs. The parties may introduce further evidence, if they so desire, as to the proper apportionment of the award.

THE CHINESE PRINCE.

OCEAN STEAMSHIP CO. OF SAVANNAH, GA., v. THE CHINESE PRINCE.

(District Court, E. D. South Carolina. May 26, 1894.)

SALVAGE—AMOUNT—TOWAGE—EVIDENCE.

The steamship Chinese Prince, when off Cape Romaine, in the latter part of December, broke her piston rod and the head of her high-pressure cylinder. She was some 13 miles from shore, in water from 9 to 13 fathoms deep, and in the track of coastwise vessels. She might have repaired damages in about 40 hours, and proceeded to port under sail and her low-pressure engine; but she signaled for assistance, and about midnight was taken in tow by the steamboat Dessoug, and brought into Charleston the next day. At the time of the accident, and for some days after, the weather was good, and at no time did either vessel incur extraordinary risk, or were the lives of their crews in danger. The detention did not interfere with the regular scheduled trips of the Dessoug out of her home port, Savannah, but she incurred extra expenses to the amount of $750. The value of the Chinese Prince and her cargo was from $225,000 to $250,000; that of the Dessoug, about $140,000. *Held*, that the Dessoug rendered a salvage service, for which $5,000 is an adequate reward, covering also the extra expenses.

This was a libel on final hearing by the Ocean Steamship Company of Savannah, owners of the steamship Dessoug, against the steamship Chinese Prince (Atkinson, claimant).

Mitchell & Smith, for libelant.

Trenholm, Rhett & Miller and Convers & Kirlin, for claimant.

BRAWLEY, District Judge. The British steamship Chinese Prince, loaded with cotton for Barcelona, left the port of Charleston at 2 p. m., December 20, 1893, intending to put in at Norfolk for coal. When off Cape Romaine, about 60 miles from Charleston, the piston rods broke, and the cylinder head of her high-pressure engine was shattered, and other damage was done to the water-service pipes. Almost immediately after the accident, the American steamship Dessoug, belonging to the Ocean Steamship Company, on her regular course from Philadelphia to Savannah, was hailed, and after some parley the Chinese Prince was taken in tow, and, starting at about 12:45, arrived off the bar of Charleston about 10 o'clock on the morning of the 21st, having taken a pilot meanwhile, and after waiting for the tide, and with the assistance of a tug, safely crossed the bar, and came to anchor inside the harbor at about 5:30 in the afternoon of the same day.

It is for this service that the libel in rem is filed, and the sum of $20,000 is claimed. The answer admits a meritorious salvage service, and asks that the same be compensated by a moderate award. There are many and divers ingredients which enter into a salvage service, and a long course of judicial decisions has determined what circumstances are most material for consideration. The degree of danger to life and property, and the value of the thing salved, is, in all cases, of the first importance. It has not been claimed or proved that any lives were in jeopardy, and this eliminates one of the ingredients which enhances the claims of salvors. The contention here relates mainly to the peril to the ship and cargo, and that will be first considered. The locality, the condition of weather and sea,

and the extent of the disability, are the necessary elements in determination of that question.

The testimony as to the locality differs somewhat from the averments of the libel, where the latitude and longitude are given by "dead reckoning;" and there are other discrepancies as to the distance of the disabled ship from Cape Romaine light, some of the witnesses putting it at 25 miles. As they all agree that they were in sight of this light, and as the United States charts fix its visibility at 18½ miles, the conclusion is that the Chinese Prince, at the time of the accident was about 18 miles northeast of Cape Romaine, and about 12 or 13 miles from shore, in water varying from 13 to 9 fathoms. She was directly in the course of coastwise vessels, and several other steamers were sighted that night. The accident occurred at a season when bad weather may be looked for on that coast. But the proof shows that there was a bright moonlight, and a light wind; a smooth sea, with some swell from the southeast. The captain of the Dessoug does say that the weather was threatening,—"mackerel skies and mares' tails,"—but the event proved that his apprehensions were not justified, for the breeze died out towards morning, and the records of the weather bureau show that the velocity of the wind did not exceed 13 miles an hour at any time that night, decreased to 8 miles the next morning, followed during the day by a dead calm. The disability was caused by the breaking of the cylinder head of the high-pressure engine. It is conceded that there were no appliances aboard ship for repairing such injury, and the extent of the damage may be inferred from the fact that several weeks were required to repair the same after the return to Charleston. The officers of the ship claim that they could have disconnected the high-pressure engine, and with the low-pressure engine the ship could have made three or four knots an hour, and have gone safely into port; that this could have been done within 36 or 40 hours; and that there were aboard ship the necessary appliances for such repairs. The testimony of one of the libelant's witnesses that he did not see any such appliances does not negative this proof, and it may be concluded that the ship might, within 40 hours, have been put into condition, with her low-pressure engines and her sails, to have helped herself, and, if the weather had continued good might have reached port without assistance. Speculation as to the result of such endeavor is needless, as her captain did not choose to be saved in that way; but the consideration of such facts, and of the possibility of the ship being rescued by other passing steamers, is material in determining the degree of peril from which she was salved. The conclusion is that the Chinese Prince was disabled but not helpless, and that the pretensions of the salvors that she was rescued from imminent peril are not sustained by the proofs. The conjecture that she was drifting rapidly towards the shoals rests mainly upon inference that does not support it. It arises out of the testimony that at the time when the accident occurred the soundings showed 13 fathoms of water, and when the towage began the soundings showed 9 fathoms, and therefore it is inferred that she was being driven upon shore; but the coast-survey charts do not show a uniform depth at that point, with a gradual shelving towards shore, but a variation

of several fathoms—from 7½ to 13—at equal distances from the coast; and the captain of the Dessoug says, "I do not pretend to say that this ship was drifting at that time." With ample ground tackle, and with such weather and sea, it is not to be conceived that there was any real danger of the steamship being carried upon the shoals. It was conceded in the argument, and the testimony supports it, that the Chinese Prince was worth about $40,000, and her cargo—5,050 bales of cotton—is valued in the manifest at $199,423. It is contended that this valuation is excessive, in that it states what the cotton would be worth upon arrival in Spain, and not its value at the port of shipment. It is unnecessary to consider whether the parties are not estopped from alleging against the sworn statement in the manifest. The award will not be fixed upon the basis of a percentage, as that is not the best measure of the value of salvage services. Adequate reward according to the circumstances of the case is the better rule. For the purposes of this case, it is considered that the value of ship, cargo, and freight is from $225,000 to $250,000.

There is some contention as to whether signals of distress were shown upon the Chinese Prince, as alleged in the libel. Her officers say that the only signals displayed were the three vertical lights, which indicated that the ship was not under control, while some of the libelant's witnesses say that she showed flash lights at intervals of five minutes. Our statutes prescribe what "signals of distress" shall be, and the flash light is not one of those named. As it is not disputed that the Chinese Prince desired assistance, it is immaterial whether that desire was made manifest by the display of a flash light, or by the hailing of the Dessoug. Any ambiguous signal will be construed according to the condition of the vessel when boarded. If she is disabled, and in need of assistance, the signal will be treated as a signal for assistance, and those answering it will be regarded as salvors.

The next subject for consideration regards the salvor, and involves an inquiry into the value of the property engaged in the salvage service, the risks to which it was exposed, the enterprise and skill displayed, and the dangers incident thereto, with the attendant responsibilities, the time and labor expended, with the loss and expenses incurred in its performance; including risks as to insurance, and other liabilities from deviation and delay and loss of trade. The Dessoug was an old ship, bought by libelants, many years ago, for $40,000, and repaired and fitted with new engines, about 10 years ago, at a cost of $65,000, and insured for $90,000. The cargo was valued at $48,000. The salvage service was wholly unattended with any risk of human life, and the circumstances called for no especial courage, enterprise or skill. All that the occasion demanded was done with intelligence and promptitude, and the danger involved was such only as is necessarily implied in handling at sea a disabled steamship, heavily laden, in such weather as has been described. As there is no proof that any except superficial repairs were required or made to the Dessoug, it may be assumed that the strain was not excessive. The service was performed subsequent to the act of February 13, 1893, and any liability for deviation in respect to the cargo is protected under that act, even if the bill of lading contained no

stipulation allowing such deviation for salvage purposes. The policy of insurance was not produced; and, in the absence of any evidence that her insurance was risked, it cannot be presumed that it contained any inhibition against the rendition of salvage services. The Dessoug made fast to the Chinese Prince, and commenced the towage, about 12 o'clock on the night of December 20th, arrived off the bar at Charleston—a distance of about 69 miles—early next morning, but, owing to the tide, could not cross until the afternoon, when she came to safe anchorage in the harbor at 5:30. She could have gone out on the same tide, if she had sailed immediately; but, desiring to consult counsel, her captain came ashore, and she was detained until the following morning. By employing some extra help in unloading her cargo at Savannah, she proceeded at her advertised time on her next voyage to Philadelphia, missing no sailing date. The expenses incurred were: For the tug Hercules, in crossing the bar, $500; for pilotage, $168; and for extra coal consumed, 40 tons, which, at the price paid in Philadelphia, would be about $100. A good deal of testimony was offered regarding the breaking of the hawser while the ships were lying off the bar; but as it is not perceived that this incident has any special significance, as affecting the amount of the award, it is unnecessary to consider it. It is conceded that this is a case of salvage as distinguished from mere towage service, but it lies near the border land; and many of the ingredients which justify a large award are either absent, or present in such low degree that the compensation cannot, in justice, be greatly more than a liberal remuneration pro opere et labore. There was no imminent peril, and no heroic rescue; no risk of life to either salvors or salved. The ship lay within sight of land, with fair weather, and in the track of a number of vessels passing daily up and down the coast, the possibility of assistance from which must be taken into account, as tending to lessen the award. Such assistance and such service as the circumstances demanded were rendered promptly, unhesitatingly, and successfully. The parties did not agree with each other as to the compensation to be paid, not because of any disagreement over terms, but by reason of the refusal of the master of the Dessoug to consider the proposition of the master of the Chinese Prince; he informing the latter that this was a question to be determined by his owners, who were "good people, and would do what was right." Inasmuch as the parties have failed to reach an agreement as to "what is right" it is for this court to determine it according to its discretion, enlightened by such assistance as comes from the consideration of the decided cases. It will serve no good purpose to review the cases which have been presented by the counsel on either side with consummate skill and learning. They have all been duly considered. The general principle which should govern is nowhere stated more admirably than by Mr. Justice Bradley in The Suliote, 5 Fed. 99:

"Salvage should be regarded in the light of compensation and reward, and not in the light of prize. The latter is more like a gift of fortune, conferred without any regard to the loss or sufferings of the owner, who is a public enemy. Salvage is a reward granted for saving the property of the unfortunate, and should not exceed what is necessary to insure the most prompt, energetic, and daring efforts of those who have it in their power to furnish aid and succor. Anything

beyond this would be foreign to the principles and purposes of salvage. Anything short of this would not secure its objects. The courts should be liberal, but not extravagant; otherwise, that which is intended to be encouragement to rescue property from destruction may be a temptation to subject it to peril."

It is considered and adjudged that the libelant is entitled to $5,000 as remuneration for the salvage services rendered, which sum includes an allowance for the expenses of the tug, pilotage, and coal. As there was no tender or payment of money into court, the costs must follow the decree. Let a decree be entered in conformity with this opinion.

THE CERES.[1]

WESSELS et al. v. THE CERES et al.

SYDSVENSKA ANGFARTYGS AKTIEBOLAG v. WESSELS et al.

(District Court, S. D. New York. April 7, 1894.)

1. SHIPPING—CHARTER PARTY—GUARANTY OF SPEED—"LIGHT-LADEN."
The charter of a steamship for the fruit trade guarantied that she should make a certain average speed, "fruit or light-laden." *Held*, that the term "light-laden" must be construed in reference to the context, and the vessel was to be deemed light-laden, in respect of draft, if her draft did not exceed that of a full fruit cargo, and in reckoning weight of cargo the weight of so much ballast as would be needed for a fruit cargo should not be counted.

2. SAME—WAIVER OF OBJECTIONS TO LOADING.
Failure of a steamer to make the speed guarantied by her charter cannot be excused by objections to her trim, as loaded by charterers, which were not made by the master at the time of loading, the deficiency in speed having been frequently complained of.

3. SAME—"LAY-UP" CLAUSE.
A clause in a charter of a steamship for the fruit trade stipulated that she "is to lay up for overhauling two weeks each year in winter, at time charterers designate." *Held*, that this assumed the need of overhauling, and the charterers' arrangements as to time therefor, and cessation of pay during such period, could not be defeated by the owners' claim that overhauling was unnecessary.

These were cross libels for damages on a charter party of the steamship Ceres,—the first, by Gerhard Wessels and others, the charterers, against the steamship; the second, by the Sydsvenska Angfartygs Aktiebolag, her owner, against the charterers.

Wing, Shoudy & Putnam, for G. Wessels and others.
Convers & Kirlin, for the Ceres.

BROWN, District Judge. The above libels were brought to recover damages upon a charter party; the first, for non-fulfillment of a guaranty of speed; the second, for charter hire and wrongful termination of the charter. I shall indicate briefly the grounds of my decision upon the points involved.

1. Guaranty of Speed: The charter on its face, and all the circumstances, show that the original hire of the steamer had mainly in view the transportation of fruit cargo. In this business a certain speed is essential, and a knowledge of what is to be counted on is important. The guaranty was, that the steamer should "make

[1] Reported by E. G. Benedict, Esq., of the New York bar.

an average speed under steam of not less than 11 knots per hour, fruit or light-laden, in moderate weather, and with good American coal," and the guaranty must be construed with reference to the objects of the charter. The provision that it shall make an average speed shows clearly that it was a practical result that was looked at, and not merely the ship's capacity of attaining 11 knots an hour under the best possible conditions. It was intended to be a continuing guaranty that the average speed of 11 knots should be accomplished, under the conditions stated; not indeed in spite of any faults of the charterers, but that in the absence of any faults or obstacles on their part, the owners should maintain the ship in a state of efficiency to accomplish that average speed.

The evidence leaves no doubt that this speed was not maintained, and that the charterers never waived their objections on account of this defect. They complained of it from the first, and were constantly met by excuses, promises, and hopes of improvement. During the last two voyages, which are the subjects of these suits, a speed of 11 knots was never attained, even for a day. The only question on this subject, therefore, is whether the conditions of the guaranty were complied with, as respects the weather, cargo and coal; and whether the failure to make 11 knots is to be ascribed to any fault of the charterers in the loading and trim of the ship. The excuse grounded upon bad coal was frivolous, as the evidence plainly shows; and as respects the weather, nothing further need be said, than that the steamer did not make 11 knots even when the weather was most moderate and favorable.

2. Fruit, or Light-Laden: The controversy has been chiefly in regard to the loading of the vessel. The case is one in which the words "light-laden" must be construed in reference to the context, and the word "fruit" immediately preceding. See Insurance Co. v. Hamilton, L. R. 12 App. Cas. 490; U. S. v. The Buffalo Park, 16 Blatchf. 190, Fed. Cas. No. 14,681; The Viola, 59 Fed. 635. The meaning is, that the ship shall make 11 knots laden with a fruit cargo, or with its equivalent, i. e., when as light-laden as with a fruit cargo, or one not more cumbersome, nor more unfavorable for speed. Much evidence has been given of the opinions of shipping men as to what the term "light-laden" means. Their diverse opinions, as well as their own testimony, show that there is no standard or custom by which to determine the meaning of the term "light-laden" independently of its context; and I do not think the meaning of the phrase is to be arrived at in that way, or that any fixed proportion of a deep-laden cargo can be arbitrarily adopted. The defendants' witnesses mostly think that two-thirds of a deep, or full load, would be "light-laden." As respects the draft of the vessel, the only limit under this charter, as respects the guarantied speed, is the draft of a full fruit cargo, i. e., the draft with such a full fruit cargo as the vessel was capable of carrying. The charterer had a right to the full fruit-cargo draft; and whatever cargo he puts aboard, if that draft is not exceeded, the steamer must, I think, be deemed "light-laden" within the intent of this charter; and this is the view expressed by several competent witnesses.

The libelant testifies that the Ceres will carry from 24,000 to 30,000

bunches of bananas; and an average weight of these would amount at least to upwards of 350 tons. The dead-weight capacity guarantied by the charter was 820 tons, including coal. On the first of the two voyages in suit, the steamer brought from Colon about 179 tons of bananas, and about 138 tons of merchandise, or 344 tons in all. Besides this, she had on leaving Colon, 225 tons of coal on board, on the first voyage, and 218 tons on the last. As her consumption of coal on the trip from Colon was about 150 tons, the excess of coal for any contingencies of the voyage was 75 tons on the first voyage and 68 on the second. It is nowhere intimated that this was an excessive supply of coal for a purely fruit cargo. The steamer was, therefore, as I must find, weighted down with less cargo than the charterers were entitled to carry for a purely fruit cargo, and therefore did not transgress the condition of "fruit, or light-laden."

3. Trim and Ballast: A further excuse on the part of the ship is, that there was so much weight of coal amidships, with the bananas above, that she was obliged to fill her two forward ballast tanks with water, amounting to 180 tons. I do not perceive, however, that this is material to the question, or that it affects the charterers' rights; for there is no intimation in the evidence that a less amount of ballast would have been needed had the cargo been wholly of bananas. The evidence shows, on the contrary, that upon both voyages, so much of the cargo as was not fruit consisted of heavy merchandise, such as coffee, cocoanuts, etc., all of which were put in the lower hold, rendering less ballast necessary than would have been needed for a purely fruit cargo of bananas. The variation from a purely fruit cargo was, therefore, in favor of the vessel. It was the ship's duty to take what ballast was necessary for a fruit cargo; and the weight of so much ballast as would be needed for a fruit cargo, could not be counted in reckoning what was a "light-lading," any more than it could be counted in a fruit cargo, so far as respects her guaranty of speed. Excluding the ballast, these two cargoes were less even than most of the claimant's witnesses admit to be "light-laden," viz., two-thirds of a dead-weight cargo.

The trim of the vessel, moreover, which is now made a subject of complaint, viz., that she was loaded too much by the stern, is not shown by the evidence to have been objected to by the master at the time. The charterers, or their supercargo, did indeed have the direction of the loading; but as the speed was one of the guaranties of the charter, and the deficiency in speed was frequently complained of, it was the master's duty, if he conceived that the proposed distribution of the cargo would affect the ship's speed unfavorably, to call attention to the subject at the time of loading, when as favorable a disposition of the cargo could have been made as the nature of the case would admit. Not having made any objection at the time when it could have been remedied, such an objection was waived, and the owners are equitably estopped from setting it up now.

It is unnecessary, therefore, to consider the precise details of the draft of the ship, or of the trim forward and aft, about which

there is some conflict in the evidence, and even discordance in the ship's records. It is evident that neither the observations nor the records were made with exactness; and the register of the miles run, as given by the patent log, is still more inaccurate. The Lloyd's deep load-line is immaterial; for even assuming the correctness of the captain's testimony as to the amount of water ballast taken on the two voyages from Colon, viz., 200 tons, of which I have some doubt, still this would make the total tonnage of cargo, coal and ballast on leaving Colon from 80 to 100 tons less than the dead tonnage guarantied by the charter; so that on adding for a full cargo 8 to 10 inches more draft, we should have 16 feet 3 inches or upwards, as the expected draft for the guarantied capacity, even if the mean draft from Colon was 15 feet 9 inches; and this intended draft of 16 feet 9 inches for a full deep-load capacity accords both with the scale delivered by the agents to the charterers, and with her actual draft on the subsequent voyage to Spain. The defendants cannot appeal to the Lloyd's deep load-line as any excuse for non-compliance with the agreements and representations of the charter. The evidence indicates that the boilers and pipes were not in perfect condition, and that the chief engineer, for that reason, forbore "to drive the ship as in other trades." Whatever the reason, however, it seems to me clear that the ship did not make the guarantied speed under the agreed conditions; and that the libelants had the right both to terminate the charter, as they did, for this breach, and to recover such damages, if any, as arose from it.

4. The Lay-Up Clause: The language of this clause is not that of a mere option. Section 18 requires docking at least once in every four months, during which hire shall cease. I think the intent of section 28, declaring that the steamer "is to lay up for overhauling two weeks each year in winter, at time charterers designate," was to give the charterers the right to designate the two weeks in winter when the vessel should be off pay, so as to suit the exigencies of their business; that this was also for the further purpose of securing perfect efficiency of the steamer during the subsequent months when she would be wanted to make as quick speed as possible; that the need of such overhauling in winter is assumed by the charter, and that the charterers were bound under the charter to expect, and therefore had the right to count on, an overhauling at such time during the winter as they should designate, and upon a cessation of pay during this period; that the owners could not defeat the charterers' arrangements as to the time for this overhauling and cessation of pay, by the claim that overhauling was unnecessary; and that the evidence does not prove that overhauling was unnecessary, but rather indicates that the subsequent two or three weeks' work upon the ship could have been done at the time designated by the charterers, with improvement in her service.

A decree may be entered in accordance with this opinion, and an order of reference, if the damages are not agreed on.

PITTSBURGH, C. & ST. L. RY. CO. v. BALTIMORE & O. R. CO. et al.

(Circuit Court of Appeals, Sixth Circuit. May 8, 1894.)

No. 127.

1. APPEALABLE JUDGMENTS—INTERLOCUTORY DECREE FOR ACCOUNTING.
A decree determining the right of a complainant to an account, and settling the principles on which the account should be taken, is interlocutory merely, and no appeal lies therefrom.

2. JURISDICTION OF FEDERAL COURTS—DIVERSE CITIZENSHIP—PROPER PARTIES.
A contract between two corporations for the joint operation of part of a line of railroad owned by them provided that the local freight business should be done by one of them, which should receive a certain percentage of the earnings therefrom, the remainder to be divided equally; and that corporation subsequently leased its line for a certain percentage of the gross earnings thereof, including the proper proportion of the earnings of said part. Thereafter the lessee, claiming to be entitled to all the rights of its lessor under the contract, brought suit for an accounting of local freights carried on said part of the line by the successor of the other party to the contract, and made both such successor and the lessor parties defendant. *Held*, that the lessor was a proper, though not a necessary, party, and as its interests in the controversy were identical with complainant's, and it and the other defendant were corporations of the same state, a federal court had no jurisdiction, although complainant was a corporation of a different state.

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

This was a suit by the Baltimore & Ohio Railroad Company against the Pittsburgh, Cincinnati & St. Louis Railway Company and the Central Ohio Railroad Company, as reorganized, for an accounting. A decree for an accounting was granted, and, after a hearing on exceptions to the report of a special master thereon (55 Fed. 701), a final decree was rendered in favor of complainant and of said defendant the Central Ohio Railroad Company. The Pittsburgh, Cincinnati & St. Louis Railway Company appealed.

The Baltimore & Ohio Railroad Company, a corporation of the state of Maryland, filed its bill in the circuit court of the United States for the southern district of Ohio, September 30, 1886. The defendants thereto are the Pittsburgh, Cincinnati & St. Louis Railway Company and the Central Ohio Railroad Company, as reorganized, both being corporations of the state of Ohio. The object of the bill was to have an accounting as to the receipts from local freights earned on that part of the line jointly owned and operated between Newark and Columbus, Ohio, and known as the Newark & Columbus Division of each road. That division was originally owned by the Central Ohio Railroad Company, which company became insolvent, and was placed in the hands of a receiver. While thus in a receiver's hands, it, under a statute of Ohio, and with the approval of the court conducting the receivership, sold an undivided one-half interest in so much of its line as lay between Columbus and Newark to the Steubenville & Indiana Railroad Company. After this sale the presidents of the two companies entered into a written agreement as to the joint operation of the division so jointly owned. Subsequently the Central Ohio Railroad Company was reorganized under the laws of Ohio, under the name and style of the Central Ohio Railroad Company, as reorganized. Under the statute permitting this reorganization, the new company succeeded to all the property rights and contracts of the old company. In 1886 the Baltimore & Ohio Railroad Company, being the complainant corporation, leased the line of the Central Ohio Railroad Company, as reorganized, and succeeded to all its rights and liabilities. In 1868 the Steubenville & Indiana

Railroad Company was consolidated with two other lines of road under the name and style of the Pittsburgh, Cincinnati & St. Louis Railway Company, being the defendant corporation herein. Under the law of Ohio, it likewise succeeded to all the rights, property, and contracts of its several constituent roads. These two companies, the Pittsburgh, Cincinnati & St. Louis and the Baltimore & Ohio, have, since the 11th of May, 1868, the date of the creation of the Pittsburgh Company, been jointly operating, maintaining, and managing the said Columbus & Newark Division of said road.

The contention of complainant in this litigation is that a certain contract entered into between the Central Ohio Railroad Company and the Steubenville & Indiana Railroad Company, in 1865, and immediately after the sale of the one-half interest in the Columbus & Newark Division to the latter company, is still in force as originally executed. That contract and its amendments are very lengthy, and cover every possible question involved in a joint ownership and operation of a railroad. This controversy turns wholly upon clauses 13 and 15 of said contract, which are in these words: "Thirteenth. The local freight business from and to Newark and Columbus, with stations on the line of said road between those points, to be done by the Central Ohio Railroad Company." "Fifteenth. The general freight agent of the Central Ohio Railroad Company shall keep an account of the earnings arising from the local business mentioned in item thirteen, and at the end of each month shall furnish said superintendent and the general freight agent of the Steubenville & Indiana Railroad Company each with a duplicate thereof; and that for such service the Central Ohio Company shall receive sixty-five per centum thereof, and the remainder shall be divided between said companies equally."

The bill charges that the complainant company and the Pittsburgh, Cincinnati & St. Louis Railway Company both recognized the validity and binding obligation of the said contract, and continued to act thereunder until the month of June, 1872, "when the said defendant entered upon and commenced the business of carrying local freights between said cities and the stations on the said Columbus & Newark Division, and has continued to do so ever since, notwithstanding your orator has repeatedly objected to the said defendant engaging in such business, and has insisted that it, as the lessee of the Central Ohio Railroad Company, as reorganized, was entitled to carry all of the local freight thereon. And your orator has repeatedly offered to state an account with the said defendant, and render and deliver to it a statement of the local freights which it has during the term aforesaid carried, but the said defendant has repeatedly and persistently refused to recognize the right of your orator to have such accounting made, and has insisted that it has the right to engage in the business of carrying local freights as aforesaid; and neither the general freight agent of your orator nor of the said the Central Ohio Railroad Company, as reorganized, has been able to keep an account of the earnings arising from the business as hereinbefore stated, by reason of the refusal of the defendant to furnish the accounts as aforesaid."

With regard to the Central Ohio Railroad Company, as reorganized, the allegations of the bill are that, by the terms of the lease to the Baltimore & Ohio Railroad Company, the said Central Ohio Railroad Company, as reorganized, was entitled to receive 35 per cent. of the gross earnings of the said the Central Ohio Railroad Company, including the Columbus & Newark Division thereof, "and including the proper proportion of the earnings of the said Columbus & Newark Division under said contract with reference to the local freights and local passengers."

The prayer of the bill was that the total amount of local freights provided for in articles 13 and 15 of the alleged contract shall be "ascertained, and the amount which is due to your orator determined, as well as that which is due to the Pittsburgh, Cincinnati & St. Louis Railway Company, and to the defendant the Central Ohio Railroad Company, as reorganized, as the lessor of your orator." It prays that an account be taken under the order and direction of the court with reference to the local freights so as aforesaid carried, "and that your orator be allowed eighty-two and one-half per cent. of the total amount of freights carried by both of said parties, and that the defendant herein, the Pittsburgh, Cincinnati & St. Louis Railway Company, be allowed

seventeen and one-half per cent. of the total amount thereof, and that thirty-five per cent. of the amount allowed to your orator be awarded to be paid as rental to said defendant herein, the Central Ohio Railroad Company, as reorganized, and that upon the taking of said account the amount which is found due to either of said parties defendant, or your orator, be directed to be paid within the time to be specified by the court."

The Central Ohio Railroad Company answered, its answer being styled a cross petition. In this pleading it is set up that, at the time of the lease to the complainant, the contract between the Central Ohio Railroad Company and the Steubenville & Indiana Railroad Company was in full force, and that the complainant became the lessee of the said railway property subject to the terms of said contract, and that the complainant had no authority or power to make any change in said contract, "and that, if said contract was changed or to be changed, it could be done only by the Central Ohio Railway Company, by and through its president, properly authorized." It further set up that by reason of said contract and lease it was entitled to receive as rental 35 per cent. of the entire earnings of the said Columbus & Newark Division in carrying local freights thereon, less 17½ per cent. which, under said contract, was to be paid to the said Steubenville & Indiana Railroad Company, or its successor, the defendant herein, the Pittsburgh, Cincinnati & St. Louis Railway Company. It was further stated that since June, 1872, the defendant had received 35 per cent. of the local freights carried on said division by the plaintiff company, but had received no part of the earnings for local freight by reason of freight carried by said defendant, the Pittsburgh, Cincinnati & St. Louis Railway Company; and it says that it is entitled to receive now from the plaintiff 35 per cent. of the local freights carried by said Pittsburgh, Cincinnati & St. Louis Railway Company since June 18, 1872, and it asks that the said plaintiff be required to account to it for the same. It denies all knowledge that the Pittsburgh, Cincinnati & St. Louis Railway Company was engaged in the business of carrying local freight, and was not accounting to the complainant therefor, and that this defendant was receiving no part thereof, and avers that these facts only came to its knowledge in the past two or three years, and that it had in no manner assented or agreed with said Pittsburgh, Cincinnati & St. Louis Railway Company that it should engage in the business of carrying local freights, and in this manner impair the usefulness of said division to said defendant, and deprive it of the revenues that belong to it, and of which it is the exclusive owner, under its charter, as set out in complainant's bill of complaint.

This cross petition was answered only by the Pittsburgh, Cincinnati & St. Louis Railway Company, which denied all liability to the Central Ohio Railroad Company, or its lessee, the Baltimore & Ohio Railroad Company, and claimed that the said agreement as to the doing of the local freight business on the said Columbus & Newark Division had been abrogated June, 1872, and had never since been in force. No answer was filed by the Baltimore & Ohio Company, with whom an accounting was asked.

An accounting was ordered, and upon the final hearing the circuit court decreed that there was due from the Pittsburgh, Cincinnati & St. Louis Railway Company to the complainant the sum of $2,748.31, with interest; and to the respondent the Central Ohio Railroad Company, as reorganized, the sum of $10,341.40, with interest. From this decree the Pittsburgh, Cincinnati & St. Louis Railway Company has appealed and assigned errors.

Harrison, Olds & Henderson, for appellant.

J. H. Collins, for appellees.

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

LURTON, Circuit Judge (after stating the facts). A preliminary question is made by the Baltimore and Ohio Railroad Company. It insists that the decree appealed from was not the final decree; that a final decree was pronounced June, 1890, and a supplemental decree

June, 1893; that the appeal was from this last decree, and that the questions settled by the former decree of June, 1890, cannot be reviewed, because there was no appeal from it within the time allowed by law. The decree of June, 1890, was purely interlocutory. The cause was then heard upon the pleadings and proof, and the principles upon which the account should be taken determined, and a reference made to a master to take and state an account upon the basis therein directed. Upon the coming in of the account so ordered, exceptions were filed. These were then considered by the court. Some were sustained, others overruled. The account was restated in accordance with these rulings, and a final decree pronounced, from which a broad appeal was prayed and granted. This appeal opens up the whole case.

A decree determining the right of a complainant to an account and settling the principles upon which the account should be taken, is an interlocutory decree from which no appeal lies. A decree of like character was appealed from in Perkins v. Fourniquet, 6 How. 206. The appeal was dismissed as premature. The opinion was by Taney, C. J., who said:

"This clearly is not a final decree in any respect. It is the common and ordinary interlocutory order or decree passed by courts of chancery in cases of this kind, and is absolutely necessary to prepare the case for a final hearing and final decree, wherever the complainant is entitled to a partition of property or an account. For the principles upon which an account is to be stated by the master, or a partition made, cannot be prescribed by the court until it first determines the rights of the parties by an interlocutory order or decree; and the case cannot proceed to final hearing without it. And the appellant is not injured be denying him an appeal in this stage of the proceedings, because these interlocutory orders and decrees remain under the control of the circuit court, and subject to their revision, until the master's report comes in and is finally acted upon by the court, and the whole of the matters in controversy between the parties disposed of by a final decree. And, upon an appeal from that decree, every matter in dispute will be open to the parties in this court, and may all be heard and decided at the same time."

Upon the coming in of the account so ordered, it was entirely in the power of the circuit court to change its opinion from that expressed in the interlocutory opinion, and dismiss the bill. This question was expressly decided on a second appeal in the case of Perkins v. Fourniquet, above cited. See, also, Fourniquet v. Perkins, 16 How. 82.

Another preliminary question remains to be decided before the merits of the case can be considered. Did the circuit court have jurisdiction of the controversy arising on the pleadings? Is the real controversy wholly between the complainant on one side and the two defendant corporations on the opposite side? The complainant corporation is a citizen of the state of Maryland. The two defendant corporations are citizens of the state of Ohio. Was the Central Railroad Company, as reorganized, either a proper or necessary party? The final decree would seem to indicate that the interest of the Baltimore & Ohio Company and those of the Central Company were common interests,—that the rights of each depended upon the same questions. In determining a question of jurisdiction, where it depends upon citizenship, it is unimportant

that the pleader has put a particular party upon the one or the other side of the case. Jurisdiction in such cases depends, not upon an arbitrary arrangement of the parties made by the pleader, but upon their arrangement according to interest. If, when arranged by interest in the litigated question, all on one side are citizens of a state other than that of those on the other side, then jurisdiction exists. Removal Cases, 100 U. S. 457.

In Railroad Co. v. Ketchum, 101 U. S. 289, the construction placed on the second section of the act of March 3, 1875, in regard to the removal of causes, was declared to be applicable to the first section concerning suits originally brought in the courts of the United States. In that case the court said:

"The same general language is used in the second section of the same act in respect to the removal of suits from the state courts, and in Removal Cases, 100 U. S. 457, we held it to mean that, when the controversy about which the suit was brought was between citizens of different states, the courts of the United States might take jurisdiction without regard to the position the parties occupied in pleadings as plaintiffs or defendants. For the purpose of jurisdiction the court had power to ascertain the real matter in dispute, and arrange the parties on one side or the other of that dispute. If in such arrangement it appeared that those on one side were all citizens of different states from those on the other, jurisdiction might be entertained and the cause proceeded with. That ruling, we think, applies as well to the first section as to the second."

What is the matter in dispute? The questions all arise out of a contract originally between the Central Ohio Railroad Company on the one side and the Steubenville & Indiana Railroad Company on the other. The bill shows that the defendant the Pittsburgh, Cincinnati & St. Louis Railway Company has succeeded to all the property interests and contract rights of the latter company. It sets out that:

"Under the terms of the lease executed by the said the Central Ohio Company, as reorganized, it took possession of the said Central Ohio Railroad, and the said Columbus and Newark Division thereof, subject to the terms of the said contract, * * * and was entitled to all the privileges and subject to all of the terms thereof, the same as its lessor had previously been."

It further alleged that:

"By the terms of the said lease, the said Central Ohio Railroad Company, as reorganized, was entitled to receive 35 per cent. of the gross earnings of the said the Central Ohio Railroad, including the Columbus and Newark Division thereof, and including a proper proportion of the earnings of the said Columbus and Newark Division under said contract with reference to the local freight and local passengers."

It then states that the obligations of the said contract had been recognized by complainant and by the defendant the Pittsburgh, Cincinnati & St. Louis Railroad Company, and acted under until June, 1872, when the said defendant commenced the business of carrying local freight, contrary to said agreement, and has continued to do so ever since, notwithstanding objections and protests by complainant, and that it has refused to account for the business so done and the earnings so arising. From all of which the complainant insists it is "entitled to have an accounting between the defendant herein, the Pittsburgh, Cincinnati & St. Louis Railway Company, and its codefendant, the Central Ohio Railroad Company,

as reorganized, and your orator, in order that the total amount of local freights provided for in articles thirteen and fifteen of the said Exhibit B shall be ascertained, and the amount which is due to the Pittsburgh, Cincinnati & St. Louis Company, and to the defendant the Central Ohio Railroad Company, as reorganized, as the lessor of your orator." It concludes with a prayer for an account as follows:

"And your orator prays that an account be taken under the order and direction of this honorable court, with reference to the local freights so as aforesaid carried, and that your orator be allowed eighty-two and one-half per cent. of the total amount of freights carried by both of said parties, and that the defendant herein, the Pittsburgh, Cincinnati & St. Louis Railroad Company, be allowed seventeen and one-half per cent. of the total amount thereof, and that thirty-five per cent. of the amount allowed to your orator be awarded to be paid as rental to the said defendant herein, the Central Ohio Railroad Company, as reorganized, and that, upon the taking of said accounts, the amount which is found due either of said parties defendants or your orator be directed to be paid within a time to be specified by the court, and, in default of such payment, that execution issue as at law, and your orator prays for such other and further relief as may be deemed best and proper in the premises."

The Central Ohio Company, thus made a defendant, waived service of process, and entered its appearance by an indorsement on the original bill signed by the solicitor for the complainant company as president of the said Central Ohio Company. Its answer was subsequently prepared by the same solicitor, and signed by him as president. This answer admits all the statements of the complainant's bill, and sets up that, under the said contract and lease, "it was entitled to receive as rental 35 per cent. of the entire earnings of said Columbus and Newark Division, in carrying local freights thereon, less seventeen and one-half per cent., which, under the said contract contained in Exhibit B, attached to complainant's bill, was to be paid to the said Steubenville & Indiana Railroad Company, and its successor, the defendant herein, the Pittsburgh, Cincinnati & St. Louis Railway Company." It admitted the receipt of 35 per cent. of the local freights carried on said division by the complainant company, but asserted that since June, 1872, it had received no part of the earnings for local freights carried by the Pittsburgh, Cincinnati & St. Louis Railway Company, and averred that it was "now entitled to receive from the plaintiff thirty-five per cent. of the freight so earned by the said Pittsburgh, Cincinnati and St. Louis Company," and it asks that "the said complainant be required to account to it for the same." It charges that the lease was subject to the said contract, and avers "that the said complainant had not any authority or power to make any change in said contract, and if said contract was changed, or to be changed, it could be done only by this defendant, by and through its president, properly authorized." It denies knowledge that the Pittsburgh, Cincinnati & St. Louis Railway Company had been engaged in carrying local freights, and that it was not accounting for same, and averred that until within "two or three years it did not know that its rental embraced nothing on account of freight carried by the said Pittsburgh Company;" and denied that it had ever "agreed

or assented to said company engaging in carrying said local freight, and in this manner impair the usefulness of said division, and deprive it of a part of the revenues which belonged to it, and of which it is the exclusive owner under its charter, as set out in the complainant's bill of complaint." This answer was indorsed as an answer and cross petition. No one seems to have been made defendant thereto, and no process issued, none being asked. The Pittsburgh, Cincinnati & St. Louis Railway Company alone answered it as if a formal cross bill. The Pittsburgh, Cincinnati & St. Louis Railway Company, in its answer, took issue upon every proposition of importance, denied any liability to the said Central Ohio Company, and set out the defenses made in its answer to the original bill. The chief of the defenses thus presented was that in June, 1872, the clauses in regard to the local freight business had been by agreement with the complainant company abrogated and set aside, and an agreement entered into that said local freight business should be done by either company, and revenue derived therefrom be retained by each company; that this agreement had been put in force by an official order issued in June, 1872, by the complainant company, and that from that time each road had done local business, and retained the revenue. That no objection, protest, or question had been made to this modification of the original agreement until after the agreement had been in force for more than 10 years. The defense of ultra vires was also set up as to the clauses which prevented either company from carrying local freight when tendered, or from offering to carry such freight. Still another defense denied that the contract had ever been signed or legally executed by the original contracting parties. If valid, that corporation insisted that the successor companies had the power to modify or abrogate the clauses in question, and this power had been exercised with the knowledge and assent of the Central Ohio Company.

Upon this jurisdictional question the learned counsel for appellees contends that the original bill presents two distinct subjects of controversy,—one wholly between the complainant and the Pittsburgh, Cincinnati & St. Louis Company, and the other wholly between the complainant and the Central Ohio Company. That in the accounting asked with the Pittsburgh, Cincinnati & St. Louis Railway Company the Central Ohio Company has no interest; and that in the accounting as to rentals since 1872, between complainant as lessee and the Central Ohio Company as lessor, the Pittsburgh, Cincinnati & St. Louis Railway Company has no interest. That all the issues in regard to the due execution of the original agreement of 1865, and in regard to the power of the successor company to modify same, and in regard to the validity of clauses 13 and 15 of that contract, as well as the issue as to the fact of modification, are issues wholly between complainant and the Pittsburgh, Cincinnati & St. Louis Railway Company, with which the Central Ohio Company has no concern. To save the jurisdiction, counsel in effect argue that the bill was multifarious. We are unable to concur with the contention that the Central Ohio Company has no concern in the issue between the companies succeeding to the rights

and obligations of the contract of 1865. If the contract of 1865 was never validly executed, then the successor companies did not, by mere succession, become obligated. If clauses 13 and 15 were void, as beyond the power of the contracting companies, then the Pittsburgh, Cincinnati & St. Louis Railway Company cannot be compelled to account for freights earned by it in contravention of a void contract; and, for the same reason, the claim of the Central Ohio Company to 35 per cent. of the gross receipts from freights carried by the Pittsburgh, Cincinnati & St. Louis Railway Company must fail. So, if the successor companies had the power to abrogate, abandon, or modify clauses 13 and 15, and did in fact lawfully abandon, abrogate, or modify those provisions, then the claim of the Central Ohio against either of the successor companies falls to the ground.

The Central Ohio was, perhaps, an unnecessary party. Still, in view of its interest in the maintenance of clauses 13 and 15, as affecting the amount of its income as rentals from its lessee, and of its contention that those clauses could not be abandoned, abrogated, or modified by the successor companies, unless it should assent, it was clearly proper that it should be a party to a controversy so vitally affecting its interests. By bringing it before the court a decree could be obtained which would conclude its claims as lessor or owner, and establish, once for all, the soundness or unsoundness of its contention as to the original validity and irrevocable character of the agreement of 1865 by any arrangement between the successor companies to which it did not assent. In view of this attitude of the Central Ohio toward the issues presented, we cannot say that it was an immaterial party. It certainly was not so regarded by the other litigants nor by the circuit court. Being a proper party, and a party whose interests in the controversy were identical with those of the Baltimore & Ohio Company, it makes a cause in which a corporation of Maryland and a corporation of Ohio are on one side of the controversy, while another corporation of Ohio is a party upon the opposite side. This arrangement operates to deprive the federal court of jurisdiction. The very late case of Wilson v. Oswego Tp., 14 Sup. Ct. 259, is a case much in point. There federal jurisdiction was held to be defeated as to a defendant whom the court thought an unnecessary party to the relief sought by the complainant, yet a proper party because of its interest in the controversy. We are clearly of opinion that, while the Central Ohio was not a necessary party to the accounting between the Baltimore & Ohio Railroad Company and the Pittsburgh, Cincinnati & St. Louis Railway Company, yet it was, in view of its interest in the issues arising upon that account, a proper party.

The decree must be reversed, with directions to the circuit court to dismiss the bill with costs.

MEYERS et al. v. SHIELDS, County Treasurer.

(Circuit Court, N. D. Ohio, E. D. June 2, 1894.)

1. FEDERAL COURTS—EQUITABLE REMEDIES UNDER STATE LAWS—RESTRAINING COLLECTION OF TAX.
   A remedy by injunction against the collection of an illegal tax, expressly provided by a state statute, may be applied by federal court of equity in the state, notwithstanding the statute also provides for an action at law to recover back the tax when paid. Cummings v. Bank, 101 U. S. 153, followed.

2. SAME—LIEN FOR TAXES AS CLOUD ON TITLE.
   A federal court of equity has jurisdiction to afford relief against the illegal assessment of back taxes under a state statute making them a lien on real estate, thereby throwing a cloud on the title thereto.

3. CONSTITUTIONAL LAW—DUE PROCESS OF LAW—NOTICE OF ASSESSMENT OF TAX.
   Proceedings by a county auditor under Rev. St. Ohio, § 2781, by which an assessment for taxes of years preceding the current year is entered on the general tax duplicate against the taxpayer without notice or opportunity to be heard, which assessment is a cloud on the title to his realty, and a lien on his property enforceable by distraint and sale of goods without suit in court, deprive him of his property without due process of law, and are invalid under Amend. Const. art. 14.

4. SAME—DISQUALIFICATION BY INTEREST.
   Such proceedings by the auditor being judicial in their nature, his direct pecuniary interest therein under Rev. St. Ohio, § 1071, which entitles him to a commission of 4 per cent. on all taxes added by him to the duplicate under section 2871, is a disqualification which makes the proceedings, when conducted by him, not due process of law within Amend. Const. art. 14.

5. TAXATION—RESTRAINING COLLECTION—AMENDMENT OF BILL.
   Failure of a bill for injunction against collection of a tax to aver that plaintiffs have property within the distraining process authorized therefor may be supplied by amendment, after submission of the cause, where the averments of the original bill were a sufficient basis for the temporary injunction allowed, and the facts are manifestly incontestable.

This is a bill in equity, filed by the complainants, who are nonresidents of Ohio, to enjoin the defendant, who is the treasurer of Cuyahoga county, Ohio, from attempting to enforce the collection of $184,108.50, which sum, it is averred, stands illegally assessed against said complainants on account of taxes alleged to have been unlawfully and fraudulently withheld from the tax duplicate of said county by the deceased for the years 1887, 1888, 1889, 1890, 1891, and 1892.

The allegations of the bill are that the complainants are the duly-appointed executors of John L. Woods, who died on March 27, 1893, as a resident and taxpayer of Cuyahoga county, leaving a will appointing complainants as his executors, both of whom are nonresidents of Ohio, and citizens of New York and Michigan, and that the controversy involves and presents to the court a question arising under the constitution of the United States. The bill further avers that for each of the years 1887, 1888, 1889, 1890, 1891, and 1892 their testator, John L. Woods, then being a resident of the city of Cleveland, did, as complainants believe and aver the fact to be, duly list for taxation all property owned by him and subject to taxation in the state of Ohio, and duly paid all taxes legally assessed against him; and in no one of said years did the said John L. Woods make a false return of his personal property for taxation, or conceal the same, or in any manner evade the payment of lawful taxes upon his property. It is further alleged that after said Woods died the auditor of Cuyahoga county, wrongfully claiming that for the years above enumerated the deceased had made false returns of his personal property for

taxation, and claiming to act under authority of sections 2781 and 2782 of the Revised Statutes of Ohio, placed upon the tax duplicate, and certified for collection against said John L. Woods, to the defendant, Joseph C. Shields, treasurer, taxes and penalties as follows:

For the year 1887	$600,000 00
For the year 1888	750,000 00
For the year 1889	750,000 00
For the year 1890	800,000 00
For the year 1891	680,000 00
For the year 1892	750,000 00

—And increased said sums, respectively, by the infliction of a penalty of 50 per cent. thereof, and multiplied the sums thus increased by said penalty by the rate of taxation for each year, making the amounts charged against said John L. Woods for taxes and penalties for said years as follows:

1887.	Principal	$ 900,000 00,	Tax		$25,470 00
1888.	"	1,125,000 00,	"		31,837 50
1889.	"	1,125,000 00,	"		31,837 50
1890.	"	1,200,000 00,	"		35 160 00
1891.	"	1,020,000 00,	"		28,866 00
1892.	"	1,125,000 00,	"		30,937 50

The bill further avers that said taxes and penalties now stand charged for collection, and upon the face of the duplicate appear as a debt against the estate of said Woods in the hands of complainants as executors, to be collected by action or distraint, and that defendant has begun an action against complainants in the court of common pleas for said county, but no service of process has yet been made upon them. The bill further avers that said auditor failed to give the notice provided for by sections 2781, 2782 of the Ohio Laws, which notice the taxpayer is entitled to have, to the end that he may show, under oath or otherwise, that he did not evade the payment of the taxes which the auditor proposes to charge against him; and the bill particularly charges that said auditor, in charging said illegal taxes against the said Woods, did so without any notice whatever to him in his lifetime, or to the complainants, saving a notice served upon the latter, in substance saying that the agents employed by the authority of the Statutes of Ohio to look up property omitted from taxation have discovered errors in the tax returns of John L. Woods, and notifying complainants, as his executors, to appear, and show cause why they should not be corrected, and the omission placed on the treasurer's duplicate for collection, which notice did not inform the complainants what kind of error had been made, nor for what year, nor that he claimed said return false and fraudulent, so as to subject the said Woods to the penalty for such false return; and, though the law authorizes the said auditor to add only such specific property to the duplicate as he ascertains to have been falsely withheld from taxation, and at the true value in money of each item of property which he so adds, complainants aver that they examined said auditor's records, and that it does not appear therein what property claimed to have belonged to said Woods was added to his tax return, or at what value the items which make up said tax were assessed; and complainants allege that said auditor did not find any specific property of said Woods omitted from his tax returns, but that, without such finding, and irrespective of its true value in money, said auditor arbitrarily, and without any authority of law, charged said taxes and penalty against said Woods, and complainants therefore cannot ascertain what property it is for which they are asked to pay said taxes and penalties, and upon what basis of valuation they were placed upon the duplicate.

Complainants further charge that the proceedings of said auditor under sections 2781 and 2782 of the Ohio Statutes, authorizing him, in the manner hereinbefore charged, to add to the tax return of the said John L. Woods the property as aforesaid, are void, because it is an attempt to take the property of said Woods without due process of law, because, under section 1071 of the Revised Statutes of Ohio, the auditor is entitled to a commission of 4 per cent. on all taxes added by him to the duplicate under sections 2781 and 2782, thereby giving him a direct pecuniary interest in the result of his determination of

the questions submitted to his judgment under said sections, thereby, in effect, holding out to him a direct bribe to decide such controversy against the citizen and in favor of the state; whereby said laws, in so far as they attempt to confer power upon said auditor to add to the tax returns of the citizen and inflict penalties therein specified, are in conflict with article 5 of the first amendment to the constitution of the United States and with the fourteenth amendment of the constitution of the United States, and with the constitution of Ohio. The complainants further charge that said taxes were illegally charged against said Woods, and do not in fact constitute a legal claim against his estate, because said finding and judgment were made after his death; and that said taxes are charged, upon the duplicate of said county, not against the estate of said Woods, but against him, whereby said auditor has attempted to enter a finding and judgment against said Woods after his death. To this bill the defendant has interposed his demurrer, on the ground that said bill does not state a case, nor contain any matter of equity entitling the complainants to any relief against the defendant.

Squire, Sanders & Dempsey, for complainants.

W. L. Avery and T. K. Dissette, Asst. Pros. Atty., for defendant.

Briefs of Boynton & Horr, Hoyt, Dustin & Kelley, and John H. Doyle, of Toledo, for plaintiffs in causes now pending, involving same questions, examined by court.

RICKS, District Judge (after stating the facts). The first contention necessary to consider is the objection by the defendant that this court, sitting as a court of equity, cannot acquire jurisdiction of this case because the plaintiffs have a complete and adequate remedy at law. Counsel have insisted upon this objection very strenuously, and urged that the remedy in equity afforded by the laws of the state of Ohio cannot be applied in this court, but that the limitation put upon the equitable jurisdiction of the federal courts by section 723 of the Revised Statutes of the United States must be considered an inhibition, at least to limiting this jurisdiction to administering in equity remedies under state statutes. But the decision of the supreme court of the United States in the case of Cummings v. Bank, 101 U. S. 153, is conclusive on this subject. The court had presented in that case the precise objection now urged, and in disposing of it with reference to the statutes of Ohio said:

"But the statute of the state expressly declares that suits may be brought to enjoin the illegal levy of taxes and assessments, or the collection of them; * * * and, though we have repeatedly decided in this court that the statute of a state cannot control the mode of procedure in equity cases in federal courts, nor deprive them of their separate equity jurisdiction, we have also held that, where the statute of a state created a new right, or provided a new remedy, the federal courts will enforce that right, either on the common law or equity side of its docket, as the nature of its new right or remedy requires. Here there can be no doubt that the remedy by injunction against an illegal tax expressly granted by the statute is to be enforced, and can only be appropriately enforced, on the equity side of the court. * * * The statute also answers another objection made to the relief sought in this suit, namely, that equity will not enjoin the collection of a tax except under some of the well-known heads of equity jurisdiction, among which is not a mere overvaluation, or the illegality of the tax, or in any case where there is an adequate remedy at law. The statute of Ohio expressly provides for an injunction against the collection of a tax illegally assessed, as well as for an action to recover back such tax when paid, showing clearly an intention to authorize both remedies in such cases."

In the case of Shelton v. Platt, 139 U. S. 591, 11 Sup. Ct. 646, the supreme court held that the circuit court of the United States, sitting in Tennessee, could not entertain jurisdiction of such a suit in equity, because the laws of Tennessee specially provided a complete remedy at law to the taxpayer resisting the collection of an alleged illegal tax. That statute provides that, where an officer charged by law with the collection of revenue due the state takes any steps for the collection of the same, a party conceiving the tax to be unjust or illegal may pay it under protest, and sue the officer to recover the money; and, if the court determines that it was wrongfully collected, then, upon its certificate to that effect, the comptroller "shall issue his warrant for the same, which shall be paid in preference to other claims on the treasury." And the act further provides that there shall be no other remedy in any case for the collection of revenue, and no writ for the prevention of such collection, or to hinder or delay it, shall in any wise issue,—either injunction, supersedeas, prohibition, or any other writ or process whatever. With such a complete and exclusive remedy at law prescribed by the state statute, a federal court of equity in Tennessee would not afford equitable relief by injunction. It would be difficult to frame a bill which would confer jurisdiction in equity, in view of that statute, and of section 723, Rev. St. U. S. But the legislative authority in Ohio has adopted an exactly contrary policy. Section 5847, Rev. St. Ohio, expressly provides the remedy by injunction to protect the taxpayer against the payment of an illegal tax. The remedy prescribed is equitable in its nature. A federal equity court, sitting in Ohio, would therefore afford the equitable relief by injunction, when the same court, sitting in Tennessee, would refuse it, and remand the plaintiff to his remedy at law. Federal courts decline, except in extreme cases, to interfere with the enforcement of the revenue laws of a state, because it embarrasses the operations of the local government, and deals directly with the most delicate and important powers of the state's sovereignty. It is only where a clear case for the interposition of the equity powers of the court is presented that it will exercise them. In Ohio the laws invite and prescribe such relief by injunction for nonresidents as well as for residents. In Tennessee the law distinctly excludes that remedy. The cases of Cummings v. Bank and of Shelton v. Platt are therefore easily reconciled and applied. The former interprets the Ohio statute as conferring a new equitable right and remedy which the federal courts will enforce. For these reasons it seems to me clear that this court has jurisdiction in this case to afford plaintiffs such relief in equity as they may be entitled to invoke under the averments of the bill. But there is still another principle upon which the court could acquire jurisdiction. The bill avers that the taxes assessed against the plaintiffs by the laws of Ohio become a lien upon their testator's property, and throw a cloud upon their title to the real property belonging to the estate. In the case of Sanford v. Gregg, 58 Fed. 620, which was a suit brought to enjoin a state officer from assessing or enforcing a tax for which it was claimed there was no warrant in law, the court says:

"While the federal courts are extremely cautious about interfering with the collection of current state revenues, yet they will not decline to enjoin a settlement of illegal back taxes which threatens to create a cloud on the real estate. * * * A settlement of alleged illegal back taxes, which, when the proper steps are taken, will constitute a lien on the real estate, constitutes such a threat to create a cloud on the title as will authorize the interference of equity; and an allegation by taxing officers that they do not intend to take the steps necessary to create the lien does not oust the jurisdiction."

The case is elaborately argued by distinguished counsel, and in a very brief opinion delivered by Judge Dallas is disposed of, so far as pertinent to this discussion, by the statement that the bill—

"Is not aimed at the collection of current revenue, but of back taxes covering a period of twenty years; and this settlement, if not itself a presently existing cloud upon title to real estate, is certainly a potential threat to create one, which is not effectually withdrawn by the allegation that this defendant does not propose to pursue it. In Jackson v. Cator, 5 Ves. 688, the Lord Chancellor (Loughborough) said: 'I never ask more upon an application for an injunction than that a surveyor has been sent to mark out trees. I do not wait until they are cut down.' * * * The first step towards the creation of a lien having been taken, the jurisdiction in equity then attached, and cannot now be divested by the averment of the defendant that he does not intend to proceed further in that direction. * * * Therefore, and irrespective of the other grounds which have been urged with much force, I am of opinion that this suit is within the equitable jurisdiction of this court."

The next question to be determined is whether the proceedings by which the auditor assesses the tax and certifies the amended duplicate to the treasurer, and thereby makes it a lien upon the taxpayers' property, are "due process of law," within the meaning of the fourteenth amendment to the constitution of the United States. And in the consideration of this question it becomes important to ascertain whether, under the Ohio Statutes, and the mode in which they are enforced by the auditor and treasurer, the taxpayer has such notice of the proceedings as is necessary to make them due process of law. And, first, what is "due process of law?" In Murray's Lessees v. Hoboken Land & Imp. Co., 18 How. 272, Mr. Justice Curtis says: "The words 'due process of law' were undoubtedly intended to convey the same meaning as the words 'by the law of the land' in Magna Charta." Lord Coke, in his commentary on these words (2 Inst. 50), says they mean due process of law. The constitutions which had been adopted by the several states before the formation of the federal constitution, following the language of the great charter more closely, generally contained the words, "but by the judgment of his peers, or the law of the land." The ordinance of congress of July 13, 1787, for the government of the territory of the United States northwest of the River Ohio, used the same words. The constitution contains no description of these processes which it was intended to allow or forbid. It does not even declare what principles are to be applied to ascertain whether it be due process. It is manifest that it was not left to the legislative power to enact any process which might be devised. "The article is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave congress free to make any process 'due process of law' by its mere will."

In Zeigler v. Railroad Co., 58 Ala. 599, the supreme court says:

"Due process of law implies the right of a person affected thereby to be present before the tribunal which pronounces judgment upon the question of life, liberty, or property in its most comprehensive sense, to be heard, by testimony or otherwise, and to have the right of controverting by proof every material fact which bears on the question of right involved in the matter."

Daniel Webster, in his argument in the Dartmouth College Case, said the "law of the land" was substantially equivalent to "due process of law," and defined the former as follows:

"By the 'law of the land' is meant the 'general law,' which hears before it condemns; which proceeds upon inquiry, and renders judgment only on trial."

Adopting Mr. Webster's definition, the supreme court of Missouri, in Clark v. Mitchell, 64 Mo. 578, say:

"It is entirely correct in assuming that a legislative enactment is not necessarily the law of the land. The words 'by the law of the land,' as used in the constitution, do not mean a statute passed for the purpose of working the wrong. That construction would render the restriction absolutely nugatory, and turn this part of the constitution into mere nonsense."

Mr. Justice Miller, in Davidson v. New Orleans, 96 U. S. 104, in considering the meaning of these words, says:

"It is probably better to leave the meaning to be evolved by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning upon which such decisions may be founded."

In the same case, Mr. Justice Bradley adds these words:

"In judging what is due process of law, respect must be had to the cause and object of the taking,—whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or none of these; and, if found to be suitable or admissible in the special case, it will be adjudged to be 'due process of law,' but, if found to be arbitrary, oppressive, and unjust, it may be declared to be not 'due process of law.'"

One principle runs through all these definitions. Webster expresses it tersely when he says: "By the 'law of the land' is meant the 'general law,' which hears before it condemns; which proceeds upon inquiry, and renders judgment only on trial." The party to be affected by the process which deprives him of his life, liberty, or property, must have notice of the time and place of hearing, in some form and at some time, and must have the privilege of being heard. He must have his day in court. Do the laws of Ohio governing the proceedings under consideration provide for such notice? It is evident that the auditor's proceedings complained of in this bill were instituted and carried forward by him under the assumption that sections 2781 and 2782 of the Revised Statutes of Ohio afforded him authority for the findings and the entry made on the tax duplicate. But a careful examination as to the origin, changes, and final enactment of these two sections as part of the Revised Statutes of the state clearly show that each has a separate history, that each was framed by the legislature for a different purpose, and each covers and applies to different violations of the tax laws. In the case of Ratterman v. Ingalls, 48 Ohio St. 468, 28 N. E. 168, the supreme court of Ohio clearly define the distinction between the two sections. Section 2781 was originally passed as section 1 of the

act of March, 1861, 58 Ohio Laws, p. 47. It was an amendment of section 6 of the act of April 5, 1859. As then enacted, it provided as follows:

"Section 1. Be it enacted by the general assembly of Ohio, that if any person, whose duty it shall be to make a return or list of property for taxation under the provisions of the act 'for the assessment and taxation of all property in this state and for levying taxes thereon according to its true value in money,' passed April 5, 1859, shall make a false return, or shall evade making a return, it shall be the duty of the county auditor to ascertain the true amount of the taxable property, moneys, credits and effects that such person ought to have returned or listed, in the manner prescribed in the thirty-fourth section of said act, and to add thereto fifty per centum on the amount so ascertained; and the amount so ascertained, with the said fifty per centum, shall be entered on the duplicate for taxation."

When this act was revised and became part of the Revised Statutes, that provision was repealed and omitted which required the auditor to ascertain the true amount of property, moneys, etc., that such person ought to have returned or listed, "in the manner prescribed in the thirty-fourth section of said act." The thirty-fourth section of that act provided that in all such proceedings the auditor might issue compulsory process for the attendance of witnesses, and then specifically provided that "it shall be the duty of the auditor in all such cases to notify every such person before making the entry on the duplicate, that he may have an opportunity of showing that his statement * * * was correct." By this repeal of this clause of the original statute section 2781 became a part of the Revised Statutes of the state without any provision requiring a notice from the auditor to the taxpayer of the nature of the proceedings before the former under that section, and of the character or scope of the "entry on the tax duplicate," in which those proceedings might result. In 1886 this section was amended so as to add a penalty of 50 per centum to the amount of taxes found to have been falsely withheld in the taxpayer's return for each of the five years next preceding, and multiply the sum or sums thus increased by the said penalty by the rate of taxation belonging to said year or years, and accordingly enter the same on the tax lists in his office, giving a certificate therefor to the county treasurer, who shall collect the same as other taxes. The statute, thus made more sweeping in its provisions, was still silent as to any notice to the taxpayer of the proceedings that might be going against him in the auditor's office. Section 2782 is a re-enactment of section 34 of the act of April 5, 1859, without any material change. It is evident from this brief history of the two sections that it was originally the legislative policy of the state to provide for a notice to the taxpayer of the nature of the proceedings in the auditor's office under both of these sections. But the bill in this case sets forth the notice given. That notice covered only the proceedings provided for by section 2782. It certainly cannot be seriously contended that under a notice from the auditor of an intention to ascertain whether the taxpayer has given to the assessor "a false statement of the personal property," etc., for the current year, such officer could proceed without other or further notice to find under section 2781 that such taxpayer had made a false return for five years, and also "ascertain

as near as practicable the true amount of personal property," etc., "that such person ought to have returned or listed; and to the amount so ascertained for each year he shall add fifty per centum, and enter the same in the tax lists in his office, giving a certificate therefor to the county treasurer, who shall collect the same as other taxes." In Scott v. City of Toledo, 36 Fed. 385, Judge Jackson held "that the notice required by section 2304, Revised Statutes of Ohio, of the adoption of the preliminary resolutions declaring the necessity of opening a street and appropriating lands, having no reference to any assessment to defray the expenses thereof, is not sufficient to make a subsequent assessment without further notice valid." But it is said the supreme court of the United States, in the case of Sturges v. Carter, 114 U. S. 511, 5 Sup. Ct. 1014, held a notice given under section 2782 was sufficient to support a finding under section 2781. But an examination of that case shows that the auditor served a written notice on Sturges to appear instanter, and give information of all property within his knowledge which had not been duly returned for taxation. He appeared and submitted to an examination, and while in attendance was informed by the auditor that he had not reported for taxation certain judgments and mortgages, called his attention to the statute under which he was proceeding, and requested such explanation as he might choose to offer; and the auditor then further informed him that he would file a supplemental assessment against him of the property which he had not included in his return for the preceding four years. He then made such supplemental assessment, taxing the defendant upon $100,000 of stock of the Western Union Telegraph Company for the years 1874, 1875, 1876, and 1877, and entered the same upon a supplemental tax duplicate, and certified the same to the treasurer for collection. The treasurer brought a civil action on this assessment for $10,776.83, in the common pleas court of Richland county, and it was removed to this court. Judgment was entered here against the defendant Sturges. The supreme court decided that, inasmuch as Sturges appeared, testified, and was then notified by the auditor of what he proposed to report and find for taxes due the preceding years, Sturges had his day in court, and was notified, within the meaning of the Ohio Laws. The errors to be corrected and the remedy to be applied under section 2782 relate only to the current year. This is accomplished by the auditor filing in his office "a statement of the facts or evidence upon which he makes such correction." But under section 2781 the proceedings may result in adding to the tax duplicate, and making it a lien upon the taxpayer's property, the tax on the true amount of property such person should have returned for the preceding five years, with the penalty of 50 per cent. The notice provided by section 2782 could not, therefore, be held to relate to or cover the proceedings under section 2781. This latter section does not provide a notice. We have seen that, as originally enacted, it did provide for notice the same as section 2782; but in the revision of the laws that notice was omitted. The proceedings, then, under section 2781, by which the plaintiffs were charged with this sum of $184,108.50, were carried forward

without notice to them. The evidence which the auditor heard was given ex parte. The bill avers that he made no findings of fact, but arbitrarily entered a gross sum on the tax lists of his office, giving a certificate therefor to the county treasurer, to be collected as other taxes.

But it is contended that it is not necessary to give the taxpayer notice of the proceedings in the auditor's office, or of the finding made and certificate returned to the treasurer by the auditor, because such proceedings are merely preliminary, and the collection of the tax so imposed cannot be enforced except by suit in court, and of such suit the taxpayer has notice, and all rights to contest the legality of the tax assessed are open to him as a defense in such suit. If this contention is true, the taxpayer would not be deprived of his property without due process of law, for the opportunity to contest the tax, and defend against its legality in the suit brought to enforce payment (with no other remedies to be applied), would give him his "day in court." Hagar v. Reclamation Dist., 111 U. S. 701, 4 Sup. Ct. 663. It therefore becomes important to determine whether the contention of defendant's counsel is true. In the case of Scott v. City of Toledo (before cited), Judge Jackson found that the assessment made upon Scott by the city council for the opening and improvement of the street on which his property abutted was made without legal notice to him, and was therefore "wanting in 'due process of law' if its collection could be enforced otherwise than by suit or legal proceedings in which all defenses to its validity or amount could be raised." He then proceeded to examine the Ohio laws under which such an assessment could be enforced, and found that they were collected the same as state and county taxes, and under section 2295 of the Revised Statutes they could be collected either by suit, by forfeiture and sale of the land, or by distraint of sufficient goods and chattels belonging to the person charged with such taxes or assessments; and, though he found that two other modes for collection by suit were provided, in either of which the taxpayer would have notice, yet, because the corporation might select the method of collecting by distraint of goods and chattels, by which the taxpayer would be deprived of any opportunity to be heard in regard to the assessment, either as to its validity or amount, the requirement of "due process of law" would be violated. The learned judge therefore concluded as follows:

"The common council of Toledo, having made the assessment in question without notice to, or an opportunity for hearing by, complainants, and having the right to enforce its collection by distraining and selling their property without resorting to any suit which would give them an opportunity to interpose any defense either to the validity or amount of said assessment, its action in the premises, even if authorized by the Statutes of Ohio, is wanting in that 'due process of law' required by the federal constitution before depriving the citizen of his property."

The principle so announced is fully supported by the decision of the supreme court in the case of Hagar v. Reclamation Dist., before cited. It is not in conflict with Kentucky Railroad Tax Cases,

115 U. S. 321, 6 Sup. Ct. 57. In that case, under a Kentucky statute, taxes were assessed against certain railroads by a state board, after notice and hearing to the railroads. They complained that the board did not give them a hearing as the law contemplated, and that the tax was illegally imposed, and deprived them of their property without due process of law. The supreme court held:

"The valuation of railroad property under the act, and the assessment of taxes thereon, are not final, in the sense that they constitute a charge on the property subject to the tax, or a liability fixed upon the corporation owning it. That result can be attained, and the tax actually collected, only by suit, * * * either for penalties incurred, * * * or for the recovery of the taxes themselves."

Scott v. City of Toledo is not in conflict with Davidson v. New Orleans, heretofore cited. In 1871 the petition of the city of New Orleans, and the administrators thereof, was filed in the seventh district court for the parish of Orleans, setting forth an assessment on certain real estate, made under the statutes of Louisiana, for draining the swamp lands within the parishes of Carroll and Orleans, and asking that the assessment should be homologated by the judgment of the court. The estate of John Davidson objected. The objection was sustained by the district court. The supreme court reversed that action, and approved the assessment roll, and that it should operate as a judgment against the property described. A writ of error was sued out to the supreme court of the United States. That court held:

"That whenever, by the laws of a state, * * * a tax assessment, servitude, or other burden is imposed upon property for the public use, whether it be for the whole state or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property, as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections. * * * This proposition covers the present case. Before the assessment could be collected or become effectual, the statute required that the tableau of assessments should be filed in the proper district court of the state; that personal service of notice, with reasonable time to object * * *. This was complied with, and the plaintiff had a fair hearing in the court of first instance. If this be not due process of law, then the words can have no definite meaning, as used in the constitution."

In both these cases, it must be observed, the tax imposed did not become a lien, or was not enforceable by distraint against the taxpayer, until suit was brought on the assessment, and a judgment of the court entered thereon. No such protection is afforded by the Ohio statute. It is doubtful whether, in a suit to enforce collection of the assessment in Ohio, the defendant would not be bound by the facts found by the auditor. The certificate sent to the treasurer is made prima facie correct. But the proceedings before the auditor complained of in this case are even more obnoxious than the proceedings against Scott reviewed by Judge Jackson in the case cited. It is not a satisfactory or sufficient answer to the objections urged against the arbitrary action of the auditor to say that his proceedings are only preliminary, and that in a suit brought to enforce

the collection of such taxes the taxpayer has his notice and his opportunity for presenting his defense. The proceeding is not of this innocent character. The statute vests in the auditor the power to proceed in a quasi judicial character. He summons the parties accused and witnesses, he administers oaths, hears the testimony, and then proceeds to a finding, which has far more vitality and efficiency than the judgment of a court, because more summary remedies are provided for enforcing the collection of the assessment which he makes. Without stating the facts upon which his conclusion is based, or the reasons which lead him thereto, he adds to the tax duplicate an assessment, according to the averments of the bill in this case, of $184,108.50. He certifies this supplemental duplicate to the treasurer, and it thereby becomes a lien upon the taxpayer's property, and a blot upon his character and reputation as a truthful and law-abiding citizen. Upon this certificate the treasurer may collect this assessment by distraint, and by those summary and arbitrary proceedings which have been properly upheld as agencies and means necessary to enforce the collection of taxes legally and justly imposed. This assessment and certificate, the result of the proceedings before the auditor, are therefore made more harmful to the defendant than the judgment of a court. Where the duplicate is regular upon its face, and the law is valid under which the taxes are assessed, the duplicate affords the treasurer the same protection as an execution does the sheriff against any liability for such seizure, even if the tax is improperly charged upon property not liable, or against a person having no property legally subject to taxation. Loomis v. Spencer, 1 Ohio St. 153; Stone v. Viele, 38 Ohio St. 317. Under section 1095 the treasurer may distrain sufficient goods and chattels belonging to the taxpayer charged with such taxes, and "shall immediately proceed to advertise the same, and sell the goods so distrained at public vendue, to pay said taxes and the costs of such distraint and sale." Under this section the supreme court of Ohio, in Stone v. Viele, has held that the treasurer may collect assessments by distraint, or sell lands upon which assessments have been levied, the duplicate having the force of an execution. If the treasurer fails to distrain goods, he may, under section 1097, apply to the clerk of the court of common pleas in his county, and said clerk shall cause notice to be given to the taxpayer, requiring him forthwith to show cause why he should not pay such taxes; and, if he fail to show a sufficient cause, the court, at the term to which said notice is returnable, shall enter a rule against him for the payment of such taxes and the costs of such proceeding, which rule shall have the same force and effect as a judgment at law, and be enforced by attachment or execution or such process as the court directs. Under section 1102 the treasurer may reach by distress, garnishee, or attachment any "dues" or credits of the delinquent taxpayer, if he has not sufficient property subject to distraint; or he may serve upon any person indebted to such taxpayer a written notice stating the amount of delinquent tax and penalty due. Then such

debtor may, after the service of such notice, pay such tax and penalty to the treasurer, whose receipt for the same shall be a full discharge of so much of said indebtedness as is equal to such tax and penalty. Under section 2859, in addition to all other remedies already noted, the treasurer may sue for these taxes, and in such suit he need only allege that the taxes are charged on the duplicate, and that duplicate is prima facie evidence of the amount and validity of the tax thereon charged. We have thus, as the result of the auditor's proceedings under section 2781, an assessment entered on the tax duplicate for taxes for five preceding years, with 50 per cent. penalty, which is a lien upon the taxpayer's real property, for the payment of which the treasurer may summarily distrain and sell at once, in any one of the several methods noted, his personal effects. It stands as a charge upon his property, a cloud upon the title to his real estate, a blot upon his character as a citizen, and yet it is claimed it is "due process of law," because if it is sought to enforce collection of such taxes by a suit in court the taxpayer will have notice of such proceedings, and may then defend against the prima facie case of guilt and indebtedness arbitrarily found against him. All the other summary remedies for collection provided by law are open to the treasurer, and may at any time be enforced; and, unless the taxpayer assumes the burden of removing the cloud upon his title and the lien upon his property by affirmative action, they stand as a menace to his credit and right of possession of his property, and as "due process of law" because of his right to notice and defense, provided the treasurer chooses to resort to the remedy of a suit in court. This is not the right to appear and make defense at the time when it is most valuable and efficient. It is a right to defend after judgment and conviction. Judge Blatchford, in Re Dana, 7 Ben. 1, Fed. Cas. No. 3,554, in commenting upon laws which gave a defendant the right of a trial by a jury in the appellate court, said:

"In my judgment, the accused is entitled not to be first convicted by a court and then to be acquitted by a jury, but to be convicted or acquitted in the first instance by a jury."

By the same principle I conclude that it is not "due process of law" to enter on the tax duplicate, without notice or trial, what amounts in legal effect to a judgment against the taxpayer, enforceable by distraint and sale of his goods and chattels, and afterwards make it "due process," because it may become possible for the taxpayer to interpose a defense, provided the collecting officer elects to bring a suit to enforce the collection when the more summary remedies have proven unavailing. This same principle is admirably stated by Mr. Justice Field in the Railroad Tax Cases, 13 Fed. 752, when he says:

"But whatever the character of the proceedings, whether judicial or administrative, summary or protracted, and whether it takes property directly or creates a charge or liability which may be the basis of taking it, the law directing the proceeding must provide for some kind of notice, and offer to the owner an opportunity to be heard, or the proceeding will want the essential ingredient of due process of law. Nothing is more clearly established,

by a weight of authority absolutely overwhelming, than that notice and opportunity to be heard are indispensable to the validity of the proceeding. It has sometimes been intimated that a citizen is not deprived of his property, within the meaning of this constitutional provision, by the imposition of an assessment. It might as well be said that he is not deprived of his property by a judgment entered against him. A judgment does not take property until it is enforced, and then it takes the real or personal property of the debtor. So an assessment may generally be enforced, not only against the real estate upon which it is a lien, but, as in this case, against the personal property of the owner also; and by it he may just as much be deprived of his property, and in the same sense, as the judgment debtor is deprived of his by the judgment."

For these reasons I conclude that the auditor's proceedings under section 2781 of the Ohio Statutes, by which an assessment is entered on the general tax duplicate against the taxpayer without notice or opportunity to be heard, and which assessment is a cloud upon the title to his realty, and a lien upon his property, enforceable by distraint and sale of goods and chattels without suit in court, are not "due process of law" under the fourteenth amendment of the constitution of the United States.

The next important question to be determined is whether the auditor is disqualified to make a valid assessment as the conclusion of the proceedings before him because of his direct pecuniary interest in the result. If he makes a finding against the taxpayer, and enters an assessment upon the tax duplicate, the statute gives him 4 per cent. upon the amount so recovered. If he fails to discover any property omitted from the taxpayer's return, he receives no compensation for his services. Because of this direct reward if he finds against the taxpayer, and of no reward if he finds in his favor; is he disqualified, and are the proceedings therefore invalid? The object of all legislation pertaining to judicial or quasi judicial proceedings is to furnish an impartial and wholly disinterested tribunal, before which such proceedings are instituted and carried forward. It is to carry out the constitutional guaranty that no man shall be deprived of life, liberty, or property without due process of law that the chief safeguard of a disinterested judge, jury, referee, or arbitrator is so carefully provided by legislation and protected by judicial scrutiny. The most notorious criminal enjoys these safeguards to the extent that the magistrate who presides at his preliminary hearing must be disinterested. Every grand juror who sits in the grand inquest as to his crimes must be disinterested; every petit juror who tries the facts after the grand jury presents its indictment must be disinterested; the judge who presides at the trial,—each and all must be wholly impartial and disinterested in the result. Even after conviction, if it is made to appear that by some mistake an interested or disqualified juror has participated in the trial and verdict reached, such interest and bias on the juror's part contaminates the whole proceeding, poisons the fountains of justice at their source, and makes the verdict null and void. Even in a civil suit, our system of judicial proceedings assures to each party a fair and disinterested judge and jury to pass upon the law and facts in controversy between them. Is it to be accepted

that all these safeguards are to be disregarded, and all the precedents of long years set aside to support proceedings of the character we have considered, simply because the legislature has deemed it necessary to do so in aid of the tax assessing and collecting powers of the state? It must be remembered in this connection that this inhibition of the federal constitution that the life, liberty, and property of the citizen shall not be taken without due process of law, reaches the legislative as well as the executive and judicial departments. We have already seen from well-considered decisions of our highest court that the legislative authority cannot usurp the power to determine what is due process of law, and on the plea of public necessity ignore the well-established safeguards which the law of the land has heretofore recognized and enforced. 64 Mo. 578. The taxing power is rightfully made efficient and protected with great jealousy, for it is necessary to the very life and maintenance of the sovereign, and very summary and sweeping enactments in support of this power have been held valid. But in the eager and hot pursuit of the citizen who wrongfully evades his just taxes we must be careful not to graft upon the body of our judicial system proceedings so arbitrary and summary that they may hereafter be the basis and precedent for laws dangerous in the highest degree to the personal liberty and property rights of every citizen. A statute which confers upon an officer, chosen solely with reference to other duties, the power to conduct a quasi judicial proceeding, which in every stage of its progress is summary, and in its findings arbitrary in the highest degree, and which makes this officer, combining the functions of judge and jury, partial and biased, because directly interested by reason of the very liberal reward which flows to him if he decides against the taxpayer, is a gigantic and perilous stride towards withdrawing from the citizen every principle of constitutional protection heretofore deemed secure and perpetual. It is not a sufficient answer to all this to say that the courts have upheld laws which are administered by officers and judges who are interested in the fees which flow from proceedings instituted and conducted before them. In reply to this very serious and grave objection to such an interested officer deciding a case of a judicial nature, the supreme court of Ohio has said that a justice of the peace and a probate judge are likewise interested, because the security of their fees as taxed by law may depend upon the result of the suit which they are to decide. The comparison, while in some respects apt, loses all force when we come to consider it in detail. The magistrate or probate judge has the same fees taxed for his compensation whether one party prevails or the other, or whether the judgment is for a small sum or a large sum. His fee is secure if the parties are solvent, or he may protect himself by demanding security before the services are rendered. So that his compensation, which is usually but a small part of the judgment rendered, is assured if he is diligent; and its amount is not contingent upon the decision he makes. The case is therefore exceptional when the security of his compensation depends upon the party against whom his judgment is rendered. But, as we have seen, the auditor's compensation is

directly dependent upon the finding he makes. If he finds against the taxpayer, he is sure of his reward, and it is secured by the highest lien, and most summary process for its collection. Not only is he interested in finding against the taxpayer, but his fee grows with the increasing amount of his assessment. The larger the assessment, the greater his commission. In the case now before me, if the auditor's assessment stands, his fee will be $7,360. The fee is evidently not intended to be given in the nature of compensation for services alone. It is therefore not only in the nature of a bribe to decide against the citizen, but a corrupting inducement to make his finding the largest possible. As the proceedings are arbitrary, and in the case under consideration no finding of fact was made, the temptation to a large assessment is so great that it would be wrong to submit the ordinary mortal to it. Not only is the auditor thus given a tempting inducement to make a large and unjust assessment, but the statute offers still further inducements to bring about the same result by giving a large fee to the witnesses who furnish evidence against the evading taxpayer. Under the act of April 10, 1888, the inquisitors employed to furnish evidence receive 20 per cent. of all that can be recovered; but this reward can only be paid out of the money actually collected. Thus we have a system, judicial in its character, which rewards not only the witnesses by a commission upon the amount of taxes recovered by reason of their testimony, but also provides a commission of 4 per cent. to the officer who conducts the proceedings, and who awards the amount of the taxes to be assessed and collected. And so connected are these agencies that it has been held that mandamus proceedings can be maintained by the inquisitors to compel the auditor to act under sections 2781, 2782. State v. Crites, 48 Ohio St. 142, 26 N. E. 1052.

But it is contended the auditor is not eo nomine a judge, and the proceedings are not judicial, and therefore the assessment made by him is not invalid because of his pecuniary interest in the judgment rendered. It is true that he is not designated as a judge, but the supreme court of Ohio has repeatedly held that the proceedings conducted by him are judicial in their nature. Gager v. Prout, 48 Ohio St. 110, 26 N. E. 1013, and State v. Crites, 48 Ohio St. 460, 28 N. E. 178.

In the first case cited the supreme court said:

"Conceding that the proceedings before the auditor are judicial in character, it does not follow, as we think, that they are to be governed by all the precise rules of the Code of Civil Procedure for the commencement and prosecution of civil actions. Notice is required, but no particular style for the proceeding or form of notice is required."

In the case against Crites, on page 173, 48 Ohio St., and page 1052, 26 N. E., the supreme court said:

"No doubt the duty is one of delicacy, and calls for the exercise of a conservative judgment and sound discretion. The great power vested in county auditors by the statute is liable to cause hardship and oppression if exercised recklessly and wantonly."

In the second case against Crites, on page 465, 48 Ohio St., and page 178, 28 N. E., the same court, in referring to the auditor's proceedings, said:

"The respondent was acting in a quasi judicial capacity. He had assumed jurisdiction, and entered upon the investigation. The law imposed upon him the duty of hearing and weighing evidence, and rendering a decision upon it. This necessarily involved the exercise of judicial discretion."

An officer called upon to summon witnesses, hear testimony, and then "exercise a conservative judgment and sound discretion," and, as in this case, enter upon the tax duplicate an assessment for over $184,000, which shall be a lien upon the taxpayer's real estate, and which may be summarily collected by distraint, it seems to me, is exercising powers of a judicial nature, and of the most potential character. If the auditor were merely finding a tax due, the amount of which is fixed by statute, as the Dow law tax, or a license fee, involving no judicial function, the want of notice would not avail the taxpayer as a matter of defense; neither would the officer's interest in the fee disqualify him. Having thus shown the judicial character of the duties which the auditor performs in the proceedings which have just been reviewed, how does the law say his direct pecuniary interest in the judgment he renders affects the validity of his proceedings? In Pearce v. Atwood, 13 Mass. 324, Chief Justice Parker said:

"It is very certain that by the principles of natural justice and of the common law no man can lawfully sit as a judge in a case in which he may have a pecuniary interest. Any interest, however small, has been held to render a judge incompetent."

Lord Campbell said, in Dimes v. Grand Junction Canal, 3 H. L. Cas. 759:

"It is of the last importance that the maxim that no man is to be a judge in his own case should be held sacred, and that it is not to be confined to a cause in which he is a party, but applies to any cause in which he has an interest. We have again and again set aside proceedings because an individual who had an interest took part in the decision."

If one of the judges of a court is disqualified on this ground, the judgment will be void, even though the proper number may have concurred without the disqualified judge. Queen v. Justices of Hertfordshire, 6 Q. B. 753; Railroad Co. v. Howard, 20 Mich. 18. The legislative voice has spoken in equally positive inhibitions against interested persons acting as judges, appraisers, road viewers, or commissioners. In Ohio, statutory provisions are in force allowing a change of venue of the suit upon the mere affidavit of the parties of prejudice, bias, or interest. Section 550, Rev. St., makes any judge interested or biased incompetent to sit in the case, and the ex parte affidavit of a party makes a change of judges obligatory without controversy. In Gregory v. Railroad Co., 4 Ohio St. 675, it was held that where two of the judges were stockholders in a railroad company, and that fact appears on the record, and the bondholder does not waive the objection, the order of the court appointing appraisers in appropriation proceedings will be reversed. In Taylor v. Commissioners, 105 Mass. 225, the supreme court held that a county commissioner is disqualified by personal interest to take part in adjudications of his board laying out and directing the construction of a highway over land of his sister's husband, and such proceeding cannot be rendered valid

by acceptance, waiver, consent, or release, but is wholly void. Cooley, Const. Lim. 410, 411, thus states the rule:

"No one ought to be a judge in his own cause. This maxim applies in all cases where judicial functions are to be exercised, and excludes all who are interested, however remotely, from taking part in their exercise. It is not left to the discretion of a judge, or to his sense of decency, to decide whether he shall act or not. All his powers are subject to this absolute limitation, and, when his own rights are in question, he has no authority to determine the case."

It is no sufficient answer to these statutory and judicial expositions of the maxims of the law to say that in most of the cases cited the legislature has recognized the disqualification of the judges, appraisers, assessors, and commissioners, because of their interest, and provided they should not act when so interested; but in the case of the auditors it has empowered them to act notwithstanding their interest, and this policy was necessary to make efficient the revenue laws of the state. But it is not within the power of the legislature to make any process which it may deem necessary or essential, even for the collection of public revenues, "due process of law," within the meaning of the federal constitution. 18 How. 276. The supreme court of Missouri, in the case before cited, says such a "construction would render the restriction absolutely nugatory, and turn this part of the constitution into mere nonsense." I am aware that the courts have gone as far as the safeguards of the constitution permit to uphold legislative enactments of an arbitrary character, for the assessment and collection of the public taxes. The many ways that have been devised to evade and defeat the collection of taxes has made it necessary to resort to extreme measures to enforce their collection; but in all the cases which I have found there is this principle recognized and respected: that where there is the exercise of any judicial functions imposed upon any of the taxing corps of officials, those judicial functions must be exercised in accordance with those sound maxims of the common law and principles of natural justice which have always controlled judicial proceedings; and the test of whether the powers conferred are judicial or not would seem to be whether with the exercise of the authority to hear testimony and determine the facts was coupled the power to enter a finding which had the force and effect of the judgment of a court. Thus, in the case of U. S. v. Ferreira, 13 How. 40, it became necessary to determine whether the authority conferred upon the United States district judge in Florida to adjudicate on claims for injuries suffered by inhabitants of that state by the operations of the American army in Florida, which claims were to be paid if the secretary of the treasury should, on a report of the evidence, deem it equitable, was authority to exercise judicial power. The claims were to be adjudicated and paid if allowed in accordance with the treaty of 1819 with Spain. The first act of congress in 1823 provided commissioners to hear and adjudicate the claims. The next act authorized the United States district judge to adjudicate the claims. He did so, and from his decision an appeal was taken to the supreme court. That court held that, as the act did not pro-

vide that there should be a suit, with parties, and process to issue, the proceedings were ex parte. The court then say:

"But neither the evidence nor his award are to be filed in the court in which he presides, nor recorded there, but he is required to transmit both the decision and evidence upon which he acted to the secretary of the treasury; and the claim is to be paid if the secretary thinks it just and equitable, but not otherwise. It is to be a debt from the United States upon the decision of the secretary, but not upon that of the judge. It is too evident for argument upon the subject that such a tribunal is not a judicial one. * * * The decision is not the judgment of a court of justice."

Apply these tests to the auditor's proceedings. He has the power to issue process; he has parties to the proceeding; he makes a finding, and files his statement of the facts in his office; and then he makes his decision, which is an assessment framed into an amended duplicate, which is certified to the treasurer, and it then becomes a lien upon the taxpayer's property, having all the force and effect of a judgment at law, with all the summary remedies for enforcement hereinbefore set forth. Surely we have here judicial powers and proceedings; and to the person who conducts these proceedings, and has the authority to enter such a judgment, should certainly be applied the disqualification of a direct personal interest in the result,—a test which we have seen is universally applied to judges and all persons exercising judicial powers.

But it is said these laws are made in the interest of the public, are necessary to secure the collection of public revenues, and none are injuriously affected by their arbitrary character but those who are trying to evade the payment of their just taxes. Suppose we concede this to be true, it is still as much the duty of the court to pass upon these questions as though the entire public were clamoring against their injustice. But the bill in this case avers that the testator made a full and true return of all his taxes for the years involved, and the demurrer admits this fact to be true. This case is therefore not one to which such suggestion applies. This court reluctantly interferes with the enforcement of state revenue laws, even when they affect only back taxes; and I am in full sympathy with those who believe that every citizen should pay taxes justly and legally imposed. I would not interpose to aid those who are not willing to bear their just share of the public burdens, unless the taxes sought to be enforced have been imposed by proceedings not in harmony with those safeguards provided by the constitution, to which I have before referred. Having, after very careful and painstaking investigation, reached the conclusion that these taxes have been illegally assessed it is the duty of the court to afford to all who are thereby wrongfully burdened such relief as the law provides. The supreme court of Ohio has decided these laws constitutional, and the proceedings of the auditor thereunder valid. The question now under consideration in this court is not whether these laws are valid under the constitution of Ohio. If it were, this court would be bound by that decision of the highest tribunal of the state. But the question presented, being a federal question, and involving a construction of the constitution of the United States, the federal courts are charged with the duty and responsibility of

deciding it, unaffected by the decisions of the state courts, except so far as they may be persuasive. For the reasons already stated, I am of the opinion that the proceedings provided by section 2781 of the Revised Statutes of Ohio, when carried forward without due notice to the taxpayer, or when conducted by the auditor, who is directly interested in the proceeds collected under the assessment made and imposed, result in depriving the citizen of his property without due process of law, and are therefore invalid under the fourteenth amendment to the constitution of the United States.

I have in this opinion considered the questions involved upon the broad principles presented in construing the Ohio Statutes with reference to the inhibition of the foregoing amendment, unaffected by any special issues peculiar to the case now before me, because there are five other cases pending in this court, brought here by removal from the state courts. The questions considered and decided affect all these cases alike, and apply to all of them.

In the case now under consideration, exceptions were taken by counsel for the defendant that the allegations of the bill were defective, in that it was not averred that plaintiffs, as executors, had any property, real or personal, within the distraining process of the county treasurer, and that, therefore, no ground for equitable interference was shown. An amendment to the bill has been tendered since the argument and submission of the case, which meets these and other contentions. Counsel object to this amendment, because, if allowed, it cannot relate back and make valid the restraining order granted upon the original bill. But the amendment does not affect or relate to jurisdictional facts. The want of notice of the auditor's proceedings, his interest in the controversy, and the illegality of the tax, as a result of such averments, are all set forth in the original bill, and are a sufficient basis for the temporary injunction allowed. The amendment tendered, of which defendant's counsel had notice, relates to facts so manifestly incontestable that the plaintiffs ought to have the benefit of whatever effect they may have upon the questions involved, and is therefore allowed.

The demurrer, both to the original and amended bill, is overruled.

COMER v. FELTON.

(Circuit Court of Appeals, Sixth Circuit. May 8, 1894.)

No. 135.

1. WRIT OF ASSISTANCE—AGAINST WHOM ISSUED.
A writ of assistance should not issue against one who is not a party to the suit, and who did not enter pendente lite.

2. RECEIVERS—CONTROVERSY REGARDING POSSESSION OF PROPERTY.
Property leased by one railroad company to another, and in possession of a receiver of an assignee of the lessee, was claimed by the receiver of the lessor on the ground that the lease had been terminated by notice by the lessor. *Held*, that the court which appointed both receivers had jurisdiction of a proceeding for determination of the controversy, either by an independent bill or by petition.

3. SAME—PROPERTY IN POSSESSION OF LICENSEE.
Property of a corporation in possession of a licensee at the time of the appointment of a receiver for the corporation passes to the receiver, subject to the rights of the licensee, and, on the termination of the license, the receiver is entitled to possession.

4. SAME—JUDGMENT AFFECTING RIGHT OF POSSESSION—RES JUDICATA.
Where an action of unlawful detainer is brought before a justice of the peace for property in possession of a receiver without leave of court, a judgment for defendant, being null and void, is not available to the receiver as a defense to a subsequent proceeding to obtain possession of the same property.

5. EQUITABLE ESTOPPEL—RELIANCE ON ERRONEOUS STATEMENT—REVOCATION OF LICENSE.
A license by one railroad company to another to use certain depot grounds provided for its termination on two years' notice by the licensor. Soon after such notice had been given, the licensee assigned its rights to another company, for which, subsequently, a receiver was appointed; whereupon the licensor wrote said receiver a letter, informing him of the notice of termination of the license, referring thereto as of a date a year later than its actual service, and inclosing a copy of the notice, not dated. An attentive reading of the letter would have indicated to the receiver that there was some mistake as to the date of notice. *Held*, that the licensor was not thereby estopped to claim the property on the expiration of the notice, in the absence of evidence that the receiver relied on the statement of the letter, and was injuriously misled thereby, notwithstanding averments to that effect in his answer, not responsive to the allegations of the licensor's pleading.

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

The appellee, S. M. Felton, is receiver for the Cincinnati, New Orleans & Texas Pacific Railway Company, hereafter designated as the Cincinnati Railway Company. The appellant, H. M. Comer, is receiver for the Central Railroad & Banking Company of Georgia, a corporation hereafter designated as the Central Railroad; and for the Savannah & Western Railroad, a corporation hereafter designated as the Savannah Railroad. This controversy is between Felton, as receiver for the Cincinnati Railway Company, and Comer, as receiver for the Savannah Railroad Company. The subject-matter of the controversy concerns certain depot grounds and terminal facilities in the city of Chattanooga, now in possession of Comer, as receiver for the Savannah Railroad. The premises involved belong in fee to a railway company known as the Cincinnati Southern Railroad. That company leased its line and depot properties to the Cincinnati Railway Company, for which Felton is receiver. The Cincinnati Railway Company subsequently, and by a contract in writing, subleased the premises in controversy to a railway company operating a line between Chattanooga, Tenn., and Columbus, Ga., and known as the Chattanooga, Rome & Columbus Railroad Company, and hereafter designated as the Chattanooga Railroad Company. This latter company subsequently sold its line of railroad, and leasehold interest in the premises, to the Savannah Railroad Company, of which Comer is receiver. After the Cincinnati Railway Company had leased the res in controversy, it became insolvent, and under a bill filed by Samuel Thomas, a creditor, in the United States circuit court at Chattanooga, Tenn. (as well as in the circuit courts of other districts through which its line extended), it was placed in the hands of S. M. Felton, as receiver. The Savannah Railroad Company, under a like bill filed in the same court, and after it had by assignment acquired the leasehold interest of the Chattanooga Railroad Company in the depot grounds in question, was placed in the hands of H. M. Comer, as receiver. Receiver Felton, under a power of revocation contained in the contract of leasing, gave notice to the president of the Chattanooga Railroad Company of the termination of the license extended to that company under its contract with the Cincinnati Railway Company.

The essential parts of that contract were as follows: "Whereas, the Chattanooga, Rome & Columbus Railroad Company, a corporation of Georgia, hereinafter known as the licensee, is desirous of constructing and maintaining, at its own expense, turntables, switching and side tracks, a connecting track with the Cincinnati Southern Railway, and appurtenances thereto, to be used in its business, in the city of Chattanooga, Tennessee, on lands hereinafter described, leased and controlled by the Cincinnati, New Orleans & Texas Pacific Railway Company, hereinafter known as the licensor: These presents witness, that said licensor has granted to said licensee the following revocable and determinable license, with the following privilege, viz.: To construct and maintain such turntables, switching and side tracks, and appurtenances thereto, as may be necessary in the conduct of its business; and a connection track with said licensor's railroad track, on the lands in the city of Chattanooga, county of Hamilton, state of Tennessee, leased to and controlled by said licensor, bounded and described as follows: * * *. And to have ingress, egress, and regress to and from the same, for the purpose aforesaid, and to use the said premises for the use of said structures, said license being granted upon the following conditions, viz.: * * * That the rights and privileges hereby granted shall cease and determine upon two years' notice in writing being given by the president of said licensor. That after notice has been given of the revocation of this license by the president of said licensor, all tracks and structures placed on said premises shall be removed without any cost to said licensor within thirty days after the date of the expiration of the said notice of revocation."

The notice given by Felton was served March 26, 1891, and its operation was to fix March 26, 1893, as the termination of the privileges enjoyed under the contract. At the date this notice was given the Chattanooga Railroad Company was in possession of its line of road and of the premises in controversy, the sale to the Savannah Railroad Company not occurring until May, 1891. On June 16, 1892, Felton, as receiver, wrote to Receiver Comer, who had, after the notice of revocation, gone into possession as receiver, the following letter:

"Cincinnati, O., June 16, 1892.

"H. M. Comer, Esq., Chairman Board of Directors, Receivers, Savannah, Ga.—Dear Sir: There have been so many changes in the management of the Chattanooga, Rome & Columbus road, and of the Central R. R. & B. Co., in the last two years, that I beg to inclose you a notice served on the former company on March 26th last, which may not have reached you. Of course this letter is not sent on account of any obligation to renew the notice, but merely as a matter of courtesy.

"Yours, truly, S. M. Felton, President."

The notice inclosed in above letter was as follows:

"The Chattanooga, Rome & Columbus Railroad Co., Chattanooga, Tenn.—Gentlemen: Whereas, on the 1st of December, 1887, the Cincinnati, New Orleans & Texas Pacific Railway Company granted to the Chattanooga, Rome & Columbus Railroad Company a revocable and determinable license, authorizing the construction and maintenance of turntables, switching and sidetracks, and appurtenances thereto, as might be necessary in the conduct of the business of the Chattanooga, Rome & Columbus Railroad Company, and the connection track, on lands in the city of Chattanooga, county of Hamilton and state of Tennessee, fully described in said license; and whereas, said license provided that the rights and privileges therein granted should cease and terminate upon two years' notice in writing being given by the president of said licensor; and whereas, the Cincinnati, New Orleans & Texas Pacific Railway Company, licensor therein, is desirous of revoking and terminating the said rights and privileges: Now, therefore, I, Samuel M. Felton, president of the Cincinnati, New Orleans & Texas Pacific Railway Company, licensor in the aforesaid license, do hereby give you this notice of the revocation of said license, and require you to remove all tracks, structures, and other things placed on said premises, without any cost to said Cincinnati, New Orleans & Texas Pacific Railway Company, within the time named therefor in the said license.

"[Signed] Samuel M. Felton."

Upon the expiration of the license, Felton demanded possession of the premises, and was refused. He then unadvisedly instituted an action of unlawful detainer before a justice of the peace, for the purpose of dispossessing Receiver Comer. The justice found for the defendant. Thereupon Felton, as receiver, filed the orignal pleading in this cause, as a petition in the case of Samuel Thomas v. The Cincinnati, New Orleans & Texas Pacific Railway Company, against H. M. Comer, as receiver for the Savannah & Western Railroad Company. In that petition he set out his appointment as receiver under a decree in the pending cause, and the appointment of Comer under decree of the same court in a like pending cause, and substantially stated the nature of the claim he asserted to the premises in dispute. The petition prayed for the issuance of a writ of assistance to put him in possession as receiver, or, if the court thought that not the proper remedy, that the court would order its officer and agent, H. M. Comer, to surrender to him the possession of the grounds in controversy. Notice was given counsel for Comer that, on the day named, application would be made for a writ of assistance.

A demurrer was interposed and overruled. An answer was then filed, and a reference made to the clerk to report as to the notice of revocation. Upon the pleadings, report, and evidence, the circuit court ordered that Receiver Comer vacate the premises, and surrender possession to Receiver Felton. From this order, Comer has appealed.

The first error assigned is as to the decree overruling the demurrer. The demurrer was as follows: "Because there is no equity on the face of said petition so far as it seeks a writ of assistance against this defendant in said cause, in that your defendant is shown to have been in possession of said terminal grounds and rights under a valid and undetermined license contract at the time petitioner was appointed receiver for said defendant company, and the decree entered on which the said writ of assistance is sought in this petition; and your defendant, H. M. Comer, was not a party to said proceedings. (2) Because the decree entered in said cause appointing said petitioner receiver of C., N. O. & T. P. Ry. Co. does not direct the property held by your demurrant to be delivered to petitioner, and is not against your demurrant, but only against the defendant in said cause, the Cincinnati, New Orleans & Texas Pacific Railway Company, and that said company only turn over such property as it then held and possessed. Wherefore, for these and other sufficient reasons, apparent on face of said petition, your demurrant prays for judgment on said demurrer that said petition be dismissed."

Barr & McAdoo, for appellant.

Lewis Shepherd, for appellee.

Before TAFT and LURTON, Circuit Judges, and RICKS, District Judge.

LURTON, Circuit Judge (after stating the facts as above). The defendant, Comer, was not made a party to the petition by service of process. Notice was given to his solicitor that on a day named an application would be made for a writ of assistance. Under this notice he appeared by counsel, and filed the demurrer to the petition heretofore set out. The first ground of demurrer goes to the jurisdiction of the court to grant a writ of assistance to dispossess him by an order made in a cause to which he was not a party. The second ground operated as an appearance and defense to the merits. It questions the order appointing Felton receiver, and insists that it was limited to the property of which the Cincinnati Railway Company was then in possession. If the defense had been confined to the power of the court to order a writ of assistance to dispossess one who had not entered pendente lite, and was not a party to the suit, it would have been well taken

so far as the application was for a technical writ of assistance. The ninth equity rule provides for the issuance of that writ: "When any decree or order is for the delivery of possession, upon proof made by affidavit of a demand and refusal to obey the decree or order, the party prosecuting the same shall be entitled to a writ of assistance from the clerk of the court." At the date of Felton's appointment, the Cincinnati Railway Company was not in possession of the premises. They were then rightfully possessed by its licensee. "This writ is often used to put into possession receivers and sequestrators. It is not issued without an order for that purpose. * * * It is a writ commanding the marshal to eject the defendant from the land, and put the plaintiff in possession, and is executed in the same manner as a writ of habere facias possessionem is executed in favor of a successful plaintiff in the action of ejectment." Fost. Fed. Pr. § 348. Manifestly, it should not issue against any but a party to the suit in which it is sought, or his privies, or one coming into possession pendente lite. Terrell v. Allison, 21 Wall. 289; Howard v. Railway Co., 101 U. S. 849; Fost. Fed. Pr. § 348.

The petition presented a controversy between two receivers of the same court. The facts stated presented a case of which the court should take jurisdiction. Each was an officer and agent of the same court. The possession of each was the possession of the court. The object of the suit was to present to the court the claim of each, and submit the right of each to the determination of the court. The court appointing a receiver draws to itself all controversies over the res, and will not, without leave, permit any other court to disturb the possession of its receiver. The proper practice would have been to have filed the petition in the cause in which Comer had been appointed receiver, and to have asked an order in that cause requiring the court's receiver to deliver possession of the leased property, the lease having terminated. The demurrer did not raise this question, and we see no jurisdictional error in maintaining the suit, either as an independent bill or as a petition in the cause in which it was filed. The alternative relief sought by the bill was proper relief on the facts stated in the pleadings.

The second ground of demurrer was not well taken. The petitioner had been appointed receiver of all the property rights of the Cincinnati Railway Company. This included its interest in the property in question. While the lease was operative, neither the Cincinnati Railway Company nor its receiver was entitled to the possession. Nevertheless, the property passed to the receiver, subject to the rights of the licensee. The right to terminate the license was a right which might be properly exercised by the receiver, and, upon the termination of the license, his right to possession was perfected.

Having by the second ground of demurrer entered an appearance and pleaded to the merits, the court properly overruled the demurrer and required an answer.

The answer set up two defenses,—res adjudicata and equitable estoppel. Upon the filing of the answer, the court directed the clerk to take proof and report as to when notice of revocation had been given, and upon whom it had been served.

The first defense rests upon the judgment in favor of the defendant in the unlawful detainer suit before a justice of the peace. That action was against one T. B. Ervin; Receiver Comer was not a party. The answer describes Ervin as the master mechanic at the Chattanooga yards and an employe of the respondent as receiver, and, as such, in charge of the premises. Defendant, Comer, is not shown to have entered an appearance or in any way made defense. Waiving the question as to whether suit against a mere servant of the receiver would justify a dispossession of the master, we are of opinion that, if the suit be treated as one against Receiver Comer to dispossess him of the possession as the agent and custodian of the court appointing him, the justice of the peace was wholly without jurisdiction to maintain such a suit. His judgment would have been treated as null and void, and any effort to enforce it by a writ of possession would have been in contempt of the court whose receiver defendant, Comer, was.

The general doctrine has been thus stated by Judge Story, in the second volume of Equity Jurisprudence (section 833a), where it is said, concerning receivers under decrees in equity:

"For his possession is deemed the possession of the court, and the court will not permit itself to be made a suitor in a court of law. The proper and usual mode adopted under such circumstances is for the party claiming an adverse interest to apply to the court to be permitted to come in and be examined pro interesse suo. He is then allowed to go before the master and to state his title, upon which he may in the first instance have the judgment of the master, and ultimately, if necessary, that of the court. And where the question to be tried is a pure matter of title, which can be tried in an ejectment, the court, from a sense of convenience and justice, will generally authorize such a suit to be brought, taking care, however, to protect the possession by giving proper directions."

In Davis v. Gray, 16 Wall. 218, the supreme court on this subject said:

"Money or property in his hands is in custodia legis. He has only such power and authority as are given to him by the court, and must not exceed the prescribed limit. The court will not allow him to be sued touching the property in his charge, nor for any malfeasance to the parties, or otherwise, without its consent; nor will it permit his possession to be disturbed by force, nor violence to be offered to his person while in the discharge of his official duties. In such cases the court will vindicate its authority, and, if need be, will punish the offender by fine and imprisonment for contempt. Where property in the hands of a receiver is claimed by another, the right may be tried by proper issues at law, by reference to a master, or otherwise, as the court in its discretion may see fit to direct."

The act of congress of March 3, 1887, permitting suits against receivers, only permits such suits, without leave of the court, "in respect of any act or transaction of his in carrying on the business connected with such property." Defendant, Comer, had been put in possession of the premises involved by a decree of the circuit court, and a suit instituted in a court of law, without leave of the

court appointing him, was a gross contempt. In re Tyler, 149 U. S. 164, 13 Sup. Ct. 785; Central Trust Co. v. East Tennessee, V. & G. Ry. Co., 59 Fed. 523.

While the justice's judgment is a general finding for the defendant, yet it is probable that he took this view of his jurisdiction, and therefore found for the defendant. But whether this be so or not is immaterial. Any judgment in another court in a suit affecting the receiver's right of possession should be treated as null and void by the court appointing the receiver thus wrongfully impleaded without leave of the court.

The third and last question is one of equitable estoppel. The contract between the two railway companies provided that the license might be terminated by giving two years' notice. That notice was properly and regularly given to the Chattanooga, Rome & Columbus Railroad Company, March 26, 1891. That company was the contracting licensee, and was in possession of the premises at the date notice was given. In May, 1891, that company sold out its road to the Savannah & Western Railroad Company, and assigned specifically all its rights as licensee in the premises in dispute. Subsequently the Savannah & Western Railroad Company became insolvent, and appellant, Comer, was appointed receiver. In view of this change in the possession, the receiver for the C., N. O. & T. P. Railway Company, as a pure act of courtesy, wrote and mailed the letter heretofore set out. A copy of the notice which had been served on the president of the Chattanooga, Rome & Columbus road was inclosed. This copy was not dated. The letter to Comer recites that this notice had been given "March 26th, last." This would refer to March 26, 1892, a year later than the actual service of the notice. The answer avers that the defendant, Comer, had no other notice whatever of any desire to determine said contract than that furnished by the letter of Felton, and that he relied upon the fact stated in that letter as to the date when notice had been given. That, being thus misled, he took no step to provide other terminal facilities in lieu of those engaged under the contract, which, as a result of the date of notice set out in the letter of Felton's, he believed would continue until March 26, 1894. He further averred that, if he was now dispossessed, the business intrusted to his management by the court would be greatly injured.

The report of the clerk covered only two facts: (1) That notice of revocation had been served on the president of the Chattanooga, Rome & Columbus Railroad Company, March 26, 1891; (2) that the letter of June 16, 1892, appended to the answer of defendant, Comer, had been written by Receiver Felton. As to whether Comer had knowledge of the true date of the notice of revocation, or was misled by the date of that notice, as stated in the letter of Felton, the report is silent. No proof was submitted upon either of these questions of fact, and the record is equally barren as to the extent and character of injury to result to the business of the Savannah Company, should Felton be permitted to show the true date of the revocation notice.

Felton's letter on its face is shown not to have been intended as a new notice of revocation. That it was not intended to mislead is equally apparent. He had no motive to deceive, and every motive to deal fairly. The letter was what it purported to be, a mere friendly act of courtesy, wholly voluntary, and intended to advise Comer of a fact which had occurred before he was made receiver and put him on his guard. Did it mislead Comer? The answer avers that it did, and that he had no other knowledge of a purpose to revoke the license than that contained in this letter. As to this the answer cannot be treated as evidence. It is sworn to, but the defense of estoppel is not responsive to any allegation of the petition, and under the well-understood rule of equity pleading is not, on the hearing, to be read as evidence. It operated only to make an issue.

The letter, read with any care, indicates, to one who knew the chain of title under which Comer held, some confusion or mistake as to date of notice. On its face its origin is ascribed to the changes which had occurred in the control of the property of the Chattanooga Railroad Company "within the last two years." It recites that notice had been given to the Chattanooga Railroad Company. That company had sold out its road, and specifically assigned its interest in the terminals involved under the license, to the Savannah Railroad Company, in May, 1891. If, therefore, notice had been given to the Chattanooga Company, it was most probable that it was given to it before it had sold out. No change had occurred in the control of the property since March 26, 1892. These facts, being personally known to Comer, should have caused him to make inquiry as to the date when the notice was given. If this letter had been attentively read, Comer would have discovered that there was some error in the reference to "March last" as the date of notice. Certainly no such presumption as that he has been injuriously misled will be indulged in, in the absence of some further evidence. That he relied upon the statement of the letter as giving the true date of the revocation, and that his nonaction was due to that reliance, are essential to an equitable estoppel. That does not appear, and the decree is therefore affirmed.

CANADIAN PAC. RY. CO. v. JOHNSTON.

(Circuit Court of Appeals, Second Circuit. May 29, 1894.)

No. 96.

1. MASTER AND SERVANT — FELLOW SERVANTS — RAILWAY CONDUCTOR AND BRAKEMAN.

   A railway company, under whose rules the conductor of a freight train has charge and control of the train and of all persons employed on it, and is responsible for its movements, is liable for injuries to a brakeman on such train caused by negligence of the conductor in unexpectedly starting the train. Railway Co. v. Ross, 5 Sup. Ct. 184, 112 U. S. 377, followed. Railroad Co. v. Baugh, 13 Sup. Ct. 914, 149 U. S. 368, distinguished.

2. LIMITATION OF ACTIONS—EXTINGUISHMENT OF DEBT—OPERATION OF FOREIGN STATUTE.

Where, before a statute of limitations of a foreign country has become operative, by way of extinguishment of the debt, as between two citizens or residents of that country, one of them has permanently changed his national domicile and become a citizen of one of the United States, the statute will not become an absolute bar, as an extinguishment, in the courts of such state.

3. TRIAL — PROVINCE OF COURT AND JURY — RULING ON MOTION TO DIRECT VERDICT.

A plea averring that plaintiff's cause of action was extinguished by a foreign statute of limitation was traversed by a replication de injuria, and issue was joined to the country. There was no conflict in the evidence as to the statute, and defendant, on the ground, among others, that on that evidence it was not liable, moved for the direction of a verdict in its favor. *Held*, that it was not error for the court, ruling on the legal effect of the undisputed evidence, and holding the statute not applicable, to overrule the motion.

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

This was an action by William Johnston against the Canadian Pacific Railway Company for personal injuries. A demurrer to defendant's plea was sustained (50 Fed. 886), and the plea was amended, and issue joined on replication to the amended plea. On trial, a motion to direct a verdict for defendant was overruled, and the jury found a verdict for plaintiff, and judgment for plaintiff was entered therein. Defendant brought error.

Frank E. Alfred and Joel C. Baker, for plaintiff in error.

Henry Ballard, Gilbert A. Davis, and A. K. Brown, for defendant in error.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. William Johnston, the defendant in error (hereinafter called the plaintiff), brought an action at law in the circuit court of the United States for the district of Vermont against the Canadian Pacific Railway Company, plaintiff in error (hereinafter called the defendant), to recover damages for injuries which he had received while in its employ, and, as he alleged, through its negligence. He recovered a verdict for $8,125. The facts in the case, as they appear in the bill of exceptions, are as follows:

The defendant is, and was at the time of the injury to the plaintiff, a corporation duly organized under the laws of the dominion of Canada, and having its place of business in said Canada, and at the time of the injury to the plaintiff was operating a railroad in Canada, which extended to, and ran into, the state of Vermont. The conductor and trainmen, and the plaintiff, who were running the train upon which the plaintiff was employed at the time he received said injury, were in the employ of the defendant. The plaintiff was employed by the defendant at Farnham, in Canada, about January 1, 1890. He worked a short time in the railroad yard in Farnham under said employment, and then went to work as a brakeman on freight trains, and remained in that service, continuously, up to the time of the injury for which the action was brought. At about half

past 10 o'clock in the forenoon of September 6, 1890, the train upon which the plaintiff was employed as a brakeman left Newport, Vt., for Montreal. It consisted of an engine, tender, 18 freight cars, and a van, having a platform, with roof projecting over it, and a brake. Four or five of the freight cars were loaded, and the remainder of said cars were empty. Samuel Gillander was the conductor of said train, and Arthur Pinney was the forward brakeman, and the plaintiff the rear brakeman. Said conductor, said two brakemen, an engineer, and a fireman constituted the entire crew or force of employes upon said train, and the conductor had full control of all the men on the train. At Sutton Junction, in Canada, the plaintiff fell or was thrown from the top of the rear end of the rear freight car of the train, between the tracks, and was run over or upon by the van, and was badly injured. The testimony on the part of the plaintiff tended to show that before reaching Sutton Junction, and while the train was about to commence the descent of a grade down to that station, the plaintiff left the van, where he had been riding, to go to his place on the top of cars; the conductor told him that certain cars were to be set out at Sutton Junction, and where to cut them off, or pull the pin; that the cars to be set out were pretty near together, and would not require much shunting to set them off upon the side track; that the plaintiff forgot where he was to pull the pin to set out the cars, and went to the rear end of the last freight car, and asked the conductor, who stood on the front platform of the van, if a tall car in the train was to be set out; that in reply to that question of the plaintiff the conductor told the plaintiff to go and get the number of the car; that thereupon the plaintiff went forward, and looked down between the cars, and read the number, and immediately went back over the two intervening cars to tell the conductor the number of the car; that when he got within four or five feet of the rear end of the last freight car, which had no brake at that end, the train started up, without any warning to him, and went forward five or six feet, with a quick snap, and the plaintiff could not reach the van, which had been detached, nor otherwise save himself, and was by the jerk of the train thrown off, and fell upon the track in front of the van, which was slowly following the train; that the van struck the plaintiff, and ran partly over him, and he received the injuries for which he claims to recover in this action. The evidence of the plaintiff tended to show that Gillander, the conductor, as the rear of the train approached the station, pulled the pin connecting the van to the rear end of the last freight car, and applied the brake upon the van; that at the time he pulled the pin he signaled to the engineer to go ahead, without notifying the plaintiff, as he had always done before; and that it was the starting of the train in obedience to the signal of the conductor, given without notice to the plaintiff, when going to give the conductor the number of the car, in obedience to the orders of the conductor, that threw the plaintiff from the train. The evidence of the plaintiff further tended to show that at the time the van was detached the plaintiff was on the top of the freight cars, and entirely out of the sight of the conductor, and that he did not know the van was detached, or that the conductor had

given any signal to go ahead, until the train started, by which he was thrown off, and that the conductor gave him no notice or warning that he was going to detach the van, or start up the train. The evidence of the plaintiff further tended to show that his place, as rear brakeman, at the time of said accident, was at the front end of the rear car, and that he was away from his position only for the purpose of going back to the rear end of the car, to tell the conductor the number of the car he had directed him to get. The plaintiff also put in evidence several of the rules of the defendant for the running of its trains, one of which read as follows:

"(92) While on the road, the conductor will have charge and control of the train and all persons employed on it, and is responsible for its movements; but when the directions of the conductor conflict with these regulations, and involve any risk or hazard, the engineer, and all who participate, will be held equally responsible."

There was no other evidence tending to show any facts of negligence of the defendant or its employes which were in any manner connected with the injuries to the plaintiff.

The evidence of the defendant tended to show that before the plaintiff left the van, at the top of the grade, as the train approached Sutton Junction, the conductor, Gillander, gave the plaintiff a written list of the number of the cars to be set from the train upon the side track, and that there was no further communication between Gillander and the plaintiff until after the injury, except what Gillander said to him when he detached the van; that Gillander supposed that the plaintiff went directly to his place on the train when he left the van; that after the van was detached it was the duty of the plaintiff, as rear brakeman, to detach the cars to be set out; that, as the rear of the train approached the station, Gillander pulled the pin which detached the van from the rest of the train, and said "All right" to the plaintiff, whom he supposed was on the front end of the next car to the van; that the plaintiff was in fact standing near the rear end of said car, facing towards the engine; that as the van was detached the plaintiff signaled the engineer to go ahead, and that the train started forward in obedience to the signal of the plaintiff; and that the plaintiff fell or was thrown off as the train started.

The plaintiff testified that he was 26 years of age, and an unmarried man; that his father was dead, and his mother lived at White River Junction, Vt.; that in 1887 he went into the employ of the defendant, in Canada, and worked as a brakeman there for three days; that in 1888 he again went to work for defendant, in Canada, and worked two months, and commenced work again for the defendant in January, 1890, and worked until the accident, September 6, 1890; that, in the intervals of working for the defendant, he had worked upon a farm some, and in a foundry; that after the accident he remained at Sutton Junction until April, A. D. 1891, when he went to his mother's house, at White River Junction, where he had ever since remained; that he called it his home at his mother's house, and had no other.

This suit was commenced by a writ dated November 6, 1891. Upon the issue made by defendant's plea that the plaintiff's cause of action was extinguished by the law of Canada, the evidence of the defendant, given by the testimony of witnesses learned and of experience in that law, tended to show that the law of Canada was as specified in articles 2262 and 2267 of the Code of Canada:

"Art. 2262. The following actions are prescribed in one year: For slander or libel, reckoned from the day it came to the knowledge of the party aggrieved. For bodily injuries, saving the special provisions contained in article 1056, and cases regulated by special laws."

"Art. 2267. In all cases mentioned in articles 2250, 2260, 2261 and 2262, the debt is absolutely extinguished and no action can be maintained after the delay for prescription has expired."

The testimony of defendant likewise tended to show that, by the law of Canada, article 1056 had no reference to the facts of this case, and that the claim of the plaintiff was not regulated by any special laws, and that, by said law of Canada, claims for bodily injuries are extinguished after the lapse of one year from and after the time when the plaintiff receives the injuries, but that the prescription is interrupted by any acknowledgment which the possessor or the debtor makes of the right of the person against whom the prescription runs, and a debt or claim may be revived after the prescription has run, by acknowledgment, without any new consideration.

At the close of all the evidence, the defendant moved the court to direct a verdict for the defendant, because there was no evidence of negligence on the part of the defendant; also, because Gillander, the said conductor, and the plaintiff, at the time of the alleged injury to the plaintiff, were engaged in the same service and employment, and were fellow servants, and the defendant was not liable in law for any injury resulting to the plaintiff from the negligence of Gillander; and also that from all the evidence received, relating to the issue made upon the defendant's pleas as to the law of Canada, the defendant was not liable in this action. The court overruled said motion to direct a verdict, and submitted said cause to the jury. The court held that said law of Canada was a statute of limitation, and did not apply to this action here, and was immaterial, and that no question arose thereon for the consideration of the jury. The defendant excepted to the refusal of the court to direct a verdict for the defendant, and to the submission to the jury, and to the holding of the court as to the law of Canada. The defendant seasonably excepted to the rule of liability laid down in the charge, for the several reasons set forth in its motion for a verdict.

There was no suggestion upon the trial of incompetence on the part of the conductor. Although the question of his negligence was in dispute before the jury, it was substantially conceded upon the argument before this court that, as between the brakeman and himself, he was negligent, in too hastily detaching the van from the residue of the train, and signaling to the engineer to go ahead, before he was aware that the brakeman had returned, and was in his usual place of safety. There was no negligence in the order to ob-

tain the number of the tall car. That was given to remedy the brakeman's forgetfulness of the details of a previous order. The conductor was not, therefore, responsible for the fact that the brakeman happened to be in a place of danger. If the engineer had suddenly, and without authority, started the train, the conductor would not have been blameworthy. His negligence consisted in causing the train to be put in motion before he was aware that the brakeman had regained a place of safety. His hasty action caused the accident.

The jury having found in the affirmative upon the question of negligence, two questions of law arise upon the record: First. Is the defendant liable for the consequences resulting to the plaintiff, a brakeman upon the freight train, from the negligence of the competent conductor upon the same train, in a matter in which he was acting as conductor? Second. Was the cause of action extinguished before suit was brought, by the operation of the Canadian statute?

The decision of the first question depends, in this court, entirely upon the fact that the circumstances of this case correspond with, and do not differ from, those which controlled the decision of the supreme court in Railroad Co. v. Ross, 112 U. S. 377, 5 Sup. Ct. 184, and are within the narrow scope to which the majority of the court confined that decision,—a decision which, notwithstanding what was said and decided in the subsequent case of Railroad Co. v. Baugh, 149 U. S. 368, 13 Sup. Ct. 914, still, admittedly, remains the law of the court, as applicable to the same state of facts. In the Ross Case, a conductor of a freight train, while he was running the train, possessed the powers specified in the regulations of the company, of which the following is a part:

"The conductor will have charge and control of the train, and of all persons employed in it, and is responsible for its movements, while on the road, except when his directions conflict with these regulations, or involve any risk or hazard, in which case the engineer will also be held responsible."

It was the conductor's express duty to show to the engineer of his train all orders which he received in regard to its movement, before leaving the station where they were received. On the night of the accident, the conductor forgot to tell the engineer of an order which had been received, to stop the train at a certain station, and wait for a gravel train; and in consequence a collision occurred, by which the engineer was severely injured. The action was brought against the railroad company to recover damages for this injury. The majority of the court, speaking by Mr. Justice Field, after an examination of the English decisions, and of the course of conflicting decisions in the states of this country, and of the reasoning which led to the respective results, came to a conclusion as follows:

"We agree with them [the Ohio and Kentucky courts] in holding—and the present case requires no further decision—that the conductor of a railway train, who commands its movements, directs when it shall start, at what stations it shall stop, at what speed it shall run, and has the general management of it, and control over the persons employed upon it, represents the

company, and, therefore, that for injuries resulting from his negligent acts the company is responsible. If such a conductor does not represent the company, then the train is operated without any representative of its owner."

The controlling reasons which led the minds of the majority to this result were stated, as follows:

"There is, in our judgment, a clear distinction to be made, in their relation to their common principal, between servants of a corporation, exercising no supervision over others, engaged with them in the same employment, and agents of the corporation, clothed with the control and management of a distinct department, in which their duty is entirely that of direction and superintendence. A conductor, having the entire control and management of a railway train, occupies a very different position from the brakemen, the porters, and other subordinates employed. He is in fact, and should be treated as, the personal representative of the corporation, for whose negligence it is responsible to subordinate servants. This view of his relation to the corporation seems to us a reasonable and just one, and it will insure more care in the selection of such agents, and thus give greater security to the servants engaged under him in an employment requiring the utmost vigilance on their part, and prompt and unhesitating obedience to his orders. The rule which applies to such agents of one railway corporation must apply to all, and many corporations operate every day several trains over hundreds of miles, at great distances apart, each being under the control and direction of a conductor specially appointed for its management. We know, from the manner in which railways are operated, that, subject to the general rules and orders of the directors of the companies, the conductor has entire control and management of the train to which he is assigned. He directs when it shall start, at what speed it shall run, at what stations it shall stop, and for what length of time, and everything essential to its successful movements, and all persons employed on it are subject to his orders. In no proper sense of the terms is he a fellow servant with the firemen, the brakemen, the porters, and the engineer. The latter are fellow servants in the running of the train under his direction. As to them and the train, he stands in the place of, and represents, the corporation."

When the question came again before the supreme court, in the Baugh Case, cited supra, which presented a different state of facts, the majority of the court, who spoke through Mr. Justice Brewer, took occasion to say that in the Ross Case it was not declared to be universally true that, by reason of the mere fact that one servant has control over another, they cease to be fellow servants, but that the general language in the charge to the jury in regard to the importance to be given to this circumstance was not erroneous "when applied to the case of a conductor having exclusive control of a train, in relation to other employes of the company, acting under him, on the same train." In the Baugh Case the engineer, who directed the movement of the engine when it was not being used in connection with a train of cars, and the injured fireman, were, in the opinion of the majority, engaged in a common employment. The engineer, notwithstanding the fact of his temporary control, was not the representative of the company. The decision also rested upon the fact that the known peril was voluntarily assumed by the fireman, who thus assumed the risk. When the two cases are analyzed, it will be seen that the facts which controlled the Ross decision did not exist, in their fullness and exactness, in the Baugh Case. In the case at bar the rule of the defendant was almost in the language of the rule in the Ross Case, and declared that the conductor, when upon the road, had the charge and control of the

train, and of all persons employed on it, and was responsible for its movements. There is also no question as to the actual representative character of the conductor. He had control in fact as well as in name. He directed the movements of the train,—when it should go forward, and when it should stand still. In the exercise of this authority, he moved the train too soon, without observing whether those under his control were in an ordinary place of safety, and thereby an accident happened. The significant facts in the two cases correspond, except that the negligence of the conductor, in the case at bar, was not as marked and gross as in the Ross Case. His negligence was in one of the details of the business, wherein he had authority, while the negligence in the Ross Case was in a particular which might be vital to all the lives, and to the existence of all the property, on board the train. The negligence of the two conductors differed materially in degree. It did not differ materially in its nature. The essence of the negligence of each was forgetfulness.

The second subject is the effect of the Canadian statute. There are two classes of statutes of limitations: One extinguishes the debt or claim; the other merely bars or prevents the remedy. And, as remedies are regulated only by the law of the place where they are pursued, this class of statutes created by one state does not prevent a remedy which is sought in a foreign state, but in such case the lex fori controls. Bulger v. Roche, 11 Pick. 36. The difference between the two classes was stated by Judge Story in his learned discussion upon the general subject in Le Roy v. Crowninshield, 2 Mason, 151, Fed. Cas. No. 8,269, as follows:

"Statutes of limitation may be so framed as merely to apply to the jurisdiction of a court. They may prohibit such court from taking cognizance of an action unless brought within a limited period after the right has accrued. Such statutes properly and emphatically belong to the regulation of judicial proceedings. Statutes of limitations may, on the other hand, declare, in terms, that contracts not sued for within a limited period shall be held to be utterly extinguished. Such contracts are a complete extinguishment or discharge of a contract, and constitute a universal bar, as much as a discharge under a bankrupt law."

No testimony was given in regard to the construction of the statute by the Canadian courts, and we have not found a controlling authority in the decisions of other courts, as to the construction of statutes, which use similar language. The statute purports to be one of extinguishment, but the prescription may be interrupted by acknowledgment on the part of the possessor or debtor, or the debt or claim may be revived after the prescription has run. The argument, therefore, is that, if the debt may be revived, after the full time of prescription has elapsed, the statute is not one of extinguishment. This suggestion does not meet the question, which, it is true, does not arise in this case, but which often may arise, and which is, what is the effect of the statute, when pleaded and shown, in an action in a foreign country, upon a debt due from a citizen of Canada to a citizen of Canada, when the time of prescription has run before suit, without interruption, while both parties resided in Canada, and the debt has never been revived? In the case of

Bulger v. Roche, supra, the debt was contracted between subjects of Nova Scotia, who remained there until the debt was extinguished by virtue of its statute of limitations; but, in the opinion of Chief Justice Shaw, the statute created no legal defense to an action by the creditor in the state of Massachusetts. The court treated the question as one arising under an ordinary statute of limitations, which merely affected the remedy. But, without attempting to pass upon what may be the effect of the statute under all circumstances, it is sufficient to say that, assuming that it possesses its largest character, and is a statute of extinguishment, it constituted no defense to the suit of this plaintiff in the state of Vermont, because, during the plaintiff's residence in Canada, it had not become operative, and had not extinguished the debt, so far as courts in states foreign to Canada are concerned. The injury happened on September 6, 1890. The plaintiff was at that time a citizen of Vermont, but after the injury he remained in Canada until April, 1891, when he returned to his mother's and his own home, in Vermont, and remained there continuously thereafter. When, before a statute of limitations has become operative, by way of extinguishment of the debt, as between two citizens or residents of a state, one of the parties has permanently changed his national domicile, and become a citizen of a foreign state, the statute will not become an absolute bar, as an extinguishment in the courts of such foreign state. It cannot become, in the country to which he has removed, an absolute extinguishment, unless the parties resided in the country of the statute during the whole period of limitation. Wood, Lim. Act. 22. The reasoning which leads to this result is stated by Judge Story, in his Conflict of Laws (section 582), as follows:

"Every nation has a complete and exclusive sovereignty to enact laws which shall limit all rights of action to certain prescribed periods within its own tribunals, and to declare that after that period all rights of action shall be extinguished; and, if the parties remain domiciled within the territorial jurisdiction during that whole period, the law, ipso facto, operates in the case, and the rights of action are completely extinguished there. But the same doctrine is not true, or rather may not be true, when, before the prescribed period has arrived, one or both of the parties have changed their national domicile, for by such change they have ceased to be under the exclusive dominion of the nation whose statute of limitation has begun to operate upon their rights of action, but has not yet extinguished them. The law thereof can no longer operate on those rights; at least, not operate except within the territorial rights of the nation. Elsewhere, they can be deemed to have only an inchoate and imperfect effect, and the change of domicile suspends their power to extinguish the rights of action in the future, since they can have no binding extraterritorial force. It is no answer to say that, when once the statute begins to run, no subsequent impediment stops it from continuing to run. That is true in the nation whose laws contain such provisions, or inculcate such a doctrine. But no other nation is bound to give effect to such provisions, or to such a doctrine."

This view of statutes of extinguishment was regarded as a reasonable one by Chief Justice Tindal in Huber v. Steiner, 2 Bing. (N. C.) 202.

A subordinate question, which arises upon the pleadings, was made by the plaintiff in error. The railroad company averred, in an amended plea, that by virtue of the Canadian statute the plain-

tiff's cause of action was extinguished and discharged to the same extent as if it had never existed. The plaintiff traversed the plea by its replication de injuria, upon which issue was joined to the country. There was no conflicting evidence in regard to the statute. At the close of the trial the defendant moved for a direction for a verdict in its favor; one ground of the motion being that, from the evidence received relating to the issue made upon the defendant's pleas as to the law of Canada, the defendant was not liable in this action. The court overruled the motion, and, upon the Canadian statute, held that it was not applicable to the action, and that consequently no question arose thereon for the consideration of the jury, to which decision the defendant excepted. The question which arose upon the undisputed evidence was merely as to its legal effect, and the court was properly not asked by the defendant to submit a question of fact upon the statute to the jury. The exception was to the ruling of the court upon the motion to direct a verdict that the statute of Canada was not applicable, and constituted no defense. The action of the court upon the motion to direct a verdict was proper. We perceive no error in the record, and the judgment is affirmed.

COTTER v. ALABAMA G. S. R. CO.

(Circuit Court of Appeals, Sixth Circuit. May 8, 1894.)

No. 149.

1. WRIT OF ERROR — AMENDMENT BY CIRCUIT COURT OF APPEALS—SEAL—RETURN WITH TRANSCRIPT OF RECORD.
   As power to amend a writ of error, under Rev. St. § 1005, is conferred by Act March 3, 1891, § 11, on a circuit court of appeals, that court may affix its seal to such a writ, formal in all respects save absence of a seal; and the operation of such a writ is not defeated by the fact that it is not returned attached to the transcript of the record, where it is returned on the day the transcript is filed, indorsed as executed by sending the transcript as commanded, for the defect may be amended.
2. SAME.
   Under the act of March 3, 1891, creating the circuit court of appeals, writs of error from that court to the circuit and district courts are sued out under the same practice and regulations as in cases of writs from the supreme court.
3. TRIAL—DIRECTION OF VERDICT—NEGLIGENCE OF RAILROAD COMPANY.
   In an action against a railroad company for the death of a locomotive engineer by derailment of his engine, plaintiff's theory was that the derailment was caused by the loosening of the rails by defendant's section men. All the testimony was that the rails on which the men had worked were on the west side only of the track. Three trains had passed safely over the rails before deceased's train. That train went off the track on the east side. An examination, made immediately afterwards, showed that a rail on the east side had been displaced several inches, and the inference from the circumstances was that this had been done maliciously for the purpose of wrecking this train. *Held*, that there was no error in directing a verdict for defendant.

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

This was an action by William Cotter, administrator of John T. Cotter, deceased, against the Alabama Great Southern Railroad Company, for damages for the death of said John T. Cotter. At the trial the court directed a verdict for defendant. Judgment for defendant was entered thereon. Plaintiff brought error.

C. Marchbanks, for plaintiff in error.
Edward Colston and Lewis Shepherd, for defendant in error.

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

LURTON, Circuit Judge. This cause came on first to be heard upon the motion of the appellee to strike the case from the docket for the want of a writ of error, and the motion of the appellant to be allowed to amend the writ of error by having the seal of the court placed thereon.

This court can have no jurisdiction to review a cause decided in the circuit court unless it has been brought here in substantial conformity to some act of congress. Castro v. U. S., 3 Wall. 46. A writ of error has been defined by the supreme court, speaking through Chief Justice Marshall, as "a commission by which the judges of one court are authorized to examine a record upon which a judgment was given in another court, and on such examination to affirm or reverse the same according to law." Cohens v. Virginia, 6 Wheat. 409. Congress has provided, by the act of March 3, 1891 (sections 6, 11), for the review of causes decided in existing circuit and district courts by this court by appeal, or by writ of error. The latter section, after referring to the time within which such review may be had, provides that "all provisions of law now in force regulating the methods and system of review through appeals or writs of error, shall regulate the method and system of appeals and writs of error provided for in this act in respect of the circuit court of appeals, including all provisions for bonds or other securities to be required and taken on such appeals and writs of error." It follows that under the act just cited writs of error from this court to circuit and district courts are sued out under the same practice and regulation as in cases of writs from the supreme court. It is also obvious that the power conferred upon the supreme court by section 1005, Rev. St., concerning the amendment of defective writs in matters of form, is likewise conferred upon this court with respect to writs of error issuing from this court.

Prior to 1791 it was the practice that a writ of error could only issue from the office of the clerk of the supreme court. In Mussina v. Cavazos, 6 Wall. 355, it is stated that a decision to that effect in West v. Barnes (in 1791) 2 Dall. 401, led to the enactment of the ninth section of the act of 1792, being section 1004 of the Revised Statutes. That section is as follows:

"Sec. 1004. Writs of error returnable to the supreme court may be issued as well by the clerks of the circuit courts, under the seals thereof, as by the clerk of the supreme court. When so issued, they shall be, as nearly as each case may admit, agreeable to the form of writ of error transmitted to the

clerks of the several circuit courts by the clerk of the supreme court, in pursuance of section nine of the act of May eight, seventeen hundred and ninety-two, chapter thirty-six."

Since that act the writ may issue by the clerks of the circuit or district courts, under the seals of their respective courts. That the writ shall be under seal is as essential now as before. As observed by Mr. Justice Miller, in regard to writs so issued by clerks of such courts:

"Such writ is in form and fact the process of this court, directed to the judges of the circuit court, commanding them to return with said writ, into this court, a transcript of the record of the case mentioned in the writ. When deposited with the clerk of the court, to whose judge it is directed, it is served; and the transcript which the clerk sends here is the return to the writ, and should be accompanied by it." Mussina v. Cavazos, 6 Wall. 355.

The writ of error allowed in this case is not attached to the transcript, nor made a part of the record. It was, however, returned to this court on the day the transcript was filed here, indorsed as executed, by sending the transcript to this court as commanded. We think the mere fact that it was not returned attached to the transcript does not render it void, inasmuch as it has performed its function, and may be now attached to the record sent here, as should have been done in the first instance. Its actual issuance and service, it being in form a colorable command in the form required by the statute, have operated to give this court jurisdiction, and under section 1005 we may amend it in all matters of formal defect. Its operation as a writ of error is not defeated by the mere failure of the clerk to send up the transcript "accompanied by it."

In the case of Mussina v. Cavazos, cited above, the writ never was returned. It was issued and served. The transcript was sent up unaccompanied by the writ, because it was accidentally destroyed before the record was made out. Concerning an objection to the jurisdiction because the original writ had not been returned as required by section 1004, the court said:

"It fully appears that during the life of the writ a good and sufficient return to it was made by sending to this court an authenticated transcript of the record. Shall we now hold, because with this return there did not come the writ itself, that what has been done under it is void, and we are without jurisdiction? This would be contrary to the uniform practice of other courts in regard to their writs, for it is believed to be well settled that rights acquired under a valid writ of process, while it was in force, cannot be defeated by the loss or destruction of the writ, if its existence, and the acts done under it, can be substantiated by other testimony. It is as reasonable to hold that a judge of this court would lose his right to sit in this place if his commission was burned up as to hold that the court loses the right to hear a case because the writ was burned before it reached the court, but after it had effected its purpose, by bringing here the transcript."

Another objection made is that the writ has no seal. Prior to the enactment of section 1005, Rev. St., this would be a fatal objection to its validity and to the exercise of any jurisdiction over the case by this court. Overton v. Cheek, 22 How. 46. That section is in these words:

"Sec. 1005. The supreme court may, at any time, in its discretion and upon such terms as it may deem just, allow an amendment of a writ of error, when

there is a mistake in the test of the writ, or a seal to the writ is wanting, or when a writ is made returnable on a day other than the day of the commencement of the term next ensuing the issue of the writ, or when the statement of the title of the action or parties thereto in the writ is defective, if the defect can be remedied by reference to the accompanying record, and in all other particulars of form; provided, the defect has not prejudiced, and the amendment will not injure, the defendant in error."

That section is from the act of June 1, 1872.

The cases cited by the learned counsel, of Insurance Co. v. Mordecia, 21 How. 195, and Hodge v. Williams, 22 How. 87, were decided before that act, and doubtless led to its passage. The power to permit the amendment of a defective writ conferred by that provision is very liberal. Neither is it fatal that more than six months have passed since the final decree sought to be reviewed was pronounced. The statute allows the amendment "at any time," in the discretion of the court. The theory of the act is that a colorable writ shall operate as a writ of error, the court being given the power to amend it in so far as it is informal. The amendment relates back to its original issuance, and presupposes jurisdiction from date of original allowance. In Insurance Co. v. Pendleton, 115 U. S. 339, 6 Sup. Ct. 74, the defect in the writ was not discovered until after final judgment, which judgment was set aside, the writ amended, and new citation ordered. This right of amendment is not an absolute one. It rests in the sound discretion of the court, and upon such terms as the court may deem just. Pearson v. Yewdall, 95 U. S. 294. So a writ of error may be so void of color as a writ from the appellate court as to be unamendable. This was the case in Bondurant v. Watson, 103 U. S. 278. In that case it did not purport to be issued under authority of the supreme court of the United States, or of the president of the United States. It was the mere command of the chief justice of the supreme court of Louisiana, under his teste and the seal of his court, to send the transcript to the supreme court of the United States. That writ was held not to be even a colorable writ, and therefore unamendable. In the later case of Railway Co. v. Kirk, 111 U. S. 486, 4 Sup. Ct. 500, the writ ran in the name of the president of the United States, as prescribed by the form prepared under the act of 1792. It was defective, in that it was not tested by the chief justice of the United States, nor signed by the clerk of the supreme court of the United States, and did not bear the seal of either the supreme court or the circuit court. In place of these formalities it was tested by the chief justice of the supreme court of Texas, signed by the clerk of the supreme court of Texas, and sealed with the seal of that court. The court held that, as it purported to run in the name of the president of the United States, it was a colorable writ, and subject to amendment. The writ under which the transcript of this cause was sent here is in all respects formal save in the absence of a seal. The seal of this court may now be affixed, which, being accordingly done, the case is heard on its merits.

Upon the conclusion of all the evidence, the circuit judge instructed the jury to bring in a verdict for the defendant. The only error assigned is upon this instruction. The contention of appel-

lant is that there was such a conflict in the evidence bearing upon the responsibility of the appellee for the death of the intestate as to make it a proper case to go to the jury. The deceased, John T. Cotter, was a locomotive engineer in the service of the Alabama Great Southern Railroad Company. The train being pulled by his engine was derailed on the night of April 20, 1891, and he was killed. This action was brought by his administrator to recover damages for his death as resulting from the negligence of the company in whose service he was. The theory of the plaintiff was that the track, at place of derailment, had been left in an unsafe and dangerous condition by the section men at work there on the previous evening, and that the derailment was a consequence of that condition. In support of this theory there was evidence showing that at or near the place of derailment there had been some "bucking" or springing of the rails, caused by expansion under the sun's heat. This condition is brought about by the tightness or closeness of the joints, there being insufficient play for the rails when lengthened by the expansion. The evidence shows that it is relieved by putting in a split or pointed rail so shaped as to slip by the end of the rail in contact with the pointed end, thus permitting expansion. To permit the warped or "bucked" rails opportunity for adjustment, there was proof that it was customary to loosen the fish-bar bolts, and draw out the joint or check spikes, and leave them out for a few hours, until the "bucked" condition had been relieved. While the joint bolts and spikes are out, the rail is secured in place only by the spikes on each side of the rail, and in each tie under the rail. The evening before this accident the track supervisor had caused a split rail to be put in at a point somewhere near the place of derailment. He had also had the joint bolts loosened, and the joint spikes drawn out, so as to facilitate the readjustment of the "bucked" rails. The work was completed at dusk, and the track left in that condition for the night. Expert testimony differed as to whether the track was safe in the condition thus left. The case did not, however, turn upon that question. The circuit judge said to the jury that there was no evidence "that the rails whose spikes had been drawn out at this point, or that the loosening of those bolts in the fish-bar joint connections, had produced the death of the intestate." The contention is that there was evidence from which the jury might rightfully infer that the derailment was produced by the condition in which those rails had been left. We have carefully examined the evidence bearing upon this point and upon the cause of the derailment. From that examination we are entirely satisfied that there was no evidence which would have warranted a verdict for the plaintiff. All the testimony shows that the rails which had been left in the alleged dangerous condition were on the west side of the track. All the work done the previous evening was on the west side of the track. Nor is there any evidence to establish the fact that the derailment occurred at the place where this work had been done. That the section men had worked up to within perhaps 50 feet of the place

of the accident is probable. That they had worked any nearer is not shown. In saying this we are not unmindful of the fact that there was a scintilla of evidence from which it might be inferred that the rails had been loosened near the place of derailment. That evidence is, however, so vague and so unsatisfactory that no verdict should stand based upon it. But, however this may be, there was still a total failure of evidence that the suspected rails caused or contributed to cause the derailment. The train went off the track on the east side. An examination was at once made as to the cause of the derailment. This developed the fact that a rail had been displaced on the east side. The bolts and spikes holding this rail had been removed, and were lying at the point where taken out. A crowbar and a wrench were on the track near by, which had evidently been used in taking out that rail. These tools were part of those left in the bushes on the side of the track the night before. After the spikes had been drawn and the joint bolts taken out, the indications were that the rail had been set out of alignment some five or six inches, and nearer the end of the ties. The wheel marks on the ties began just where this displaced rail had lain, and followed the bed of the rail north to the next rail. There the wheels had nibbed the corners of the next rail and deflected to the outside. After running on the ties some 90 feet, gradually getting further and further from the east rail, the engine went off the fill, and turned over. The evidence that no spikes or bolts had been drawn from any rail on the east side is undisputed in the proof. Late that evening it is shown that the rails on the east side had been examined, and from none had any bolts or spikes been drawn. There was no indication of disturbance of any of the rails on the west side, and no displacement of any rail which had been worked on the evening before. No less than three trains had safely passed over these rails before the train in charge of intestate. The inference is that a rail had been maliciously displaced on the east side of the track after the passage of the last train for the purpose of wrecking this train. The evidence wholly failing to show that the condition in which the track was left the evening before had anything to do with the derailment on the opposite side of the track, we therefore think there was no error in directing the jury to return a verdict for the defendant.

The judgment is accordingly affirmed.

MUTUAL FIRE INS. CO. OF NEW YORK v. ALVORD.

(Circuit Court of Appeals, First Circuit. April 18, 1894.)

No. 68.

1. INSURANCE—CONDITIONS OF POLICY—ARBITRATION.
   The insured is not precluded from suing on a policy by a provision therein that the amount to be paid, in case of disagreement, shall be submitted to arbitration, but not expressly or by implication prohibiting suit until after such arbitration.

2. SAME—SUBMISSION TO ARBITRATION.
   In an action on a policy providing for estimates of loss by both parties, and that, in the event of disagreement, the amount should be ascertained

by two appraisers, each party selecting one, and the two selecting an umpire, evidence of an agreement for submission, expressly declaring that it shall not be construed as a waiver of the rights of either party, and an award thereon, not showing that any estimate of loss was made by the insurer, or that any umpire was chosen, is inadmissible.

3. EXPERT TESTIMONY—QUALIFICATIONS OF WITNESS.
The question whether a witness is qualified to testify as an expert is largely within the discretion of the trial judge.

4. INSURANCE — PROVISIONS OF POLICY AGAINST OVERINSURANCE — RIGHTS OF MORTGAGEE
Under a policy providing against other insurance except to a certain amount permitted, with a mortgagee clause making any loss payable to the mortgagee, and providing that he should not suffer for any act or neglect of the mortgagor, his rights are not affected by the mortgagor obtaining more insurance than the amount permitted, even though the policies are in his possession, or though the insurance is taken out by him at the mortgagor's request; and a policy taken out by him, which, with the insurance then existing, does not exceed the amount permitted, is not invalidated by subsequent insurance by the mortgagor in excess of that amount.

In error to the Circuit Court of the United States for the District of Massachusetts.

This was an action by Alfred E. Alvord against the Mutual Fire Insurance Company of New York on a policy of insurance against fire. At the trial the jury found a verdict for plaintiff. A motion by defendant for a new trial was overruled, and judgment for plaintiff was entered on the verdict. Defendant brought error.

The policy contained a provision that "this entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has, or shall hereafter make or procure, any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy." An agreement added to the policy permitted "other concurrent insurance to three-fourths value."

A mortgagee clause, added to the policy, made the loss, if any, payable to plaintiff, "mortgagee or trustee," and provided "that this insurance, as to the interest of the mortgagee or trustee only, therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the property described."

The charge of the presiding judge at the trial, relating to overinsurance, referred to in the following opinion of the court, was as follows:

"Now, gentlemen, there is another question raised here which comes in as part of the defense, and as to which the burden of proof is on the defendant, and that is the claim that some one has violated the terms of these policies with reference to other insurance, so as to invalidate them. These policies contain a clause in the usual form, prohibiting other insurance without the consent of the underwriter; and it also provides that, if other insurance is obtained without the consent of the underwriters, it shall avoid these policies; and it goes further, and contains the usual provision that it shall so avoid even though the other insurance is itself void. And then comes in a clause permitting other concurrent insurance to an amount not exceeding three-quarters of the value. Now, that is a reasonable clause, an advantageous clause, and a clause that ought to be fairly and justly enforced by the courts and by juries, because it is the main remedy which the company has against overinsurance, against fraudulent insurance; a practice, so far as it exists, detrimental, gentlemen, alike to you and to the insurance companies. It does not follow that in this case the other insurance must be fraudulently or willfully obtained, or even knowingly obtained, in excess of the amount permitted. It is a case where the underwriters, in order to protect themselves against overinsurance, are entitled to say, and must say, that overinsurance avoids the policy, even though it is obtained innocently or ignorantly; no question of fraud arising, but a pure question of fact, nothing else.

"But, gentlemen, this policy provides that the mortgagee shall not suffer—I am not giving you the precise language, but the substance of it—shall not suffer by the act or neglect of the mortgagor; and therefore I instruct you, gentlemen, that although the mortgagor may have of itself taken out policies in excess of the amount permitted, and although it may have made these policies payable to the mortgagee, and the mortgagee may have taken them and held them, yet the taking out of the policies is the act of the mortgagor under these circumstances, and not an act for which the mortgagee should suffer. So, also, gentlemen, if Mr. Alvord, at the request of the mortgagor, obtained policies of that character, and did nothing more than to obtain them at the request of the mortgagor, that would be an act of Mr. Alvord in his individual capacity as the agent of the mortgagor, and not his act as trustee, and would not affect him in this litigation, if that was all which appeared in the case. So that if, by the course of dealing between the parties, especially between the mortgagor and the mortgagee, Mr. Alvord, under authority implied in the course of business, obtained policies, as already stated, in excess of the amount permitted, yet, gentlemen, he would still be acting as the agent of the mortgagor, in his individual capacity, and not as trustee; and his act would not affect his rights as trustee, or the rights of the bondholders whom he represents. In other words, so far as he, either by direct authority or by implication arising from the course of business, obtained insurance policies as the agent or representative of the mortgagor, he acted individually, and not as trustee, and these suits cannot be affected by what he did.

"But, gentlemen, there is some evidence here concerning a certain Concord policy or certain Concord policies, as to which I leave the facts entirely for you, stating that, if Mr. Alvord, as trustee, or under color of his office as trustee, or on his own motion, for the purpose of protecting the trust property, and without request from the mortgagor, obtained insurance, although that insurance was to cover the mortgagor's interest, and it was payable to him, that was his own independent act as trustee, by which he must stand or fall. But, gentlemen, if you reach that stage of the case, if you come to a determination upon that point, and hold that under these rules Mr. Alvord was acting of his own motion as trustee in securing this Concord policy or policies, so that his obtaining of it was his own act, and not the act of the mortgagor, you have this fact further to consider: Those Concord policies, you will find, were all dated the 25th day of July, 1890, and expired the 25th day of July, 1891; and at that time the amount of policies then existing upon the property, if I have computed correctly,—you will compute it,—the amount of policies then existing upon the property was $69,500, including the Concord policies,—all of them. In other words, the amount of policies, as shown by the proof of loss, obtained after July 25, 1890, if I have computed correctly,—you will have the proof with you,—was $23,000. And I instruct you, gentlemen, that if the policies obtained by the trustee on his own motion did not, at the date when they were obtained, bring the amount of insurance beyond the three-quarters which was permitted, the obtaining of the additional $23,000 afterwards by the mortgagor cannot be considered by you. You are to look at the state of the policies at the time when the Concord policies were obtained, and not consider what were subsequently taken out. I may be in error about these figures, but I simply call your attention to the fact. But bear in mind that the burden is upon the defendants, not upon the plaintiff, to show to you the amount of insurance existing on the property at the time when the Concord policies were taken out."

Godfrey Morse and Edwin N. Hill, for plaintiff in error.

Barron C. Moulton and Victor J. Loring, for defendant in error.

Before COLT, Circuit Judge, and NELSON and ALDRICH, District Judges.

COLT, Circuit Judge. The policy of insurance upon which this suit was brought contains the following provisions relating to the ascertainment or estimate of loss:

"This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation, however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality. Said ascertainment or estimate shall be made by the insured and this company; or, if they differ, then by appraisers, as hereinafter provided; and, the amount of loss or damage having been thus determined, the sum for which this company is liable pursuant to this policy shall be payable sixty days after due notice, ascertainment, estimate, and satisfactory proof of the loss have been received by this company in accordance with the terms of this policy. * * * In the event of disagreement as to the amount of loss, the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire. The appraisers, together, shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss. * * * This company shall not be held to have waived any provision or condition of this policy, or any forfeiture thereof, by any requirement, act, or proceeding on its part relating to the appraisal, or to any examination herein provided for; and the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers, when appraisal has been required."

It is undoubtedly true that a policy of insurance may contain a valid provision which prohibits the insured from maintaining an action until the amount of loss shall have been first submitted to arbitration, and an award shall have been made. In such a case the determination of the amount by arbitration is recognized as a condition precedent to the right of the insured to bring suit. Hamilton v. Insurance Co., 136 U. S. 242, 10 Sup. Ct. 945; Scott v. Avery, 5 H. L. Cas. 811; Viney v. Bignold, 20 Q. B. Div. 172. But, in order to make such award a condition precedent to the right of maintaining suit, it must be so expressed in the policy, or necessarily implied from its terms. A mere provision in the policy that the amount to be paid in case of disagreement shall be submitted to arbitration does not prevent the insured from maintaining an action, unless the policy further provides that no action shall be maintained until after award; but such agreement to submit to arbitration is regarded as a collateral and independent agreement, the breach of which, while it will support a separate action, cannot be pleaded in bar to an action on the principal contract. Hamilton v. Insurance Co., 137 U. S. 370, 385, 11 Sup. Ct. 133; Roper v. Lendon, 1 El. & El. 825; Collins v. Locke, 4 App. Cas. 674; Dawson v. Fitzgerald, 1 Exch. Div. 257; Reed v. Insurance Co., 138 Mass. 572; Seward v. City of Rochester, 109 N. Y. 164, 16 N. E. 348; Insurance Co. v. Pulver, 126 Ill. 329, 18 N. E. 804; Crossley v. Insurance Co., 27 Fed. 30. There is nothing in the terms of this policy which expressly or by implication forbids the insured from bringing suit until after the amount of loss has been submitted to arbitration and an award has been made, and therefore we must consider the provisions in the policy relating to this subject as constituting a collateral and independent agreement, and not one which was a condition precedent to the right of maintaining an action.

We start, then, with the proposition that the plaintiff had a right to bring suit any time after 60 days from the receipt of proper proofs of loss by the defendant, and it is clear that the present action was not brought until more than 60 days after the receipt of such proofs of loss.

But it is contended that the evidence which was offered and excluded in the court below was to the effect that an agreement for submission was entered into between the parties, and an award made. We find, however, in the agreement of submission, this express provision:

"It is further expressly understood and agreed that this submission to appraisers is not, and shall not be construed into, a waiver of any of the rights or defenses of either party."

By this provision the parties expressly reserved to themselves all the rights which they possessed under the policy, and the plaintiff thereby reserved the right of bringing suit, which he possessed independently of any award. This clause was evidently intended to guard against the waiver, by virtue of the submission, of any right possessed by either party.

The plaintiff further contends that this evidence was properly rejected, because, by the terms of the policy, before there should be any submission, the insurance company should first make an estimate of the loss as well as the insured, and then, if there were a disagreement, appraisers should be selected; that the evidence offered did not disclose that the insurance company had ever made any estimate of loss, but only the assured; and that, therefore, the conditions under which a submission could properly take place had not been complied with.

The policy further provides that the appraisers chosen "shall first select a competent and disinterested umpire," but in the evidence offered it did not appear that any such umpire was chosen.

Upon the whole, we are clearly of opinion that the court below committed no error in excluding the agreement to submit, the award, and the documents relating thereto.

Other assignments of error relate to the alleged improper admission of certain witnesses to testify as experts, on the ground of want of qualification. Whether a witness is qualified to testify as an expert is to be passed upon and determined by the court below. It is a question largely within the discretion of the presiding judge, and his determination is generally conclusive. Spring Co. v. Edgar, 99 U. S. 645; Tucker v. Railroad Co., 118 Mass. 546; Perkins v. Stickney, 132 Mass. 217; Lawrence v. Boston, 119 Mass. 126.

Nor do we find any error in the refusal to admit the evidence contained in the deposition of Samuel R. White. The evidence was plainly unintelligible, and liable to mislead, in the form in which it was presented.

As to the examination of the plaintiff, who was called as a witness by the defendant, the order of his examination was within the discretion of the court, and therefore affords no ground of error.

The charge of the presiding judge relating to overinsurance was correct, because the mortgagee clause contained a provision that

the mortgagee should not suffer for any act or neglect of the mortgagor or owner of the property. Consequently, if the mortgagor obtained more insurance than he was entitled to, it was his own act, and could not affect the rights of the mortgagee. The fact that the policies were in the possession of the mortgagee did not make him a party in obtaining any excess of insurance which may have existed.

With respect to the Concord policy which the evidence tended to show was obtained by the mortgagee or plaintiff, trustee, we think the court was right in charging the jury that, if such insurance was taken out at the request of the mortgagor, it would be his act, and not the act of the trustee; and, further, if they believed it was the act of the trustee, and that at the ime of issuing such policy the whole amount of insurance then existing, including the policy in question, did not exceed the amount permitted, it could not invalidate his claim under this policy. Upon the whole, we can find no error in the court below, and it follows that the exceptions must be overruled, and judgment affirmed.

ARDMORE COAL CO. v. BEVIL et al.

(Circuit Court of Appeals, Eighth Circuit. May 21, 1894.)

No. 349.

1. INDIAN TERRITORY—ARKANSAS STATUTES IN FORCE—ACTION FOR DEATH BY WRONGFUL ACT.
   Under Act May 2, 1890, § 31, which extends over the Indian Territory, certain laws of Arkansas, as published in Mansfield's Digest, "which are not locally inapplicable or in conflict with this act or with any law of congress, relating to the subjects specially mentioned in this section," enumerating chapters of said digest by title and number, among them "Pleadings and Practice, chapter 119," section 5225 of that chapter, allowing recovery of damages for death by negligence, cannot be excluded on the ground that it does not relate to pleadings and practice, as the intent was to adopt the provisions of the enumerated chapters as a whole, unless they were locally inapplicable, or in conflict with the act or some other existing act of congress.
2. OPINION EVIDENCE — CONDUCT OF EMPLOYE IN PARTICULAR LINE OF DUTY.
   Testimony that the conduct of an employe in a particular line of duty, in which he had been engaged but one day, if any, was very imprudent, given by a witness who had very little opportunity to observe his conduct in that capacity, without detailing the facts on which such opinion was predicated, is incompetent to show that he was unfit to be so employed because of his carelessness.

In Error to the United States Court in the Indian Territory.

This was an action by Etta Bevil and others against the Ardmore Coal Company for damages for the death of Henry Bevil. At the trial the jury found a verdict for plaintiffs. Judgment was entered thereon. Defendant brought error.

W. A. Ledbetter, for plaintiff in error.

W. B. Johnson, A. C. Cruce, and Lee Cruce, for defendants in error.

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

THAYER, District Judge. This was a suit which was brought by Etta Bevil and her three minor children against the Ardmore Coal Company on account of the death of her husband, Henry Bevil, who was killed while working for the defendant company at its coal mines in the Indian Territory. The complaint averred, in substance, that as the deceased was engaged in loading one of the defendant's coal cars with lumber, at the mouth of a shaft or tunnel which led into one of the company's coal mines, he was run over and killed by another car belonging to the defendant, which had been carelessly unloosed from its fastenings and suffered to run down a tramway which led to the mouth of the shaft where the deceased was working. The defendant company had in its employ a man by the name of James Peers, who at the time of the accident was, and for one day previously had been, engaged as a car rustler. His duties appear to have consisted in hooking and unhooking a cable by means of which cars were drawn out of the mine or lowered into it. The shaft descended into the mine to a considerable depth, and at an angle of from 30 to 40 degrees. It was provided with a double-track railway or tramway, one of which tracks was used for drawing cars out of the mine and the other for lowering them into the mine. As we gather from the testimony, it was the duty of the car rustler to stand on an elevator platform, at or near the mouth of the shaft, and to detach the cable from loaded coal cars as they were drawn upon the elevator platform to be dumped, and to attach the cable to empty cars as they were lowered into the mine. Bevil and Peers were evidently fellow servants, but the complaint charged as a ground for recovery that Peers was a careless and reckless man, that he was indifferent to the safety of his fellow employes, that the defendant company knew or might have known that he was an unfit man to act as a car rustler by reason of his habits of negligence, and that the death of the deceased was in fact occasioned by the careless conduct of said Peers at the time of the accident.

Confining ourselves to the points discussed in the briefs of counsel, it is necessary to refer briefly, and in the first instance, to the contention of counsel "that in the Indian Territory no cause of action survives in favor of anybody for injuries which result in death." This proposition is based on a highly technical construction of the act of congress of May 2, 1890 (Supp. Rev. St. vol. 1, pp. 733, 734), which extended certain general laws of the state of Arkansas over the Indian Territory. Section 31 of that act declares:

"That certain general laws of the state of Arkansas in force at the close of the session of the general assembly of that state of 1883, as published in 1884, in the volume known as Mansfield's Digest of the Statutes of Arkansas, which are not locally inapplicable or in conflict with this act or with any law of congress, relating to the subjects specially mentioned in this section, are hereby extended over and put in force in the Indian Territory until congress shall otherwise provide, that is to say: The provisions of the said General Statutes of Arkansas relating to administration, chapter one," etc.

Then follows a particular enumeration of numerous other chapters of Mansfield's Digest, embodying general laws, which are referred to and described by the number of the chapters and the title thereof

as they are numbered and entitled in Mansfield's Digest published in 1884. Because section 31 above quoted contains the phrase, "relating to the subjects specially mentioned in this section," it is argued that when a chapter of Mansfield's Digest is subsequently referred to by its number and title in the following manner, "Pleadings and Practice, chapter one hundred and nineteen," no provision found in such chapter is extended over the territory unless, upon a critical view of the provision, it is found to be properly classified as a law relating to pleading and practice. In other words it is insisted that congress did not intend to approve the classification which the learned author of the Digest had seen fit to make, or to adopt the several enumerated chapters of the Digest as a whole, but that it merely intended to extend over the territory such provisions of law found therein as properly related to the subjects designated by the titles of the several enumerated chapters. It so happens that Lord Campbell's act, as re-enacted in the state of Arkansas, is section 5225 of chapter 119 of Mansfield's Digest, which chapter is entitled, "Pleadings and Practice," and it is contended that this section was erroneously classified under that title, as it does not relate to pleading and practice, and for that reason that the provisions contained in section 5225 were not extended over the Indian Territory by the act of congress aforesaid. We think that the process of reasoning by which the foregoing result is attained is altogether too technical and refined to deserve much consideration. We have had some difficulty in stating the contention in an intelligible form, as well as the substance of the argument by which counsel seek to enforce it; and this is perhaps a sufficient reason for rejecting the construction for which counsel contend. In construing a statute like the act of May 2, 1890, it is generally safe to reject an interpretation that does not naturally suggest itself to the mind of the casual reader, but is rather the result of a laborious effort to extract from the statute a meaning which it does not at first seem to convey. It is apparent, we think, that congress intended to extend over the Indian Territory all of the provisions that are found in the several chapters of Mansfield's Digest, which are enumerated in section 31 of the act of May 2, 1890, unless they were locally inapplicable, or were in conflict with the act of May 2, 1890, or with some other existing act of congress. The phrase, "relating to the subjects specially mentioned in this section," is tantamount to the expression, "hereafter more particularly mentioned and described in this section." Congress intended to put in force in the Indian Territory all of the general laws contained in the several chapters of Mansfield's Digest which are designated in section 31 of the act of May 2, 1890, by number and title. It certainly did not intend to make the existence or nonexistence of a law to depend upon the question whether it was published under a title which correctly indicated the character of the law. It follows, therefore, that no error was committed by the trial court in overruling the motion to exclude all testimony on the ground that the complaint did not state a cause of action.

It is next assigned for error that the trial court erred in permitting the following question to be propounded to one D. H. Collier, who was the father of, and the principal witness for, the plaintiff Etta Bevil: "Did or not James Peers, in operating the cars as car rustler, act in a prudent or imprudent manner while he was operating the cars as car rustler for the Ardmore Coal Company?" The witness answered the question as follows: "He did not rustle them correctly, and was very imprudent." It is manifest, we think, after a careful perusal of the entire record, that there was no evidence before the jury tending to show that Peers was a careless or reckless man except the testimony of Collier in the answer above quoted; and it is also manifest that, in the absence of such testimony, there was no evidence to support the verdict for $12,000 which the jury eventually rendered against the defendant company. It must be conceded that the judgment rests wholly upon the opinion expressed by Collier in reply to the question above-mentioned. It may also be said that it appears from the uncontradicted evidence in the case that Peers had only served as a car rustler for one day previous to the accident, and that Bevil was injured early in the morning of the second day on which Peers served in that capacity. Moreover, we do not find any explicit testimony in the record showing for what length of time, if any, Collier had observed Peers' conduct as a car rustler, or that he had in fact had any opportunity to observe his conduct in that line of duty, except as it may be inferred that he had had some opportunity from the fact that he assumed to express the aforesaid opinion. It does appear, however, that Collier, Bevil, and Peers had worked together in the shaft of the mine, in the discharge of various duties, for about 15 days prior to the accident, and it is most probable, we think, that whatever opinion Collier had formed with reference to Peers' competency as a car rustler had been formed while Peers was employed in another and entirely different line of duty. It should be further observed that the evidence fails to show that the occupation of a car rustler was one requiring either a high degree of skill or experience. On the contrary, it is evident, that the duties pertaining to that occupation were exceedingly simple, and that any common laborer possessing ordinary sense would be able to discharge them in an efficient manner. Under these circumstances, we are persuaded that the trial court erred in overruling the defendant's objection to the above-mentioned question, and that such error is of sufficient importance to entitle the defendant company to a new trial.

We do not question the general rule that witnesses may give their opinion concerning the general character of a person for prudence or carelessness, when an issue of that kind is raised by the pleadings. To avoid the trial of numerous collateral issues concerning the conduct of a person on particular occasions, it is competent for a witness to give the result of his observation of a person's general conduct, with respect to his being negligent or otherwise, provided always that the witness has had a fair opportunity to observe

his conduct. Frazier v. Railroad Co., 38 Pa. St. 104, 110; Gahagan v. Railroad Co., 1 Allen, 187, 190; Railroad Co. v. Rambo, 8 C. C. A. 6, 59 Fed. 75. The rule in question, permitting witnesses to give their opinion on such questions, rests largely upon grounds of convenience and necessity. But in the present case the question propounded was not framed with a view of eliciting an opinion from the witness as to whether Peers was generally, by disposition and habit, a careless person, and for that reason unfit to be trusted in the discharge of duties which required the exercise of care and discretion. The question had reference to his conduct in a particular line of duty, which he had only followed for one day prior to the accident. The witness was asked whether Peers acted in a prudent or imprudent manner as a car rustler, not whether he was generally a prudent or imprudent person. This question was also asked under circumstances which rendered it evident that the witness, at best, had only had a very meager opportunity to observe his conduct as a car rustler, and that he was probably a prejudiced witness in view of his relationship to the plaintiffs. Under these circumstances, Collier was practically permitted to say that, in his opinion, on the particular occasion when Bevil was hurt, Peers had acted in an imprudent manner, and to make this statement without detailing the facts upon which his opinion was predicated so that the jury might judge of its reliability. But, even if it be conceded that the question propounded was not objectionable because it confined the witness' attention to Peers' conduct in a particular line of duty and during a single day, rather than to his general character for prudence or imprudence, still it is evident that no sufficient foundation was laid for permitting the witness to answer the question, even in the form in which it was propounded. Collier was not shown to have had a sufficient opportunity for observing Peers' actions while in charge of the car elevator to entitle him to pronounce judgment with reference to his general conduct in that line of service. Even if it should be conceded that the jury might infer from the fact that a coal car broke loose, rushed down the incline, and ran over Bevil, that it so broke loose through some culpable neglect of Peers, as to which proposition we express no opinion at this time, yet in the case at bar it was not sufficient to show that Peers was guilty of a single act of negligence that had resulted in the death of the deceased. It was necessary for the plaintiff to prove, or to produce testimony tending to prove, that Peers was an unfit person to be employed in the service in which he was engaged at the time of the accident, because of his careless or reckless habits, and that this fact was known to his employer, or that it ought to have been known. The only evidence offered tending to show that he was a careless man, and unfit to be so employed, was the opinion expressed by Collier, and that was incompetent for the reasons heretofore stated. Wherefore the judgment must be reversed, and the cause remanded, with directions to award a new trial.

It is so ordered.

PHILADELPHIA TRACTION CO. v. LIGHTCAP.

(Circuit Court of Appeals, Third Circuit. May 21, 1894.)

No. 11.

HORSE AND STREET RAILROADS—NEGLIGENCE—COLLISION—INSTRUCTIONS.

Where, in an action against a street-car company for injury caused by a collision, defendant asks an instruction to the effect that, if plaintiff stopped his horse near the car, and the car then started with the horse in a position of safety, and the horse became unmanageable from having been scared by the ringing of the gong, and jumped in front of the car before it could be stopped, this would not be negligence, it is proper to modify the instruction by adding that if the horse was in a state of alarm, and the gong was rung violently, and so near to the horse as to produce greater alarm, and cause the accident, that might be negligence.

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

Action by John A. Lightcap against the Philadelphia Traction Company for personal injuries. Plaintiff obtained judgment. Defendant brings error.

Thomas Leaming, for plaintiff in error.

S. Morris Waln and John W. Westcott, for defendant in error.

Before ACHESON, Circuit Judge, and BUTLER and GREEN, District Judges.

BUTLER, District Judge. The plaintiff below, Lightcap, sued for injuries sustained by a collision with the defendant's cars, while crossing its tracks on Market street. His statement avers that he was driving up Eleventh street, on March 24, 1893, and that on reaching Market street, and seeing it was "blocked with wagons, he stopped on the side until he could get an opportunity to cross; that when he saw he could cross in safety, and was ordered by a policeman to proceed, he drove on, and when he reached the railroad tracks he was struck by a car carelessly and negligently operated by the servants of the company; that the car had stopped, or was in the act of stopping, about twenty feet from the point where he was crossing, when, although the servants of the company saw him crossing, they carelessly, negligently, and suddenly started the car in motion, causing it to crash into his wagon, throwing him out with great violence," and seriously injuring him.

This was the cause of action which the plaintiff sought to establish, and which his testimony (though contradicted by the defendant's) tended to prove. After the evidence had been closed, the defendant injected another issue, by presenting the following point:

"(5) If the jury believe that the plaintiff stopped when both vehicles were very close to the intersection of the two tracks, and that the train proceeded with the plaintiff's horse in a position of safety, and that the horse then became unmanageable from having been scared by the ringing of the gong or other cause, and jumped in front of the cable train before it could be stopped, this is not evidence of negligence, and your verdict should be for the defendant."

The court answered as follows:

"I affirm that, with this qualifying suggestion, that if you find from the evidence—and I leave that to you, without any intimation of my own about it—

that this horse was in a state of excitement and alarm, and the ringing of the bell was done violently and so near to it as to produce greater alarm and to bring about the accident, that might be negligence; but, as I remember the evidence, gentlemen, it was that the horse was then standing with his head a short distance from the track; that he was, as some of the witnesses say, trembling, and, as others say, quiet and docile. The gripman, who says he was trembling, excited and scared, says that he pulled the bell, and I remember his motion distinctly, that way. [Indicating a moderate single pull.]

"Now, gentlemen, the facts are for you. I state my recollection of them only to aid you, not to control you. It is for you to say what the facts were. If from the facts there is any reason to say that in the act of ringing the bell, which ordinarily is a duty to give notice, there was any negligence, that is, in the manner, at the time, and under the circumstances of the ringing. But with that explanation, and subject to that, I affirm this point."

To this answer the defendant excepted, and assigned it as error.

We are not called upon to determine whether the point might not properly have been rejected. Its affirmance without qualification would certainly have been error. It asked the court to say that if the horse "became unmanageable from the ringing of the gong," under the circumstances stated, and thus caused the accident, "the verdict should be for the defendant." One of these circumstances, (on which the conclusion of the point is based,) is that the "horse was in a position of safety" at the time. The jury could not, however, so find; the defendant's own evidence forbids it. He was standing within three or four yards of the track, where the car must pass, trembling with fright, as the gripman testifies. His position, when the car moved, and the gong sounded, could not, therefore, be found to be one of safety. It was clearly one of peril. And yet the court is asked to say that the jury may find otherwise, and predicate upon it instruction that the sounding of the gong was not carelessness—without any regard to the character of such sounding. This certainly would not have been justifiable. It was for the jury to determine whether, under all the circumstances existing at the time, the defendant observed proper care. These circumstances were: The terrified horse, standing close to the tracks, and near the car, which must pass immediately by his head, if moved; the starting of the car and sounding of the gong—whether moderately or immoderately (in view of the circumstances) as might be found. It was for the jury to consider whether it was proper to start the car before the plaintiff had gotten away; if it was, whether it was necessary to sound the gong at that moment; and if it was necessary, then whether it was sounded immoderately in view of the circumstances, either in loudness or duration. While it is a duty of railroad companies to give warning at the approach of crossings, the duty may be, and sometimes is, modified by circumstances.

It was therefore the duty of the court in affirming the point to invite attention to the existing conditions, and leave the jury to determine whether the conduct of the defendant's servants was careless or not. This in substance is what was done. The word "violently," used in connection with the ringing, did the defendants no injustice. It was used in a comparative sense, with reference to the

circumstances. What would be moderate ringing under some circumstances might be immoderate or violent under others. The character of the ringing upon this occasion, was, as before stated, for the jury to determine from the evidence. It was loud enough and continuous enough, according to the defendant's testimony, to increase the horse's terror, render him ungovernable, and cause the accident. But even if the use of the term here would be objectionable in the absence of what the court subsequently said in closing its instructions on this subject, it is not so when read in that connection. The court there said:

"If from the facts there is reason to say that in the act of ringing the bell, which ordinarily is a duty to give notice, there was any negligence, —that is, in the manner, and at the time, and under the circumstances, you may find negligence. With that explanation, and subject to that, I affirm this point."

The answer was as favorable as the defendant was entitled to. The judgment is therefore affirmed.

THE DUNBRITTON.[1]

CROOKS et al. v. THE DUNBRITTON. KNUDSON et al. v. SAME. SMAIL et al. v. SAME.

(District Court, S. D. New York. April 20, 1894.)

SHIPPING—DAMAGE TO CARGO—STOWAGE—PLUMBAGO AND OIL—PERILS OF THE SEA—BURDEN OF PROOF.

The ship Dunbritton loaded certain barrels of plumbago at Ceylon, and stowed them in the lower hold. Pipes of oil were afterwards stowed in the betweendecks. The shipment of oil and plumbago in the same vessel is customary. The shippers of cargo other than oil knew that oil was to be taken aboard. The deck upon which this oil was stowed was especially strong, tight, and secure; and the court found, as matter of fact, that the cargo was well stowed and dunnaged. Near Cape Horn the ship experienced very bad weather, and on one occasion shipped a heavy sea; and by reason of this heavy weather, and without any fault of the ship, there was much leakage from the oil. On arrival at New York, some of the plumbago and other goods were found to have been damaged by the oil, to recover for which damage the shippers filed this libel. *Held*, that the damage having occurred by reason of perils of the sea, the burden of proof was upon the shippers to show some fault in the ship, in not protecting the goods against such damage; and as, on the evidence, the shippers had failed to show such fault by any preponderance of proof, they could not recover.

These were three libels against the ship Dunbritton,—the first, by R. Flemming Crooks and others; the second, by Morris F. Knudson and others; and the third, by Henry Smail and others,—all to recover for damages, by leakage of oil, to plumbago and other goods, cargo of said ship.

George A. Black, for libelants.

Seward, Guthrie & Morawetz, for claimant.

BROWN, District Judge. The two libels first above named were filed to recover for damages to plumbago; the last, for damage to

[1] Reported by E. G. Benedict, Esq., of the New York bar.

certain light goods, which were shipped on board the ship Dunbritton, at the ports of Colombo (Ceylon), Cochin, and Aleppy in March, April and May, 1892, and damaged by cocoanut oil during the passage to this port.

The plumbago, consisting of 1,359 barrels, was all taken on board at Colombo and put in the lower hold. It was well stowed and dunnaged, probably in not very unequal quantities forward and aft, as I infer from the testimony, leaving the middle of the hold for other cargo. Forty-five pipes of oil, also shipped at Colombo, were stowed in the betweendecks, aft of the after hatch, and immediately over the plumbago in the hold. These pipes were placed in the aft betweendecks partly for the purpose of trimming the ship, and also because more than enough oil was expected at the other ports to fill the hold amidships. Sailing from Colombo on March 23d, the ship reached Cochin after a voyage of 19 days, where the rest of the oil, being less than expected, was received and stowed in the lower hold. After a short stay at Cochin, the ship proceeded to Aleppy, arriving there on the same day, where the cargo was completed by taking in tumeric, nux vomica, matting, bales of yarn, mats, and other light cargo, stowed partly amidships and forward in the betweendecks, and partly in the hold on top of the barrels and oil. The Dunbritton left Aleppy on May 12, 1892, and arrived at this port on the 19th of October following. On the discharge of the cargo, 718 barrels of plumbago, and a considerable quantity of the other goods, were found more or less damaged by oil. The libelants claim that the damage to the plumbago was caused through bad stowage, in placing the pipes of oil in the betweendecks immediately over the plumbago aft, the damage being alleged to have been caused by the leaking of oil through the deck; and that the damage to the other goods arose from improper stowage, and lack of dunnage to separate them sufficiently from the oil. The defendant contends that the stowage was in all respects good and proper, and that the damage arose from sea perils alone.

The case has been prosecuted on both sides with extreme assiduity; nearly 100 witnesses having been examined, and some 1,500 pages of testimony taken. I shall attempt only to give my conclusions upon the chief points involved:

1. I find that all the heavy cargo throughout was well stowed and dunnaged; and that the other cargo, which by the bill of lading was taken as "broken stowage" or as "oil broken stowage," was well stowed in accordance with these provisions of the bill of lading, with the knowledge and approval of the libelants' agents on the spot, and by stevedores selected and nominated by them.

2. In approaching Cape Horn, the ship for several weeks experienced very bad weather, and on the 10th of July shipped a heavy sea, which did a good deal of damage to her upper works, filled the upper deck with water, and carried away two of the ventilators, through which the water poured down through the betweendecks, until the hold was found to have three feet of water.

3. That in consequence of the heavy weather, and without any fault of the ship, there was much leakage from the pipes of oil in

the hold, and considerable from those in the betweendecks; that this leakage was through perils of the seas, and the cause of all the oil damage here sued for, and within the exceptions of the bill of lading; that there was also water damage to the barrels of plumbago, which has been partly collected; and that a large number of the barrels showing oil damage, also showed rusty hoops as signs of contact with water.

4. That the ship was chartered to the libelants in the third libel above named, for the transportation of oil, as well as other cargo; that the agents of the other shippers understood that oil was to be taken on board, and that the shipment of oil and plumbago on the same ship from that port was customary (The Gloaming, 46 Fed. 671; The Titania, 19 Fed. 101, 107); that the stowage of oil in the betweendecks over the plumbago, though it would be bad stowage, if the deck was not tight, was not in this instance bad or improper stowage, for the reason that the deck was specially strong, tight and secure, the small hatches aft of the main hatch, having been thoroughly caulked before the oil was laden on board.

5. That no oil from the pipes in the betweendecks leaked through that deck upon the plumbago or other goods below, or through the small hatches as the libelants have contended, except a slight stain in one place, which is of no account; that the damage by oil to the plumbago was not confined to the plumbago stowed aft of the after hatch, but was found also to a considerable extent in the plumbago stowed in the forward part of the hold; that the 718 barrels of plumbago damaged, had the injury all been sustained from leaks through the deck aft, would have comprised nearly all the plumbago that was stowed aft; and the damage, had it come about in that way, would also have shown most clearly upon the light goods stowed in the space of about 18 inches deep immediately below the betweendecks, and upon and over the upper tier of the barrels there stowed; whereas, in fact, those light goods were not noticeably damaged, nor were the barrels injured until about half way to the bottom of the hold, which was about 15 feet deep.

6. That somewhat more damage from oil astern than forward is to be reasonably accounted for by the fact that the vessel was loaded deeper by the stern than forward; and the oil taken up and floated by the water would, therefore, be carried more astern, and higher up there, than forward.

7. That the leakage having occurred through a peril of the seas without the ship's fault, the burden of proof is upon the libelants to show some fault and insufficient care in the ship, in not protecting the goods against damage from such leakage of oil (Clark v. Barnwell, 12 How. 272, 281; The Euripides, 52 Fed. 161), and that no such fault is shown by any preponderance of proof in the testimony in favor of the libelants; but that the libelants' testimony is fully met and answered by the defendant's witnesses, who in several essential particulars had the best means of exact observation and information, and are for that reason most trustworthy.

There should be a decree for the defendant, with costs.

BONNELL et al. v. STOLL et al.

(Circuit Court of Appeals, Third Circuit. March 22, 1894.)

No. 19.

1. PATENTS—INVENTION—SPRING BED BOTTOMS.
There is no invention in substituting a single hinge wire, passing through adjacent coils of two sections of a folding wire bed bottom, for two or more hinge wires which previously served the same purpose; such change is an improvement in degree only. 57 Fed. 396, affirmed.

2. SAME.
The Bonnell & Lambing patent, No. 405,821, for improvements in bed bottoms, is void, as to the second claim, for want of invention. 57 Fed. 396, affirmed.

Appeal from the Circuit Court of the United States for the District of New Jersey.

This was a suit by Elliott M. Bonnell and John S. Lambing against Robert P. Stoll and others for infringement of a patent for improvements in bed bottoms. The circuit court dismissed the bill (57 Fed. 396). Complainants appealed.

Albert B. Osborne, for appellants.
Francis C. Lowthrop, for appellees.

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

WALES, District Judge. The appellants were complainants below, and brought suit for the infringement of letters patent No. 405,821, for improvements in bed bottoms, issued to them on June 25, 1889. Their bill was dismissed by the circuit court on the ground of anticipation and want of patentability. The specifications describe a bed bottom constructed of parallel rows of helical springs, united to each other by a spiral or coiled wire, passing through and connecting the adjacent portions of the upper whirls of the springs, while a similar spiral or coiled wire connects the bottom whirls of the springs. The bed bottom is made in two sections or halves, and the spiral or coiled wire which connects the tops of the adjacent rows of springs serves as a hinge, the bottom wire being omitted at the point where the two sections separate, thus allowing them to fold the one upon the other. There are two claims. The second claim only is alleged to be infringed, and reads 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 connecting spiral or coiled wire, mentioned in the second claim, also serves other purposes in the construction of the complainants' bed bottom, but the chief and only function attributed to it in this claim is its action as a hinge between the two sections, so that one can fold upon the other. Confining the consideration of patentability to this one feature, namely, the action or use of the coiled wire as a hinge, and in view of the prior state of the art, as proved by the

evidence and the defendants' exhibits, it is very clear that the second claim cannot be sustained. A number of exhibits were produced on the part of the defendants to show that the complainants' invention had been anticipated. It will be sufficient to refer to two of these,—the "Maier Bed" and the "Lace Web Spring," each of which antedated the patent in dispute. These exhibits show folding bed bottoms made in two sections, constructed entirely of spiral springs, united by coiled wire, the two sections being held together by a spiral or coiled wire, which performs the three functions of the spiral wire hinge of the complainants' device, namely, "loosely and yieldingly connecting the springs," furnishing "a spiral filling for the interspaces" between the four adjacent springs, and "serving as a hinge," folding the sections. In the Maier bed, as in the complainants' device, the connection between the two bed sections is effected by a spiral connection of wire, yieldingly joining the springs, and permitting the two sections to fold the one upon the other, and presenting a spiral filling for the interspaces along the connecting line between the sections. In the lace web spring, if a single spiral hinge wire were employed instead of the number of hinge wires shown in the exhibit, the same thing would be produced which is pointed out in claim 2 of complainants' patent. The effect of such a change would be to make one wire do the work of several, and this is the distinctive feature which is relied upon to support the claim. Admitting that it was novel to use one wire, instead of two or more, for a hinge, and that in consequence the patented articles were more rapidly made, and sold at a cheaper price than before, and thereby became more useful, it does not appear that originality of invention or discovery was required or exercised in making the change from several wires to one. The cheaper article is not always the better one. The substitution of one material for another, or the reduction or increase in size or weight, is not proof of invention. Such changes result from observation and experience, and most frequently are only the carrying forward of the plans and suggestions which have been already made by others. It is not enough that a thing shall be new, in the sense that in the shape or form in which it is produced it shall not have been before known, and that it shall be useful, but it must amount to an invention or discovery. Thompson v. Boisselier, 114 U. S. 11, 5 Sup. Ct. 1042. This doctrine has been frequently recognized and applied. Estey v. Burdett, 109 U. S. 633, 3 Sup. Ct. 531; Pennsylvania R. Co. v. Locomotive Engine Safety Truck Co., 110 U. S. 490, 4 Sup. Ct. 220; Hollister v. Manufacturing Co., 113 U. S. 59, 5 Sup. Ct. 717; Burt v. Evory, 133 U. S. 349, 10 Sup. Ct. 394; French v. Carter, 137 U. S. 239, 11 Sup. Ct. 90. The complainants' second claim contains, at the best, an improvement in degree only of what had preceded it in the same field, and is wanting in the element of invention which would entitle it to a patent. The decree of the circuit court is affirmed.

MORRILL'S HEIRS v. SCOTT et al.

(Circuit Court, D. West Virginia. May 3, 1894.)

TAXATION—REDEMPTION—GRANTS BY STATE AFTER FORFEITURE.

After the passage of Act Va. Feb. 12, 1844, authorizing previous owners of certain lands forfeited to the state for nonpayment of taxes to redeem them on or before June 1, 1845, but saving the rights of any person having legal or equitable title to any of the lands by subsequent grant or otherwise, grants of said lands were obtained from the state, before June 1, 1845, upon entries and surveys made before the act. *Held*, that the grants conferred no title, as against a redemption pursuant to the act, because lands so forfeited to the state were not at that time subject to entry and grant, and under Act March 28, 1843, vesting all the state's right to such lands delinquent before January 1, 1845, in persons having title or claim under grant from the state previous to that date who should have paid the taxes, the forfeiture did not become absolute until after the passage of Act Feb. 12, 1844.

Action of ejectment by the heirs of Morrill against Scott and others, for lands claimed by plaintiffs under a patent from the commonwealth of Virginia, and by defendants under subsequent grants from the commonwealth made after the lands had become delinquent and forfeited for nonpayment of taxes.

Act Va. March 28, 1843, § 1, provided that "all the right, title, and interest which shall be vested in the commonwealth in any lands or lots lying west of the Alleghany mountains, by reason of the nonpayment of the taxes heretofore due thereon, or which may become due on or before the first day of January, 1845, * * * shall be and the same are hereby absolutely transferred and vested in any person or persons (other than those for whose default the same may have been forfeited, their heirs or devisees) for so much as such person or persons may have just title or claim to, legal or equitable, claimed, held, or derived from or under any grant of the commonwealth, bearing date previous to the first day of January, 1845, who shall have discharged all taxes duly assessed and charged against him or them upon such lands, and all taxes that ought to have been assessed or charged thereon from the time he, she, or they acquired title thereto, whether legal or equitable."

Couch, Flournoy & Price, for plaintiffs.

Johnson & Riley, for defendants.

JACKSON, District Judge. This is an action of ejectment brought by the plaintiffs to recover certain lands claimed by the defendants, who are in actual possession under color of title. The plaintiffs derived title to the land in controversy by mesne conveyances from the grantee of the patent issued by the commonwealth of Virginia February 10, 1786. The title to the land continued and remained in the plaintiffs and those under whom they claim, unless it was forfeited under the act of 1835, when it would become vested again in the commonwealth of Virginia, as forfeited and delinquent lands, and not as waste and unappropriated lands; the same having been previously granted, whereby the original title to the lands passed out of the commonwealth to the grantee, under the patent

issued in 1786. By the act of the Virginia legislature passed February 27, 1835, "all lands and lots returned delinquent for the nonpayment of taxes, west of the Alleghany mountains," became forfeited unless redeemed before the 1st day of November, 1836, when the forfeiture became absolute, and the land so forfeited passed by operation of law, and vested in the commonwealth, for the benefit of the president and directors of the literary fund. Staats v. Board, 10 Grat. 400; Wild's Lessee v. Serpell, Id. 405; Hale v. Branscum, Id. 418. After the forfeiture became complete the title would remain and continue in the state, unless redeemed or transferred under legislative sanction.

It appears from the evidence in this case that the lands now in controversy were forfeited under the act of 1835, and that the forfeiture became absolute the 1st day of November, 1836, whereby the title to them vested in the commonwealth. During the time the lands were held by the commonwealth, Thomas Coleman and Henry Sherman, two of the defendants, obtained grants from the commonwealth on the 29th of June, 1844, upon entries and surveys made in 1843. Charles Smith, another defendant, obtained his grant for the land he claimed September 20, 1844. But before the defendants obtained their grants, and while their title was in an inchoate condition, the legislature, by a private act passed February 12, 1844, authorized the previous owners to redeem the lands by the payment into the treasury of the commonwealth of all taxes due thereon on or before the 1st day of June, 1845. It is conceded that this act was complied with by the payment of all back taxes into the treasury of the state before that time. There was, however, a saving in the act to any person having legal or equitable title to any of the lands by virtue of subsequent grant or otherwise.

This brings me to the consideration of the legal effect of this act; and the first question that presents itself is, were these lands liable to entry and survey, and subject to grant? As we have before seen, they were granted by the commonwealth of Virginia in 1786, when the title passed out of the state, and so remained until she was reinvested with it under the act of 1835, holding them as forfeited and delinquent lands; and she so held them down to the time she relinquished her right to them by the act of February 12, 1844. At no time since the grant of 1786 were they ever held as waste and unappropriated lands, and as such liable to survey, entry, and grant. It is evident that they could not be granted as waste and unappropriated lands; and, if liable to entry, it must be because the state held them as forfeited lands, and, by legislative enactment, made them subject to entry and grant after the forfeiture. But since the lands became forfeited, and during the time the title was in the state, there was no act of the legislature in existence that authorized the entry of forfeited lands. In fact, a grant for land forfeited for nonpayment of taxes was unauthorized by any law prior to the Code of 1849. Atkins v. Lewis, 14 Grat. 30. It is true that forfeited and delinquent lands have been in some, possibly in a number of, instances, surveyed, entered, and carried into grant; but in no instance were these grants ever held valid by the courts except where

the legislature relinquished the right of the state to the land. Such was the effect of the decision of the court in the case of Levasser v. Washburn, 11 Grat. 572. If this position be correct, it must follow that the lands granted to the defendants by their patents passed no title to them, in the absence of any law either authorizing them to enter the lands, or confirming their title to them.

But it is claimed that, though the patents were void, yet because they were founded upon entries made prior to the act of February 12, 1844, and carried into grant before the 1st day of June, 1845, they conferred an equitable title upon the defendants, which is within the saving clause of the act of 1844, and should avail them to defeat the recovery in this action. I do not think this is now an open question, since the decision of Atkins v. Lewis, before referred to. But, if it was, the plain answer to this position seems to be that, while the title to the lands remained in the commonwealth, her legislature has both the power and legal right to dispose of them as it deemed best for her interest. This was done by the act of 1844, while she was fully invested with the legal title; and whatever claims the defendants had were mere inchoate rights, which the state might refuse to recognize. No one could question the right of the legislature, after the passage of the act of 1844, and before the 1st day of June, 1845, to pass an act to repeal the law creating the land office in the state; and, if it was done, all inchoate rights would cease, unless specially provided for. If the state could, by a proper enactment, do this, clearly she would have the right to restore lands to the previous owner upon any terms she chose to impose, even where, under her laws, the rights of third parties began to intervene, which were in an inchoate condition, and before she had divested herself of title to them. In view of what I have said, it is apparent that the state, by the act of 1844, abrogated the forfeiture, and released the lands, upon the payment of all the taxes due her June 1, 1845.

It is, however, insisted, with some show of plausibility, that the defendants are protected by the act of March 28, 1843. The answer to this position is that by the terms of that act the forfeiture was not complete and absolute before the 1st of January, 1845, and the redemption of the lands in question having been authorized before that time, under the act of 1844, there was no legal title in the state to transfer and vest in any one. If the defendants had obtained their grants before the passage of that act relinquishing the right of the state to them, the question presented would be far different; and under the decision in the case of Hale v. Branscum, 10 Grat. 418, the defendants might be entitled to hold the land embraced by their patents, if such lands were liable to entry. If, however, the later decision of the same court, in the case of Atkins v. Lewis, is law (before cited in 14 Grat.), which decided that there was no statute of the state that authorized the entry and granting of delinquent and forfeited lands at the time the defendants made their entries upon which they obtained their grants, then, and for this reason, the grants were void, and conferred no title whatever upon the defendants claiming and holding under them.

For the reasons assigned, I reach the conclusion that the lands in question were forfeited under the act of 1835, and that the forfeiture became absolute in November, 1836; that after the forfeiture occurred the title to the lands remained in the state until June 1, 1845; that the entries made, and the grants issued thereon, by the state to the defendants, passed no title, because the grants were secured after the passage of the act of 1844, which authorized the redemption; that the lands were not subject to entry and grant, and that the act of 1843 does not apply to this case, because the forfeiture could not become absolute after the passage of the act of February 12, 1844, until and after the time fixed for the redemption transpired, for the reason that the prior owners had an equity of redemption in the lands until June 1, 1845, when the taxes were to be paid into the treasury, which being done, reinvested them with the legal title, during which period the rights of the defendants, if any they had, were suspended.

CHICAGO & O. R. R. CO. v. McCAMMON.

(Circuit Court of Appeals, Seventh Circuit. May 1, 1894.)

No. 143.

RAILROAD COMPANIES—MORTGAGE—FORECLOSURE.

A decree foreclosing a railroad mortgage directed that the property be sold, discharged of all liens and claims against the railroad company or its receivers, and that the price be paid partly in cash, to be applied in payment of certain claims, and the rest in interest coupons. The road was sold to a purchaser who paid his bid in full, according to the directions of the court, and the sale was confirmed by the court. *Held*, that the court had no power to direct the purchaser to pay a claim which had been adjudicated against the receiver after confirmation of the sale.

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

Petition by William McCammon against the Chicago & Ohio River Railroad Company for an order requiring the company to pay petitioner the amount of a certain judgment. Petitioner obtained such an order, and the company appeals.

The trustees for the bondholders of the Danville, Olney & Ohio River Railroad Company, on the 17th of October, 1882, filed their bill in the court below against that company for foreclosure of a deed of trust upon the railroad of that company. In that suit a receiver was appointed on the 11th of November, 1882, who operated the road under direction of the court until it was turned over to the present appellant, upon its sale under decree of foreclosure entered on the 16th of November, 1885. The decree, inter alia, provided that no bid should be received for less than the sum of $175,000, "and that, of the purchase price so bid, not less than the sum of $25,000 shall be paid in cash, and also such other proportion of said purchase price shall be paid in cash as this court may from time to time direct, in order to meet other claims which this court has adjudged, or may adjudge, in this cause, to be prior in equity to said mortgage or trust deed,—the court reserving the right to resell, in this cause, said premises and property, upon failure to comply within twenty days with any order of this court in that regard; and the balance of said purchase price not required to be paid in cash may be paid either in cash, or the purchaser at such sale shall have the right

to satisfy his bid, in whole or in part, by paying over and surrendering the unpaid coupons or interest warrants belonging to said mortgage bonds of said defendant, the Danville, Olney & Ohio River Railroad company, of date January 1, 1880, at such price or value as would be equivalent to the distributive amount that the holders thereof would be entitled to receive thereon in case the whole amount of the bid were paid in cash." The decree further provided "that, as to so much of the purchase price as is hereby required to be paid in cash, the same shall be payable in cash, or by surrender of the certificates of indebtedness issued by Charles Howard, as receiver, while operating the said railroad, or by the surrender of approved prior claims against James A. Eads, Charles Howard, and Charles E. Henderson, while operating said road, as receivers, under the orders of this court in this cause." The decree further directed that the fund to arise from the sale should be applied—First, to the payment of the costs of the suit, the compensation of the trustees and of counsel, and to the proper expenses of sale; second, to the payment of the certificates of indebtedness issued by the receiver in the performance of his duties, and under order of the court, which certificates were specified in a certain report of the master, and to the payment of any other claims against either of the receivers, which had been adjudged, or might be adjudged, by the court, to have priority over the mortgage or trust deed, and to the payment of all taxes upon the mortgaged estate; third, to the payment of such other claims now pending in the cause, and not theretofore or therein adjudged, and which might thereafter be adjudged and decreed by the court to be prior and superior in equity to the first mortgage bonds; fourth, to the payment of matured coupons of the mortgage bonds; and, lastly, the surplus was to be applied in payment of the principal of the first mortgage bonds. The decree further provided that the conveyance of the title to the purchaser, after confirmation of the sale, should be a perpetual bar, in law and in equity, against every claim of the railroad company, or other person claiming under it, and the purchaser should be vested with, and should hold, possess, and enjoy, the mortgaged premises, and all the rights, privileges, and appurtenances appertaining thereto, as fully and completely as the railroad company, and that the purchaser should have, and be entitled to hold, the railroad and property free and discharged from the mortgage or trust deed, a certain lease of the Chicago & Eastern Illinois Railroad Company, and all other claims of the defendant railroad company and all other parties to the suit. On the 10th of February, 1886, the property was sold by the master to Hales W. Suter and John W. Carter for the price of $175,000, which sale was confirmed by the court on the 24th of February, 1886, and a further decree was entered, that, upon the performance by the purchasers of the terms and conditions contained in the original decree directing a sale, they should be entitled to a sufficient deed of conveyance of the property. It appears by the final report of the master, dated August 2, 1884, that the purchasers at the sale had paid, in cash and in receivers' certificates, the full amount of the bid. Suter and Carter, the purchasers at the sale, assigned their rights to Austin Corbin and others, who subsequently assigned to the Chicago & Ohio Railroad Company, the present appellant, who presumably received a deed from the master, and is in possession of the property. Intermediate the sale and its confirmation, and on the 11th of February, 1886, William McCammon, the appellee, filed an intervening petition, seeking to be awarded, against the Danville, Olney & Ohio River Railroad Company and its receivers, certain damages sustained by him while in the service of the receivers, and in the operation of the railroad under them. This claim was resisted by the receivers. Over two years thereafter, and on the 30th of June, 1888, the court rendered a decree in the matter, adjudging that the intervener recover from the receivers of the road the sum of $1,000 for personal injuries sustained by him in the discharge of his duties while in the service of the receivers, and further providing that, if there should be no money in the hands of the receivers for the payment of such damages, then the purchasers of the road were ordered to pay in a sum sufficient to satisfy the claim and costs. The claim of the intervener was determined, and the decree thereon passed, without notice to the purchasers. On the 17th of July, 1888, Austin Corbin and his asso-

plates entered a petition for rehearing of the decision of the court upon the intervening petition of McCammon, which motion was overruled on the 3d day of February, 1892. On the 25th of August, 1892, McCammon filed his petition for an order requiring the Chicago & Ohio River Railroad Company, the present appellant, to pay the amount of the judgment awarded him by the court, which petition was demurred to by the appellant. The court, on the 1st of June, 1893, upon overruling such demurrer, ordered and decreed that the Chicago & Ohio River Railroad Company should pay into the registry of the court, for the use of McCammon, the sum of $1,000, with his costs, from which last decree the present appeal is taken.

Bluford Wilson (Philip Barton Warren, of counsel), for appellant.
George A. Sanders, for appellee.

Before WOODS and JENKINS, Circuit Judges, and BAKER, District Judge.

JENKINS, Circuit Judge (after stating the facts). The rights and liabilities of a purchaser at a judicial sale are measured by the terms and conditions of the decree. If the decree directs a sale subject to liens established or to be established, or subject to debts and liabilities incurred by a receiver in the management of the property, the purchaser at the sale takes the property cum onere, and liability for the claims so reserved by the decree follows the property in the hands of the purchaser, or his assignee. The liability of the appellant for the claim with which it has been charged must therefore depend upon the terms of the decree of November 16, 1885. It is clear that this property was directed to be sold, discharged of all liens and claims against the Danville, Olney & Ohio River Railroad Company, or its receivers. There is no suggestion in the decree that the road was to be sold subject to any lien whatever. The design of the court is patent upon the face of the decree,—that the fund produced by the sale was to be appropriated to the payment of all claims against the receivers before the payment of the matured coupons. The difficulty attending the payment of the appellee's recovery for damages arises from the fact that the fund obtained by the sale was insufficient, having been absorbed in the payment of other claims against the receivers before the claim of the appellee had been adjudged by the court. The sale would seem to have been made in exact accordance with the directions of the court, to have been confirmed by the court, and the conditions of the sale to have been fully met by the purchaser. We are at a loss to understand upon what principle the court can, in such case, after confirmation of the sale, and the performance of the conditions of sale, decree a further condition, which, in substance, enhances the price to be paid for the property. If the court had authority to compel the purchaser to pay one thousand dollars in addition to the price bid, it might, with equal propriety, when circumstances demanded, compel him to pay a hundred thousand dollars. The sale, when confirmed by the court, and its conditions met by the purchaser, created, in effect, a contract between the court and the purchaser, and the court could no more impose an additional term or condition upon that contract than could an individual. Farmers' Loan & Trust Co. v. Central R. of Iowa, 7 Fed.

537; Davis v. Duncan, 19 Fed. 477. The appellee acquired by his award no lien upon the property. The award would be imposed as an equitable lien upon any fund in the hands of the receiver, but there was, at the passing of the decree, no such fund. It had previously been exhausted in the discharge of other obligations. We see no propriety in imposing the burden of the payment of the appellee's claim upon the appellant. It might, we think, with equal propriety, be imposed upon a stranger to the record. The decree was allowed by the court in misconception of the terms of the foreclosure decree.

It is further insisted that the decree of June 30, 1888, to the effect that, if there were no moneys in the hands of the receivers for the payment of the amount awarded the appellee, the purchasers of the road should pay in a sum sufficient to satisfy the claim and cost, and the decree of February 3, 1892, overruling the motion of Austin Corbin and others, purchasers and assignors to the appellant, for the vacation of the decree of June 30, 1888, and for a rehearing, are res adjudicata, and binding upon the present appellant. The purchasers of the road had no concern with the claim of the appellee. They had no interest to be affected by its allowance or disallowance. The distribution of the purchase money of the property was a matter of indifference to the purchasers, with which they had no right to interfere. Central Trust Co. v. Grant Locomotive Works, 135 U. S. 207, 10 Sup. Ct. 736. It would be otherwise if, by the original decree, the property was sold subject to unascertained claims. Railroad Co. v. Wilson, 138 U. S. 501, 11 Sup. Ct. 405. The purchaser was a party to the suit, and subject to the jurisdiction of the court, as respects all orders necessary to compel the completion of the purchase, but no further. Having no right to be heard as to the distribution of the fund, the purchaser could not object to the allowance of the claim of the appellee. The purchaser had not been summoned to meet the claim of the appellee, was not interested to oppose it, was not a party to the intervening petition, and could not have appealed from the decree allowing the claim. It is difficult to perceive the jurisdiction of the court to decree that the purchasers of the road should pay the amount awarded the appellee, in the event that the receiver had no funds to pay.

Afterwards, on the 17th of July, 1888, Austin Corbin and others, assignors to the appellant, moved for a vacation of that decree, and for a rehearing of the matter, which seems to have been held under advisement by the court from July, 1888, until February, 1892, when the motion was overruled, and a hearing denied. It is claimed that the intervention of the assignors of the appellant, by their motion for a rehearing, made them parties to the proceeding, and therefore they were concluded by the decree of June 30, 1888, and the order of February 3, 1892. The difficulty with this contention is that that decree was interlocutory, and could not have been appealed from. The decree established the equities, and determined that the appellee was entitled to a certain sum of money, to be paid primarily by the receiver, and, if there should prove to be no money in his hands, then by the purchaser. There was no decree against the

purchaser. Whether there should be one, and the amount thereof, depended upon a contingency not then resolved. And this appears to have been the understanding both of the court and of the appellee, for the appellee subsequently moved the court, upon the showing that the receiver had no moneys wherewith to pay his claim, for a decree requiring the present appellant to pay it. The decree of June 1, 1893, was therefore the final decree, and that of June 30, 1888, was, as to the appellant, merely interlocutory. To authorize an appeal, the decree must be final in all matters within the pleadings, so that an affirmance of the decree will end the suit. Craighead v. Wilson, 18 How. 199; Bostwick v. Brinkerhoff, 106 U. S. 3, 1 Sup. Ct. 15; Parsons v. Robinson, 122 U. S. 112, 7 Sup. Ct. 1153; Railway Co. v. Simmons, 123 U. S. 52, 8 Sup. Ct. 58; Iron Co. v. Martin, 132 U. S. 91, 10 Sup. Ct. 32; McGourkey v. Railway Co., 146 U. S. 536, 13 Sup. Ct. 170.

We are of opinion, therefore, that the appellant here was not concluded by the decree of June 30, 1888, or by the order of February 3, 1892, overruling the motion for rehearing, and that the present appeal was properly taken from the final decree of June 1, 1893, awarding judgment against the appellant for the amount of the appellee's claim. The judgment must be reversed.

Upon Petition of the Appellee for Rehearing.

(May 31, 1894.)

JENKINS, Circuit Judge. The argument for the appellee rests upon misconception of the terms of the decree. It assumes that the court directed the sale of the road at the upset price of $175,000, the purchaser taking title subject to such claims as had been or might be adjudged to be prior in equity to the trust deed. If this were so, the court committed manifest error in directing the application of the proceeds of sale to the payment of any of the adjudicated claims. The contention rests on fundamental error, rendering vicious the whole argument. The decree directs a sale fixing a minimum price to be received, but does not subject the title of the purchaser to any reserved lien. It directs that, of the amount bid, $25,000 should be paid in cash, and that such other proportion of the purchase price should be paid in cash as the court may from time to time direct, to meet claims which the court had adjudged, or might thereafter adjudge, to be prior in equity to the trust deed. The right reserved to resell was upon failure of the purchaser to comply with the order of the court in that regard; that is, in respect to the proportion and amount of the purchase price that should be ordered to be paid in cash. There is no obscurity in the language employed. There was not, as counsel suppose, any reservation of right to resell in case of failure by the purchaser to comply with any order directing payment of claims in priority to the trust deed. The purchaser conformed to every order in respect to the sale, and paid the whole amount of the bid in the manner provided

by the decree. If error intervened in the distribution of the proceeds, or in stating a minimum price insufficient to pay all claims, it was not a fault to be charged upon the purchaser. We are fully satisfied of the correctness of our decision. Rehearing denied.

DEWEESE v. REINHARD et al.

(Circuit Court of Appeals, Eighth Circuit. May 7, 1894.)

No. 364.

PUBLIC LANDS—HOMESTEAD ENTRY—GRANT TO STATE—ANNULLING CERTIFICATION.

Lands selected by a state under a grant by congress (Act Sept. 4, 1841) were certified to it, and thereafter conveyed by it and its grantees. Several years afterwards, a settlement was made thereon by one claiming under the homestead laws, but his application for entry and his final proofs were rejected on the ground of such previous selection and certification. *Held*, that he stood in no such privity with the United States as would entitle him to maintain a suit to cancel the certification to the state, or to obtain the benefit thereof, on the ground that the lands were not subject to selection by the state.

Appeal from the Circuit Court of the United States for the District of Nebraska.

This was a suit by James M. Deweese, Jr., against Jacob Reinhard, Louisa Fieser, Louis P. Fieser, Bertha M. Kraus, and George C. Kraus, to quiet title to certain land. The bill was dismissed. Complainant appealed.

This is a suit which was brought by the appellant for the purpose of quieting his title to the N. E. ¼ of section 14, township No. 5, range 3, in Saline county, state of Nebraska. The record discloses the following facts:

That the land in controversy, together with other lands, was selected by the state of Nebraska, on March 26, 1868, under the provisions of an act of congress approved September 4, 1841 (5 Stat. 455, § 8), which granted to each new state thereafter admitted into the Union 500,000 acres of land for the purposes of internal improvement; that such selection of lands was duly approved by the secretary of the interior on March 29, 1870, who caused the same to be duly certified to the state of Nebraska on April 7, 1870; that the state afterwards granted 100,000 acres of land, including the tract now in controversy, to the Midland Pacific Railway Company, and on July 19, 1871, issued a patent therefor to the railway company; that the appellees have since acquired the title of the Midland Pacific Railway Company to the premises in dispute, under and by virtue of several mesne conveyances, the last of which was a deed to the appellees, executed on November 11, 1878. Nearly five years after the date of the conveyance to the appellees, to wit, on May 31, 1883, the complainant settled on the tract of land now in question, claiming the right to make such settlement under and by virtue of the homestead laws of the United States. In support of his settlement, he prepared the requisite affidavit, and an application for permission to enter the land as a homestead, and presented the same to the register of the proper land office of the United States at Beatrice, Neb., on May 31, 1883. The application for a homestead entry was forthwith rejected by the register on the ground that the lands had been selected by the state on March 26, 1868, and that such selection had been approved by the secretary of the interior on March 29, 1870. An appeal was taken by the complainant from the decision of the register rejecting the aforesaid application, which appeal was based on the ground that the lands in dispute, at the time of their selection by the state, lay within the 20-mile limits of a grant made to the Burlington & Missouri River Railroad Company in Nebraska by an act of congress approved on July 2, 1864, and that the same

were not subject to selection by the state of Nebraska under the act of September 4, 1841. On the hearing of the aforesaid appeal before the commissioner of the general land office, that officer affirmed the action of the register in rejecting the application for a homestead entry. Such order of affirmance was made by the commissioner on July 7, 1883. On a further appeal to the secretary of the interior, the action of the commissioner of the general land office was affirmed on January 18, 1884, the secretary stating, in substance, that the previous certification of the lands to the state of Nebraska was a final adjudication of all questions pertaining to the title to the lands in controversy, so far as the department of the interior was concerned. Notwithstanding the foregoing proceedings, the appellant continued in possession of the lands until July 6, 1888, and on that date, after due notice, he presented the requisite proofs to the register of the land office at Beatrice, Neb., that he had resided on and cultivated the lands in question for a period of five years and more from the date of his entry. These final proofs of residence and cultivation were likewise rejected by the register, because the lands had been selected by, and duly certified to, the state of Nebraska in the years 1868 and 1870. The contention of the complainant, before the circuit court, was that the lands had been unlawfully selected by and certified to the state, because they were within the limits of an antecedent grant to the Burlington & Missouri River Railroad Company. At the same time, however, he contended that they were subject to homestead entry, and that they had been duly appropriated by himself under the provisions of the homestead laws. The bill contained a prayer in the alternative that the complainant's title might be quieted against the claim of the defendants, or that, in lieu thereof, it might be decreed that the defendants took the legal title to the premises in controversy in trust for the complainant, and that they might be required to convey the same to him. The bill was dismissed on final hearing for want of equity, whereupon the complainant prayed an appeal to this court.

G. M. Lambertson (J. W. Deweese, on the brief), for appellant.

Charles E. Magoon and Charles Offutt, for appellees.

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

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

At the threshold of this case, we are confronted with the question whether the appellant stands in such privity with the United States as entitles him to maintain a suit to annul the certification of the land in dispute to the state of Nebraska, which act on the part of the secretary of the interior had the legal force and effect of a patent. Frasher v. O'Connor, 115 U. S. 102, 5 Sup. Ct. 1141. It will be observed from the foregoing statement that the alleged equitable title which the appellant seeks to enforce not only had its origin in a settlement made upon the land in controversy more than 15 years after it had been certified to the state in supposed compliance with the provisions of existing laws, but that such settlement was also made by the appellant with full knowledge, actual or constructive, that the state of Nebraska had issued a patent for the land more than 12 years previous to the attempted settlement, and that in the meantime the land had been several times conveyed to private parties. Moreover, the appellant's application to enter the land as a homestead was rejected by the proper land office on the very day that his entry upon the land is said to have been made, because of the prior selection of the same by the state, and, on an appeal duly prosecuted to the commissioner of the general land

office and to the secretary of the interior, the action of the local land officer in rejecting the application for entry was speedily approved by both of those officers. There is nothing in the record now before us which shows that any officer of the land department at any time recognized the appellant's right to enter the land as a homestead, or authorized the settlement thereon which he saw fit to make. From the date of his entry, on May 31, 1883, until the rejection of his final proof, in July, 1888, the appellant appears to have occupied the premises without the sanction of any officer of the government, either express or implied. It is insisted, however, that the appellant has succeeded to all of the rights of the United States with respect to the land in question, and is entitled to challenge the appellees' title thereto, notwithstanding the facts aforesaid, because the laws of the United States gave him the right to appropriate the land as a homestead, which right could not be impaired or defeated by the officials of the land department, it being land that had been unlawfully selected by the state. We do not dispute the general proposition that a person becomes the equitable owner of a tract of land forming a part of the public domain, if it has been surveyed and placed on the market, when he makes a prior settlement thereon under the homestead or pre-emption laws of the United States, and subsequently complies with all of the terms and conditions of those laws which entitle him to a patent. It may also be conceded that the right of a homestead or pre-emption claimant to a patent, when he has made a lawful settlement, and done everything required of him to perfect his claim, cannot be prejudiced either by the intentional misconduct of the officers of the land department, or by their mistakes of law or neglect of duty. Moreover, it may be admitted that the holder of an equitable right or title to a tract of land, which has been acquired in the manner aforesaid by a lawful settlement thereon, and by the performance of such other acts as the law prescribes to entitle a settler to a patent, stands in privity with the government, in such sense that he may maintain a bill to cancel a patent erroneously issued to a third party for the same land after the settler's rights had become vested. These principles find sufficient illustration and support in the following cases: Lytle v. Arkansas, 9 How. 314; Shepley v. Cowan, 91 U. S. 330; Barnard's Heirs v. Ashley's Heirs, 18 How. 43; Cunningham v. Ashley, 14 How. 377; Wirth v. Branson, 98 U. S. 118.

But is it a necessary or even a reasonable deduction from these premises that, after the government has granted a patent for a tract of land forming a part of the public domain, a third party may then make a settlement on the same land without the consent of those officers of the government who are charged with the custody and control of the public lands and with the administration of the land laws, and, having made a settlement under such circumstances, may then maintain a bill in his own name to annul the prior grant, which the government, for a long period of years, has shown no disposition to disturb? We think that this question should be answered in the negative, both upon principle and authority. One who makes a homestead or pre-emption settlement under the cir-

cumstances last supposed, and with the knowledge that it has been patented to, and is claimed by, another, does so with the evident intention of taking advantage of the mistakes of others, and, in the forum of equity, should not be allowed the same privilege of assailing a patent which may justly be conceded to one who seeks to enforce an equitable title to land, that had its origin in a settlement made before the government parted with the legal title. In the former case, a person who makes a settlement with knowledge of a prior grant thereby places himself in an attitude of open hostility to the executive department of the government, usually for the purpose of speculating on a flaw in his neighbor's title; and, while occupying that attitude, we think that he should not be allowed, as complainant in a suit in equity, to challenge the validity of the prior grant, which it may be inexpedient, and clearly inequitable, to call in question. Cragin v. Powell, 128 U. S. 692, 700, 9 Sup. Ct. 203. The government ought to have as much discretion as a private grantor, in determining whether it will assail the validity of its own grant, especially in cases like the one at bar, where no right had attached in favor of third parties when the grant was made. If there is a defect in the appellees' title, congress may deem it both expedient and just to remedy the defect by appropriate legislation; and no one can doubt its power to do so, notwithstanding the title asserted by the complainant, in view of the circumstances under which that title was acquired.

We think that the authorities fully support the foregoing views. In Cooper v. Roberts, 18 How. 173, the plaintiff claimed a tract of land under a patent issued by the state of Michigan, which was occupied by the defendant as mineral land, under a lease executed by the secretary of war. It was held that the land had been lawfully appropriated by the state, as school land, at the date of its patent, under an act of congress granting to the state the sixteenth section in each township for the maintenance of public schools. Thereupon, the defendant sought to impeach the patent on the ground that it had been issued in violation of the laws of Michigan. But the court said, speaking through Mr. Justice Campbell, that the defendant did not claim in privity with the state of Michigan, and was not in a position to question the validity of its grant; that, as the state had not seen fit to complain of the patent, the defendant could not be heard to do so. In the case of Spencer v. Lopsley, 20 How. 264, 273, the same principle was reaffirmed and applied. In that case the plaintiff claimed under a title which had emanated from the states of Coahuila and Texas years before the defendant had made a settlement on the premises in dispute. The defendant attempted to impeach the grant on which the plaintiff relied because it had not been executed in conformity with the laws of the state or sovereignty from which it had emanated; but the court said, again speaking through Mr. Justice Campbell, that he was a mere volunteer, who had entered on the land after it was granted, and that he had no commission to challenge a grant which the state, for a quarter of a century, had not seen fit to disturb. The case of Beard v. Federy, 3 Wall. 478, also seems to us to have an important

bearing on the point at issue. In that case the act of congress authorizing the issuance of the patent under which the plaintiff claimed provided that the patent should be "conclusive between the United States and said claimants only, and should not affect the interests of third persons." But the supreme court held that the term "third persons," as used in said act, did not embrace all persons who might assert a title to the land covered by the patent, but only such persons as might have acquired a superior equitable title thereto by acts done before the patent was issued, and that, as against all other persons, a patent issued under the provisions of the act was conclusive, and not subject to attack. It was also held in Field v. Seabury, 19 How. 323,—and the doctrine is now well established,—that a patent for land can only be impeached for fraud at the suit of the government. See, also, to the same effect, Smelting Co. v. Kemp, 104 U. S. 636, 657; Vance v. Burbank, 101 U. S. 514; Crommelin v. Minter, 9 Ala. 594; Doll v. Meador, 16 Cal. 295. It will be found, we think, on a critical examination of all of the federal adjudications, that in no case has a person who had a merely equitable claim to a tract of land as yet been allowed to maintain a bill to cancel a patent, or to quiet his title, as against an outstanding patent issued to a third party for the same land, or to have the patentee adjudged to be a trustee of the legal title, unless the equitable title asserted by the complainant had its origin in a settlement made upon the land before the patent was issued, and before the patentee had done any act with a view of appropriating the property, and securing a patent therefor. In no case does it appear that a bill of the present nature has been successfully prosecuted by a claimant whose rights had their origin years after the government had parted with the legal title. In making this statement, we have not overlooked the decision in Doolan v. Carr, 125 U. S. 618, 8 Sup. Ct. 1228, on which the appellant's counsel places much reliance. In that case it was decided that a defendant in a suit in ejectment had the right to show by appropriate evidence that the patent under which his adversary claimed was utterly void. The court appears to have sustained the admissibility of such evidence, in obedience to the old and familiar rule that in an ejectment suit the plaintiff always exposes his own title to attack, and must recover altogether on the strength thereof, rather than on the weakness of his adversary's title. But we do not understand that the court intended to go beyond that point, or to hold that a homestead claimant may maintain a bill in equity to cancel, or to obtain the benefit of, a patent issued to a third party, when, as in the present case, the settlement on which the claimant relies was made without the sanction of the officers of the land department, and years after the patent in question was issued. That view of the case seems to us to be utterly irreconcilable with sound doctrine and the decisions heretofore cited.

Our conclusion is that the complainant's bill was properly dismissed for the reasons herein stated, and, without deciding the other questions that are presented by the record, the decree of the circuit court will be affirmed.

ANDREWS et al. v. NATIONAL FOUNDRY & PIPE WORKS, Limited.

(Circuit Court of Appeals, Seventh Circuit. January 11, 1894.)

No. 92.

1. WATER COMPANIES—MORTGAGE—FRANCHISE.
A water company mortgaged, with covenants of warranty, "all the rights, privileges, immunities, franchises, and powers which were granted in and by" a certain city ordinance. *Held*, that the mortgage covered all franchises owned by the company and enumerated in said ordinance, whether the same were in fact granted by the city or by the state.

2. MUNICIPAL CORPORATIONS—POWER TO GRANT—FRANCHISE—WATER COMPANY.
A city whose charter gives it "the general powers possessed by municipal corporations at common law," and also gives it express power "to provide for the erection of waterworks," has power to grant to a corporation a franchise to supply the inhabitants of the city with water.

3. APPEAL—APPELLATE JURISDICTION—PRELIMINARY INJUNCTION.
A preliminary injunction made upon a prima facie showing is an "interlocutory order" of injunction, from which an appeal to the circuit court of appeals will lie. Richmond v. Atwood, 5 U. S. App. 151, 2 C. C. A. 596, and 52 Fed. 10.

4. SAME—EFFECT OF REVERSAL.
A decision on appeal, reversing an order granting a temporary injunction, is conclusive only of the rights of the parties upon the showing made in support of the order.

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

Creditor's bill by the National Foundry & Pipe Works, Limited, against the Oconto Water Company, S. D. Andrews, W. H. Whitcomb, Charles C. Garland, F. H. Todd, George W. Sturtevant, Jr., S. W. Ford, Matt S. Wheeler, A. J. Elkins, N. S. Todd, Minneapolis Trust Company, Oconto National Bank, City of Oconto, and Oconto City Water-Supply Company.

An order was entered appointing a receiver for the property of the water company and restraining the defendants from interfering therewith. Defendants Andrews and Whitcomb appeal.

This appeal is from a preliminary order of injunction granted in connection with an order appointing a receiver of the property and effects of the Oconto Water Company. By the terms of the order, the appellants, Andrews & Whitcomb, with others, were restrained "from holding, managing, or interfering in any way with the rights, franchises, property, rents, profits, bonds, and affairs of said Oconto Water Company and the said water plant in the hands of said receiver, and from asserting any right, title, or interest in the property or the rents, issues, and profits thereof, until the further order of the court." When this order was made, Andrews & Whitcomb were in possession of the waterworks, claiming title by purchase at a foreclosure sale under a mortgage made to them by the Oconto Water Company to secure the repayment of money loaned which was used in the construction of the plant. The appellee, at whose instance the receiver was appointed and the injunction granted, was a judgment creditor whose execution had been returned unsatisfied. For a detailed statement of the facts, reference is made to the opinion delivered in the circuit court, reported in 52 Fed. 29. The mortgage under which the appellants assert title was executed in pursuance of the contract of September 13, 1890, whereby it was agreed that there should be a transfer in trust to the appellants "of the Oconto waterworks franchise as issued to said Oconto Water Company;" but, by its own terms, the mortgage or deed of trust was of

"all the rights, privileges, immunities, franchises, and powers, of whatsoever name or nature, which were granted unto the said Oconto Water Company in and by that certain ordinance passed by the common council of said city on the ninth day of July, A. D. 1890, being ordinance No. 153," etc.; following which the mortgage proceeds to say: "To have and to hold the said rights, privileges, immunities, franchises, and powers, and each and all thereof, unto the said Andrews & Whitcomb, and unto their heirs and assigns forever; and the said Oconto Water Company, for itself and its successors, hereby covenants and agrees to and with the said Andrews & Whitcomb that it has good right and lawful authority to sell, assign, transfer, and set over in the manner aforesaid all of said rights, privileges, immunities, franchises, and powers, and that it is the owner and holder of all thereof on the date hereof." The first section of the ordinance contains the granting clause, and reads as follows: "Section 1. That the Oconto Water Company, its successors and assigns, be and are hereby authorized, subject to the limitations herein or by law provided, to construct, own, maintain and operate water-works in the city of Oconto, to lay pipes for the carrying and distributing of water in any of the streets, avenues, alleys, lanes, bridges or public grounds of the city as now or may hereafter be laid out, to acquire and hold as by law authorized any and all real estate easements and water rights necessary to that end and purpose, with all necessary and proper buildings, wells, conduits or other means of obtaining water supply, with all necessary machinery and attachments thereto to supply the city and inhabitants thereof with good and wholesome water, suitable for fire and domestic purposes, and for this purpose may enter upon any street, avenue, alley, lane, stream, bridge or public ground under control of the city, to take up any pavement or sidewalk thereon, and make such excavations as may be necessary for the laying of such pipe and attachments; provided, that such use of such ground be made with the least practical inconvenience to the inhabitants of said city; that such excavations be guarded by barricades wherever necessary and lighted at night, and that such sidewalk, pavement or excavation be replaced by and at the expense of the grantee, its successors or assigns, in as good condition as before, as nearly as practicable, and with the least possible delay. Said grantee and its successors or assigns shall assume all risk of accidents arising from the construction and operation of said water works and shall save the city harmless from all damages therefor." The city of Oconto by its charter (chapter 56, Laws Wis. 1882) is given "the general powers possessed by municipal corporations at common law," and among other specified powers is authorized "to enact, enforce, alter, amend and repeal ordinances, rules and by-laws, for the benefit of the trade, commerce and health," and "to provide for the erection of water-works for the supply of water to the inhabitants of the city." By section 930a of chapter 125 of the Acts of 1879, every city of Wisconsin was authorized "to permit," subject to rules and conditions of its own choice, "the laying of pipes in the streets and alleys and the maintenance and use of such pipes for the purpose of conveying water," etc.

The Oconto Water Company was incorporated July 8, 1890, under the general law of the state, which required the articles of incorporation to contain a statement "of the business or purposes" of the organization; and, in compliance with that requirement, the articles stated that this company was formed "for the purpose of constructing and operating a system of waterworks within the city of Oconto, in Wisconsin, for supplying said city and its inhabitants with water for protection against fire, and for domestic, manufacturing, and other purposes." Upon an analysis of the several statutes and the ordinance referred to, the court below reached the conclusion that the water company received its franchises directly from the state and not from the city under the ordinance mentioned, and that the mortgage, and the decree of foreclosure and sale thereunder, limited as they were by their terms to franchises granted by the ordinance, vested the appellants with no interest in the property or franchises of the water company. Upon this point the court said: "At the threshold of the inquiry, the court is confronted with the question what rights Andrews & Whitcomb acquired under the agreement of September 13, 1890, the instruments executed pursuant thereto, and the foreclosure of the rights thereby acquired. The grant to them was of 'all the rights, privileges,

immunities, and powers, of whatever name or nature, which were granted unto the said Oconto Water Company by the ordinance of the city of Oconto.' What rights could the city lawfully grant, and what were granted? The solution of the questions depends upon the powers conferred upon that municipality. The city by its charter is vested with the general powers possessed by municipal corporations at common law, and with certain governmental powers specifically defined in its charter, and with authority to enact and enforce ordinances under the 'general welfare' clause usual in charters of municipal corporations, and specific power is vested touching various matters of municipal concern. Laws Wis. 1882, c. 56. The general power is conferred upon cities to borrow money and to issue negotiable bonds for the purchase or erection of waterworks. Rev. St. Wis. § 942. By chapter 125, Laws 1879 (Sanb. & B. St. § 930a), the common council of every city is authorized to permit, subject to such rules and regulations as may be imposed, the laying of pipes in the streets of the city, and their maintenance and use, for the purpose of conveying water or steam under the surface of the streets. By the general statute entitled 'Of Cities' (Laws 1889, c. 326; Sanb. & B. St. c. 40a), cities are authorized to own and operate waterworks, and to legislate on all matters with reference to their construction, operation, management, and protection (section 925N). In the chapter entitled 'Organization of Corporations' (Rev. St. Wis. c. 86), under which the Oconto Water Company confessedly had being, it is enacted that 'any corporation formed for the purpose of constructing and operating water-works in any city or village of this state may make and enter into any contract with such city or village to supply such city or village with water for fire and other purposes upon such terms and conditions as may be agreed upon, and may, by the consent of, and in the manner agreed upon, with the proper authority of such city or village, use any street, alley, lane, park, or public grounds for laying water pipes therein; * * * and any such city or village may, by contract duly executed by the proper authorities, acquire the right to use the water supplied by such corporation, or such portion thereof as it may desire, upon such terms and conditions as may be agreed upon by such corporation and the authorities of such city or village.' Section 1780, as amended. These are all the statutory provisions which I have been able to find touching the question of municipal authority and corporate franchise here presented.

"It may be difficult to enumerate the common-law powers of a municipal corporation. It is certain, however, that the conferring of franchises upon other corporations is not one of them. Under its charter, by a well-known principle of law, it can exercise no power not expressly granted or fairly to be implied. It may be that, by virtue of its duty to care for the public health and safety, a city has the power to contract for a supply of water; but it cannot, without express legislative authority, construct, maintain, or operate waterworks. Dill. Mun. Corp. (4th Ed.) § 27. Without like authority it cannot grant exclusive right to use the streets, and a distributing plant located in the streets is essentially a monopoly. The right to use the public highways for gas pipes or water mains rests in legislative authority, directed, granted, or delegated to municipalities. So, likewise, the right to operate waterworks is of legislative origin, and can only be conferred by a municipal corporation when expressly authorized by the supreme legislative power of the state. It cannot be doubted that the common council of the city of Oconto, in the enactment of the ordinance in question, entertained a broad and generous view of its own powers. It was pleased to confer, or attempt to confer, upon this water company, the power 'to construct, own, maintain, and operate waterworks in the city of Oconto, * * * to acquire and hold, as by law authorized, all real estate, easements, and water rights necessary to that end and purpose, with all necessary and proper buildings, with conduits or other means of obtaining water supply, with all machinery and attachments thereto,' in addition to the right to use the streets and public grounds of the city for its water mains and pipes, and undertook to regulate contracts and dealings between the water company and the inhabitants of the city, using water, and to bestow upon the company the right of access to the homes of consumers of water, and to regulate its exercise. If the right to confer these great privileges and franchises, and to exercise inquisitorial powers, can be pointed out, the

ordinance is effective to the end designed. No ordinance, however, can enlarge, vary, or diminish the powers of a municipality.

"Whence came that power? I find no legislative warrant for it. The charter of the city does not confer it. No general law applicable to the city of Oconto grants it. The chapter entitled 'Of Cities' (Sanb. & B. St. c. 40a) was enacted in 1889 (Laws 1889, c. 326). It provides that no city then incorporated shall be affected by the provisions of the act, unless it shall adopt the same for its government in the manner provided. Sanb. & B. St. § 925d. The present charter of the city of Oconto was enacted in 1882. Laws 1882, c. 56. There is no suggestion in the record that the city of Oconto has ever adopted the provisions of the general law, and we are not at liberty to assume that it has. Failing such adoption, the city is not affected by, and derives no power from, that general law, assuming that the chapter has relation to waterworks owned and operated by a corporation other than the municipality, which may be doubtful. The city is therefore only authorized to permit the laying of pipes in the streets, and their maintenance and use. Sanb. & B. St. § 930a. That is not a grant of power to bestow a franchise, but permission to suffer an easement. The law of its incorporation confers upon the Oconto Water Company its franchise (1) to own and operate the waterworks; and (2) to use the streets of the city. Id. § 1780. The former power is without condition; the latter is subject to the assent of the municipality. The practical efficacy of the franchise may depend upon the discretionary act of the city. The franchise is not, however, derived from that discretion, but from the will of the legislature. The law authorizes the city to assent to the exercise of a power granted by the statute. The grant of power to the water company, as to the use of the streets, becomes operative only upon the happening of that contingency of municipal assent. That is not a grant of power to a city to confer a franchise. Sims v. Railway Co., 37 Ohio St. 556. The matter is somewhat analogous to the case of an act of the legislature taking effect only upon the assent of the people expressed at the polls, which is now generally held to be valid, upon the ground that the law derives its potency from legislative will, and not from the assent of the poll. So, here, the right to use the streets was conferred upon the Oconto Water Company by the law of its incorporation, subject to the contingency of the assent of the city. The franchise emanates from the legislature, not from the municipality. The ordinance is not an exercise of legislative power, but of the right to contract. City of Indianapolis v. Gas-Light Co., 66 Ind. 396.

"The case of State v. Madison St. Ry. Co., 72 Wis. 612, 40 N. W. 487, is not in conflict. The ruling there was to the effect only that, considering the terms of Rev. St. Wis. § 1862, the provisions of the ordinance there under review, by force of the statute, became part of the law of the incorporation of the railway company, and for violation of such provision an action could be maintained by the attorney general to vacate the charter or annul the existence of the railway company, under the provisions of Id. § 3241. Applying the doctrine of that case to the one in hand, the most that can be said is that the conditions of the assent of the city to the use of its streets inhere in and are part of the law of incorporation of the defendant water company. None the less, however, are its franchises derived from the legislature, and not from the municipality. It is also to be noticed that there is a marked difference in the statute under consideration in that case and those in question here. Section 1862, there considered, provides that 'any municipal corporation * * * may grant to any such corporation [a street-railway corporation] such use, and upon such terms as the proper authorities shall determine, of any streets or bridges. * * * Every such road shall be subject to such reasonable rules and regulations * * * as the proper municipal authorities may by ordinance from time to time determine.' There the legislature does not directly grant to the railway corporation any power to use the streets, but delegates to the municipality the right to grant the power. Here the power is in terms conferred by the legislature upon the water company, subject to the assent of the municipality. There the street railway is subject to constant municipal control. Here the water company is independent of municipal direction except in the use of the streets. It is, I think, clear that the power possessed by the city of Oconto was only to yield its assent to a legislative grant of the

use of its streets, and to contract for a supply of water. The franchises of the water company were conferred by the legislature of the state, and not by the ordinance of the city.

"The question then recurs, what rights passed to Andrews & Whitcomb under the instruments of transfer and their foreclosure? By their terms they convey or assign only such rights and privileges as were granted the water company by the ordinance of the city. No other franchise or rights are attempted to be conveyed. If the right to the use of the streets may be said to have proceeded from the municipality, it was, standing alone, a mere easement. The transfer of such naked right could not carry with it the ownership of the mains, nor the title to the plant as an entirety, nor the franchise to operate the plant, nor to the land upon which the plant was situated. So that if it be true, as is here claimed, that a naked franchise is transmissible, that the franchise is the main and the plant the incident, and that a transfer of the former carries with it the title to the tangible property essential to its use and beneficial enjoyment, it still remains that here there was no transfer of the franchise to operate the plant, and consequently no transfer of tangible property. It therefore results that the claim of Andrews & Whitcomb to the plant is unfounded in law, and its possession by them wrongful as against the complainant."

W. H. Webster, for appellants.

George H. Noyes, for appellee.

Before WOODS, Circuit Judge, and BUNN and BAKER, District Judges.

WOODS, Circuit Judge (after stating the facts). Without regard to the question whether the Oconto Water Company received its franchises directly from the state, or indirectly through the city of Oconto, by force of the ordinance which purported to grant them, we are of opinion that the mortgage in question may be upheld. The appellants, it is not disputed, advanced large sums of money to the water company in the belief that they were receiving a valid security; and, while they are presumed to have known the law, it is not to be presumed, if there is reasonable escape from it, that either party to the transaction intended a vain thing. "Interpretatio facienda est ut res magis valeat quam pereat;" and other familiar maxims lend support to the requirement that a contract or deed shall be so construed as to have effect rather than so as to be made void. By the literal terms of the mortgage and of the decree of foreclosure, upon which the title of the appellants depends, there was a conveyance or assignment of "all the rights, privileges, immunities, franchises, and powers, of whatever name or nature. which were granted in and by that certain ordinance," etc., and if, upon a proper interpretation of the statutes touching the question, no mortgagable right, privilege, or franchise was granted in or by the ordinance, as distinguished from a direct grant by the state, then by a strict construction the mortgage was, as it was held to be, ineffective and meaningless. But not by the words alone should a writing be interpreted. "The rule is to regard the intention, rather than the words;" and here the evident intention, deducible from the whole instrument, was to mortgage the rights and franchises which the ordinance granted in terms, or which it purported to convey. The resolution whereby the water company declared its acceptance of the ordinance, and "of the franchise thereby granted," shows that both

parties entertained an equally broad and generous view of the powers of the common council of the city in the premises; and, when the deed of trust came to be drawn, it was only natural that for certainty of description reference should be made to the ordinance by which the rights of the company were defined, and, as the parties supposed, were granted. And even if this supposition was mistaken, must it be held that the entire purpose of the parties failed and that notwithstanding the covenant of the water company that it was "the owner and holder," and had "good right and lawful authority" to make transfer and sale "of said rights, privileges, immunities, franchises, and powers," "in the manner aforesaid," yet the instrument is a total nullity? Indeed, why should it not be held that by that covenant the water company is estopped to deny that its franchises were granted by the ordinance? Or must it be said that the covenant covers only rights and franchises which were granted by the ordinance, and, like the granting clause, is itself void because no franchise came to the company in that way? It would seem more reasonable, the ordinance having been made a part of the deed by reference, as if copied into it, to treat the covenant as covering the rights and privileges named in the ordinance, whether derived from one source or another. To say the least, upon the whole instrument, it is only reasonable and in accord with the canons of construction to read the expression, "which were granted," etc., as if it were, "which in terms were granted unto the said Oconto Water Company in and by that certain ordinance," etc. The added words are fairly implied, and the addition, without doing violence to any part of the writing, gives effect alike to the words of grant and covenant, and accomplishes the evident purpose for which the deed was executed.

But, if compelled to put upon its terms a strict and literal construction, we should still consider the mortgage valid, because we are not able to agree that the Oconto Water Company, by force of the ordinance, received no right, privilege, or franchise which was capable of being mortgaged, and which could be properly described as granted in or by the ordinance. While "it is essential to the character of a franchise," as was held in Bank v. Earle, 13 Pet. 595, "that it should be a grant from the sovereign authority, and in this country no franchise can be held which is not derived from a law of the state," and while the right to the use of the public streets of a city by a gas company or water company, for the purpose of laying down its pipes, is generally considered to be such a franchise, it is well settled that the legislature of a state may confer the power to grant such franchises upon municipal corporations; though, when so granted, they are, nevertheless, to be regarded as derived from the state. The question here, therefore, is not whether the franchises of the Oconto Water Company were obtained from the state; they necessarily came, directly or indirectly, from that source. It is whether or not the common council of Oconto had been given the power to grant such franchises, and in this instance did grant those named in its ordinance. Without that ordinance, it is clear the water company could not

lawfully have laid its pipes in the streets of the city, nor have put into practical effect its "franchise to operate the plant,"—if it can be said to have had such franchise, by reason merely of its act of incorporation, and before the ordinance was passed. The city of Oconto, by its own charter, had the power, and therefore was under the duty, of caring for the public health. That power it could employ in any reasonable way; if it chose, for instance, by contracting for a water supply through pipes laid in the streets. The making of such a contract would, of necessity, carry with it the right, on the part of the contractor, to lay the pipes and to operate the plant. Such right is a franchise, and, the making of the contract operating by necessary implication as a grant of the privilege or franchise, the power given to make the contract was power to grant the franchise. But, besides the power to provide for the health of its inhabitants, the city of Oconto had the express power, apparently not brought to the attention of the court below, "to provide for the erection of waterworks for the supply of water to the inhabitants of the city." We do not agree with the suggestion of counsel that by this provision the city had no right to contract for a supply of water, and was authorized only to construct and operate a plant of its own. The authority extended to any reasonable method; and it follows that, before the Oconto Water Company was incorporated, the city of Oconto, by its own charter, had power, from the state, to grant franchises like those in question to any person or body capable of receiving them. By its act of incorporation the Oconto Water Company came into being, endowed, not with the right to establish and operate waterworks in Oconto, but with capacity to receive and exercise that right or privilege upon such terms as the city should consent to grant. But, though capable of receiving, it could acquire no complete or effective right or franchise without the consent, and there is no impropriety, legal or verbal, in saying without the grant, of the city. The ultimate source of such franchises in all cases being the state, the difference between a municipal power to grant them and authority to contract for or to consent to the exercise of them is a difference of words rather than of substance. The language of the court of appeals of New York in the case of People v. O'Brien, 111 N. Y. 1, 18 N. E. 692, is pertinent. Speaking of the Broadway Surface Railroad Company, the court said:

"On May 13, 1884, that company filed articles of association and became incorporated as a street railroad company under the provisions of chapter 252 of the Laws of 1884, a general act passed to authorize the formation of such corporations, pursuant to the mode introduced by the amendment to the constitution of 1874. By such incorporation the company became an artificial being, endowed with capacity to acquire and hold such rights and property, both real and personal, as were necessary to enable it to transact the business for which it was created, and allowed to mortgage its franchises as security for loans made to it, but having no present authority to construct or operate a railroad upon the streets of any municipality. This right, under the constitution, could be acquired only from the city authorities, and they could grant or refuse it at their pleasure. The constitution not only made the consent of the municipal authorities indispensable to the creation of such a right,

but, by implication, conferred authority upon them to grant the consent, upon such terms and conditions as they chose to impose, and upon the corporation the right to acquire it by purchase."

So, here, not by reason of a constitutional provision, but by statute, the ultimate efficient right could be acquired only by act and consent of the city authorities, which they could grant or refuse at their pleasure.

Whether or not, and to what extent, the mortgage of the franchises covers the plant of the company, need not now be considered.

The objection is made that the statute authorizes an appeal only from an "interlocutory order" of injunction granted "upon a hearing in equity;" that the order in this case was a preliminary one, made upon a prima facie showing, and is not appealable; but we concur in the opinion of the court of appeals for the first circuit that the statute was intended to extend the right of appeal "to all that class of interlocutory orders or decrees [of injunction] which interfere with the possession of property or operate in the restraint of trade." Richmond v. Atwood, 5 U. S. App. 151, 2 C. C. A. 596, and 52 Fed. 10. The order granting an injunction should be set aside, and it is so ordered.

On Rehearing.

(June 11, 1894.)

Before HARLAN, Circuit Justice, WOODS, Circuit Judge, and BUNN, District Judge.

WOODS, Circuit Judge. "A rehearing is asked for the purpose," says the petition, "of ascertaining definitely whether the following material questions are involved in the appeal, and, if so, whether they have been in whole or in part determined by the opinion filed or the decision rendered upon the hearing: First. Does the so-called 'mortgage of the franchise' cover the plant and other tangible property of the Oconto Water Company now in the hands of the receiver, and, if so, to what extent? Second. Should the order granting the injunction be wholly set aside, or only modified so far as it affects the rights or interest of Andrews and Whitcomb in the franchise? Third. Should the one hundred thousand dollars of bonds ordered delivered over to the clerk of the court as void be returned to Andrews and Whitcomb? Fourth. Was the so-called 'mortgage of the franchise' a valid instrument? Fifth. If such instrument was valid, was the same so foreclosed, and the franchise covered thereby so sold, as to give to Andrews and Whitcomb the title to, and right of possession of, any property held by the receiver?"

We do not deem it necessary, or perhaps proper, to speak more definitely in respect to any of these questions. The granting or refusal of an injunction or restraining order pendente lite has always been a matter of judicial discretion on the part of the court

or judge whose order was sought. If refused in the first instance, it might be granted at a later stage of the case or at the final hearing, and, if granted when asked, it might afterwards be revoked or modified, and at the final hearing be denied or made perpetual; and we are of opinion that it was not intended by the recent statute, which for the first time gave a right of appeal from interlocutory orders of injunction, that a decision upon the appeal from such an order should be conclusive upon the court in the further progress or in the final determination of the case. All that should be conclusively determined by such an appeal, we think, is that the order appealed from was a proper one when made, and therefore should be affirmed, subject to the discretion of the court thereafter to modify or annul it; or that, when made, the order was an improper one, and should be reversed or modified, subject likewise to the discretion of the court, upon a new or further showing, invoking the application of different rules or principles, to reinstate the order in the original or modified form, and at the final hearing to consider or reconsider all questions involved, whether of law or of fact, and give such judgment or decree as should seem right. From that judgment the aggrieved party would of course have the right to appeal and to obtain thereon a decision in all respects final. Notwithstanding the rule in respect to final judgments that, on a mandate from the supreme court affirming a decree, the circuit court must execute its decree as affirmed (Durant v. Essex Co., 101 U. S. 555), it has been decided that the affirmance of an interlocutory order of injunction does not operate to deprive the circuit court of its inherent power to suspend the injunction, whenever the ends of justice call for the exercise of such power (Edison Electric Light Co. v. U. S. Electric Lighting Co., 59 Fed. 501, 8 C. C. A. 200); and by the same principle, we think, a decision on appeal reversing or modifying such an order should be deemed conclusive only in respect to the particular order reviewed, and that in the further progress and upon final hearing of the case in the circuit court the opinion and ruling on the appeal should be regarded as advisory only,—more or less controlling, according to the circumstances. In this case the circuit court looked upon the mortgage of the appellants as a nullity. For the reasons given in the opinion, this court reached the opposite conclusion. But if, instead of the positive conviction declared, we had entertained grave doubt upon the point on which the question turned, it would have been our duty to rule just as we did, because an injunction before final hearing should be allowed only when the right to it is clear. Standard Elevator Co. v. Crane Elevator Co., 6 C. C. A. 100, 56 Fed. 718. It is plain, therefore, that our decision did not involve, and should not be regarded as, a technical and final adjudication, for the purposes of the case, of the points which we considered in reaching our conclusion that the order of the circuit court was wrong, or of the questions propounded in the petition for rehearing.

The question remains, what should be the scope of the mandate? It is not necessary to consider whether or not under the statute an appeal may be had from an order appointing a receiver. On that

question, see Construction Co. v. Young, 59 Fed. 721, 8 C. C. A. 231; Dudley E. Jones Co. v. Munger, etc., Co., 2 U. S. App. 188, 1 C. C. A. 668, 50 Fed. 785; Richmond v. Atwood, 2 C. C. A. 596, 52 Fed. 10; Pennsylvania Co. v. Jacksonville, etc., Ry. Co., 55 Fed. 131, 5 C. C. A. 53; American Const. Co. v. Pennsylvania Co., 148 U. S. 372, 13 Sup. Ct. 758. The appointment in this case was of a receiver of the property of the Oconto Waterworks Company, and of that the appellants cannot complain. The wrong done them was in ordering them to surrender to the receiver the possession of the waterworks plant of which they were in possession, claiming title under the foreclosure sale, in directing the receiver to take possession thereof, and in enjoining them against asserting title or claim to the property. These features of the order are prohibitory or mandatory in character, and subject to review upon appeal. The order whereby certain bonds were required to be delivered to the clerk involves no present harm to either party, and need not be disturbed. The mandate therefore will be that those portions of the order of the circuit court whereby the receiver was directed to take and the appellants to surrender possession of property, excepting the bonds aforesaid, and the appellants enjoined from asserting title, be set aside, and that the possession be restored to the appellants, unless for some cause, not apparent in the record before us, the possession of the receiver should be continued. The petition for a rehearing is overruled.

BAKER, District Judge, who participated in the original decision, concurs.

ADKINS v. W. & J. SLOANE.

(Circuit Court of Appeals, Eighth Circuit. May 7, 1894.)

No. 344.

APPEAL—OBJECTIONS NOT RAISED BELOW—TRIAL BY COURT.

The sufficiency of the evidence to support a general finding by the court on a trial at law without a jury cannot be reviewed on writ of error, where the case was submitted by both parties without a request for a peremptory instruction on the facts, although a general exception was taken to the judgment at the time it was entered.

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

This was an action by attachment brought by W. & J. Sloane, a corporation, against Isaac Wolf, in which James G. Adkins filed an interplea claiming property taken under the attachment. On trial of the issues arising on the interplea before the court, a jury having been waived by stipulation, judgment was rendered for plaintiff. Adkins brought error, upon which the circuit court of appeals rendered an opinion affirming the judgment. 8 C. C. A. 656, 60 Fed. 344. Adkins moved for a rehearing.

Henry Wollman, Clarence S. Palmer, and R. O. Boggess, for plaintiff in error.

Nathan Frank, for defendant in error.

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

PER CURIAM. A motion for a rehearing has been filed in this case, which we have duly considered. The point is urged that, even though it be true that the circuit court made a general finding in favor of the defendant in error and against the plaintiff in error, yet there was no testimony whatever to sustain such finding. A general exception was taken to the judgment at the time it was entered, and, in view of that exception, it is now urged that it is the duty of this court to review the testimony on which the verdict was based, and to determine whether there was any evidence to support it. We think, however, that this view is erroneous. The case was submitted to the circuit court, by counsel for both parties, upon the evident assumption that there were certain issues of fact which must be determined by the court. The trial court was not asked to grant a peremptory instruction that, upon the undisputed facts, the intervener was entitled to recover; and, in the absence of such a request, it is well settled that we are not authorized to review the finding of the circuit court, even in the respect above stated. This precise question was decided by the supreme court in the cases of Martinton v. Fairbanks, 112 U. S. 670, 5 Sup. Ct. 321; Cooper v. Omohundro, 19 Wall. 65; Insurance Co. v. Unsell, 144 U. S. 439, 451, 12 Sup. Ct. 671; and by this court in Village of Alexandria v. Stabler, 1 C. C. A. 616, 50 Fed. 689. It is true that in the two cases last cited the trial was before a jury, but the same rule is applicable when the trial is before the court. To raise the issue in this court, on a writ of error, that there was no evidence to support the verdict of the trial court, it should be made to appear that the same issue was presented to the trial judge by an appropriate instruction. The motion for a rehearing is accordingly denied.

DIETZ v. LYMER.

(Circuit Court of Appeals, Eighth Circuit. May 7, 1894.)

No. 351.

1. APPEAL—DISCRETION OF TRIAL COURT—NECESSITY OF BILL OF EXCEPTIONS.
   The discretion of the trial court in sustaining motions to make answers more certain, and to strike out parts of answers as indefinite, and imposing costs as a condition of amending an answer, will not be reviewed on writ of error; especially where there is no bill of exceptions to make such motions part of the record.

2. SAME—OBJECTIONS NOT RAISED BELOW—TRIAL BY REFEREE.
   On writ of error to review a judgment entered on a referee's report in an action at law, where there is no written stipulation waiving a jury, and nothing showing a reference under the state statute, and where there is no bill of exceptions, and no specific exception was taken to the overruling of exceptions to the referee's report or to the judgment thereon at the time it was entered, no question is presented for review. Investment Co. v. Hughes, 8 Sup. Ct. 377, 124 U. S. 157, followed.

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

This was a suit brought by the receiver of the City National Bank of Hastings, Neb., against Charles N. Dietz, one of its depositors, to recover a balance of $2,237.78, which was alleged to be due and owing to the bank. Attached to the petition as an exhibit was an itemized account of the transactions between the parties, which showed an overdraft by the depositor to the amount last above stated.

The defendant filed an answer to the petition, in which he denied that he was indebted to the bank in the sum claimed, or in any sum whatever. The defendant further pleaded that his business transactions with the City National Bank had been conducted by and through an agent of his by the name of Elsemore; that Elsemore only had authority to collect money for and in behalf of the defendant, which had been realized by the sale of lumber belonging to the defendant, and authority to deposit the same in said bank after paying certain incidental expenses, and to remit the moneys so collected and deposited, to the defendant, by checks drawn on said bank. The answer further charged, in substance, that the bank had full knowledge of the limited authority of the defendant's agent; and that, notwithstanding such knowledge, it discounted many notes which were by said agent offered for discount, some of which notes had been received in payment for lumber belonging to the defendant, and were indorsed by said Elsemore in the name of the defendant, and others of which were signed by Elsemore in the name of the defendant and as his agent. It was further alleged that the bank paid many checks which were drawn on said account by Elsemore for purposes wholly foreign to the defendant's business; and that, by means of such unauthorized transactions, the bank had enabled the defendant's agent to convert to his own use many thousands of dollars which were deposited to the credit of the defendant in said bank. The answer also averred that the pretended statement of account between the bank and the defendant, which was filed as an exhibit, was erroneous in many respects, for the reason that many debit and credit items had been omitted therefrom.

Pursuant to a motion filed in behalf of the plaintiff, the circuit court ordered the defendant to make his answer, in some respects, more definite and certain; but this order appears to have been ignored by the defendant's counsel, as no amended pleading was filed in obedience to said order. Subsequently the court sustained a motion of the plaintiff to strike out certain designated portions of the aforesaid answer which it had previously held to be indefinite and uncertain. At a later day, and without further pleadings, the case was committed to a referee for trial under the following order of reference:

"On this 15th day of November, A. D. 1892, the parties to this cause, by their respective counsel, in open court consenting thereto, it is ordered by the court that this cause be, and the same is hereby, referred to Eleazer Wakeley, who is hereby appointed referee, and required to proceed as expeditiously as possible to take the evidence, and find the facts at issue, and report the same, together with his conclusions of law thereon, to the court. Said referee shall fix the time and place of hearing, and give to each party, or to counsel for the party, ten days' notice thereof; and said referee shall have power to issue compulsory process for the attendance of witnesses, sign any true bill of exceptions, and make rulings and orders in the case, and exercise all of the powers that might be made and exercised by this court at any stage of the case, and shall give to each party five days' notice of the filing of his report herein.

"[Signed] Elmer S. Dundy, Judge."

The referee in due time filed his report, containing an elaborate finding of facts and a single conclusion of law, wherein he recommended that the plaintiff's action should be dismissed. After the report had been filed, the defendant asked leave to file an amended answer, which leave was granted, on condition that the defendant pay all the costs that had accrued since the entry of a previous order granting leave to the defendant to file an amended answer. The defendant did not avail himself of the leave to amend his answer on the

condition last stated. Thereafter the case came on to be heard in the circuit court upon exceptions to the referee's report, which appear to have been taken by both parties; and, on the hearing thereof, the circuit court overruled those exceptions which had been filed by the defendant, and sustained those which had been interposed by the plaintiff. At the same time, it rendered a judgment in favor of the plaintiff, for $787.24, upon the report of the referee as it stood, after certain findings had been overruled and certain findings had been confirmed, without recommitting the report of the referee, and without any written stipulation being on file waiving a jury. To reverse that judgment, the defendant below sued out a writ of error.

C. S. Montgomery, Paul Charlton, and M. A. Hall filed brief for plaintiff in error.

Westel W. Morsman filed brief for defendant in error.

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

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

The defendant below has assigned for error the action of the circuit court in sustaining the several motions to make the answer more certain, and to strike out parts of the answer because they were too indefinite. He has also assigned for error the action of the trial court in requiring the defendant to pay certain costs as a condition precedent to filing an amended answer after the referee's report had been returned into court. These assignments of error cannot be noticed in this court, for the reason that they relate to matters in which the action of the trial court was purely discretionary, like its action upon a motion for a new trial or a motion for a continuance. In the federal appellate courts the propriety of orders of this nature will not be reviewed on a writ of error. Doswell v. De La Lanza, 20 How. 29, 32; Mulhall v. Keenan, 18 Wall. 342; Railroad Co. v. Howard, 1 C. C. A. 229, 49 Fed. 206; Railway Co. v. Heck, 102 U. S. 120; Davis v. Patrick, 6 C. C. A. 632, 57 Fed. 909, 913, and citations. Moreover, motions of this character form no part of the record, unless they are made such by a bill of exceptions; and no bill of exceptions was signed or allowed, so far as the record shows, either when the orders in question were made or afterwards. Jefferson City v. Opel, 67 Mo. 394; Marquis v. Clark, 64 Mo. 601.

It is further assigned for error that the circuit court improperly sustained the plaintiff's exceptions to portions of the referee's report, and erroneously entered a judgment against the defendant upon said report for the sum of $787.24. The last-mentioned assignment is met and overcome by the decision of the supreme court of the United States in Investment Co. v. Hughes, 124 U. S. 157, 8 Sup. Ct. 377. In that case, as in the one at bar, there was no allusion made to the state code of procedure in the order of reference, and for that reason it seems to have been held that the reference should be regarded as a common-law reference, and not as a reference under the statute of the state regulating references. Furthermore, there is no bill of exceptions in the present record, and for that reason the testimony taken by the referee and by him reported

is not before us. Neither does it appear from the record that the action of the circuit court in entering a judgment for the plaintiff on the referee's report, after it had been modified, was excepted to or challenged on the ground that the circuit court had no authority to enter such a judgment. It is true that in the judgment entry there is a notation to the effect that "the defendant, by his counsel, now excepts," but on what ground the exception was predicated we are not advised. It may have been urged, and such was most likely the contention of the defendant in the circuit court, that the judgment was erroneous, because the court had erred in overruling some of the referee's findings of fact. At all events, there is nothing in the record which indicates that the defendant contested the right of the court, on the hearing of the exceptions, to enter a judgment against the defendant without recommitting the case to the referee. For aught that appears, the defendant simply contended that the referee's report should be confirmed, and that his conclusion of law should be adopted, because all of his findings were sustained by the testimony, and that the judgment was erroneous because the court did not adopt that view. In the light of what has been said, we are unable to distinguish the case at bar from the one heretofore cited,—Investment Co. v. Hughes, supra. In that case it appears to have been ruled that the record presented no question which the supreme court could review on writ of error, because there was no bill of exceptions, no written stipulation waiving a jury, and because no specific exception had been taken to the judgment at the time it was entered, on the ground that the trial court should have recommitted the case to the referee when the exceptions to his report were sustained. It is obvious, we think, that the same defects exist in the present record; and, following the ruling thus made in the case heretofore cited, the judgment of the circuit court must be, and the same is hereby, affirmed.

HUNT et al. v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. May 7, 1894.)

No. 335.

1. APPEAL—HARMLESS ERROR—EVIDENCE ON SCIRE FACIAS.
   The admission, in a proceeding by scire facias, of oral evidence, merely corroborative of facts sufficiently proved by production of the appropriate record and files, which establish all the essential recitals in the writ, is not ground for reversal of the judgment.
2. SAME—OBJECTIONS NOT RAISED BELOW—PRESUMPTION.
   An objection to the admissibility in evidence of the transcript of proceedings before a commissioner, on the ground that it was not returned to and filed in the office of the clerk, cannot avail on appeal, where it was not made at the trial, and where, nothing to the contrary appearing in the record, it must be presumed that the commissioner discharged his duty in that respect.
3. BAIL IN CRIMINAL CASES—DEFENSE TO RECOGNIZANCE—ESTOPPEL.
   It is no defense to a recognizance that a warrant for removal of the accused from the district in which he was arrested was not signed by the

proper judicial officer, where, without objection on that ground, the accused applied for a reduction of the bail originally fixed, gave such recognizance for the reduced amount, and was discharged thereon.

4. SAME.

It is no defense to a recognizance that it was taken and acknowledged before the clerk of the district court, where this was done by order of the district judge, made at the request of the accused, and to secure his speedy discharge.

In Error to the District Court of the United States for the Western District of Missouri.

This was a proceeding by scire facias by the United States to enforce a forfeited recognizance against Robert H. Hunt and Hugh C. Ward, the sureties therein. On trial by the court, judgment was rendered for the United States. Defendants brought error.

Hugh C. Ward (Richard H. Field on brief), for plaintiffs in error.

G. A. Neal, U. S. Dist. Atty. for Western District of Missouri, for the United States.

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

THAYER, District Judge. The judgment that is involved in this case was rendered in a proceeding by scire facias to enforce a forfeited recognizance. The record shows that on September 20, 1892, an affidavit was filed before L. E. Wyne, United States commissioner for the western district of Missouri, which charged in substance and in legal effect that one Millard C. Curtis, who was the assistant cashier of the American National Bank of Kansas City, Mo., had theretofore embezzled certain moneys of said bank, and had made certain false entries in its books of account. A warrant was issued by the commissioner, addressed to the United States marshal for the western district of Missouri, for the arrest of said Curtis, which warrant was returned by the marshal unexecuted on the day that it was issued, to wit, September 20, 1892, because the accused could not be found in his district. Thereafter, on September 22, 1892, a similar affidavit was filed with P. A. Hoyne, United States commissioner for the northern district of Illinois, charging said Curtis with embezzling certain funds of the aforesaid bank, at Jackson county, Mo., within the western district of Missouri, on the 2d day of June, 1892. On this affidavit a warrant was issued against Curtis, by Commissioner Hoyne, on September 22, 1892, under which the accused was arrested on the same day, in the city of Chicago, and taken before the commissioner. On a hearing had, the commissioner found probable cause for the arrest to exist, and the accused was ordered to give bail in the sum of $10,000 for his appearance before the district court of the United States for the western district of Missouri at the succeeding March term, 1893, of said court, or, in default of giving such bail, to be committed to the jail of Cook county, Ill. Curtis having failed to furnish bail, as required, he was removed to the western district of Missouri on the 23d day of September, 1892, under a warrant signed by the Honorable Walter

Q. Gresham, circuit judge, and he was there delivered into the custody of the United States marshal for the western district of Missouri, who committed him to the county jail of Jackson county, Mo. Afterwards, to wit, on September 24, 1892, on an application made in behalf of the accused to have his bail reduced, the bail originally fixed by Commissioner Hoyne at $10,000 was reduced to the sum of $3,000, by an order made by the Honorable John F. Philips, United States district judge for the western district of Missouri. On the same day a recognizance in the sum last stated was entered into by R. H. Hunt and Hugh C. Ward, the plaintiffs in error, as sureties for said Curtis, by virtue of which he was forthwith released from imprisonment. At the next regular term of the United States district court for the western district of Missouri, held at Kansas City, to which term Curtis had been recognized to appear, indictments were duly found and returned against him, charging him with making false entries in the books of the American National Bank of Kansas City, and with embezzling and misapplying its funds while in his charge as assistant cashier. The accused failed to respond when called to answer the said indictments, whereupon the recognizance heretofore mentioned was declared forfeited, and a writ of scire facias was directed to be issued against the sureties. The writ was duly served upon the plaintiffs in error, who afterwards appeared and answered the writ, interposing several defenses thereto. The case was tried before the court, and the United States obtained a judgment for the sum stated in the recognizance.

It is insisted by the plaintiffs in error that the district court erred in admitting certain oral testimony which was offered at the trial, and the rule is invoked in support of this contention that in proceedings by scire facias such testimony is not admissible. We do not dispute the existence nor the binding force of the rule last stated. A writ of scire facias, when issued, should only recite facts that are disclosed by the record and files of the court from which the writ emanates. Therefore, when the defendants named in a writ of scire facias, by way of defense thereto, deny any of its recitals, it is incumbent on the plaintiff to verify the same by producing the record and files, and the facts in question cannot be otherwise proven, unless the record and files have been lost or destroyed. The rule itself is but another mode of stating the familiar rule of evidence that matters of record cannot be proven by parol. Treasurer v. Merrill, 14 Vt. 64; People v. Kane, 4 Denio, 535; Railroad Co. v. Sperry, 3 Biss. 311, Fed. Cas. No. 7,712. But in a proceeding by scire facias, if the appropriate record and files are produced which establish all of the essential recitals contained in the writ, the judgment should not be reversed on appeal merely because the trial court permitted oral evidence to be introduced which was merely corroborative of facts already sufficiently proven by the record. An error of that kind is clearly immaterial, and will not warrant a reversal of the judgment. Stephens v. Crawford, 1 Ga. 574. All of the oral testimony to which the defendants in the present case inter-

posed an objection, save a certain class of oral testimony that will be referred to hereafter, was testimony that simply tended to show facts which were sufficiently disclosed by the record. For example, the testimony of the court crier tending to show that the parties to the recognizance had been duly called prior to the forfeiture was not prejudicial, because the record entry that the "said Millard C. Curtis, although solemnly called to come into court in discharge of said recognizance, comes not, but makes default," was a sufficient entry of record to support the forfeiture without the aid of parol testimony. The same remark may be made with respect to the testimony of the clerk of the district court, which tended to show that the recognizance had been acknowledged before him by virtue of a written order of the district judge. Also the same remark may be made with respect to the testimony of the deputy marshal of the northern district of Illinois, which tended to show the manner in which he had executed the warrant of removal. All of the material facts testified to by these witnesses were clearly established by the records of the court, or by papers produced at the trial, which properly belonged to and formed a part of the court records and files. No error was committed in the admission of this testimony which would justify a reversal, although it may have been incompetent.

In this connection it is proper to add that we can attach no importance to the contention of counsel that the transcript of the proceedings before Commissioner Hoyne ought not to be considered in determining the question of the liability of the sureties, because, as it is said, the transcript was not returned to and filed in the office of the clerk of the United States district court for the western district of Missouri. With reference to the latter contention, it is sufficient to say that the transcript, when produced on the trial and read in evidence, was not objected to by the sureties, and no exception was saved to its introduction. Furthermore, there is nothing in the record to show that it had not been filed with the clerk of the United States district court for the western district of Missouri before it was produced and offered in evidence. As it was the duty of the commissioner before whom Curtis was examined and held to file a transcript of his proceedings with the clerk of the United States district court for the western district of Missouri, it must be presumed, in the absence of any evidence to the contrary, that this duty had been discharged; that the transcript was produced from the proper custody, and formed a part of the court files.

It is further assigned for error that the warrant of removal was improperly admitted in evidence, for the reason that it was not signed by the United States district judge for the northern district of Illinois, and was therefore void. We entertain the view that it is wholly immaterial to the decision of this case whether the warrant of removal was or was not signed by the proper judicial officer. The accused did not see fit to raise that question after he was removed to the western district of Missouri, but waived all objections to the process by which the removal had been accomplished by voluntarily appearing before the district judge of that district, and asking to have the bail fixed by Commissioner Hoyne reduced, and

by subsequently tendering bail for the reduced amount, which was accepted, and by means of which he obtained his discharge. Neither the accused nor the sureties upon his bond are in a position to question the validity of the warrant of removal after admitting by the acts aforesaid that the accused was under a lawful obligation to give bail, and that they did not choose to question the mode of his removal. The conduct of the principal and the sureties in the recognizance estops them in this proceeding from impeaching the warrant of removal. Peck v. State, 63 Ala. 201; Stever v. Somberger, 24 Wend. 275; Manufacturing Co. v. West, 1 Cush. 388; Littleton v. State, 46 Ark. 413, 417. We think that it makes no differencc, so far as the present case is concerned, by what means the removal from the northern district of Illinois to the western district of Missouri was accomplished, or whether the warrant of removal was valid or otherwise. The validity of the recognizance is in no wise dependent upon the latter question. The accused had been lawfully ordered by the United States commissioner to give bail for his appearance before the United States district court for the western district of Missouri, or, in default thereof, to stand committed to jail. By reason of his having been so lawfully ordered to give bail, it follows, we think, that if he had sued out a writ of habeas corpus after his removal, to obtain his discharge, based upon the ground that the warrant of removal was void, it would have been the duty of the court or judge before whom he was brought by such writ to have ordered his commitment to jail, to await the action of a grand jury, if he failed at that time to give a bond for his appearance, even though such court or judge might have been of the opinion that the warrant of removal was void. The result is that no prejudicial error was committed against the sureties in admitting the warrant of removal, even though it was void. For the wrong done to the prisoner, if any, in removing him under illegal process, he must seek a remedy in some other proceeding. The alleged trespass will not avail the prisoner or his sureties as a defense to this proceeding.

This brings us to the consideration of the last and most important question presented by the record, namely, whether the recognizance in suit is void because it purports to have been signed and acknowledged before the clerk of the United States district court for the western district of Missouri, instead of being acknowledged before the district judge. Among the papers produced at the trial which formed a part of the files in the clerk's office was the following order, signed by the district judge:

"John M. Nuckols, U. S. District Clerk: In the matter of the United States v. M. C. Curtis, you may approve recognizance for him in the sum of three thousand dollars, with two sureties in addition to the principal, the same to be sufficient and approved by you. John F. Philips, Judge."

The recognizance also bore the following indorsement:

"Taken and acknowledged before me, on the day and year first above written. John M. Nuckols, Clerk of the U. S. District Court.

"Done by order of the Honorable John F. Philips, judge of the United States district court for the western district of Missouri, hereto attached."

It was proven by oral testimony, which was objected to, that at a late hour of the day on which the recognizance bears date, to wit, September 24, 1892, the accused being then in custody at Kansas City, an application was made to the district judge, by his attorney, to reduce his bail; that this application was duly heard by the district judge, in the presence of the attorney for the accused, also in the presence of the district attorney; and that the bail was reduced and fixed at the sum of $3,000. Thereupon, as the hour was late, and as the sureties could not be produced immediately, the prisoner's attorney requested the district judge to make the aforesaid order, permitting the bond to be executed before the clerk, his object being to secure the speedy release of his client, and prevent his detention in prison over night. It will be observed, therefore, that the record and files show that the prisoner had been lawfully charged with an offense against the laws of the United States; that he had been legally arrested therefor, examined, and ordered to give bail; and that the bail, as originally fixed, had been reduced by an order made by the district judge. In addition to these facts, there is oral proof that the bail bond was signed before the clerk, at the prisoner's request, to secure his speedy release. Assuming, for the purpose of this decision, that the recognizance in question was in legal effect taken by the clerk of the district court, and that there was no statute, state or federal, then in force authorizing the clerk to take bail in criminal cases, the question arises whether, under the facts aforesaid, either the accused or his sureties can be heard to allege that the recognizance is void because it was not taken by the proper officer. In the case of Jones v. Gordon, 82 Ga. 570, 9 S. E. 782, the accused was arrested in a county different from that in which the offense was committed, and was taken before a justice of the peace for the county where the arrest was made, who had no jurisdiction of the case and no authority to take bail therein. Before such justice the accused gave bail, with sureties, for his appearance before the superior court of the county where the offense was committed. It was conceded that the magistrate before whom the proceedings were had had no jurisdiction of the case, or authority to take bail. Nevertheless, it was held that as the recognizance was given voluntarily, and was effectual to secure the prisoner's release from imprisonment, it was supported by a sufficient consideration, and might be enforced against the sureties. The court said, in substance, that the accused had the right to waive a legal trial, and the right to waive the disqualification of the justice to take bail, and that he had done so in effect by giving bail for his appearance before a court that had jurisdiction of the offense. In the case of Weldon v. Colquitt, 62 Ga. 449, where a person who had been arrested on Sunday insisted upon an immediate hearing before a magistrate on that day, and was held to bail, and forthwith entered into a recognizance, and by that means secured his release from arrest, it was held that the recognizance might be enforced by a writ of scire facias, although it was executed on Sunday, and although the magistrate had no right to conduct an examination on that day, and although his order of commitment was for that reason void.

So in the case of Littleton v. State, 46 Ark. 413, it was held that a recognizance might be enforced against the sureties therein, although the sheriff before whom it was taken had executed the warrant of arrest in a county where he had no authority to execute it. It is also a well-established doctrine that where a bond is given in the course of a judicial proceeding, such as a bond to secure the release of attached property, or a forthcoming bond, the sureties are estopped by the execution of the obligation from afterwards asserting that no levy had been made, or that the property was not subject to attachment, or that the bond was invalid for other reasons of a like character. Haggart v. Morgan, 5 N. Y. 422; Portis v. Parker, 58 Am. Dec. 95; Kincannon v. Carroll, 30 Am. Dec. 391; Bostwick v. Goetzel, 57 N. Y. 584. See, also, U. S. v. Wallace, 46 Fed. 569. We think that the principle maintained by the foregoing cases is sound, and should be applied in the case at bar. We can conceive of no sufficient reason why the sureties should be permitted to question the validity of the recognizance on the ground that it was acknowledged before the clerk, when it was so acknowledged at the request of the accused, and for the purpose of securing his immediate release, and when it was effectual for that purpose. We know of no reason why it was not competent for the accused to waive the formality of an acknowledgment of the bond and an examination of the sureties before the district judge; and, having obtained his discharge by means of such a waiver, we know of no reason why he and his sureties should not be estopped from questioning the validity of the bond on that ground. In our judgment, the case is one in which the wholesome doctrine of estoppel may be properly invoked and applied. The course pursued in taking bail was adopted at the solicitation of the accused, and for his advantage. The bond taken was accepted as sufficient by the district judge, and the accused was forthwith released. The contract made by the principal and his sureties was voluntary. It also rested upon an adequate consideration, to wit, the release of the accused from imprisonment. Under these circumstances, it would be trifling with the administration of justice to hold that the recognizance was invalid because it was signed and acknowledged before the clerk. We accordingly hold that the testimony which showed that the recognizance was acknowledged before the clerk, at the request of the accused, was properly admitted. It did not tend to contradict any of the recitals contained in the record or in the writ of scire facias, and was not inadmissible on that ground. We furthermore hold that the sureties are estopped from questioning the validity of the bond upon the ground that it was entered into before the clerk, and, so holding, the judgment of the circuit court is hereby affirmed.

UNITED STATES v. CARR et al.

(Circuit Court of Appeals, Eighth Circuit. May 7, 1894.)

No. 366.

1. BILL OF EXCEPTIONS—SIGNING AND FILING AFTER TERM.
A bill of exceptions signed and filed after the term at which judgment is entered does not become part of the record, and will be ignored, unless it affirmatively appears that it was so signed and filed by consent of parties or in compliance with a standing rule of court, or an order made and entered of record at the trial term, or unless it appears that the court's control over the record was preserved by the pendency of a motion for a new trial.

2. APPEAL—SUFFICIENCY OF EVIDENCE—WAIVER OF JURY.
A recital in the record that a jury was "expressly waived" does not show with sufficient certainty a waiver by a stipulation in writing, as required by Rev. St. § 649.

3. SAME—OBJECTIONS NOT RAISED BELOW—ISSUES NOT TRIED.
Where no demurrer or objection was interposed to an answer claiming credits for fees for official services, the right to such fees, if the services were actually rendered, cannot be considered by the circuit court of appeals.

4. SAME—STIPULATION AS TO FACTS.
A stipulation admitting certain facts, where there is nothing to show that the cause was submitted to the court on the facts stated therein, does not constitute an agreed case on which an appellate court can consider whether the judgment is such as ought to have been rendered on the agreed facts.

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

This was an action by the United States against Thomas J. Carr, Charles F. Miller, Luke Voorhees, Elias W. Whitcomb, and John W. Collins, on the official bond of said Carr as United States marshal, wherein the other defendants were sureties. Defendants' answer claimed credits for certain fees and other compensation as due said marshal. The circuit court, on trial without a jury, allowed part of said credits, and rendered judgment for the United States for the residue of the amount claimed. The United States brings error.

Benjamin F. Fowler filed brief for the United States.

Willis Van Devanter (John W. Lacey, on the brief), for defendants in error.

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

THAYER, District Judge. This was a suit by the United States upon the official bond of the United States marshal for the territory of Wyoming, which was executed by the marshal and his sureties, the defendants in error, on the 23d day of August, 1886. For a breach of the bond, the government alleged that the marshal had failed and refused to pay over to the proper accounting officers of the treasury department of the United States the sum of $773.11, which was the property of the United States, and which it was his duty as marshal to so pay. The defendants admitted the receipt

by the marshal of the aforesaid sum of money, and his failure to pay the same to the United States, but they averred in their answer to the complaint that the United States was indebted to the marshal in the sum of $404.87 for fees, mileage, and other compensation justly due to him for services rendered as United States marshal for the territory of Wyoming, which sum they prayed might be allowed to him and deducted from the amount claimed by the government. Attached to the answer was an itemized statement of the various sums claimed to be due to the marshal for fees, mileage, etc., the whole amount claimed aggregating the sum last stated. No reply to the answer appears to have been filed, and, so far as the record shows, the sufficiency of the defendants' answer was not called in question in any form, either by a demurrer, motion, or exception. The record contains a stipulation, signed by counsel for the respective parties, whereby they appear to have admitted certain facts pertinent to the issues raised by the pleadings; but this stipulation fails to show that the cause was submitted to the court upon the facts stated therein. On the contrary, the record recites that "the cause, coming on for hearing, and a jury being expressly waived, is submitted to the court upon the pleadings and evidence after being fully argued by counsel." It further appears from the record that the circuit court allowed the marshal $394.25 of his claim for fees and expenses, and that it rendered a judgment in favor of the United States for the residue of its demand, to wit, for the sum of $382.86. This judgment was entered of record on the 1st day of April, 1893, during the November term, 1892, of the circuit court for the district of Wyoming. That term expired by law prior to the second Monday of May, 1893; but the bill of exceptions was not settled, signed, nor filed until the 22d day of August, 1893. The record fails to show that the time for filing a bill of exceptions was extended to August 22, 1893, by an order made and entered of record at the trial term. It fails to show that it was signed and filed in compliance with a standing rule of the circuit court of the district of Wyoming, or that it was so filed by consent of parties either oral or written. This court has recently held in the case of Railway Co. v. Russell, 60 Fed. 501, that a bill of exceptions which is signed and filed after the lapse of the term at which the judgment is entered does not become a part of the record, and will be ignored, unless it affirmatively appears that it was so signed and filed by consent of parties, or in compliance with a standing rule of court, or an order made and entered of record at the trial term, or unless it appears that the court's control over the record was preserved during the succeeding term by the pendency of a motion for a new trial, as in the case of Woods v. Lindvall, 1 C. C. A. 34, 4 U. S. App. 45, and 48 Fed. 73. It follows, therefore, that the present bill of exceptions constitutes no part of the record, and presents no question which this court is authorized to review. Moreover, the recital found in the present record that a jury was "expressly waived" does not show that a jury was waived by a stipulation in writing, with sufficient certainty to meet the requirements of the decision of the supreme court of the United States in the case of Bond

v. Dustin, 112 U. S. 604, 5 Sup. Ct. 296, and of this court in Rush v. Newman, 7 C. C. A. 136, 58 Fed. 158, 160. This latter suggestion, however, is not important, for the reason, above stated, that there is in the present case no bill of exceptions which can operate to bring the testimony or any of the rulings of the trial court upon the record. It follows, we think, in view of numerous federal adjudications, that as an appellate court we are limited in our examination of the case in hand to the single inquiry whether the complaint filed in the circuit court was adequate to support the judgment, and that can hardly be regarded as a debatable question. Bond v. Dustin, supra; Andes v. Slauson, 130 U. S. 435, 438, 9 Sup. Ct. 573; Railway Co. v. Henson, 7 C. C. A. 349, 58 Fed. 531; Merrill v. Floyd, 2 C. C. A. 58, 50 Fed. 849; Walker v. Miller, 8 C. C. A. 331, 59 Fed. 869.

It is apparent from the judgment entry that the circuit court allowed the defendants in error a credit for a large portion of the fees mentioned in the exhibit attached to the defendants' answer; but, as no demurrer was interposed to the plea claiming these credits, there is nothing in the record to indicate that the government contested the marshal's right to such allowances if the services charged for were actually rendered. It follows, therefore, that this court will not undertake to determine whether the fees in question, or any of them, were properly allowed as a credit, inasmuch as it does not appear that an issue of that kind was raised and decided by the trial court. Railway Co. v. Henson, supra; Elliott, App. Proc. §§ 470, 476.

We have already alluded to the fact that the stipulation found in the record does not constitute "an agreed case," because it does not appear that the case was submitted to the court for its decision upon the facts recited in such stipulation. We are accordingly precluded from considering the question whether the judgment is such as ought to have been rendered on the agreed facts, as we might have done if it clearly appeared that the stipulation was intended to state an agreed case according to the practice approved in U. S. v. Eliasson, 16 Pet. 291; also, in Stimpson v. Railroad Co., 10 How. 329, and Burr v. Navigation Co., 1 Wall. 102.

Finding no reversible error in the record, the judgment of the circuit court is hereby affirmed.

SCOFIELD et al. v. PARLIN & ORENDORFF CO.

(Circuit Court of Appeals, Seventh Circuit. May 1, 1894.)

No. 130.

1. EVIDENCE—LETTER—PRESUMPTION OF GENUINENESS.
A letter received in due course of mail in response to a letter sent by the receiver is presumed, in the absence of any showing to the contrary, to be the letter of the person whose name is signed to it.

2. SAME—ADMISSION CONTAINED IN OFFER OF COMPROMISE.
Where the execution of the contract sued on is denied by the defendant, a letter offering to compromise the claim, and making an express recognition of the contract, is admissible in evidence as an admission of the execution of the contract.

3. CONTRACTS OF CORPORATIONS—EVIDENCE—PRINCIPAL AND AGENT.
A contract entered into on behalf of a business corporation by its agent or manager is admissible in evidence against the corporation without proof that its execution was authorized by any formal corporate act.

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

Assumpsit by Gerrit S. Scofield and Frank M. Scofield, copartners doing business under the firm name and style of G. S. & F. M. Scofield, against the Parlin & Orendorff Company. Defendant obtained judgment. Plaintiffs bring error.

The plaintiffs in error, Gerrit S. Scofield and Frank M. Scofield, citizens of Connecticut, doing business under the firm name of G. S. & F. M. Scofield, brought this suit against the defendant in error, the Parlin & Orendorff Company, a corporation and citizen of Illinois. The first count of the declaration alleges the execution by the defendant and acceptance by the plaintiffs of the following written proposition:

"Established 1871. G. S. and F. M. Scofield, General Advertising Agents, 30 East 14th Street, New York City. P. O. Box 4,401.

"New York City, Dec. 3rd, 1885.

"You are hereby authorized to procure for us the insertion of our advertisement in any number of country newspapers, not to exceed five hundred (500), said advertisement to occupy a space of four inches, single column, for a period of six months. Upon presentation to us of the first copy of each paper containing our advertisement we agree to issue our duebill in favor of the publisher, or order, and to accept said duebill, when accompanied by thirty-five dollars ($35.00), in cash, as full payment for one of our Clipper three-wheel plows, the regular list price of which is seventy dollars, f. o. c. at Canton, Ill. We further agree to pay you a cash commission of five dollars ($5.00) for each paper in which you procure the insertion of our advertisement, said commission to be due and payable upon presentation to us of the first copy of each paper containing our advertisement. We also authorize you to furnish all electrotypes necessary to carry out this contract, for which we agree to pay you twenty cents apiece.

"[Sgd.] Parlin & Orendorff Co."

It is further alleged that, in the performance of the contract so made, the plaintiffs procured for the defendant the insertion of its advertisement according to the terms and conditions of the contract in 327 country newspapers, and, immediately after the publication, in each instance presented to the defendant the first copy of the newspapers containing the advertisement; that they also furnished a corresponding number of electrotypes, of which the defendant had notice; and that by means of the premises the defendant became liable to pay, and in consideration thereof undertook and promised to pay, to the plaintiffs the sum of $1,700.40. The declaration contains also the common counts for work and labor done, goods sold, and money had and received. The defendant pleaded the general issue and non est factum. There was a trial by jury, which, by direction of the court, returned a verdict for the defendant. In order to prove the execution of the contract, the plaintiffs offered in evidence alleged correspondence between the parties, including a number of letters which purported to be written upon the defendant's letter-head paper, to be dated at its place of business, and to be signed by the defendant, and were shown to have been received in due course of mail by the plaintiffs, or by their attorney, to whom they were addressed. To the first letter offered, dated May 31, 1886, and which contained the expression, "since we contracted with Scofield Bros.," and other expressions indicating the existence of a contract between the parties, it was objected that "the letter shows upon its face that it was written in pursuance of an arrangement by which they endeavored to compromise these matters, and there is no proof of its execution, or who executed it, or the authority of anybody to write it." The court sustained the

objection, putting its ruling on the ground "that it is not admissible under the special count, nor under the common count, being in the nature of an offer of compromise, and that compromise is not declared on, and it is not a corporate act." Other letters were excluded upon the same grounds, and when the letter of December 5, 1885, was offered, and a similar objection made, the court said: "The declaration declares on a special contract, which, it alleges, was made on the 3d day of December, 1885. A letter is offered in evidence, purporting to be by the Parlin & Orendorff Company, accepting the propositions, and so on. It does not purport to be the overt act of the corporation at all, and is evidently not what is declared on. The contract is described with reference to date, and so on, and what purports to be a haec verba copy, as I suppose, is set out. The objection will be sustained." And again the court said: "This is a special contract, declared on against a corporation, alleging the corporation made the contract. I have held that any act to bind the defendant must be a corporate act. I have held furthermore that only certain kinds of proof could be introduced on the special count, and that on the common count only certain kinds of proof could be introduced, and the proof offered does not fall within that class. That is the substance of what I attempted to hold." Each of the letters offered in evidence to which the name of the defendant was subscribed had the following printed heading: "Office of Parlin & Orendorff Company, Manufacturers of Agricultural Implements, Canton, Ill., — 188–."

Sanders & Powers and Morton Culver, for plaintiffs in error.

Orendorff & Patton, for defendant in error.

Before WOODS and JENKINS, Circuit Judges, and BAKER, District Judge.

WOODS, Circuit Judge (after stating the facts). We are of opinion that the court erred in excluding from the jury the correspondence, and especially the letters purporting to be from the defendant, which were offered in evidence for the purpose of showing the execution, and the existence between the parties, of the contract set out in the declaration. "The depositing in the post office of a letter properly addressed, with the postage prepaid, is prima facie evidence that the person to whom it was addressed received it" (Briggs v. Hervey, 130 Mass. 186); and, conversely, a letter received in due course of mail, and especially if it be in response to a letter sent by the receiver, is presumptively the letter of the one whose name is signed to it. Of the genuineness of the letters in question there was certainly sufficient prima facie evidence. The plaintiffs were advertising agents; the defendant, a manufacturer of agricultural implements. The letter of November 30, 1885, the first in order of date, showed the willingness of the defendant to accept for its implements one-half of stated prices when accompanied by proof that enough advertising had been done to pay for the other half. To this the plaintiffs responded by the letter of December 3d, inclosing a form of their regular contracts, to be signed by the defendant, and two days later was written the letter of December 5, 1885, over the name of the defendant, saying, "We return herewith our agreement for advertising, which you will please execute [perform] as soon as possible." In this letter was inclosed the agreement sued on, and also a statement of the contents of the proposed advertisement, to which also was appended the signature, "Parlin & Orendorff Co., M'f'r's, Canton, Ills."

The letter of May 31, 1886, after an express recognition of the fact that a contract between the parties had been made, proceeds to an offer of compromise. This letter, while not admissible to prove the offer of compromise, was admissible to show an independent statement or admission of fact pertinent to the question in issue. Of the authenticity of these letters, and the contract transmitted with one of them, the circumstances in proof, the regular transmission by mail, the letter heads and envelopes, and the contents of the letters themselves leave no reasonable doubt. They should have gone to the jury, and, in the absence of contrary evidence, should have been accepted as conclusive of the execution of the contract by the defendant. The ruling of the court to the contrary, and, presumably, the sworn denial of the execution of the contract, proceeded upon the theory that, in order to bind the corporation, a contract must be shown to have been executed or authorized by a formal corporate act, such as an order or resolution of a board of directors. But the business of modern mercantile and manufacturing corporations is not always, or even generally, conducted in that way, but is committed to agents and managers, whose powers are limited practically only to the lines of business for the prosecution of which the corporations were formed. It follows that correspondence conducted by these agents, and contracts made by them, in the name of the principal, in the due and ordinary course of business, must be admissible in evidence as if the parties were natural persons. If a document offered against a corporation is not genuine, or its execution unauthorized, the corporation will be able in most instances to show the fact, while, on the other hand, if direct proof of formal or overt corporate action or authority were required of the opposite party, it would often be, indeed it would be in the power of the corporation to make it, difficult or impossible.

It is contended by the appellee that there was a failure of evidence in other material respects, and, that, if there was error in excluding the letters and contract, it was harmless. There is, we think, no such lack of evidence in any respect suggested as to justify the taking of the case from the jury. Besides, the contract was, as it seems to us and as counsel for appellee have argued, essential to the plaintiffs' right of recovery upon any view of the case presented, and, that having been ruled out, the plaintiffs were not bound, in order to save the question, to go on making proof which, when made, could not, under the ruling of the court, be available. The judgment is reversed, and the cause remanded for a new trial.

CRABTREE v. McCURTAIN.

(Circuit Court of Appeals, Eighth Circuit. May 7, 1894.)

No. 365.

APPEAL—ASSIGNMENT OF ERRORS—TIME OF FILING.

In pursuance of rule 11 of the circuit court of appeals for the eighth circuit (47 Fed. vi.), requiring an assignment of errors to be filed with the petition for the writ of error or appeal, and declaring that errors not assigned according to this rule will be disregarded, the court will not review a judgment when the assignment of errors was not filed until after the writ of error was allowed, nor until after expiration of the six months allowed for suing out the writ of error. U. S. v. Goodrich, 4 C. C. A. 160, 54 Fed. 21, followed.

In Error to the United States Court in the Indian Territory.

This was an action by Jane McCurtain, administratrix of Jackson F. McCurtain, deceased, against William F. Crabtree, on a promissory note made by defendant, payable to said Jackson F. McCurtain. A demurrer to defendant's answer was sustained, and judgment for plaintiff was entered thereon. Defendant brought error.

Geo. E. Nelson filed a brief for plaintiff in error.

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

SANBORN, Circuit Judge. By the act of March 3, 1891 (26 Stat. pp. 826, 829), no writ of error, by which a judgment can be reviewed in this court, can be sued out after six months from its entry. Rule 11 of this court provides that the plaintiff in error shall file with his petition for the writ of error an assignment of errors, that no writ of error shall be allowed until such assignment of errors has been filed, and that errors not assigned according to this rule will be disregarded. The judgment the plaintiff in error seeks to review here was entered March 14, 1893. The writ of error and citation are tested August 10, 1893. No assignment of errors was filed until September 18, 1893. The assignment of errors was not filed until after the time to sue out a writ of error to review this judgment had expired, nor until more than a month after the writ returned here was issued. Under our rule, which we have repeatedly declared would be enforced, the supposed errors assigned will be disregarded, and the judgment below affirmed, with costs. U. S. v. Goodrich, 4 C. C. A. 160, 54 Fed. 21; Union Pac. Ry. Co. v. Colorado Eastern Ry. Co., 4 C. C. A. 161, 54 Fed. 22; Flahrity v. Union Pac. Ry. Co., 6 C. C. A. 167, 56 Fed. 908.

It is so ordered.

NATIONAL BANK OF COMMERCE OF KANSAS CITY, MO., v. FIRST NAT. BANK OF KANSAS CITY, KAN., et al.

(Circuit Court of Appeals, Eighth Circuit. May 21, 1894.)

No. 315.

1. APPEAL—OBJECTIONS NOT RAISED BELOW—TRIAL BY COURT.
   Exceptions to findings and rulings in an opinion delivered by the court on a trial, without a jury, of an action at law, and to a general finding contained in the judgment, avail nothing on appeal, where no request was made at the trial for any ruling on any proposition of law, or on the sufficiency of the evidence to sustain such a finding or judgment.
2. SAME—ASSIGNMENTS OF ERROR.
   Assignments of errors "in excluding legal and proper evidence offered by" plaintiff, and "in admitting illegal and improper evidence offered by" defendant, are insufficient under rule 11 of the circuit court of appeals for the eighth circuit (47 Fed. vi.), requiring an assignment of errors to "set out separately and particularly" each error, and, when error is alleged in admission or rejection of evidence, to "quote the full substance of the evidence admitted or rejected."
3. SAME—ERROR NOT PREJUDICIAL.
   Refusing to permit counsel to inspect, for purposes of cross-examination, a memorandum used by a witness to refresh his memory during his direct examination, is not ground for reversal, where, on the finding of the court on the question involved, it is clear that no cross-examination could have affected the result.
4. EVIDENCE—COMPETENCY—REBUTTAL.
   In an action by one bank against another as indorsee on notes, plaintiff's president testified that he conversed with defendant's president, who became such after the indorsement, and that the liability of defendant was not questioned. *Held*, that testimony by defendant's president that he did not know of the indebtedness, and that in such conversation plaintiff's president had concealed it from him, was competent in rebuttal.

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

Elijah Robinson, for plaintiff in error.

Samuel R. Peters (Joseph W. Ady and John C. Nicholson, on the brief), for defendants in error.

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

SANBORN, Circuit Judge. The National Bank of Commerce of Kansas City, Mo., the plaintiff in error, brought an action in the court below against the First National Bank of Kansas City, Kan., and W. T. Atkinson, its receiver, the defendants in error, upon four causes of action. The court below denied a recovery on the first and second causes set forth in the petition (55 Fed. 465), and this writ of error was sued out to reverse this decision.

The first cause of action was based on a promissory note for $38,959, dated October 22, 1890, made by the English & American Mortgage Company, Limited, a corporation, indorsed by the First National Bank of Kansas City, Kan., by D. R. Emmons, its president, and payable to the order of the plaintiff in error. The second cause of action rested upon a promissory note for $7,500, dated October 20,

1890, made by the same mortgage company, indorsed in the same way, and payable to the order of the plaintiff in error. The defense to these notes was that neither the president nor any other officer of the defendant bank ever had any authority to make these or like indorsements; that that bank never received any consideration or benefit from them; that they were mere accommodation indorsements; that they were not made in the ordinary course of the business of the bank, and were never ratified by it; and that the plaintiff bank had full knowledge of all these facts from the inception of the transactions out of which these notes arose. A jury was waived, and the case was tried by the court, which found all the issues relating to these two causes of action for the defendants.

No request was made for any ruling upon any proposition of law during the trial, nor was the court requested to hold that the evidence was insufficient to sustain a finding or judgment for the defendant upon either of the causes of action in question. The court below delivered an exhaustive opinion, in which the facts and the law of the case were discussed; and to every finding and ruling contained in this opinion the plaintiff excepted, and it also excepted to the general finding for the defendants contained in the judgment. But these exceptions avail nothing. Where the finding is general, there are only two methods by which questions of law can be so presented to the trial court that this court can review them, viz. by seasonable objections and exceptions to the rulings of the court upon the admission or rejection of evidence, and by requesting the court, before the trial is ended, to make declarations of law, and by excepting to its refusal to do so, and to its declarations of law, if any, that do not accord with the views of counsel, in exactly the same way that instructions to a jury would be requested, and the rulings of the court giving and refusing instructions would be excepted to if the trial was before a jury. The finding of the court, whether general or special, performs the office of the verdict of the jury. When it is made and filed, the trial is ended, and exceptions to it are as futile as exceptions to a verdict. When the trial court makes a special finding of the facts, the only additional question we are permitted to consider is the sufficiency of the facts found to sustain the judgment rendered. The sufficiency of the evidence to sustain the findings is never presented unless a request is made, before the trial is ended, that the court will hold the evidence insufficient. These rules have been repeatedly announced by this court. Trust Co. v. Wood, 8 C. C. A. 658, 60 Fed. 346; Walker v. Miller, 8 C. C. A. 331, 59 Fed. 869; Bowden v. Burnham, 8 C. C. A. 248, 59 Fed. 752; Clement v. Insurance Co., 7 Blatchf. 51, 53, 54, 58, Fed. Cas. No. 2,882; Norris v. Jackson, 9 Wall. 125, 127; Insurance Co. v. Folsom, 18 Wall. 237, 249; Cooper v. Omohundro, 19 Wall. 65, 69; Martinton v. Fairbanks, 112 U. S. 670, 5 Sup. Ct. 321; Lehnen v. Dickson, 148 U. S. 71, 13 Sup. Ct. 481.

If the facts recited in the opinion of the court could be treated as a special finding in this case (and we are clearly of the opinion that they cannot), they are ample to support the judgment. In the opinion and in the judgment the court finds all the issues arising

on the two causes of action in controversy for the defendants. The law is unquestioned that an accommodation indorsement of a national bank, from which it derives no benefit, made by an officer without authority, and out of the ordinary course of the business of the bank, is void in the hands of the original payee of the paper, when he takes it with full knowledge of the character of the indorsement. 2 Morse, Banks, § 728 et seq.; 1 Rand. Com. Paper, § 334, and authorities cited. It follows that we can consider no rulings of the trial court in this case except those made upon the admission or rejection of evidence.

But, upon an examination of the record relative to these rulings, we discover that, while exceptions were taken to some of them, none of these rulings were assigned as error in accordance with the rules of this court. Our eleventh rule provides that:

"The plaintiff in error or appellant shall file with the clerk of the court below, with his petition for the writ of error or appeal, an assignment of errors which shall set out separately and particularly each error asserted and intended to be urged. No writ of error or appeal shall be allowed until such assignment of errors shall have been filed. When the error alleged is to the admission or to the rejection of evidence, the assignment of errors shall quote the full substance of the evidence admitted or rejected. * * * Such assignment of errors shall form part of the transcript of the record and be printed with it. When this is not done, counsel will not be heard except at the request of the court; and errors not assigned according to this rule will be disregarded; but the court, at its option, may notice a plain error not assigned." 47 Fed. vi.

The only pretense of the assignment of any errors in the rulings of the court upon the admission or rejection of evidence is in these words:

"First, the said circuit court erred in excluding legal and proper evidence offered by said plaintiff; second, the said circuit court erred in admitting illegal and improper evidence offered by defendant."

This is a patent and total disregard of the rule. No error is set out "separately and particularly." The substance of the evidence, the admission or rejection of which is alleged to be error, is not quoted in full or at all. Nor is it possible to determine from this assignment, or rather from this failure to make an assignment, of errors, what the rulings were that are claimed to be erroneous. One of the purposes of this rule is to require the defeated party to clearly disclose to the trial court the rulings he alleges to be erroneous before the writ of error or appeal is allowed, to the end that writs of error and appeals may not be permitted for mere delay in cases in which there is no doubtful question to be decided. It is true that in this case no objection to the consideration of the rulings excepted to during the trial was made by the counsel for the defendants in error on the ground that they were not properly assigned as errors; but the rule to which we have referred is wise and salutary, and the court cannot allow it to be disregarded because the counsel consent to ignore it.

The result is that no errors have been assigned in this case in accordance with the rules and practice of this court, and a compliance with these rules requires us to disregard them all, unless

the record discloses a plain error which we deem it proper to notice. The object of the trial of lawsuits, however, is to reach just decisions. The rules of the court are but aids to reach these results, and they should be enforced and applied in such a way as to attain them. That no injustice might be done in this case, we have carefully considered all the alleged errors referred to by counsel for plaintiff in error in his brief and in his argument, and we are all of the opinion that there was no error in the trial of this case prejudicial to his client, and that the judgment was well supported by the evidence, and in strict accordance with the law.

One of the rulings most bitterly complained of was the refusal of the court below to permit the counsel for the plaintiff in error to inspect, for the purposes of cross-examination, a memorandum which one of the witnesses for the defendant had used to refresh his memory during his direct examination. This was undoubtedly an erroneous ruling. Chute v. State, 19 Minn. 271 (Gil. 230); Peck v. Valentine, 94 N. Y. 569; State v. Bacon, 41 Vt. 526; Adae v. Zangs, 41 Iowa, 536; Starkie, Ev. (10th Ed.) p. 184; 2 Rice, Ev. p. 757. But it appears from this record, beyond doubt, that this error did not prejudice, and could not have prejudiced, the plaintiff in error. On August 3, 1889, the English & American Mortgage Company, Limited, a corporation with its home office in London, England, and with its branch office at Kansas City, Kan., applied to the plaintiff in error to cash a draft on its London office for £5,000 sterling, payable to the order of Eli H. Chandler, its manager at Kansas City. The plaintiff refused to cash it unless it was first indorsed by the defendant bank. D. R. Emmons, the chairman of the board of directors of the mortgage company, was the president of the defendant bank. The draft was taken to the latter bank, and there indorsed by it, by the hand of its cashier, and was then taken back to the plaintiff, where it was discounted, and its proceeds were placed on the books of the plaintiff to the credit of the defendant bank for the account of the mortgage company. The defendant bank was notified of this credit, and thereupon charged the plaintiff with the amount of these proceeds, and credited the mortgage company with the same amount. The mortgage company drew these proceeds from the defendant bank within a few days thereafter, and the latter bank received no compensation, by discount or commission, for its part in this transaction. On October 13, 1889, a like draft for £3,000 sterling was presented, indorsed, and discounted in the same way, and on August 26, 1889, a like draft for £2,000 sterling was presented, indorsed, and discounted in the same manner. These drafts were never fully paid. After they fell due, promissory notes, made by the mortgage company and indorsed by the defendant bank, were given to the plaintiff for a part or the whole of the amount due upon them, and one or more promissory notes, signed and indorsed in like manner, were given to the plaintiff bank for amounts due it from the mortgage company and from D. R. Emmons on account of paper upon which the defendant bank was not originally liable as an indorser. The notes thus made were renewed from time to time, and the two notes in suit were the last renewals.

The only question concerning which the witness referred to his memorandum to refresh his memory was whether or not any part, and, if so, what part, of the original consideration of the notes in suit was an indebtedness of the mortgage company or of Emmons to the plaintiff, that did not arise from the three drafts originally indorsed by the defendant bank. The court found upon this question that the entire consideration of one of the notes in controversy arose from the indorsed drafts, and that the entire consideration of the other arose from the indebtedness of the mortgage company and of D. R. Emmons, for which the defendant bank was not originally liable as an indorser, and then held, as a matter of law, that both notes were void. It is clear that no cross-examination on this question could have availed the plaintiff aught, because the notes were void, whether they were founded on the one or the other, or on both, of the alleged considerations, and error without prejudice is no ground for reversal.

In February, 1891, the First National Bank of Kansas City, Kan., which at that time owed the plaintiff bank about $15,000 on account, and was an indorser on the notes in suit, was consolidated with the Exchange Bank, and I. D. Wilson, who was the president of the latter bank, succeeded Mr. Emmons as the president of the First National Bank. Dr. Woods, the president of the plaintiff bank, testified that he had a conversation with Mr. Wilson after he became president of the bank, and that he never, at any time prior to the failure of the First National, heard of any defense to the notes in question. On cross-examination he testified that he did not tell Mr. Wilson before the consolidation that the indebtedness of the First National to his bank was $15,000. Mr. Wilson testified that, at the time he was talking about the consolidation of the banks with Dr. Woods, the latter said that the First National Bank of Kansas City, Kan., owed the plaintiff $15,000. He was then asked if he knew at that time of the indebtedness of the First National to the National Bank of Commerce in the sum of $34,000 or $38,000, and, over the objection of the plaintiff, that it was not his business to know about this indebtedness because he was not an officer or director of the First National, he answered that he did not. This objection was untenable. The plaintiff had sought to strengthen the presumption of the liability of the defendant bank for this large indebtedness by the testimony of Dr. Woods that Mr. Wilson had never questioned it until after the failure of the bank. It was certainly competent and material rebuttal evidence that Mr. Wilson did not know of this large indebtedness, and that Dr. Woods had concealed it from him in this conversation by the statement that the indebtedness of the First National to his bank was $15,000.

The rulings to which we have referred are among those most bitterly complained of by the plaintiff in error. Exceptions were taken to many others, but they present no novel or important question of law, and exhibit no prejudical error. It would serve no good purpose to discuss them. The judgment below must be affirmed, with costs; and it is so ordered.

KANSAS & A. V. RY. CO. v. MORTON.

(Circuit Court of Appeals, Eighth Circuit. May 7, 1894.)

No. 372.

NEGLIGENCE—ADMISSION IN PLEADING.

The answer of a railway company, in an action against it for personal injuries alleged to have been received by plaintiff while employed by bridge builders in the employ of the company, averred that he was employed by the company, and that his injuries were caused wholly by negligence of his fellow servants in such employment. *Held*, that this admission of culpable negligence of its servants precluded the company from maintaining on the trial that the injury was due to inevitable accident, and was not occasioned by its negligence.

In Error to the United States Court in the Indian Territory.

This was an action by Thomas H. Morton against the Kansas & Arkansas Valley Railway Company for personal injuries. At the trial the jury found a verdict for plaintiff. Judgment for plaintiff was entered thereon. Defendant brought error.

George E. Dodge and B. S. Johnson filed brief for plaintiff in error.

William M. Cravens filed brief for defendant in error.

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

THAYER, District Judge. The plaintiff in error was sued by the defendant in error, in the United States court in the Indian Territory, in an action for personal injuries. The defendant in error charged in his complaint that he was employed as a cook by a party of bridge builders, who were in turn employed by the defendant railway company, and were engaged in building bridges for the company, which employment required them to move from point to point on the defendant's railroad in a train provided with two caboose cars for the use of said gang of bridge builders; that the plaintiff, by virtue of his employment as cook, had the right to pass over the defendant's railroad, and to use the two cabooses aforesaid for the purpose of cooking for the men who employed him, and also for the purpose of sleeping therein at night; that as the two cabooses in question were standing on the side track at Vian Station, in the Indian Territory, on the night of September 22, 1892, and while the plaintiff was sleeping in one of said cabooses which was used for that purpose, a switch leading from the main track to the side track was left open through the carelessness of the defendant's employes, and that by reason thereof the caboose was run into by a passing freight train belonging to the defendant company, which was also carelessly operated by those in charge thereof, and that in consequence of the collision the plaintiff sustained serious injuries, for which he claimed damages in the sum of $5,000.

To this complaint the railway company filed an answer, in which it denied that the plaintiff was an employe of said gang of bridge builders. On the contrary, it averred that the plaintiff was em-

ployed by the railway company itself. It admitted that the caboose in which the plaintiff was sleeping was run into by one of its trains, but it denied that the defendant had been guilty of any negligence for which it was responsible to the plaintiff, because the injuries sustained by the plaintiff were "caused wholly through and by reason of the negligence of his fellow servants in the management of its train, and in the leaving open of the switch, as charged by the plaintiff." The answer further denied that the plaintiff had sustained serious injuries, as charged in his complaint. As the pleadings stood when the case went to trial, the issues of fact arising thereunder were—First, whether the plaintiff was an employe of the railway company or an employe of the gang of bridge builders; and, secondly, whether he had sustained injuries by reason of the collision, and the extent of said injuries. On a trial of these issues the jury returned a verdict in favor of the plaintiff, upon which verdict a judgment was afterwards entered. To reverse the judgment, the railway company has sued out the present writ of error.

A number of exceptions were taken to instructions given by the trial court, all of which exceptions have been embraced in the assignment of errors. But in this court only two propositions have been argued by the plaintiff in error, and they are as follows: In the first place it is said that the railway company was only bound to exercise ordinary care to avoid injuring the plaintiff, and it is claimed that the trial court so charged the jury as to exact of the company a higher degree of care and diligence. In the second place it is said that the burden was on the plaintiff to prove his case, and that he utterly failed to show that the defendant was negligent in the discharge of any duty which it owed to the plaintiff. It may be conceded, as stated in the first of these propositions, that ordinary care was the full measure of the duty which the defendant company owed to the plaintiff under the circumstances disclosed by the testimony; but a careful examination of the charge satisfies us, beyond any reasonable doubt, that this was the view taken by the trial court, and clearly enforced in all of its instructions. Our attention has not been directed to a single paragraph of the charge where a higher degree of care was required of the defendant company. But a more conclusive answer to both of the foregoing propositions is this: The defendant's answer, as we have above shown, admitted that the collision was occasioned by the culpable negligence of persons who were in its employ. By its answer it rested its defense to the action upon the ground that the plaintiff was not in the service of the bridge builders, but in its service, and was therefore a fellow servant of the persons through whose fault, in leaving the switch open, the collision had been occasioned. This, and the further plea that the plaintiff had not sustained any serious injury, were the sole issues to be tried, as we feel constrained to construe the pleadings.

On the trial of the case, an attempt appears to have been made—unconsciously, perhaps—to shift the ground of defense by showing that the collision was due to inevitable accident, and that it was not occasioned by negligence. We find nothing in the testimony,

however, which fairly tends to support such a defense. The switch was certainly left open and unguarded through the carelessness of some one in the employ of the railway company; but even if there had been some testimony which tended to support the last-mentioned defense, yet such defense was not pleaded, and it would still be necessary to hold the defendant bound by the admission contained in its answer. The testimony shows very conclusively, and so the jury have found under proper instructions, that the plaintiff was really in the service of the bridge builders, and was not a fellow servant of those persons through whose carelessness the switch was left open. This fact is practically conceded by counsel for the plaintiff in error. It follows that no prejudicial error was committed by the trial court, and its judgment is therefore affirmed.

BURKHEISER v. MUTUAL ACCID. ASS'N OF THE NORTHWEST.

(Circuit Court of Appeals, Seventh Circuit. May 1, 1894.)

No. 121.

MUTUAL BENEFIT INSURANCE—FORFEITURE.

A mutual benefit association insured its members "against personal bodily injuries effected during the continuance of membership in this insurance through external violent and accidental means," and against death resulting from such injuries within 90 days after the accident. *Held* that, where a member died within 90 days after an accident that caused his death, the fact that before his death he ceased to be a member, because of default in paying an assessment falling due after the accident, did not relieve the association from liability, since its liability became fixed at the time of the accident.

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

Assumpsit by Mary Burkheiser against the Mutual Accident Association of the Northwest upon an insurance policy on the life of plaintiff's husband. Defendant obtained judgment. Plaintiff brings error. Reversed.

George Burkheiser, the husband of the plaintiff, was insured by the defendant under its certain policy or certificate of insurance dated October 4, 1890, "against personal bodily injuries effected during the continuance of membership in this insurance through external, violent and accidental means." By the policy provision is made for indemnity against accidental injury in two ways—First, for loss of time and for certain specified permanent injuries; second, for death, the result of accident, within 90 days thereafter. The first was payable to the insured, the second to the plaintiff. On the 20th day of December, 1890, Mr. Burkheiser met with an accident, within the terms of the policy, and died on the 23d day of January, 1891, solely from the effects of the injury. On the 15th day of December, 1890, the company duly levied an indemnity assessment upon its members, payable on the 15th day of January, 1891, notice of which was given to Burkheiser on the 15th day of December, 1890. The defendant pleaded this assessment and the failure of Burkheiser to pay the same, and claimed that, by reason thereof, and by force of the by-laws of the association, he ceased to be a member from and after the 15th day of January, 1891, whereby the policy of insurance certificate of membership was wholly discharged and annulled. The section of the by-law referred to is as follows: "Any member who shall fail or neglect to remit to the association the amount of any assessment made upon him

within thirty days from the date of notice thereof so sent shall cease to be a member of said association. Provided, however, that any person may be restored to his membership upon payment of the assessment upon which he lapsed, and with the sanction of the president and secretary. Any member so reinstated shall not be entitled to any indemnity for injury sustained between the time last provided and of such reinstatement, and no person who has so forfeited his membership shall be eligible to such reinstatement unless, at the time of the application therefor, he would be eligible to membership in said association, under section one of this article." At the trial, the facts being established as pleaded, the court instructed the jury that the defendant was not liable upon the policy, to which ruling there was proper exception and assignment of error.

James A. Fullenwider, for plaintiff in error.
Albert H. Veeder and Mason B. Loomis, for defendant in error.

Before WOODS and JENKINS, Circuit Judges, and BAKER, District Judge.

JENKINS, Circuit Judge (after stating the facts). The correctness of the ruling is dependent upon the proper construction to be given to the contract of insurance in question. If liability for an accidental injury came to an end when Mr. Burkheiser, by reason of default in payment of the assessment, ceased to be a member of the association, the instruction was correct. If, however, liability for an accident occurring during the membership in the association continued, notwithstanding the cessation of membership after the accident, then the instruction was wrong, and the court should have directed a verdict for the plaintiff. The policy insures against personal bodily injuries effected during the continuance of membership in this insurance through external, violent and accidental means. The language of the contract is plain and unambiguous. It was clearly designed to effect the object of the association, which was to indemnify for injury sustained during membership. The consideration paid by the assured is for such protection. The injury which resulted in the death of Mr. Burkheiser occurred during such membership. The accidental injury was the cause; the death, the consequence. The contract indemnified against injury produced by accident as the operating cause, and occurring during membership. The contract with respect to liability of the company had relation to the time of the happening of the accident, not to the time of the final outcome of the injury, or to the time when liability should be discharged by payment. The liability of the association became absolute upon the occurrence of the accident, the amount of indemnity and the person to whom it should be payable being contingent upon the character and result of the injury sustained; as to the plaintiff, contingent only upon the death of the assured within the stated time. It was not contingent upon continuation of membership, either within the letter or spirit of the contract. There was no obligation on the part of the assured to continue in membership after an injury, nor does his failure so to do result in forfeiture of indemnity for injuries theretofore received, or in discharge of liability theretofore incurred. We search the policy in vain for a suggestion that that liability should be released or

discharged if, through default in payment of an assessment, the assured should, after the incurring of the accidental injury, cease to be a member of the association. By failure to honor the assessment, he indeed ceased to be a member of the association, and could no longer look to the company for indemnity for accidental injury thereafter occurring; but by no term of the contract and by no provision of the by-laws does such cessation of membership work forfeiture of rights accrued, or release the company from legal liability incurred under the policy during continuance of membership. The membership ceases; the legal liability for previous accidental injury remains. By one condition of the policy, it was competent for the association to cancel the certificate of membership at any time upon refunding paid unexpired assessments, or at the expiration of time covered by any one paid assessment. Can it be claimed that the association under this provision could, upon complying with its condition, absolve itself from liability for an accident occurring previous to such cancellation? We think not. Cessation of membership, whether voluntary or involuntary, operates prospectively, not in derogation of acquired rights or in release of antecedent liability. This view is impliedly sustained by that provision of the eighth by-law of the association above quoted, to the effect that a reinstated member shall not be entitled to indemnity for injuries occurring in the interval of time between default and reinstatement. It recognizes the liability of the association to respond for accidental injury sustained during the membership, notwithstanding subsequent severance or interruption of membership relation.

The case of Klein v. Insurance Co., 104 U. S. 88, has no pertinency here. There default upon an ordinary life policy of insurance occurred before the death of the insured. By the terms of such contracts, the insurance is against death occurring during the life of the policy, lapsing upon default in payment of the premium. The case at bar is quite different. Here the accident—which is like to the case of death in an ordinary life policy—occurred during the life of the policy, and liability attached immediately upon the occurrence of the injury. It is further to be observed that if the language used in this policy or certificate can fairly be said to admit of two interpretations, and to be of doubtful construction, the court should construe the provisions of the contract strictly as respects the company, and liberally as regards the insured, because the language employed is that of the insurance company. If the construction be doubtful, or the meaning obscure, it is the fault of the company. National Bank v. Insurance Co., 95 U. S. 673, 678; Grace v. Insurance Co., 109 U. S. 278, 282, 3 Sup. Ct. 207; Moulor v. Insurance Co., 111 U. S. 335, 341, 4 Sup. Ct. 466; Insurance Co. v. McConkey, 127 U. S. 661, 666, 8 Sup. Ct. 1360; Kratzenstein v. Assurance Co., 116 N. Y. 54, 59, 22 N. E. 221. The court below should have instructed the jury to return a verdict for the plaintiff. The judgment is reversed, and the cause remanded, with instructions to the court below to award a new trial.

DURAND et al. v. SCHULZE et al.

(Circuit Court of Appeals, Third Circuit. May 24, 1894.)

No. 21.

1. PATENTS—INTERPRETATION OF CLAIMS—PROCESS AND PRODUCT.
A patent may cover both a process and its product; but, if the claim of the patentee is restricted to the process, the patent cannot be made to include the product by reference to other portions of the specifications. 60 Fed. 392, affirmed.

2. SAME.
The Koechlin patent No. 253,371, for manufacture of dye stuffs, construed, and *held* to cover the process alone, and not the product. 60 Fed. 392, affirmed.

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

This was a suit by L. Durand, Huguenin & Co. against Green, Schultz-Berge & Koechlin, for infringement of a patent. The circuit court dismissed the bill (60 Fed. 392). Complainants appeal.

Livingston Gifford, for appellants.

Edward N. Dickerson, for appellees.

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

WALES, District Judge. This is a suit brought for infringement of letters patent No. 253,371, dated February 14, 1882, for manufacture of colors or dye stuffs, granted to Horace Koechlin, and by him assigned to the appellants. The specific charge against the defendants is that they imported, used, and sold coloring matter embodying and containing the invention described and claimed in the patent. The defendants denied infringement, alleging that the patent was for a process only (which they did not use), and not for a product. The circuit court sustained this defense, and dismissed the bill of the complainants. The claim of the patent reads as follows:

"I claim the improvement in the manufacture of coloring matter consisting in the production of violet coloring matters by the action of nitroso derivatives of the tertiary amines on tannin, or equivalent reaction, substantially as described."

As it was not proved that the defendants had used the process, the only question that was considered and decided by the circuit court was whether the claim covered both the process and the product. One and the same patent may cover both a process and its product, but, if the patentee choose to restrict himself to one by his claim, he cannot include the other also by a reference to other parts of his specification. It is well known that patentees, generally, make a much broader statement of the novelty of their invention in the body of the specification than they limit themselves to in the claim, which latter is held to be the distinctive feature of a patent. By the act of congress of 1836, the applicant for a patent was, for the first time, required to "particularly specify and point out

the part, improvement or combination which he claims as his own invention or discovery." In Merrill v. Yeomans, 94 U. S. 568, the court said:

"In practice, this allegation of the distinct matters for which he (the applicant) claims a patent comes at the close of the schedule or specification. * * * This distinct and formal claim is therefore of primary importance in the effort to ascertain precisely what it is that is patented."

In Keystone Bridge Co. v. Phoenix Iron Co., 95 U. S. 278, it was said by the court:

"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 a patent, is bound by it," citing Merrill v. Yeomans.

By the act of 1870, under which the patent in suit was issued, the requirement in regard to the claim is still more strict, the language of the act being that the applicant shall "particularly point out and distinctly claim the part," etc. In Mahn v. Harwood, 112 U. S. 360, 5 Sup. Ct. 174, and 6 Sup. Ct. 451, the court said:

"The taking out of a patent which has (as the law requires it to have) a specific claim is notice to all the world, of the most public and solemn kind, that all those parts of the art, machine, or manufacture set out and described in the specification, and not embraced in such specific claim, are not claimed by the patentee,—at least, not claimed in and by that patent. If he has a distinct patent for other parts, or has made application therefor, or has reserved the right to make such application, that is another matter not affecting the patent in question. But, so far as that patent is concerned, the claim actually made operates in law as a disclaimer of what is not claimed, and of all this the law charges the patentee with the fullest notice. * * * Of course, what is not claimed is public property."

Again, in Burns v. Meyer, 100 U. S. 671, the court said, in reference to the claim of a patent:

"It defines what [the patent office], after a full examination of previous inventions and the state of the art, determines the applicant is entitled to. The courts, therefore, should be careful not to enlarge, by construction, the claim which the patent office has admitted, and which the patentee has acquiesced in, beyond a fair interpretation of its terms."

In White v. Dunbar, 119 U. S. 51, 7 Sup. Ct. 72, Mr. Justice Bradley, speaking for the court, said:

"The context may undoubtedly be resorted to for the purpose of better understanding the meaning of the claim; but not for the purpose of changing it and making it different from what it is. The claim is a statutory requirement, prescribed for the very purpose of making the patentee define precisely what his invention is; and it is unjust to the public, as well as evasive of the law, to construe it in a manner different from the plain import of its terms."

The above extracts from adjudged cases show how closely a patentee is held to his claim in describing the invention for which he has sought and obtained his patent, and exhibit a marked unanimity of judicial opinions in relation to this provision of the patent law. In the apt words of Judge Dallas, in rendering the decree of the circuit court (60 Fed. 392), the law prescribes "that the claim must be taken as defining precisely what the invention covered by the patent is, and, hence, the true question is, not what the patentee might have claimed, but what he has claimed; the latter, not the former, being made the measure of his rights." Koechlin might

have claimed a product, if his description of his invention be true. He says: "Other coloring matter can be made by similar reactions. The product, as well as the method of producing the same, constitutes a part of the invention, which comprises, therefore, the preparation and the coloring matters above mentioned;" but, when he comes to his claim, he limits his invention to the method by which the coloring matters are to be produced, namely, "by the action of nitroso derivatives," etc. Disconnected from what precedes it, there is no hint in the claim that the "violet coloring matters" are a new production, which has been invented or discovered by the patentee; and from this omission to claim the product, as well as the method of making it, the inference is reasonable that he would be satisfied with a patent for the process. Other portions of the specifications may, as was said in White v. Dunbar, be resorted to, "for the purpose of better understanding the meaning of the claim; but not for the purpose of changing it and making it different from what it is." The words "manufacture" and "production," as used in the claim, are not the names of things but of acts. The claim indicates the mode and manner of doing certain things, or of making certain combinations, in order to produce certain results, and is for the improved process of obtaining those results, i. e. in manufacturing and producing them. It is not stated that violet coloring matters have never before been produced, or that they could not be produced by other processes than those described in the claim. The claim is for "the improvement in the manufacture of coloring matters," and describes the improvement as "consisting in the production of coloring matters by the action of nitroso derivatives," etc. The improvement, that is, the process, is claimed as new, but not the product. The contention that, in the Koechlin patent, the product inheres in the process, and that, therefore, the claim of the one necessarily includes the other, cannot be sustained on principle or authority. The claim is single, and is either for a process or a product; otherwise, if the claim is divisible, one part being for a process, and another part for a product, it would be a double claim, and as such in danger of being held void for ambiguity. The applicant for a patent may separately claim both a process and a product, but cannot properly claim them in one claim. They are the proper subjects of separate and distinct claims. Merrill v. Yeomans, 1 Ban. & A. 55, Fed. Cas. No. 9,472; Goodyear v. Rubber Co., 2 Cliff. 371, Fed. Cas. No. 5,583. The decree of the circuit court is affirmed.

H. L. JUDD & CO. v. FOWLER et al.

(Circuit Court of Appeals, Second Circuit. May 29, 1894.)

No. 141.

PATENTS—CONSTRUCTION OF CLAIM—INFRINGEMENT.

In the Fowler, Lingley & Fowler patent, No. 466,940, for an improved curtain rod, to be held between opposite sides of casings by pressure of springs, the first claim, for the combination, with the rod, of "a tube hav-

ing one end inclosing and sliding on the rod, and having its opposite end reduced in diameter, a spring inclosed in said tube, and held from longitudinal movement by said reduced end of the tube, and a shell or tip carried by the reduced end of the tube, and adapted to bear against the window casing," is not to be construed as requiring the spring to be held from longitudinal movement in either direction, which would compel the reduction of the end of the tube, which constitutes the invention, to be effected by compression; but the claim is to be read with the statement in the specification, which is co-extensive with the actual invention, that the spring may be prevented from pushing through the end of the tube, not only by compression, but also by turning over the end of the tube, forming an internal flange, or by indenting the end of the tube; and it is infringed by the use of any one of those methods of construction.

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

This was a suit by Henry A. Fowler, John H. Lingley, and Samuel Fowler against H. L. Judd & Co., a corporation, for infringement of a patent. The circuit court rendered a decree for complainants. Defendant appealed.

On the hearing in the circuit court the following opinion was rendered:

Wheeler, District Judge. This suit is brought upon letters patent No. 466,940, dated January 12, 1892, and granted to the orators Henry A. Fowler and John H. Lingley, as inventors, and to the orator Samuel Fowler, as assignee, for an improvement in curtain rods, to be held between opposing sides of casings by the friction of the ends made to press against the casings by springs. The infringement alleged is of the first claim, which is for: "(1) In a curtain rod, the combination, with a rod of a tube having one end inclosing and sliding on said rod, and having its opposite end reduced in diameter, a spring inclosed in said tube, and held from longitudinal movement by said reduced end of the tube, and a shell or tip carried by the reduced end of the tube, and adapted to bear against the window casing, substantially as described."

The defenses are want of novelty; that the two orators were not inventors, and one John H. Bennett was the inventor, of this improvement; and that the defendant does not infringe.

The defendant has pleaded, put in evidence, and relied upon various structures, brackets, rods, and fixtures made before, and patents for such things issued before, the date of this invention; but none of these things show a curtain rod or analogous structure held in place by the mere pressure of springs outwardly from the ends of the rods against opposite parallel casings; and although, in some or all of them, each of all the parts of the combination of this claim is found, in none of them are all of these parts in the same combination found, and neither any nor all of them appear to anticipate this claim.

The orators Fowler and Lingley, and one Carroll W. Dodge, as joint inventors, on July 12, 1889, made an application for a patent for a curtain rod, which contained this claim: "(1) In a curtain rod, the combination of a rod or bar upon which the curtain is supported, a flaring shell forming a tip, a tubular sleeve, with one end of said sleeve inclosing the smaller end of said shell or tip, and forming a tight fit, whereby said shell and tube form practically a single piece, the opposite end of said tube being reduced in thickness, and inclosing and sliding upon the rod, so the curtain held upon said rod will slide freely over the tube, a shank preferably formed integrally with said shell or tip, and concentric with the tube, and a spiral spring held on said shank with its bore slightly less than the diameter of the shank, and with its end bearing against the inclosed end of the rod, substantially as described,"—on which a patent was granted February 16, 1892, after the patent in suit, and is owned by the orators. The specification stated that the tips could be made of solid pieces of metal, and the elastic blocks attached thereto, but that they considered it better to construct them, as represented in the drawings, of sheet metal, stamped into the desired form, with the rubber blocks

inserted in the open ends. The construction of stamped tips to go into the end of the tube, and support the ends of the spring, was not practicable, and solid tips were too heavy and expensive. These difficulties appear to have been stated by Fowler and Lingley to Bennett, who was a manufacturer of the articles for the owners of the patent, and the tip was made to go over the end of the tube, so it could be stamped out of sheet metal, and the outer end of the tube was reduced in diameter to hold the spring. Bennett appears to have made useful suggestions about these changes to overcome the difficulties, but he did not apply for a patent, nor claim the invention against them, and seems to have done what he did as an artisan, rather than as an inventor; and the presumption that Fowler and Lingley were the inventors of this improvement, arising from the grant of the patent to them and their assignee, is not overcome by the proof of what he did about it. It is argued that somehow the pendency of the application of Fowler, Lingley, and Dodge deprived Fowler and Lingley of the right to claim the improvements of this patent against Bennett, or account for his failure to apply for a patent for these improvements himself. But they owed him no duty, and he had no rights in the matter unless he was an inventor. Whether he was or not has been considered in view of all the circumstances. The patent in suit was expressly made subject to the prior application of Fowler, Lingley, and Dodge, then pending, and, of course, covers only improvements upon the invention described in it. For such improvements the patent seems to be valid.

The defendant has proceeded somewhat upon the claim of Bennett that he, and not Fowler and Lingley, was the inventor of this improvement, which, as now considered, fails. Besides this, the defendant has changed the form of the tube by turning in the outer end to keep the spring from being forced through it, instead of reducing its diameter by a taper, and bent out the end of the wire of the spring, or crooked the spring itself, to engage with the tube, and keep the spring from falling out in putting up or taking down the structure. The tube reduced in diameter of this claim of the patent is said in argument to be a tube reduced in every diameter producing a true taper, which will, by its reduction in that manner, hold the spring from longitudinal movement, from which the tube and spring of the defendant so differ as not to infringe. This claim originally was for: "(1) In a curtain rod, the combination of a sliding tube, having its outer end reduced in diameter, as described, a spring with its outer diameter less than the internal diameter of said sliding tube, but slightly greater than the internal diameter of the reduced section of said tube, by which said spring is held within said tube, substantially as described." This claim was rejected as incomplete, with a suggestion that it be amended to include the rod, tubes, spring, and caps. The specification was thereupon amended by inserting: "The ends of the tubes are sufficiently contracted in diameter to prevent the end of the rod from being pushed through the end of the tube, and crowding the disks out of the tip as the spring is being compressed by the sliding motion of the tube on the rod, in the operation of applying the curtain rod to the window casing. The compression of the tube is thus made to serve a double purpose,—in holding the spring from falling out of the tube when the tube is removed from the rod, and also in preventing the end of the spring from being pushed through the end of the tube and against the disk as the spring is compressed against the end of the rod. This latter purpose can obviously be secured by turning over the end of the tube, thereby contracting the opening, and forming an internal flange, by which the end of the spring will be held from contact with the disk, or the end of the tube which is held in the tip can be indented, so as to reduce its internal diameter, and hold the outer end of the spring from longitudinal movement while it is being compressed." And the claim was made to be as it now is.

The claim is to be read with reference to the specification. When so read, the description of a tube as reduced in diameter, holding an inclosed spring from longitudinal movement by its reduced end, will as well, although not so aptly, include the tube of this amendment as that of the other form. If this were not so, the changes of form of the end of the tube and of the mode of engaging the spring in the defendant's structure do not alter their mode of operation, and seem to be immaterial. They do the same thing, in substan-

tially the same way, as the corresponding parts of the patented invention, the substance of which the defendant appears to have taken. The defendant, therefore, appears to infringe.

Let a decree be entered for the orator.

Arthur v. Briesen, for appellant.

Stewart Chaplin (D. H. Driscoll, on brief), for appellees.

Before WALLACE, LACOMBE and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. This appeal calls in question the correctness of a decree of the circuit court for the southern district of New York, which sustained the validity of letters patent No. 466,940, dated January 12, 1892, and issued to the complainants Fowler and Lingley as inventors, and to the complainant Samuel Fowler as assignee, for an improvement in curtain rods, and which also adjudged that the defendant had infringed the first claim of the patent. On July 12, 1889, the inventors, Fowler and Lingley, and Carroll W. Dodge, applied for letters patent for an improved curtain rod, which, numbered 468,987, was issued on February 16, 1892. This patent is for a tube sliding telescopically over the end of a curtain rod, the tube carrying at one end a tip or head to receive an elastic disk which bears against the window casing, and having a spring inclosed within the tube, one end of the spring bearing against the end of the rod. The tension of the spring forces the tube away from the end of the rod, and thus enables the elastic disk to be held firmly against the casing. Previous devices of this sort were either fastened to the woodwork, or the ends of the rod were made to press against the casing by a screw thread. The novelty of the invention consisted in holding the rod in place solely by the outward push of a spring. The patentees began to manufacture curtain-rod tips of this sort in June, 1889, and ceased the manufacture during the next month. The device was defective because the pressure of the spring was exerted directly against the head, and pushed it out of the tube, unless it was solid and soldered into the tube,—a construction which made the manufacture too expensive. Fowler and Lingley, the two inventors named in the patent in suit, thereupon sought for, and invented, an improvement which should obviate the defect, and applied, on May 8, 1890, for a patent therefor, which was issued as No. 466,940, and was, by its terms, made subordinate to the Fowler, Lingley, and Dodge application then pending in the patent office.

As the decision of the case depends entirely upon the construction to be given to the first claim, and as the construction depends upon an examination of the claim in connection with the specification, and with the history of the application in its progress through the patent office, it is important to quote the specification with substantial completeness. The material portion is as follows:

"B is a rod forming the central section of our improved rod, and can be of metal or other material, as wood, or of wood covered with metal, or it can consist of a piece of tubing. Upon each end of the central rod, B, we place the telescopic sliding tubes, C, C, with their inner ends ground or turned down to an edge in order to allow the rings or the hem of a curtain to slide freely

over them. The outer ends of the sliding tubes, C, C, are compressed or reduced in diameter by compression or upsetting. On the reduced outer ends of the sliding tubes, C, C, are placed the tips, D. D, which are either tubular in form, as represented in Fig. 4, or flaring or bell-mouthed, as represented in Fig. 3, the special form of the tip itself being immaterial. Within the tip, D, and resting upon the ends of the sliding tubes, C, are the disks, E, and upon the disks, E, are placed the rubber disks, F, F. Springs, G, G, are inclosed within the sliding tubes, C, the outer diameter of the springs being larger than the internal diameter of the sliding tubes, C. at their reduced ends, C', C'. The springs are large enough to require considerable pressure to cause them to enter the ends, C', C', and they are held in place by the pressure of the springs against the inner surface of the sliding sleeves at their reduced ends, C', C', and kept from falling out of the tubes when they are removed from the ends of the rod, B. The opposite ends of the springs, G, G, rest against the ends of the rods, B, and as the entire length of the curtain rod, with the ends as applied, is longer than the space between the sides of the casing, so that, when it is applied to the casing, the springs, G, G, are compressed, their tension exerts a pressure against the sides of the casing, which serves to hold the rod firmly in position. (The ends, C', C', are sufficiently contracted in diameter to prevent the spring, G, from being pushed through the end of the tube, C, and crowding the disks, E and F, out of the tip, D, as the spring, G, is being compressed by the sliding motion of the tube, C, on the rod, B, in the operation of applying the curtain rod to the window casing. The compression of the tube, C, is thus made to serve a double purpose,—in holding the spring, G, from falling out of the tube, C, when the tube is removed from the rod, B, and also in preventing the end of the spring from being pushed through the end of the tube, and against the disk, E, as the spring is compressed against the end of the rod, B. This latter purpose can obviously be secured by turning over the end of the tube, C, thereby contracting the opening, and forming an internal flange, by which the end of the spring will be held from contact with the disk, E, or the end of the tube, C, which is held in the tip, D, can be indented so as to reduce its internal diameter, and hold the outer end of the spring from longtitudinal movement when it is being compressed.)"

The part of the specification inclosed in parentheses was introduced by amendment.

The first claim is as follows:

"(1) In a curtain rod, the combination, with a rod, B, of a tube, C, having one end inclosing and sliding on said rod, and having its opposite end reduced in diameter, a spring inclosed in said tube, and held from longitudinal movement by said reduced end of the tube, and a shell or tip carried by the reduced end of the tube, and adapted to bear against the window casing, substantially as described."

The invention consisted in reducing in diameter the outer ends of the sliding tubes, whereby they received the force of the outward thrust of the springs, which were thus prevented from being pushed through the ends of the tube, and, as the tips no longer needed solidity to withstand the pressure of the springs, they were placed over the reduced outer ends of the tubes. The compression of the tube, in addition to its preventing the end of the spring from being pushed through the end of the tube, also kept the spring in position by friction, and thus prevented it from falling out when the tube was removed from the rod. In order to accomplish the first and main object of the improvement, the specification states three ways in which the ends can be reduced in diameter: First, by compressing them; secondly, by turning over the end, thereby forming an internal flange which will hold the end of the spring

away from the disk; or, thirdly, by indenting the end of the tube. The defendant's expert says that in its curtain-rod tips "the outer end of the tube is turned inward slightly at its extreme end, and has ears bent in from a point or short distance back from the end. These inturned ears form a stop to prevent the end of the spring from being pushed through the outer end of the tube," and that "the result is that a spring of uniform diameter simply abuts against the stops formed by these inturned ears, and is not held from longitudinal movement by the reduced end of the tube." It is further said that the reduced ends do not hold or retain the springs, but that they are kept from falling out by being bent or bowed outwardly, so as to bear against the interior of the tube and create friction with it, and consequently that the defendant's reduced ends perform only one function of the patented method of construction. A further distinction is said to exist between the two structures, in that whereas, in the complainants' patent, the reduced outer ends of the tubes form a neck or seat for receiving the tip, in the construction of the defendant's articles the tip goes over the reduced end, and is forced upon that portion of the exterior of the outer end of the tube which is not reduced in diameter.

The attempt to avoid infringement rests mainly, if not entirely, upon such a construction of the first claim as to limit it to one mode of reducing the end of the tube, viz. by compression, and to exclude the modes named in the amended specification,—"by turning over the end of the tube," or by indentation. The theory of the defendant is that the claim, as finally allowed by the patent office, was so reduced in scope as to limit it to that feature of construction which would prevent the spring from longitudinal movement in either direction. The original application contained three claims which were properly rejected as "incomplete and vague." The amendment included in parentheses was then made, and three new claims were written, the first of which is as follows:

"In a curtain rod, the combination with a rod, B, of a sliding tube, C, having its outer end reduced to hold an inclosed spring from longitudinal movement, a spring held in said sliding tube, and a tip carried by said sliding tube, and adapted to bear against the window casing, substantially as described."

The second and third claims referred to particular features of the device, and are not important in this case. The first and second claims were rejected "on the patent to La Dow, in connection with patent to Smyth, both of record." The patent to Charles La Dow—No. 297,136, dated April 22, 1884—was for a suspensory rod, which consisted of a rod provided at one end with a socket button, and at the opposite end with a nut upon the screw-threaded end of the rod. The frictional contact with the opposing surfaces of the window casings was effected by the rotation of the screw-threaded rod. The patent to James B. Smyth—No. 192,663, dated July 13, 1877—was for an improvement in a rotating window-shade roller, so that the roller could be made longer or shorter. The only part of the device which seems to have any relation to the patented device of the patent in suit is that the axle of a pulley wheel at the end of

the roller is held against the bearing, which is attached to the casing, and by which the roller is supported, by the tension of a spiral spring, and thus the roller is prevented from being detached from its bearings. The roller is not held between the two casings by frictional contact. These two references seem to have little connection with the invention of the patent. But the real imperfection of the claim was that it did not clearly and with precision express how the various parts co-operated with each other. Thus, by "a sliding tube reduced to hold an inclosed spring from longitudinal movement," the draughtsman obviously meant that the reduced end was the means which held the spring from longitudinal movement; but the operative character of the combination was much better expressed by the language subsequently employed. The defendant insists that the language of the claim, as finally amended, which was that the spring was held from longitudinal movement by the reduced end of the tube, requires that the reduced tube should prevent the spring from moving longitudinally in either direction, and that such requirement compels the reduction to take place by compression. If this construction was necessary, in view of the state of the art, or of the limitations in the specification, or of the requirements of the patent office, it would merit favor; but it is not required by either of those considerations. The specification was coextensive with the actual invention, and described three ways in which the spring could be prevented from being pushed through the end of the tube,—by compression, or by forming an internal flange, or by indenting the end so as to hold the outer end of the spring from longitudinal movement. The claim requires the end to be reduced in diameter, and specifies that the spring was to be held from longitudinal movement by the reduced end, the specification having particularly described three ways in which the end of the spring could be thus held. The claim does not limit the invention to such means of reducing the internal diameter as shall entirely prevent the spring from movement. The defendant took one of the methods of construction described in the specification, and included in the claim. It is not of importance that it did not take the best method which was so described.

The defendant's remaining answer to the charge of infringement is that, by a proper construction of the claim, the reduced end is to form the entire seat for the neck of the tip, whereas, in the defendant's device, the tip is said to be carried or have its seat by that portion of the end of the tube back of the reduced portion, which is of full diameter. The point seems too wire-drawn to require discussion. The specification said that "on the reduced outer ends of the sliding tube, C, C, are placed the tips, D, D." This part of the patented invention consisted in the fact that the reduced end of the sliding tube received or carried, or upon it was placed, the neck of the tip. The decree of the circuit court is affirmed, with costs.

SHAPLEIGH v. CHESTER ELECTRIC LIGHT & POWER CO. et al.

(Circuit Court, E. D. Pennsylvania. May 29, 1894.)

No. 21.

PATENTS—INTERPRETATION—INFRINGEMENT.

The Shapleigh patent No. 433,187, for a "safety cut-off" for electrical apparatus, construed, and *held* not infringed.

This was a bill by M. S. Shapleigh against the Chester Electric Light & Power Company and others, for infringement of a patent. Heard on the pleadings and proofs.

Mark W. Collet, John R. Bennett, and Randall Morgan, for complainant.

Strawbridge & Taylor, for respondents.

DALLAS, Circuit Judge. This suit is brought by Marshall S. Shapleigh upon letters patent No. 433,187, dated July 29, 1890, granted to him for a "safety cut-off." The claims which he alleges the defendants have infringed are as follows:

"(1) The combination of a pair of spring clamps, a fuse placed between the jaws of said clamps and automatically clamped thereby, and terminals provided with lateral supports operating to compress the jaws of said clamps externally, substantially as described.

"(2) The combination of a pair of spring clamps insulated from each other except through the fuse, terminals placed on a suitable insulating block, and provided with lateral supports, between which the jaws of said clamps pass, and are compressed externally, and a fuse automatically held by and between the jaws of said clamps, substantially as described."

"(4) The combination of a pair of spring contact clamps, made of an elastic conducting material, and provided with jaws, by and between which the fuse is placed and automatically clamped, with a pair of terminals placed on a suitable insulating block, and provided with lateral supports operating to compress the jaws of the clamping contacts externally, substantially as described."

"(7) The combination of a block provided with two terminals, supports of conducting material electrically connected to said terminals, and in permanent mechanical connection therewith, a pair of spring clamps provided with jaws connected by an insulating piece, and a fuse, the whole being arranged so that the jaws are pressed upon the fuse automatically, and complete the circuit between the terminals."

"(9) The combination of a pair of spring clamps insulated from each other, and provided with jaws, a fuse automatically held by and between the jaws of said clamps, and terminals provided with lateral supports sufficiently close to compress the jaws, substantially as described."

Safety cut-offs were not new with this inventor. Before the patent in suit was applied for, they were well known, and, as in the complainant's device, their principal constituent was a strip of metal more fusible than the conducting wire employed throughout the system generally. These more fusible pieces are themselves capable of conducting, without fusing, the current intended to be transmitted, and, being interposed as a part of the continuous conductor, they simply form, so long as the normal current is not exceeded, a small section of any circuit to which they are applied; but if and when, from any cause, the ordinary current is materially

increased, they, by fusing, break the circuit, and thus operate to secure immunity from the danger which otherwise would arise from the passage of the abnormal current beyond the point of their insertion. In addition to the fusible strip, all automatic cut-offs comprise certain other requisite features in common; but it is not necessary to describe them.

Each of the claims involved in this case is for a combination of physical parts constituting an integral organism, and, of each of them, terminals provided with lateral supports are an essential element. As to whether the defendants' arrangement embodies this element, the experts broadly differ. Having considered their testimony with care, and having also closely examined and compared the respective devices for myself, I have reached the conclusion that that of the defendants is, at least as to the element especially mentioned, materially different in structure from that of the plaintiff; and, furthermore, I am convinced of the pertinency and soundness of the point made by the learned counsel for the defendants:

"That each terminal of each pair of terminals of the Shapleigh patent is an electrical device embodying lateral supports, and must necessarily so be, whereas but one terminal, at most, of each pair of defendants' terminals, is or need be an electrical terminal embodying lateral supports, and that, therefore, * * * defendants' device does not infringe the specific combination of the claims of complainant's patent."

Upon the ground that infringement of the plaintiff's patent by the defendants has not been shown, the bill is dismissed, with costs.

JOHNSON v. OLSEN.

(Circuit Court, D. Indiana. May 29, 1894.)

No. 8,782.

1. PATENTS—LIMITATION OF CLAIMS—REJECTION AND ACQUIESCENCE.
   The principle that ar inventor who acquiesces in the rejection of a claim is estopped from insisting upon such a construction of the claims allowed as would be equivalent to what was rejected, applies when the rejected claim is narrower, as well as when it is broader, than those allowed. Morgan Envelope Co. v. Albany Perforated Wrapping Paper Co., 14 Sup. Ct. 627, followed.

2. SAME—INVENTION—EXCELSIOR MACHINES.
   The use of lugs to prevent lateral movement having been long known and practiced, their adaptation to an excelsior machine, to prevent lateral movement of the sliding plate, involves no invention.

3. SAME.
   Wooden bearings for excelsior machines being old, there is no invention in placing the wood so that the grain will run vertically with the line of motion, instead of at right angles thereto.

4. SAME.
   The Johnson patent No. 452,553, for improvements for excelsior machines, is void for want of novelty and invention.

This was a suit by Jesse B. Johnson against Olaf R. Olsen for infringment of a patent for improvements in excelsior machines.

V. H. Lockwood, for complainant.
Chester Bradford, for defendant.

BAKER, District Judge. This is a suit in equity for an injunction, and for the recovery of damages for the infringement of letters patent of the United States No. 452,553, issued May 19, 1891, to the complainant, on improvements in excelsior machines. The defendant has interposed as grounds of defense: license, invention of the machine by defendant, abandonment, two years' prior use, that the claims are for aggregations, lack of novelty, and lack of invention. The defendant's contention—and the only one which the court deems it necessary to pass upon—is that the complainant's patent is void for lack of novelty and lack of invention. The object of the invention is to enable upright excelsior machines to cut a larger quantity of long, unbroken, hair-like fibers from wood than prior machines had been able to cut, and to produce a machine which could be operated more cheaply, while it would last longer, and need less repairs. The claims as finally allowed, and the claims originally made and rejected, and afterwards canceled by complainant, and also the various amendments which appear in the record of the application on which the patent was granted, are as follows:

Jan. 23, '91. ~~1.~~ In an excelsior machine a framework, a driving mechanism carried thereon, a reciprocating frame carrying knives connected to such driving mechanism, a pair of corrugated rolls to hold the block of wood in place. the lower roll journaled in boxing, upon the uprights,
Dec. 15, '90. *movable vertically upon a recessed bed-plate bolted to the frame* the upper journaled on a ~~movable sliding~~ plate, and
Nov. 28, '90. *to such sliding plate* springs connected ~~therewith~~ whose tension holds the upper roll in contact with the wood, all combined substantially as shown and described.

1. ~~2.~~ In an excelsior machine a framework, driving mechanism carried therein, reciprocating knives connected to the driving mechanism, a pair of corrugated rolls for holding the block of wood, the upper connected to a sliding plate, a pair of springs connected to such sliding plate, for holding the upper roll in contact with
Dec. 15, '90. *recessed* the wood, the sliding plate moving vertically upon a bed plate having lugs to prevent any lateral movement of the
Nov. 28, '90. ~~*and its central part recessed as shown*~~ slide and crank and gear mechanism connected to such sliding plate for lifting the same, all combined substantially as shown and described.

Jan. 23, '91. 3. In an excelsior machine a framework, driving mechanism carried thereon, reciprocating knives connected to the driving mechanism, a pair of corrugated rolls for receiving and holding the block of wood to be operated upon, the lower one journalled in boxings upon the uprights of the frame, the upper one journalled in boxings ~~sliding~~ *upon a recessed bed-plate bolted to the frame* *Dec. 15, '90.* upon a ~~sliding~~ plate, springs connected to such sliding plate for holding the upper roll in contact with the wood, pinions connected to the shaft of such roll, a vertical shaft connected to and revolvable by the main shaft provided with worms engaging with gears on the corrugated rolls and so disposed that the upper and lower rolls revolve in opposite directions for holding the block of wood and feeding it to the knives, all combined substantially as shown and described.

~~4.~~ 2. In an excelsior machine a framework, driving mechanism carried in bearings thereon, a vertically reciprocating slide frame carrying scoring and shaving knives connected to such driving mechanism, a pair of corrugated rolls for gripping and feeding the wood to the knives, the lower one journalled in boxings on the framework, the upper one journalled in bearings on a sliding plate, springs connected to such plate for holding the *Dec. 15, '90.* upper roll in contact with the wood, such ~~its central point recessed and~~ *recessed* *Nov. 28, '90.* sliding plate moving vertically in bed plates let into *and* the framework provided with lugs for preventing the lateral movement of the slide, all combined substantially as shown and described.

Erase and insert A. ~~5. In an excelsior machine the bed plate (8),~~ *Nov. 28, '90.* the central portion set in and ~~its ends provided with~~ lugs, substantially as and for the purpose ~~described.~~

A. 3. ~~5.~~ In an excelsior machine the bed plate (8), its central portion recessed and let into the upright of the frame, its ends provided with lugs, in combination with a sliding plate (5) and an upper corrugated roll journalled therein, substantially as shown and described.

4. ~~6.~~ In an excelsior machine the sliding plate (5) having a rack-bar at its upper end and a slot (11) at its lower end secured to the upright (f) of the frame
Nov. 28, '90. ~~by a countersunk bolt (9) and a lower bolt (10)~~, such plate sliding upon a bed plate (8) having its central part set back and lugs (1) upon its upper and lower ends, and having a boss (26), in combination with springs (2) connected to the sliding plate, substantially as shown and described.

Jan. 23, '91. ~~7.~~ In an excelsior machine a pair of corrugated rolls for gripping a block of wood, the lower one journalled in bearings on the framework, the upper one journalled in bearings on a plate sliding vertically
Dec. 15, '90. *a recessed bed-plate bolted to* upon the framework, in combination with springs connected to such slide for holding the upper roll against the block of wood, the shafts of such rolls provided with pinions which engage with worms upon a vertical rod driven from the main shaft, whereby the upper and lower rolls are revolvable in opposite directions for gripping the wood and feeding it to the knives, all combined substantially as shown and described.

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5. ~~8.~~ In an excelsior machine a framework, plates connected to the sides thereof, auxilliary plates adjustably connected to such side plates, wooden backings connected to lugs, one to the adjustable plate and the other to the stationary plate, and set with the grain of the wood vertically and at such a distance as to permit the passage of the knives between such wooden backings, all combined substantially as shown and described.

6. ~~9.~~ In an excelsior machine a framework, driving mechanism carried thereon, a vertically reciprocating slide frame carrying scoring and shaving knives connected to such driving mechanism, such slide frame provided with wooden backings, the grain of the wood being vertical on either side, metal plates connected to the side of the framework, and means for adjusting the same to compensate for the wear of the parts during the operation of the machine, all combined substantially as shown and described.

An analysis and comparison of the rejected and canceled claim 1 of the application, and the original claim 2 of the application, which became claim 1 of the patent, will show that the only ma-

terial difference between them is in the addition of lugs to the bed plate, and the crank and gear mechanism for operating the sliding plate in the claim allowed. Claim 1 of the application was rejected by the examiner on the distinct ground that it had been anticipated in former patents, American, English, and German. This decision of the examiner was acquiesced in by the complainant, and the rejected claim was canceled. The patentee having once presented his claim in that form, and the patent office having rejected it, and he having acquiesced in that rejection, is, under the repeated decisions of the supreme court, now estopped to claim the benefit of his rejected claim, or such a construction of his present claims as would be equivalent thereto. Leggett v. Avery, 101 U. S. 256; Shepard v. Carrigan, 116 U. S. 593, 6 Sup. Ct. 493; Crawford v. Heysinger, 123 U. S. 589, 8 Sup. Ct. 399; Union Metallic Cartridge Co. v. U. S. Cartridge Co., 112 U. S. 624, 5 Sup. Ct. 475.

It is true that these were cases where the original claim was broader than the one allowed, but the principle is the same if the rejected claim is narrower. Morgan Envelope Co. v. Albany Perforated Wrapping Paper Co., 14 Sup. Ct. 627. Why the claims 1 to 4, inclusive, of the present patent were allowed after the rejection of claims 1, 3, 5, and 7 of the original application does not appear. The objections made to the claims as originally presented seem to be equally applicable to those allowed. The crank and gear mechanism for operating the sliding plate are old and familiar, and no novelty is shown in their combination or use. The lugs to prevent lateral movement of the sliding plate are made an element in the first four claims of the patent, and it would seem that they constituted the feature which was regarded by the examiner as distinguishing these four claims from the prior art. The use of lugs to prevent lateral movement has been long known and practiced, and, even if this were not so, their application by the patentee as shown and described in his patent would not constitute invention. If lugs had not been previously used in excelsior machines, their use would have been readily suggested to a skillful mechanic familiar with such machines.

If the springs connected with the sliding plate for holding the upper roll in contact with the wood were not the mechanical equivalent of the weights formerly in use to accomplish the same purpose (and I am inclined to think they are), still the springs were an essential part of the rejected claims, and, having acquiesced in their rejection, the complainant is now estopped to ask for such a construction of his present claims as would give him the benefit of his rejected claims.

Claims 5 and 6 are in all their essential features old and well known, and conceded to be, except that the wooden linings in the slides are arranged with the grain of the wood running vertically with the line of motion. Wooden bearings, wooden linings for bearings, and wooden slides for bearings are all old and well-known devices. Wooden bearings for excelsior machines were known and in use prior to complainant's alleged invention, differ-

ing from it in no important particular except that the grain of the wood was placed at right angles with the line of motion. This change, in my opinion, does not constitute invention.

In view of what has already been said, I do not deem it necessary to express any opinion upon the other grounds of defense. The bill will be dismissed for want of equity, at complainant's cost.

ELECTRIC MANUF'G CO. et al. v. EDISON ELECTRIC LIGHT CO. et al.

(Circuit Court of Appeals, Seventh Circuit. May 1, 1894.)

No. 135.

1. PATENTS FOR INVENTIONS—ACTION FOR INFRINGEMENT—INJUNCTION.
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. 57 Fed. 616, affirmed.

2. SAME—ELECTRIC LIGHTS.
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 ex parte 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, because of the improbability of Goebel's making so important a discovery without its becoming generally known, and without his obtaining a patent for it. 57 Fed. 616, affirmed.

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

Suit by the Edison Electric Light Company and the Edison General Electric Company against the Electric Manufacturing Company, T. A. Pamperin, Julius B. Grunert, and George Beyer to restrain the infringement of a patent. Defendants appeal from an order granting a preliminary injunction.

The appellees filed their bill in the court below to restrain the infringement by the appellants here of the second claim of letters patent No. 223,898, issued to Thomas A. Edison, January 27, 1880, for improvements in electric lamps, which claim is 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." By the original answer, the defendants below conceded that they had infringed the second claim as it had been construed by the courts, but afterwards, by amendment, denied infringement, substantially upon the ground that, by the proper and narrower construction which they insisted should be given to the claim by reason of the prior state of the art, founded upon an alleged prior invention by one Goebel, not considered in the prior litigation, the defendants' lamp should not be construed as infringing upon the patented rights of the appellees. The patent itself was also attacked upon the ground of the alleged prior invention of Goebel. The court below, upon a hearing, granted an injunction pendente lite, from which order this appeal is prosecuted. The case below is reported in 57 Fed. 616, where the facts are sufficiently stated for the disposition of the case here.

W. H. Webster (Wm. H. Kenyon, John J. Herrick, Allan D. Kenyon, and A. P. Smith, of counsel), for appellants.

H. G. Underwood (C. E. Mitchell, F. P. Fish, R. N. Dyer, and D. H. Driscoll, of counsel), for appellees.

Before WOODS and JENKINS, Circuit Judges, and BUNN, District Judge.

JENKINS, Circuit Judge (after stating the facts). The question presented by this appeal involves the proper rule for the guidance of the court in allowing a preliminary injunction where there has been previous protracted and expensive litigation, resulting in the establishment of the validity of the patent, but where the present alleged anticipation of the invention had not been considered. The patent in question was sustained in Consolidated Electric Light Co. v. McKeesport Light Co., 40 Fed. 21, and in Edison Electric Light Co. v. U. S. Electric Lighting Co., 47 Fed. 454, which latter case was affirmed upon appeal in the second circuit (11 U. S. App. 1, 3 C. C. A. 83, and 52 Fed. 300), and followed in Edison Electric Light Co. v. Sawyer-Man Electric Co., 11 U. S. App. 712, 3 C. C. A. 605, and 53 Fed. 592. In these cases, however, the alleged prior invention of Goebel was not asserted or considered.

The alleged anticipation by Goebel seems first to have been presented in the case of Edison Electric Light Co. v. Beacon Vacuum Pump & Electrical Co., 54 Fed. 678, in which case Judge Colt, upon motion for preliminary injunction, asserted the rule that where the validity of a patent has been sustained by prior adjudication, and especially after a long, arduous, and expensive litigation, the only question open upon motion for a preliminary injunction, in a subsequent suit against another defendant, is the question of infringement, the consideration of other defenses being postponed until final hearing; the only exception to the rule being where the new evidence is of such a conclusive character that, if it had been introduced in the former case, it probably would have led to a different conclusion. And in such case the burden is upon the defendant to establish this, and every reasonable doubt must be resolved against him. This rule was substantially approved by the learned judge whose decision is before us for review. Judge Hallett, in a similar case (Edison Electric Light Co. v. Columbia Incandescent Lamp Co., 56 Fed. 496), held to a different rule, substantially to the effect that in such case, as in one where there had been no adjudication, the complainant must show a clear right in support of a preliminary writ, and a defense which puts his case in doubt is sufficient to defeat the application. We have held in Standard Elevator Co. v. Crane Elevator Co., 9 U. S. App. ——, 6 C. C. A. 100, and 56 Fed. 718, that, in the absence of prior adjudication or public acquiescence, a preliminary injunction should not be granted unless the rights of the patentee be clear, and the infringement be without reasonable doubt. As applied to the case of a patent that had not passed judicial scrutiny, we declared the rule asserted by Judge Hallett. Where, however, the patent has been strenuously contested, and its validity determined by a competent tribunal, we think a strong presumption arises in favor of the patent which im-

poses upon the contestant the burden of attack. Of course such prior adjudication does not conclude the question of right, even as to the defenses passed upon, except as between parties and privies. Such a judgment is not within the principle of res judicata. It is effective, however, to impress upon the patent such additional presumption of validity that demands of a contestant a quantum and force of evidence, beyond that passed upon in the prior adjudication, sufficient to convince the court of the probability that, had such further evidence been presented and considered upon the former hearing, a different result would have been reached. In other words, in such case the patentee may rightfully rest upon his patented right confirmed to him by the solemn adjudication of a competent judicial tribunal. He who attacks that right must overcome the legal presumption of right in the patentee. The strength of that presumption is variant, depending upon the circumstances surrounding the adjudication relied upon to support it. It is stronger when rested upon a final hearing than upon a motion for a preliminary injunction. Its potential force is intensified by the affirmance by an appellate tribunal of the adjudication in favor of the patent. The extent of the burden of overcoming the presumption is therefore measured by the degree of effective force imputed to the presumption. Where anticipation of invention has been asserted and determined to be unfounded, the presumption would be much stronger against cumulative evidence to prove anticipation by the one whose claim had been repudiated than where anticipation is asserted in behalf of some other supposed inventor, whose claim was not in contention in the case adjudicated; and yet, in the latter instance, in addition to the presumption attaching to the patent itself, there would arise a further presumption, more or less strong, and depending upon the circumstances, that, as the issue was the invalidity of the patent because of anticipation, bona fide contestants, earnestly striving to undermine the patent, would have asserted the defense, if known to them and deemed substantial. It may be difficult to formulate a rule that will comprehend all the conditions which could be presented, but we think it safe to say that in general, where the validity of a patent has been sustained by prior adjudication upon final hearing, and after bona fide and strenuous contest, the matter of its validity upon motion for preliminary injunction is no longer at issue, all defense, except that of infringement, being reserved to the final hearing; subject, however, to the single exception that, where a new defense is interposed, the evidence to support it must be so cogent and persuasive as to impress the court with the conviction that, if it had been presented and considered in the former case, it would probably have availed to a contrary conclusion. In the consideration of such new defense of anticipation, regard should be had to the rule that such a defense is an affirmative one; that the burden of proof is upon him who asserts it; and that the grant of letters patent is prima facie evidence that the patentee is the first inventor of the device described therein, and of its novelty. Coffin v. Ogden, 18 Wall. 120; Smith v. Vulcanite Co., 93 U. S. 486; Lehnbeuter v. Holthaus, 105

U. S. 94; Cantrell v. Wallick, 117 U. S. 689, 6 Sup. Ct. 970; Barbed-Wire Patent, 143 U. S. 275, 12 Sup. Ct. 443, 450. The propriety of this rule is enforced by the consideration that an adjudication in the case of a patent is not only a judgment *inter partes*, but is a judicial construction of a grant by the government, and in a broad sense deals with and determines the rights of the public. A patent is sui generis. By it the public, through its authorized representatives, grants a monopoly for a term of years in consideration of the surrender of the invention to public use upon expiration of the term. When, upon judicial contest, a competent court has sanctioned the grant and determined the right thereunder, the monopoly thereby granted ought not to be permitted to be invaded except upon a clear showing that the decision invoked in its favor was wrong. It is true that the prior adjudication does not deal with the supposed new defense, and does not affect the merits of that defense upon final hearing; but the fact that it was not presented, especially where the existence of the claim was known to and considered by counsel, is a circumstance to be considered by the court in passing judgment upon the merits upon the hearing for an interlocutory injunction. We are of opinion that the rule was correctly interpreted by the court below, and properly applied to the case in hand.

We are asked to determine the extent to which this court should go in review of an exercise of discretion by the court below in granting a preliminary injunction. There would seem to be some divergence of opinion in the circuit courts of appeals upon this question. The cases of Dudley E. Jones Co. v. Munger, etc., Manuf'g Co., 2 U. S. App. 188, 1 C. C. A. 668, and 50 Fed. 785, in the fifth circuit; Watch Co. v. Robbins, 6 U. S. App. 275, 3 C. C. A. 103, and 52 Fed. 337, and Blount v. Societe Anonyme du Filtre Chamberland Systeme Pasteur, 6 U. S. App. 337, 3 C. C. A. 455, and 53 Fed. 98, in the sixth circuit; Consolidated Electric Storage Co. v. Accumulator Co., 3 U. S. App. 579, 5 C. C. A. 202, and 55 Fed. 485, in the third circuit; American Paper Pail & Box Co. v. National Folding Box & Paper Co., 1 U. S. App. 283, 2 C. C. A. 165, and 51 Fed. 229, in the second circuit; and Davis Electrical Works v. Edison Light Co., 5 U. S. App. 611,[1] 60 Fed. 276, in the first circuit,—are perhaps in antagonism, leading the court of the sixth circuit to certify the question to the supreme court. That court, however, in Watch Co. v. Robbins, 148 U. S. 266, 13 Sup. Ct. 594, held that the fact that courts had reached contradictory results did not under the statute warrant the submission of the question for its decision, but might furnish ground for a certiorari upon proper application. We do not deem it needful at this time to enter that field of discussion, because, assuming the right of the appellate court to review to the fullest extent the decision of the court below, we are satisfied with the correctness of the conclusion reached upon the merits with respect to the issuance of the preliminary injunction.

[1] 8 C. C. A. 615.

It is not essential that we should enter upon an elaborate or studied investigation of the voluminous mass of evidence presented. It might be improper so to do, since possibly the case upon its merits and after final hearing may come up before us for review. We base our conclusion upon grounds not conclusive of the fact of Mr. Goebel's alleged prior invention, but effective in the consideration of the question whether the case presented is so clear and satisfactory that it overcomes the presumptive force which, under the rule adopted, must be conceded to the patent. We are content to rest our conclusion upon two grounds, which, in our judgment, sanction the issuance of this injunction.

The great problem in the art of electric lighting to render it practicable for general use was to discover a method of subdivision of the light. This is claimed to have been solved by Mr. Edison, and to have been publicly declared in 1879, and the invention secured to him by letters patent issued in 1880. For years before, scientific minds the world over were concentrated upon the investigation of electricity and electric lighting. Innumerable experiments and failures marked the pathway to success. The division of light was asserted by some of the most eminent electricians of the day to be an idle dream, and an insoluble problem,—an ignis fatuus, delusive, and unreal. Mr. Edison's invention dispelled the clouds of doubt, and demonstrated the accomplished fact. Mr. Goebel claims to have made this discovery a quarter of a century before, in the year 1854, in the city of New York, and to have made these incandescent electric lights for his own pleasure and amusement, and to have used them for lighting his store, and to light a wagon upon which was mounted a telescope, with which he publicly traversed the streets of that city. As this record is now presented to us, and considering the claim in the light of cotemporaneous history, we find it difficult to give credence to the story. During a quarter of a century, from 1854 to 1880, the scientific world was struggling with the problem, and could not solve it; and yet, if the claim asserted for Mr. Goebel be well founded, it had already been solved, and he had made public demonstration of it in the commercial metropolis of the Union; the scientific world, however, and the public generally, remaining in total ignorance of it. How he could thus hide his light under a bushel passes comprehension. The mind cannot readily yield assent to the assertion of a claim under such circumstances, and when it is supported solely by ex parte evidence. We had occasion in Standard Elevator Co. v. Crane Elevator Co., supra, to make some observations with respect to the weight to be attached to ex parte evidence, and to the value of a cross-examination. Upon further reflection upon the subject, induced by the submission to us of this case, we deem it proper to reassert and to emphasize what was there said. Certainly we cannot go to the extent of saying that ex parte evidence can be relied upon to establish the improbable. It may be that, upon final hearing, Mr. Goebel's claim may be sustained, notwithstanding the improbabilities attaching to and surrounding it. It is sufficient to say here that we cannot be satisfied as to

the fact except upon clear and convincing evidence, tested by the ordeal of an intelligent cross-examination.

The further circumstance to which we refer, and which impels us to sustain the order of the court below, is that Mr. Goebel, having accomplished that for which the world was waiting in eager expectancy, that for which scientis s were striving and experimenting for a quarter of a century after its discovery, that which was not only of incalculable value to the world, but of unlimited profit to the inventor, never applied for a patent for his alleged invention. That he did not was not owing to any philanthropic motive. He seems to have been a man of much mechanical ingenuity. He understood well the protection which the law yields to the deserving inventor. In regard to small matters he sought that protection. In 1885 he applied for a patent on a sewing-machine hammer, and in 1881 for certain other devices; among others, for a coil connected with his exhibit lamp. There was, however, no attempt to secure the protection of the law for an invention that, had it been known, would have startled the world and made him a millionaire. That he should have been so careful to secure his rights with respect to trifling matters, and evince such utter disregard of his interests in a matter of great moment, challenges belief. This renders the more improbable the story of his invention. The supreme court has regarded such conduct as largely controlling. In the Telephone Cases, 126 U. S. 556, 562, 565, 8 Sup. Ct. 778, in commenting upon the conduct of Mr. Drawbaugh with respect to his alleged anticipation of the Bell telephone, his failure to apply for letters patent therefor, and his obtaining letters patent upon other and less important matters, the court observes that:

"It becomes important to consider the conduct of Drawbaugh with reference to his alleged invention during these twenty years of eventful history in relation to the discovery and use of telephones. * * * No man of his intelligence, with or without the enthusiasm upon the subject which it is said he possessed, could have remained silent under such circumstances. * * * He was silent so far as the general public were concerned, when, if he had really done what those witnesses now think he did, he most certainly would have spoken. There is hardly a single act of his connected with the present claim from the time he heard, before going to Philadelphia, that somebody else had invented a telephone, which was on exhibition at the Centennial, that was not entirely inconsistent with the idea even then of a complete discovery or invention by himself which could be put to any practical use."

In Barbed-Wire Patent, 143 U. S. 275, 289, 12 Sup. Ct. 443, 450, the court observe:

"If Morley regarded this fence of any value, he would have applied for a patent upon it, since he had in fact obtained a patent for his traveling pen, which appears to have been a comparatively worthless contrivance."

Without assuming to say that the story of this invention is untrue, and without designing to suggest what result should be reached upon final hearing, we are compelled to say that the story is surrounded by such an atmosphere of improbability that, until it shall have been thoroughly sifted and sustained upon final hearing, the claim ought not to be permitted to invade the monopoly accorded

to another for the same invention, whose claim has passed safely the ordeal of judicial scrutiny. We think, therefore, the court below well held that the patent of Mr. Edison should be protected from invasion pendente lite. The order appealed from will be affirmed.

NEW YORK FILTER CO. v. O. H. JEWELL FILTER CO. et al.

(Circuit Court, S. D. New York. June 9, 1894.)

PATENTS—LIMITATION OF CLAIM BY DISCLAIMER—FILTRATION OF WATER.

The Hyatt invention, described in patent No. 293,740, for an improvement in the art of filtering water, defined, and the patent, as limited, sustained. The claim was for the described method of introducing a substance to coagulate or separate impurities sufficiently to facilitate their removal by the filter bed. The specification described the coagulant as a substance such as perchloride or persulphate of iron. From a year after the date of the patent its owners used alum in place of these substances, because more convenient and less expensive. Several years afterwards, they disclaimed a part of the specification which stated that the patentee did not confine himself to the employment of the persulphate or perchloride of iron or permanganate of potassa as a coagulating agent, nor to any particular proportions or quantities of such agent, nor to any particular liquid; thereby restricting the patent to the actual objects and scope of the invention. *Held* that, by this disclaimer, the claim was not so limited as to exclude from the protection of the patent the use of alum or the salts of alumina, which for many years had been well known to be interchangeable as coagulants with the reagents specifically named.

This was a suit by the New York Filter Company against the O. H. Jewell Filter Company and others, for infringement of a patent.

Philipp, Munson & Phelps, for complainant.

Lysander Hill, for defendants.

SHIPMAN, Circuit Judge. This bill in equity is founded upon the alleged infringement of letters patent No. 293,740, dated February 19, 1884, to Isaiah Smith Hyatt, for an improvement in the art of filtering water. The title to the patent has become vested in the complainant. At and prior to the date of the invention, the patentee was connected with a corporation which was endeavoring to introduce to the public filters having a filter bed of sand for the filtration of turbid water, or water which contained suspended impurities. The apparatus was not a success, by reason of its imperfect purification of the water, and the patentee, in his search for an improvement, found a remedy which is the subject of the patent in suit, and the use of which is not limited to any particular mechanical apparatus. The patentee, in his specification, described his invention as follows:

"The invention relates to improvements in the art of filtration; and it consists in the method hereinafter described of arresting and removing the particles of foreign matter liable to pass through the filter bed with the escaping water during an uninterrupted process of filtration, or one in which a stream of water is passed through a bed of filtering material contained in a filter, the filter being a receptacle containing a bed of filtering material, and having a supply pipe for the introduction of the water and a pipe for its passage therefrom, the said supply pipe having another pipe, through which I in-

troduce into the water, simultaneously with its passage into the filter, a substance—such as perchloride or persulphate of iron—for the purpose of sufficiently coagulating the impurities in the water to admit of their arrest by the bed during the passage of the water through the filter. In practicing the invention, some form of mechanical apparatus must be employed; and, while I do not confine myself to any particular construction, I recommend the apparatus described and claimed in letters patent of the United States No. 273,542, granted to John W. Hyatt on the 6th day of March, 1883, which I have used with very satisfactory results."

It further appears from the specification that the particular apparatus which the patentee recommended to be used with his invention consisted, in general, of an upper and lower compartment, separated by a diaphragm. The lower compartment was provided with a supply pipe and a bed of sand, or other suitable filtering agent. The specification proceeds as follows:

"The supply pipe, F, has connected with it a pipe, O, which will pass from any suitable supply of persulphate of iron or perchloride of iron, or other coagulating agent, which, by preference, will be in solution. The filter bed and the persulphate or perchloride of iron, or other coagulating agent, will meet at the juncture of the pipes, F and O, and then pass into the filter together, with the result that the minute particles of foreign matter in the liquid will be sufficiently coagulated to permit their arrestation by the filtering agent. As I have stated, the proportions or quantities of the coagulating agent cannot be accurately defined. It is only necessary that a sufficient quantity be used to effect that degree of coagulation which will admit of the fine impurities being arrested from the water on its passage through the filter bed during a continuous process. It will be understood that in this process the coarse impurities present in the water may be arrested by the filter bed without coagulation. I may mention, as an illustration, that I have successfully purified the water of the Mississippi river at New Orleans by using about one-eighth of a pound of perchloride of iron, of from 50° to 60° Baume, to a thousand gallons of water. I do not confine myself to the employment of persulphate or perchloride of iron or permanganate of potassa, but make use of any other suitable agent which is capable of coagulating the impurities of the liquid, and preventing their passage through the filter bed. Neither do I limit myself to any particular proportions or quantities of the coagulating agent, as they may be varied according to circumstances and the character of the liquid to be treated. Nor do I confine myself to any particular liquid, although I contemplate chiefly the purification of water in large quantities. It is obvious that, by the use of the uninterrupted process hereinbefore described, I entirely dispense with the employment of settling basins or reservoirs, as now commonly employed."

The claim is as follows:

"The method hereinbefore described of arresting and removing the impurities from water during an uninterrupted passage of same from a supply pipe into a filtering apparatus, thence through a filter bed contained therein, and out through a delivery pipe leading therefrom, which method consists in introducing into the water, simultaneously with its passage to or into the filter, a substance which will sufficiently coagulate or separate the impurities to facilitate their arrest and removal by the filter bed, thus obviating the necessity of employing settling basins."

The entire paragraph commencing with the words "I do not confine myself" was disclaimed by the owner of the patent on July 24, 1889. It had long been known that alum and the salts of alumina and the persalts of iron were coagulants which, when placed in a vessel of turbid or impure water, coagulated or collected together the suspended inorganic or organic, but not the dissolved, impuri-

ties which are present in turbid water, and caused or assisted in causing, by a process of sedimentation, these suspended impurities to settle upon the bottom of the vessel. Knowledge of this fact has been utilized in a crude way by travelers, hunters, and soldiers for very many years. In the English patents to Peter Spence, dated May 27, 1882, and March 29, 1882, the use of these two coagulants upon impure water for the purpose of sedimentation, is made very prominent. It has also been known that, in various processes which have been devised for depriving sewage of its deleterious qualities, these chemical substances have been useful, either in the process of sedimentation or at some time prior to the process of filtration. Lime and soda have long been used for "softening" water, or for dissolving mineral matter in water. Hyatt's invention was not a process of mere sedimentation, nor for the softening of hard water, nor for the treatment of sewage. The clarification or purification of turbid waters in streams or rivers, so that they might be made useful in the highest degree for potable or domestic or manufacturing purposes, had become important in this country, and the object of Hyatt was to combine some chemical means in connection with and as a part of filtration, so that filtration might be a success, and the use of large settling basins might be avoided. His discovery was that the use of such a coagulant as a persalt of iron, by mixing it in unexpectedly minute quantities with a stream of turbid water, as it flowed through a sand filter bed, or bed of other suitable material, would arrest and hold in such filter bed a large amount of suspended impurities present in the water, so that the water, as it reached, by percolation, the bottom of the bed, would be pure, although the coagulant and the impurities had deeply penetrated the bed. The salt forms with the flowing water a gelatinous or sticky hydrate, which catches and holds the impurities by reason of its jelly-like character. The action of the filter bed, in connection with the hydrate, in removing the impurities, is described by Prof. Morton as follows:

"The filter bed, in the first place, catches along its tortuous passages minute particles of this gelatinous precipitate formed from the iron salt, and then the passages thus lined with this precipitate further catch and arrest other portions of the same, as well as particles of suspended matter. The filter bed likewise aids in the chemical reaction by which the gelatinous precipitate is formed, so that portions of gelatinous precipitate come into existence or are developed during the passage of the liquid through said filter bed, in consequence of the agitation to which said liquid is subjected in flowing through these tortuous passages, and thus the filter bed has its power of catching and arresting particles of suspended matter still further developed."

It will thus be seen that the action of the hydrate, in connection with a stream flowing upon a filter bed, was not simply a repetition of the old process of subsidence or sedimentation. The invention thus used in connection with sand or gravel, or crushed-quartz filter beds, has proved to be exceedingly useful. Large quantities of water can be rendered pure with great expedition and economy. The process not only frees water from suspended impurities, but greatly aids in freeing, and it is said to entirely free, it from bacteria or living organisms. It is also extremely useful in clarify-

ing water in large quantities for those manufacturing purposes which demand the use of perfectly clear water. Its patentability has been sharply attacked, by reason of the previous knowledge of the utility of alum and of the salts of iron as a coagulant, and more especially by reason of the use of these chemical substances in various ways in systems for rendering sewage harmless. The fact of the prior use of these reagents is not important upon the question of patentability, for the patentee does not pretend to have discovered that they are coagulants. He invented a method by which their properties can thoroughly, promptly, and economically be made extremely useful for the clarification of water upon a large scale. Much time and space have been occupied with the attempt to prove and disprove the alleged fact that the state of the art in regard to the separation of filth and water in sewage destroyed the patentable character of Hyatt's invention. The object of the defendants in this part of the case was to broaden the complainant's patent, and it therefore insisted that it includes the treatment of water in whatever form or guise it is found, although it is mixed with other substances, so as to be in a partially liquid state, and includes a treatment for any purposes for which water may be used, whether merely for irrigation or for an addition to the current of a stream or for potable purposes; and that, as thus construed, it has for its predecessors all the systems for the purifying treatment of partially liquid material for any purpose whatever. Hyatt's actual invention, as it is made apparent by its history, and by the disclaimer, was to make impure or turbid water, and no other fluid, pure from suspended impurities, and clean for potable, domestic, and manufacturing purposes. His system was not one to make sewage either useful or innocuous, although the present owners of the patent may have endeavored to represent it as such in advertisements. A sand bed, or any filter bed of suitable material for the purposes of the patent, would be worthless for the treatment of such material. The bed would be forthwith clogged, and the attempt to use Hyatt's filter-bed system for the separation from each other of the component parts of the compound which is known as sewage would be useless. The treatment of sewage which does not undertake to make water pure for purposes of personal and domestic use, but to make filth a fertilizer, requires a different process from one which undertakes to make turbid water absolutely free from suspended impurities, and therefore capable of being drank without injury. No system which had previously been discovered for making sewage beneficial was of value to Hyatt beyond the fact that previous inventions informed him that, in all systems for the separation of suspended impurities from water, salts of iron or salts of alumina perform a prominent part. The process for treating the sewage of the town of Coventry, in England, and the three English patents of Frederick Arthur Paget (sealed April 16, 1875), Peter Jensen (dated November 21, 1882), and Fritz Hille (sealed April 23, 1872), which are thought to have the greatest importance, show complex processes, among which is filtration, for the treatment of sewage, in which the various salts of iron and of alumina are or may be used;

but, for the purposes for which Hyatt wanted to use a reagent, neither process conveyed an idea of material practical importance. He was not informed how to use the reagents in connection with a stream of water flowing upon an ordinary filter bed, for the purpose of freeing the stream from its ordinary impurities, and converting it into water of the purest class. In the course of his experiments, he also ascertained—what was a surprise to scientists—that a remarkably small quantity would successfully accomplish the purification in connection with a sand filtering bed. Having made his invention, he either directed or permitted his draughtsman in his original specification to state his invention in such broad and vague terms as to justify the charge that he was endeavoring to obtain a patent for a method of clarifying any fluid or semifluid, for any purpose, from any impurities or imperfections, however caused, by any coagulant in any quantity. Neither did the well-known use of lime or soda as an agent for the "softening" of water, as it is termed, or for the dissolving of mineral matter, which has been taken up by and contained in water used for domestic or manufacturing purposes, throw such light upon the method in which water could be purified from suspended impurities as to cause the softening process, of which the inventions described in the English patents of 1879 and 1881 to John Henderson Porter are examples, to limit or destroy the patentable character of Hyatt's invention. About a year after the date of the patented invention, the owners of the patent commenced, and have continued, to use alum in place of the persalts of iron, because it could be readily procured anywhere, while the persalts of iron could not be promptly procured, and must be shipped in carboys of glass, which caused its transportation to be expensive. The defendants also use alum, and use the Hyatt invention, if the use of alum is included in the patent.

The fact of infringement depends upon the question whether the owner, by its disclaimer, so limited the claim as to exclude the use of alum or the salts of alumina from the protection of the patent. All the terms of the disclaimer are not easily to be understood. The patentee had given no formula of proportions or quantities of the reagent, but had said that a sufficient quantity was to be used, and, by way of illustration, mentioned that a very small quantity, one which would naturally create surprise, was sufficient for the purification of the turbid water of the Mississippi. The disclaimer struck out the clause which stated that the patent was not limited to particular proportions or quantities, but, as there was nothing in the patent which created a limitation, that part of the disclaimer simply brings into prominence the fact that, in the opinion of the patentees, small quantities only would be requisite for the purposes of the invention. The disclaimer also specified, what should never have been in doubt, that water was the only liquid to be purified, but it properly did not say that the purification was for potable purposes only, nor that sand, or its equivalent granular material, made the only filtering bed suitable to be used. It is the natural, and probably the best, material to be used for the purposes of the invention. The patent was intended, before the disclaimer, to include any sub-

stance which could accomplish the broad scope which the patentee was willing should be included in his patent. This is indicated by his inclusion in the disclaimed paragraph of permanganate of potash, which is not a coagulant of impurities, but oxidizes or burns those impurities which are of an organic character. The intent of the disclaimer was to confine the scope of the patent to the actual character and extent of the invention as it has been heretofore described, but it was not to limit the patent to those reagents only which were specifically named. The defendants insist that the owner of the patent disclaimed not only reagents which could perform any work of coagulation or separation, not only of suspended, but of dissolved, impurities, for any purpose, such as for irrigation, but that all equivalents of the persalts of iron were also excluded. The argument that no line can be drawn between equivalents, but that, if one set of coagulants is excluded, all chemical substances which perform like work must be excluded also, has a certain force, but the argument does not adapt itself closely to the facts of the case, which are that alum had been for scores of years a well-known interchangeable article with persalts of iron for the coagulation of suspended impurities in turbid water, especially for the purpose of slaking thirst; that the invention was a method of using reagents "such as" persalts of iron, so as to clarify turbid water in large quantities; that by the disclaimer the patent had been restricted to the actual objects and scope of the invention; and that the owners of the patent had themselves used alum for four years before the disclaimer. It would be unnatural to suppose that the disclaimer was intended to exclude the article which the owners were using, and the use of which by others they were continually asserting to be an infringement, especially when, if it was excluded, the patent became worthless. Before the disclaimer, the idea of the use of any coagulant or reagent ran through the specification and the claim, and was not confined to the disclaimed paragraph. By the disclaimer, the patent is made to say: I do not claim the use of any reagent which may turn out to be a coagulant. My invention was for a more limited purpose, and was for the use of reagents which, in connection with a running stream of water upon a filter bed, became hydrates, and I claim reagents "such as"—of the same kind or class as—persalts of iron, or of that well-known kind of which persalts are an example. Such a construction includes, with persalts of iron, their interchangeable chemical substance, the salts of alumina. A more limited and technical construction would seem to contain an element of unfairness. Let there be a decree for an injunction and an accounting.

BROWNING v. COLORADO TELEPHONE CO.

(Circuit Court of Appeals, Eighth Circuit. May 21, 1894.)

No. 359.

1. PATENTS—NOVELTY—TERRA-COTTA WIRE CONDUIT PIPE.
A patent claiming a rectangular terra-cotta wire conduit pipe having rectangular partitions made in one integral piece by forcing the material,

while plastic, through a die, and burning it, cannot be sustained as for a new article of manufacture, the making of sewer pipe out of clay by the same process being old, and hollow blocks of terra cotta, rectangular in form, and divided into ducts by partitions, being previously well known, although used as building material, rather than as a conduit for wires.

2. SAME.

The Lynch patent, No. 396,407, for terra-cotta wire conduit pipe, *held* void for want of novelty.

Appeal from the Circuit Court of the United States for the District of Colorado.

This was a suit by Frank T. Browning, administrator of John H. Lynch, deceased, against the Colorado Telephone Company, for infringement of a patent. The bill was dismissed. Complainant appealed.

James M. Lewis and Chester H. Krum, for appellant.

Frederick P. Fish and C. W. Waterman (W. K. Richardson, Edward O. Wolcott, and Joel F. Vaile, on the brief), for appellee.

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

THAYER, District Judge. This was a suit which was filed by the appellant in the circuit court for the district of Colorado to restrain the infringement of letters patent No. 396,407, issued to John H. Lynch, the appellant's intestate, on the 29th day of January, 1889. The defenses interposed were, in the main, anticipation, want of patentable novelty, and noninfringement. The Lynch patent must be classified as a patent for "a new article of manufacture." The article described in the specification and drawings is a terra-cotta pipe, rectangular in form, which is made like a piece of ordinary sewer pipe by forcing the material out of which it is made, while in a plastic state, through a die, and subsequently burning it. It differs from a piece of ordinary sewer or drain pipe only in the respect that the interior or bore of the pipe is divided, according to the illustrations given in the drawings of the patent, into six compartments or ducts by one vertical and two horizontal partition walls which extend the full length of the bore. The walls of these partitions are made somewhat thinner than the exterior wall of the pipe, and they are formed as the material is forced through the die so as to become an integral part of the pipe. The walls of the partitions are made slightly thinner than the exterior wall, so as to secure a uniform shrinkage, when the pipe is burned, after being molded. The single claim of the patent is for "a rectangular terra-cotta wire conduit pipe, having rectangular partitions, all of uniform thickness, and made in one integral piece, substantially as shown and described." We might well take judicial notice of the fact, even if it was not abundantly proven by the testimony, that the art of making sewer or drain pipe, both rectangular and cylindrical in form, out of clay, is very old. It is a part of our common knowledge that sewer and drain pipes have been manufactured out of clay for a long period practically by the same process which the patentee employs in making his so-called "terra-cotta wire conduit pipe." The evidence also discloses

to our entire satisfaction that at the date of the Lynch patent "a rectangular terra-cotta pipe," having the bore divided into ducts by partitions, was not a new article of manufacture. The several hollow blocks of terra cotta which were produced on the hearing, all of which antedate the patent in suit, namely, Exhibits C, D, K, N, R, and S, have all of the essential and characteristic features of the alleged new terra-cotta wire conduit pipe described in the patent. They are rectangular in form. The interior of each is divided into two or more compartments or ducts, and they might severally be laid in sections so as to form a continuous pipe or conduit for carrying a wire or a cable composed of wires. The several exhibits above referred to might be appropriately termed terra-cotta conduit pipes, as well as hollow blocks of terra cotta. It is true that these several exhibits were intended to be used as building material, rather than as a conduit for carrying wires, but this fact is quite immaterial. If the alleged new article of manufacture was in fact an old article at the date of the patent,—as we think it was,—in view of the aforesaid exhibits, then it goes without saying that the patentee was not entitled to a patent merely because he suggested the idea of devoting it to a new use. Neither the number of the ducts into which the bore is divided nor the length of the pipe is a material feature of the invention. It is obvious, therefore, that he did not suggest any changes, either in the form or the structure of the old article, which were necessary to adapt it to the new use, and according to well-established principles he is not entitled to a patent merely for suggesting the application of an old article or device to a new use. Brown v. Piper, 91 U. S. 37, 41; Roberts v. Ryer, Id. 150, 157; Knapp v. Morss, 150 U. S. 221, 228, 14 Sup. Ct. 81; Aron v. Railway Co., 132 U. S. 84, 89, 10 Sup. Ct. 24; Ansonia Brass & Copper Co. v. Electrical Supply Co., 144 U. S. 11, 17, 12 Sup. Ct. 601.

Without pursuing the subject at any greater length, it is sufficient to say that we are clearly of the opinion that the patent in suit is void for the reasons which we have indicated. The decree of the circuit court is therefore affirmed.

KRICK v. JANSEN.

(Circuit Court of Appeals, Second Circuit. May 29, 1894.)

PATENTS—FLORAL DESIGNS.

The Krick patent (No. 408,416) for a floral design, consisting of a foundation having holes in it, combined with picks, for holding the flowers in position, *held* not to show patentable invention. 59 Fed. 364, reversed.

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

This was a suit by William C. Krick against Edward Jansen for the infringement of a patent. The defendant demurred to the bill. The second ground of demurrer assigned was the want of novelty on the face of the patent. The demurrer on this ground was overruled. See 52 Fed. 823. The plaintiff subsequently obtained a decree. See 59 Fed. 364. The defendant thereupon appealed.

Louis C. Raegener, for appellant.
Isaac S. McGiehan, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. This appeal is from a decree of the circuit court which sustained the validity of letters patent No. 408,416, dated August 6, 1889, and issued to William C. Krick, for an improvement in floral letters or designs, and which adjudged that the defendant had infringed the patent. The invention relates to floral letters or floral designs for decorative purposes, and consists of flowers secured to a foundation piece of wood, metal, or pasteboard, of the required size and shape, and provided with small holes in the back of the piece, into which toothpicks are inserted to hold the whole design in position. The patentee says, in his specification, that the object of the invention is—

"To provide a letter or ornament made of small flowers wired or glued to a wooden foundation piece, which is adapted to be held in position by means of toothpicks inserted in its back, all as will be hereinafter explained. In marking or forming designs on floral pieces, it has been the custom heretofore to tie the flower to the end of a toothpick, and stick the toothpick into the floral piece, and repeating the same process until the design, letter, or figure is complete. In practice, I have found this to be a very tedious and slow process—First, because it takes a great deal of time to tie each flower singly to the pick; and, second, because the design, letter, or figure is very apt to be made crooked when each flower is applied to the piece singly."

The specification further says as follows:

"To construct my improved floral letter or design, I first cut the foundation piece, A (of wood, metal, or stiff pasteboard), to requisite size and shape. The holes, c, c, are then made to receive the pick. I then secure the flowers by binding the stem portion to the form either with wire or fine twine. As each letter or design is secured with two or three picks, it can be accurately adjusted to the floral piece without disturbing the other flowers."

The claim was for—

"A floral letter, figure, or design for decorating purposes, consisting of the flowers, a, secured to the foundation piece, A, which is formed to create the letter or figure desired, and provided with the holes, c, in the combination with the picks, e, all as herein described."

It appears from the testimony of the patentee that, prior to the date of his invention, floral designs, such as wreaths and crosses, had been made of wood, and that two methods were employed to attach the flowers to the wooden foundation,—one by winding them upon the wood with thread or wire, and the other by putting moss around or upon the foundation, and fastening the flowers to toothpicks, which were afterwards inserted in the moss. It was also testified that it had long been customary to decorate the interior walls of churches and Sunday-school rooms, during festival periods, by words apparently formed of flowers or evergreens, which were made by cutting the letters out of a foundation of pasteboard or cardboard, and covering the face of the foundation with flowers or leaves. It thus appears that, before the date of the invention, wooden frames, in the shape of wreaths or crosses, were used as a foundation to

which the flowers which covered the frame were attached by picks thrust into the moss, and that it was usual to make a foundation of letters cut on or from a sheet of cardboard, the face of which was covered with flowers. After the use of wooden frames as a foundation for floral decorations, which were secured to the moss by picks, and after the use of cardboard letters for analogous purposes, there was no invention in securing flowers to a foundation piece so formed as to create the desired letter or figure, although provided with small holes, through which the wooden picks are inserted to fasten the letter to the entire floral ornament. The patentee added holes in the back of the wooden foundation to the pre-existing devices. We do not perceive, in the wooden letters with the holes, notwithstanding its popularity, a patentable improvement upon the wooden cross or wreath. This result obviates the necessity of examining the question of infringement. The decree of the circuit court is reversed, with costs, and the case is remanded to that court, with instructions to dismiss the bill, with costs of the circuit court.

SIXTEEN HUNDRED TONS OF NITRATE OF SODA v. McLEOD.

(Circuit Court of Appeals, Ninth Circuit. April 2, 1894.)

No. 117.

1. SHIPPING—CHARTER PARTY—DEMURRAGE—RESTRICTIONS ON LIABILITY.
   A charter party which makes the charterer liable for demurrage only when caused by his default does not relieve him of liability for delay caused by his omission to perform his covenants, even though he is not guilty of negligence.

2. SAME—POLITICAL OCCURRENCES.
   A charter party provided for demurrage for detention of the vessel by default of the charterer excepting detentions caused by political occurrences. *Held*, that political occurrences which prevented the charterer from procuring a cargo, but did not prevent him from loading any cargo he might procure, did not relieve him from liability for demurrage. Ross, District Judge, dissenting.

Appeal from the District Court of the United States for the Northern District of California.

Libel by McLeod against 1,600 tons of nitrate of soda for demurrage. Libelant obtained a decree. The owners of the cargo appeal.

Page & Eells, for appellant.
Andros & Frank, for appellee.

Before McKENNA and GILBERT, Circuit Judges, and ROSS, District Judge.

GILBERT, Circuit Judge. On the 16th day of September, 1890, the British ship Dunstaffnaage, then on a voyage to a South American port, laden with lumber, was chartered to J. W. Grace & Co., merchants of San Francisco, to bring nitrate of soda "from a

safe nitrate port, as ordered by charterers, to San Francisco, Cal., direct." The provisions of the charter party which are material to be considered upon this appeal are as follows:

"The said parties of the second part (J. W. Grace & Co.) do engage to provide and furnish the said vessel during the voyage aforesaid with a full cargo, say, nitrate of soda in bags, to be received by the vessel as customary, freight to be paid on the right and full delivery of cargo at the final port of discharge at and after the rate of five dollars U. S. gold coin per ton of 2,240 pounds avoirdupois, English weight, delivered. The said parties of the second part shall be allowed for the loading and discharging of said vessel at the respective ports aforesaid as follows: Thirty working lay days, to commence 24 hours after her inward cargo or her unnecessary ballast is finally discharged. * * * And for each and every day's detention by default of said parties of the second part, or their agents, they agree to pay to the said party of the first part demurrage at the rate of four pence sterling per ton register per day; but, should the vessel be detained by the master beyond the time herein specified, demurrage shall be paid to charterers at the same rate and in the same manner. * * * The cargo shall be received and delivered within reach of the vessel's tackle. Penalty for nonperformance of this agreement, the estimated amount of freight. The act of God, enemies, political occurrences, fire, and accidents beyond charterers' control, as well as the dangers of the sea and navigation always excepted."

The vessel arrived in due course at Antofagasta, in Chili, where she discharged her cargo of lumber, and received her instructions from her charterers to proceed to Caleta Buena in Chili, to take a cargo of nitrate of soda. She arrived at Caleta Buena on February 9, 1891. After her departure from Antofagasta, and while on her way to Caleta Buena, civil war broke out in Chili between the faction known as the Balmacedists, who supported the president, and those known as the Congressionalists, consisting of the congress of Chili and its adherents; each faction claiming to be the lawful government of the country. The Congressional party were in possession of Caleta Buena when the Dunstaffnaage arrived at that port, and the Balmacedists had no representative there. The president and his party were at that time recognized by the United States and other countries as the government of Chili, and they continued so to be recognized until September 7, 1891, when the Congressional party, having been victorious in the contest, was recognized. By the laws of Chili in force at the time the Dunstaffnaage lay at Caleta Buena, the sellers of cargoes of nitrate of soda were required to pay the government, at the point of shipment, an export duty on such cargoes. The charterers of the vessel had purchased in due time a cargo of nitrate of soda for shipment under the charter party, but were unable to obtain a delivery of the same from the sellers after the arrival of the vessel, for the reason, as stated in the stipulation of the parties to this suit, that "no sellers of nitrate would consent to deliver the same for shipment during such time as the Balmaceda party was unrepresented at Caleta Buena, on the ground that a payment to the Congressional party would not be a liquidation of such duty, and a defense to them as against any claim which might thereafter be made therefor by the Balmaceda party, or a defense against any charge that might thereafter be made against them by said Balmaceda party for the violation of said revenue law." The vessel

was subsequently loaded with the cargo of nitrate at the port where she lay, but a delay of 28 days occurred, for which the owners claimed demurrage under the terms of the charter party. On her arrival in due course at San Francisco, this suit to recover demurrage was instituted. A decree was entered for the libelant in the district court, and the charterers, the owners of the cargo, take this appeal therefrom.

There are two principal questions presented upon the appeal, the decision of both of which must depend upon the construction to be given to certain provisions of the charter party: (1) Was the delay in loading occasioned by the "default" of the charterers? (2) Was the delay excused by virtue of the last clause of the charter party, whereby exception is made in the case of nonperformance of the covenants by reason of "political occurrences," etc.? The provision for demurrage is one of the stipulations usually found in the contract. In the absence of a clause limiting the liability of the charterers to cases where the detention shall occur from the fault or default of the charterers, or from some accident or cause specifically named, the obligation to pay demurrage is an absolute one, and its meaning is that, if the ship is detained over the stipulated days, the charterer shall pay the stipulated sum for such time over and above the lay days as the ship is in such condition that she cannot be handed back for the owner. In Randall v. Lynch, 2 Camp. 352, where the detention was caused by the crowded state of the docks, but the charterer was, nevertheless, held liable, Lord Ellenborough, in delivering the opinion of the court, said: "I am of the opinion that the person who hires a vessel detains her if, at the end of the stipulated time, he does not restore her to the owner." In Barret v. Dutton, 4 Camp. 333, the detention occurred from a severe frost, which froze the river, and rendered loading impossible. The vessel, moreover, owing to the same reason, could not have sailed if she had been loaded in the stipulated time. The court, nevertheless, held the charterer liable for demurrage. But, in this case, there is inserted in the demurrage clause a limitation of the liability of the charterers for delay in loading or discharging. It is stipulated that they shall be answerable only for detention which may result from their default. To what extent does this provision modify their obligation? There is in the use of the word "default" no necessary imputation of negligence. As used in such an instrument, it can mean only the nonperformance of contract duty,—a failure upon the part of one of the contracting parties to do that which he had contracted to do. The most that can be claimed for its effect is that it excludes liability of the charterers for delay in loading or discharging, if the delay result from a sudden or unforeseen interruption or prevention of the act itself of loading or discharging, not occurring through the connivance or fault of the charterers. The courts have so construed such limitation in other contracts. In Thacher v. Gaslight Co., 2 Low. 361,[1] the parties had contracted for quick dispatch in discharging a cargo of coal, and,

[1] Fed. Cas. No. 13,850.

for every day's detention by default of the party of the second part, demurrage at $50 per day. The vessel arrived, and was delayed 10 days before she could get a berth at the charterers' wharf. There was evidence that the charterers had suitable accommodations for receiving cargoes of coal which were sufficient for ordinary occasions, and that they endeavored to charter vessels to arrive at such times as not to interfere with each other, and that they had done so at this time, but that, contrary to their expectation, other vessels arrived in port just before the libelant's schooner. The court said:

"The proviso intends to exonerate the charterers from delay occasioned by superior force acting directly upon the discharge of the cargo, and not from the indirect action of such force, which, by its operation upon other vessels, has caused a crowded state of the docks. If the respondents do not furnish the wharf room, or any other means or appliances which they are to supply, it is not enough for them to prove that they have taken reasonable measures to procure them. In short, the default does not mean negligence, but a failure of contract on their part, unless it is caused by a direct and unavoidable vis major, or something like it."

In Davis v. Wallace, 3 Cliff. 123,[2] it had been agreed that the vessel should have quick dispatch in discharging, and, in case of detention, the charterers were to pay demurrage, provided the detention should happen by their default. After reaching the wharf designated as the place of discharge, the vessel was detained three days by reason of the berth being occupied by another vessel. It was held that the libelant was entitled to demurrage. Clifford, J., in delivering the opinion of the court, said that the stipulation for quick dispatch excluded all delay save the time employed in discharging, except what was occasioned by natural causes beyond the control of the parties so contracting.

The appellants rely upon the language of Mr. Chief Justice Waite, in Davis v. Pendergast, 16 Blatchf. 565, Fed. Cas. No. 3,647, where, in referring to the limitation of liability to delays resulting from the default of the charterer, it was said:

"The respondent in effect agreed that no more than forty-five running days should be occupied in loading or discharging the cargo, unless it was occasioned by some unusual and extraordinary interruption, that could not have been anticipated when the contract was made."

There is in the decision no application of the words so used to the facts in that case, and there is no definition of the nature of the unusual and extraordinary interruption not anticipated by the contracting parties, which, in the mind of the court, would have excused the charterers. As a matter of fact, there was no such interruption claimed or proven in that case. The decision actually made was that the charterers were liable for delays which occurred through the intervention of "Sundays and holidays, customhouse and port regulations, and lack of wharfage and lighterage;" that those were risks assumed by the charterers, and that detention by reason thereof placed them in default. But the language of the opinion in that case is inapplicable to the facts disclosed in the

[2] Fed. Cas. No. 3,657.

case at bar. There was no unusual or extraordinary interruption in the loading of the Dunstaffnaage. There was no interruption or interference therewith at all. There was no interposition of force between the cargo and the vessel. There was no closing of docks or seizure of property. The difficulty was of an entirely different nature. It arose from the fact that the charterers had no cargo to load. In entering into the charter party, the shipowner placed his vessel at the disposal of the charterers for the stipulated time and voyage. He had the right to rely upon the existence of a cargo ready for shipment as soon as the vessel should arrive at Caleta Buena. The failure to provide that cargo was the default of the charterers. When the master of the vessel demanded the cargo, the charterers had none. Their cargo had been contracted for, but had not been delivered to them. They could not obtain possession of it. But there was no interference upon the part of the Chilian government, or upon the part of any armed force, to prevent their obtaining possession of the cargo, or handling or moving the same, or placing it within reach of the vessel's tackle. In the case of Dow v. Hare, Fed. Cas. No. 4,037a, an unreported decision of Judge Hoffman in the district court for the northern district of California, and affirmed on appeal to the circuit court, the charterer had chartered the ship to carry a cargo of coal to Oonalaska, and there deliver the same on board the United States steamer Saranac. When the chartered vessel arrived with her cargo at the designated port, the Saranac was not in port. She had been wrecked and lost at sea. The vessel, after waiting during her lay days and for several days thereafter, discharged her cargo on the wharf, and brought suit for demurrage. It was urged in defense of the action that the charterers were not liable, inasmuch as the detention was not due to their "default." In delivering the opinion, the court said:

"It was as much the part of the contract that the shipper should provide a consignee to receive the goods at the place of destination as that the carrier should transport and deliver them. If, on the arrival of the vessel, the consignee cannot be found after diligent inquiry by the master, the delay so occasioned ought in justice to be deemed to have been caused by default of the shipper or his agents. * * * By the bill of lading, the Saranac was the consignee to whom the coal was to be delivered. The consequence of her unpunctuality ought rather to be borne by the party whose agent she was, and who had particularly stipulated that she would be ready to receive the whole cargo within ten days after the ship arrived, rather than upon the shipowner, who was a stranger to the contract."

But it is contended in the second place that, while there may have been no interference with the act of loading, the delay is nevertheless excused by virtue of the last clause of the charter party, whereby the performance of all the charterers' covenants, including the covenant to "furnish and provide a cargo" is excused if prevented by "political occurrences," etc., and that, if the charterers are excused from furnishing a cargo, they are likewise excused for delay in loading, since the cargo must be furnished before it can be loaded. It is sufficient to say in answer to this argument that no political

occurrence is shown in this case which would serve to release the charterers from the performance of any of their covenants. The substance and effect of the covenant to provide and furnish a cargo was that the charterers would deliver a cargo within reach of the ship's tackle, for the purpose of loading. They did not covenant to purchase or acquire a cargo. With the procurement of the cargo, the shipowner had no concern. The charterers were to provide a cargo, and the owner was to provide a ship. In such a case the charterer may be presumed to have his cargo under control. If a political occurrence should prevent him from delivering a cargo or moving a cargo, the excuse contemplated in the charter party would exist; but when the intervention of the political occurrence is carried further back, and is made to apply to the procurement of a cargo in the market, the contingency is too remote to have been contemplated by the parties, unless the language of the charter party so expresses by clear and unmistakable terms. In this case the inability of the charterers to furnish a cargo arose from the refusal of all sellers of nitrate of soda to deliver cargoes of that article during the continuance of the then existing political situation. It is immaterial to this case whether such refusal was inspired by the fear of the sellers that they might subsequently be required to pay a second duty to the Balmacedan government, or by the fear that they might be dealt with as for acts treasonable to that government. Their reasons, whatever they were, were sufficient to cause an absolute refusal upon their part to deliver such cargoes. Political occurrences, it is true, had caused their refusal, but the political occurrences opposed no obstacle to their free disposition of their property, or to their handling or transporting the same by land or by water. Political occurrences had indirectly closed the nitrate of soda market at Caleta Buena, but the owners of that commodity were free to act concerning the same, and their refusal to sell and deliver was purely voluntary. The case is in no material feature different from the cases of The India, 1 C. C. A. 174, 49 Fed. 76, and Sorensen v. Keyser, 2 C. C. A. 650, 52 Fed. 163. In those cases, the contracts were for cargoes of saw logs, and the terms of the contracts required delivery alongside the vessels within a stipulated time, but excepted, in the computation of lay days at the port of loading, the time lost, if any, by reason of drought. The charterers were unable, on account of the low stage of water in the interior streams, occasioned by drought, to procure a cargo for delivery at the port. The court held that fact to be no defense to the actions for demurrage, that the inability to procure cargoes was not within the exception, and that the exception "by reason of drought" referred only to a failure to deliver alongside for loading. In Grant v. Coverdale, L. R. 9 App. Cas. 470, where the agreement was to load within a specified time, "frosts, etc., and other unavoidable accidents preventing the loading excepted," the charterer was held liable for demurrage, although frosts prevented him from bringing the cargo alongside the ship. The agreement in that case referred to delay in loading only, but the reasoning con-

tained in the decision is applicable to the case at bar. Lord Selbourne said:

"It would appear to me to be unreasonable to suppose, unless the words make it perfectly clear, that the shipowner has contracted that his ship may be detained for an unlimited time on account of impediments, whatever their nature may be, to those things with which he has nothing whatever to do, which precede altogether the operation of loading, which are no part whatever of it, but belong to that which is exclusively the charterer's business. * * * If, therefore, you are to carry back the loading to anything necessary to be done by the charterer in order to have the cargo ready to be loaded, no human being can tell where you are to stop."

The case of Hudson v. Ede, L. R. 2 Q. B. 566, cited by the appellant, was a case where, by the terms of the charter party, the vessel was to proceed to the port of Sulinah, and there load a complete cargo of grain, the cargo to be brought alongside the ship at the port of loading, at the charterer's expense and risk, 30 days to be allowed for loading and unloading, a demurrage over and above laying days, at six pounds a day, "detention by ice and quarantine not to be reckoned as lay days." It appeared that all grain shipped at Sulinah was kept at points higher up the Danube, and was brought by lighters down the river, and unloaded into ships at Sulinah. The ship being ready to load, notice was given the charterer, but the river immediately above Sulinah became frozen up, and so remained for two months. The charterer was unable to bring his cargo down the river, and he was held not liable for demurrage. But that was not a case of failure to provide a cargo. It was the decision of the court that since, from the circumstances and the custom of the port, the cargo had to be brought down the river after the arrival of the ship, detention by ice must be construed to extend to detention by ice of the lighters coming down the river to load the ship, and that the lighters were as much prevented going to the ship and loading the same by reason of ice in the river as they would have been by ice obstructing their movement in the port of Sulinah itself.

It follows from these views that the decree must be affirmed, with costs to the appellee.

ROSS, District Judge (dissenting). I am unable to agree to the judgment in this case. The gist of the contract between the parties was that Grace & Co. were to provide and furnish the ship, within reach of her tackle, at the port of Caleta Buena, a full cargo of nitrate of soda in bags, which the ship should there receive, and transport direct to San Francisco, and there deliver, for a certain stipulated sum per ton of 2,240 pounds; the charterers to be allowed for the loading of the ship 30 working lay days, to commence 24 hours after her inward cargo and unnecessary ballast should be finally discharged, and the receipt by them of written notice to that effect from her captain. The charter party further provided that for each and every day's detention by default of the charters or their agents they should pay to the ship demurrage at the rate of four pence sterling per ton per day, but should the ship be detained by the master beyond the time specified, demurrage should be paid

to the charterers at the same rate and in the same manner; and it concluded with this provision:

"The act of God, enemies, political occurrences, fire, and accidents beyond charterers' control, as well as the dangers of the seas and navigation, always excepted."

This exceptive clause manifestly applies to each and every covenant of the charter party,—to those on the part of the charterers to procure, furnish, and load the cargo, as well as to that on the part of the ship to transport it. If an act of God or of enemies, or political occurrences, or fire, or an accident beyond the charterers' control, or of navigation, cause the failure of either party to comply with either or all of the terms of the contract, such failure must be held excused, for the reason that such is the agreement the parties made. The question then is, did such political occurrences intervene between the making of the charter party and the time the ship was ready to enter upon its performance as to exonerate the charterers from liability for the detention to which the ship was subjected? It is conceded that, after the making of the charter party, the charterers purchased, from a certain company at Caleta Buena, the contemplated cargo of nitrate in time for shipment in accordance with the terms of the contract. But, before the time for shipment arrived, what was practically a civil war broke out in Chili between two factions, one of which was called the Balmaceda party and the other the Congressional party, and each of which claimed to represent the legitimate government of the country. That war was in progress when the ship got ready to receive the cargo. The port of Caleta Buena was then in the possession of the Congressional party, and there was no representative of the Balmaceda party there. By a law of Chili then in force, there was payable by the sellers on all cargoes of nitrate sold for shipment from Chilian ports an export duty of $1.50, Chilian money, per 100 Spanish pounds, which duty was payable to the government of Chili at its customhouse at the port of shipment. It is further stipulated by the parties that the only reason why the cargo was not shipped within the time required by the charter party was "that no sellers of nitrate would consent to deliver the same for shipment during such time as the Balmaceda party was unrepresented at Caleta Buena, on the ground that a payment of the export duty to the Congressional party would not be a liquidation of such duty and a defense to them as against any claim which might thereafter be made therefor by the Balmaceda party, or a defense against any charge that might thereafter be made against them by said Balmaceda party for the violation of said revenue law."

It is not important, I think, whether or not the fears of the nitrate sellers were well founded, although it is not unreasonable to suppose, in view of the history of that contest, that payment by a seller of nitrate of the duty imposed by the Chilian law upon its exportation, to the Congressionalists, thereby furnishing them in part with the sinews of the war they were waging against the party headed by the then president of the republic (Balmaceda), might, in the

event the latter had been successful in the contest, have been visited with consequences far more serious than the collection of the duties over again. The agreed fact remains that none would consent to deliver any nitrate for shipment during the time here in question, and that such refusal was caused by the then prevailing political occurrences. For this reason the charterers were unable to procure or furnish the cargo for the ship during the time in question, and, as a necessary consequence, unable to load it within that period. The real cause of this failure on their part was the political occurrences—the political contest then being waged between the contending factions in Chili—against liability for which by either the parties to the charter party chose to stipulate. I think the cases of The Village Belle, 2 Asp. 230, Hudson v. Ede, L. R. 2 Q. B. 566, and Fenwick v. Schmalz, L. R. 3 C. P. 313, give support to this view, and that the cases of Grant v. Coverdale, L. R. 9 App. Cas. 470, The India, 1 C. C. A. 174, 49 Fed. 76, and Sorensen v. Keyser, 2 C. C. A. 650, 52 Fed. 164, are not against it. In Grant v. Coverdale, the clause of exception applied only to the failure to load. In The India and in Sorensen v. Keyser, the exception "by reason of drought" the court held referred only to a failure to deliver the logs alongside the vessel for loading. But in the case at bar the parties themselves so placed the exception clause in the charter party as to make it apply to every covenant thereof.

THE WELLS CITY.

MORRIS BEEF CO., Limited, v. THE WELLS CITY.

(Circuit Court of Appeals, Second Circuit. May 29, 1894.)

No. 103.

SHIPPING—CARRIAGE OF GOODS—LIABILITY FOR DELAY.

A clause in a bill of lading, giving the ship liberty "to tow and assist vessels in all situations," authorizes her, if in the ordinary course of the voyage she falls in with another vessel in distress, to go to her assistance and tow her to such place of safety as, under the particular circumstances of the case, is most reasonably accessible.

Appeal from the District Court of the United States for the Southern District of New York.

This was a libel by the Morris Beef Company, Limited, against the steamship Wells City, George John Savage, claimant, for damage to cargo. The district court dismissed the libel (57 Fed. 317). Libelant appealed.

MacFarland & Parkin (W. W. MacFarland, of counsel), for appellant.

Convers & Kirlin (J. Parker Kirlin, of counsel), for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. The libelant appeals from a decree dismissing a libel filed to recover damages for the decay and de-

terioration of a lot of beef shipped in good order at New York upon the steamship in a refrigerator, under a bill of lading for transportation to and delivery at Bristol, England. 57 Fed. 317. Upon the voyage the steamship fell in with a vessel disabled and in distress, and took her in tow, and, in performing the salvage service, deviated from the voyage, and was detained thereby about four days beyond the ordinary voyage period. The deviation was only such in distance and duration as was necessary to enable the steamship to take the vessel to a place of safety. In consequence of the delay, the condition and value of the beef was materially impaired. The bill of lading, after reciting the receipt, in apparent good order and condition, of the merchandise, continues as follows:

"To be delivered from the ship's deck in the like good order and condition at the aforesaid port of Bristol (subject to certain enumerated exceptions), and with liberty, during the voyage, to call at any port or ports to receive fuel, to load or discharge cargo, or for any other purpose whatever; to sail with or without pilots; to tow and assist vessels in all situations."

If the deviation was, under the circumstances, justified by the provision in the bill of lading in respect to liberty to tow and assist vessels in all situations, the libelant has no just cause of complaint.

It is urged for the appellant that the clause in question is not intended to authorize a deviation to earn salvage at the expense of the cargo; that to construe the clause so as to permit this would be subversive of the object of the contract; and that the only rational construction is that it exempts the carrier from becoming an insurer against excepted risks. In construing such clauses, they are to be read in the light of the general purposes of the contract, and reconciled, so far as may be, with all of its expressed and implied conditions. They are not to be permitted to operate to the extent of their literal scope when this would be inconsistent with the substantial objects of the contract. One of the fundamental conditions of the contract by bill of lading is the obligation of the shipowner to be diligent in carrying the goods on the agreed voyage, and to carry them directly, without any unnecessary deviation; and a construction of the clause which would permit him to abandon the voyage, and go in search of a salvage service at his option, and merely for his own profit, would be inadmissible, as subversive of that obligation, and giving the shipowner a power obviously beyond any which the shipper could have contemplated. "Liberty to do something outside the voyage must be construed with reference to that, and as intended to be consistent with it." Carv. Carr. by Sea, § 286. When a vessel has deviated from her proper course, the shipowner is not only liable for the delay, but he becomes absolutely responsible for any loss or damage to the goods which may have occurred during the deviation, and which can be attributed to it. He is not protected by the exception of perils in the contract, and becomes practically an insurer against the excepted risks. The clause giving the privilege to deviate would undoubtedly protect him against such a liability. Effect, therefore, can be given to it without im-

porting a privilege of assisting vessels unnecessarily, or under circumstances unreasonably injurious to the interests of cargo owners. But, if the only purpose of the clause were to protect the shipowner against liability as an insurer against the excepted risks, that intention could have been easily expressed, and in short and explicit terms. The nature of the privilege, as well as the language, requires that it should not be fettered by a narrow or illiberal construction. "It is the duty of all ships to give succor to others in distress. None but a freebooter would withhold it." Lord Stowell, in Laing v. Glover, 5 Taunt. 49. A deviation to save life is justifiable, and, while the weight of authority has not sanctioned a deviation made merely to save property, the tendency of modern opinion, founded upon considerations of public policy, is illustrated by the recent act of congress which provides that neither the vessel nor her owners shall be held responsible for damage or loss resulting from attempting to save life or property at sea, or from any deviation in rendering such service. Act Feb. 13, 1893. The clause does not require a contracted construction upon the theory that it is a one-sided provision, which inures merely for the benefit of the shipowner. Not only is it to be assumed that the cargo owner has received a consideration for it in a reduced rate of freight, but, as was pointed out in Stuart v. Navigation Co., 32 Law T. (N. S.) 257, such a provision is for the general benefit of the whole body of shippers, whose losses caused by the delay incident to the exercise of the privilege in some instances are counterbalanced by their gains in others, when but for it their property would perish. Undoubtedly, some limitation must be implied in the general liberty to tow and assist, given by the clause. In Stuart v. Navigation Co., supra, the question was somewhat considered, and the observations of the judges show the difficulty in defining the precise scope of the privilege, and attempting to decide when and how far a vessel may go to the assistance of another in exercising it. We think it may be rationally construed as authorizing the vessel, when, in the ordinary course of the voyage, she falls in with another in distress, to go to her assistance, and tow her to such place of safety as, under the particular circumstances of the case, is most reasonably accessible. For these reasons, we are unable to accede to the construction of the clause urged for the appellant, and placed upon it by the learned district judge whose decision we are called upon to review, and we conclude that the deviation made by the steamship was justifiable, as within the terms of the privilege. This conclusion leads to an affirmance of the decree, and renders it unnecessary to consider whether the steamship should have been exonerated upon any other ground by the district court. The decree is affirmed, with costs.

THE HUGO.

BRAUER et al. v. COMPAGNIA DE NAVIGACION LA FLECHS.

(District Court, S. D. New York. April 26, 1894.)

SHIPPING—LIABILITY FOR LOSS.

The damages for cattle lost at sea through the negligence of the ship includes, in addition to the market value of the cattle at the place of shipment, the freight paid in advance, and the pro rata premiums of insurance.

Exceptions to Commissioner's Report on Damages. See The Hugo, 57 Fed. 403.

MacFarland & Parkin, for libelants.
Butler, Stillman & Hubbard, for respondent.

BROWN, District Judge. 1. As respects the number of cattle lost through the misconduct of those on board the Hugo (see 57 Fed. 403), the testimony presents such extreme difficulties that I do not find sufficient warrant for departing from the finding of the commissioner; having no confidence that any different finding that I might make on that point would be any more nearly accurate or just than the commissioner's finding.

2. The damages for the loss of the 63 cattle, as found by the commissioner, being estimated in the same manner as upon a total destruction of cargo at sea in collision cases, viz.: the market value of the articles at the place of shipment, with interest and expenses of transportation (The Ocean Queen, 5 Blatchf. 493, Fed. Cas. No. 10,410), I think the libelants are entitled to recover, in addition to the market price in New York, as fixed by the commissioner, the advanced freight also, on the 63 cattle lost (not on the 126); and in addition thereto, the pro rata proportion of insurance premiums paid, and the cost of feed for the 63 cattle, with interest; both of those items being necessary, or reasonable and proper expenses and charges, which should, therefore, be added to the market value at the place of departure. The Scotland, 105 U. S. 24, 35; The Aleppo, 7 Ben. 121, Fed. Cas. No. 158. The exceptions in the bill of lading do not extend to cases of losses by negligence, or misconduct, as is here found in regard to the 63 cattle; though they do apply to the residue of the loss through sea perils.

As above modified, the report is confirmed.

THE PARADOX.

JOHNSON ENGINEERING & FOUNDRY CO. v. THE PARADOX.

(District Court, S. D. New York. June 13, 1894.)

MARITIME CONTRACT—"BUILDING" OF VESSEL.

A contract for the machinery of a vessel is not enforceable in admiralty, where such machinery was supplied for the completion of the construction of the vessel, and such vessel was not then completed for the purpose for which she was intended.

In Admiralty. Libel for materials and supplies.

Hoadly, Lauterbach & Johnson, for libelant.
Benedict & Benedict, for respondent.

BROWN, District Judge. The libelant furnished machinery to the yacht Paradox. If the supply of machinery is to be deemed a part of the "building" of the vessel, the contract, by the settled law of this country, is not a maritime contract, and cannot be enforced in this court. Though the state law gives a lien for building a vessel, the lien can be enforced in the state courts alone.

The Paradox was designed and built for the purpose of experimenting with a system of water-jet propulsion, patented by J. S. Morton. The libelant company, and its immediate predecessor, contracted to put in the propelling machinery. The original contract was made with the preceding company before the vessel was launched; and the libelant, the succeeding company, took up and finished what the former left undone. The evidence leaves no doubt that all the machinery was contracted for and supplied for the purpose of completing the construction of the vessel as an experimental yacht, in accordance with the original design. The libelant's officers understood this from the beginning. After the hull, constructed by other persons, was sufficiently advanced, it was launched, towed to the libelant's yard, and the machinery there put in by the libelant company, and by the preceding company, with changes of detail from time to time in the course of construction so as to make the machinery as efficient as possible.

In the case of The General Cass, 1 Brown, Adm. 334, Fed. Cas. No. 5,307, Longyear, J., says:

"The true criterion by which to determine whether any water craft, or vessel, is subject to admiralty jurisdiction, is the business or employment for which it is intended, or is susceptible of being used, or in which it is actually engaged, rather than its size, form, capacity, or means of propulsion."

When the vessel is completed for the purpose intended, then the vessel is "built," and not till then; whether it be a steamer, a sailing vessel, a barge, a scow, or a mere float designed to support and transport a bath house (The Public Bath No. 13, 61 Fed. 692); and whatever is supplied to such a vessel for the purpose of making it what it was intended to be, and to enable it to enter upon the kind of business or navigation intended, is a part of the "building" of the vessel. This is the clear weight of authority. The case seems to me to be entirely within the decisions of Roach v. Chapman, 22 How. 129; In re Glenmont, 32 Fed. 703; The Pioneer, 30 Fed. 206; The Iosco, 1 Brown, Adm. 495, Fed. Cas. No. 7,030; Wilson v. Lawrence, 82 N. Y. 409; in which cases all the suggestions and arguments of the libelants seem to me to be met and overruled.

I much regret the necessity of this conclusion in the present case; but it seems unavoidable upon the authorities, and I must, therefore, dismiss the libel, though without costs, as not based upon a maritime contract, and hence not within the jurisdiction of this court.

THE LIME ROCK.

BORNE et al. v. DONNELLY et al.

(Circuit Court of Appeals, Second Circuit. May 29, 1894.)

No. 104.

Appeal from the District Court of the United States for the Southern District of New York.

The decision of the district court in this case will be found fully reported in 55 Fed. 126. The proctors for the appellant claimed in their brief that the "new evidence" hereafter referred to in the opinion of the court of appeals tended to establish the following facts, namely:

"(1) That the libelants testified falsely when they testified that the Alpha was in good condition. (2) That the Alpha had been leaking previously, had been in danger of sinking within a day or two of the collision, and that the leak in her had been only temporarily stopped by Capt. Kelly's putting overboard some manure to check the leak."

Benedict & Benedict, for appellants.

Hyland & Zabriskie, for appellees.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. Notwithstanding the new evidence introduced by the appellant since the decision of the cause by the district court, we are satisfied that the libelants' canal boat was sufficiently strong and tight for the ordinary exigencies of her use as a coal boat, and that she did not sink in consequence of any defect in her condition, but that she was forced ahead, and brought in contact with the dock, by the impact of the steam lighter, and a hole thereby knocked into her bow. The occurrence was due to the carelessness of those in charge of the lighter. They used unnecessary violence in the attempt to move the canal boat. The lighter must accordingly be condemned for the damages. We should have been better satisfied if the commissioner to whom it was referred to ascertain and report damages had rejected the item allowed for repairs which were not made, but which he found were necessary to put the canal boat in as good condition as she was previous to the accident; but the proofs are not such as to justify us in overruling his conclusion and that of the district judge. The decree is affirmed, with interest and costs.

THE PHILADELPHIAN.

LEWIS et al. v. TRANT.

WILEY et al. v. SAME.

(Circuit Court of Appeals, First Circuit. April 18, 1894.)

No. 66.

1. COLLISION—CONFLICTING EVIDENCE.

Testimony as to precautions taken by a steamer to avoid collision with a schooner, given by intelligent witnesses on board the steamer, who co-operated in the precautionary maneuvers, is not overcome by that of witnesses looking on from remote points, or aboard the schooner, who failed to observe such precautions.

2. SAME—SCHOONER UNNECESSARILY TACKING ACROSS STEAMER'S BOW.
A steamship is not liable for collision with a schooner unnecessarily tacking across the steamer's bow, in a narrow channel, and in such close proximity that the steamer cannot avoid her.

Appeal from the District Court of the United States for the District of Massachusetts.

These were two libels against the steamship Philadelphian (William H. Trant, claimant) for damages from a collision between said steamship and the schooner Lizzie Williams,—one by A. S. Lewis and others, members of the crew of said schooner, and Joseph Welch, also on board the schooner at the time of the collision, for loss of personal effects, and other damages; the other by Otis H. Wiley and others, owners of said schooner, for loss of the vessel, and other damages. The cases were consolidated by order of the district court, and, on hearing, the libels were dismissed. Libelants jointly appealed. A motion by appellants for leave to take further proofs was granted (60 Fed. 423), and additional depositions were taken.

The collision occurred in Boston harbor, at 20 minutes past 11 o'clock in the morning of the 27th of April, 1892, a short distance above the upper middle buoy. The steamer was a vessel 455 feet long, 45 feet beam, 3,322 tons, 10,600 tons displacement, and her draught at the time was 26 feet 6 inches. The schooner was about 75 feet long, of 57 tons, and her draught at the time was about 10 feet. At, and for some distance on either side of, the place of collision, the channel for the steamer was about 1,000 to 1,200 feet wide, while, for the schooner, it was about 3,000 feet wide. Both vessels were on their way down the harbor, to sea. The wind was about east, and the tide about slack, at full high water.

The evidence for libelants showed that the schooner left T wharf between 10 and 11 o'clock in the morning, and was beating down the harbor. When she pulled out from T wharf, she stood first on the port tack, towards South Boston. She then tacked, and stood on the starboard tack, over to Jeffries' Point, in East Boston, where she came about again, and stood again on the port tack, to the southward, towards South Boston. She came about again when about a third of a mile off the starboard bow of the steamer, and stood across her bows, on the starboard tack, and while on this tack came in collision with the steamer. The steamer was not seen from the schooner until after she had come about, and gathered good headway, on this last starboard tack.

The evidence on behalf of the steamship was that she left her dock in Charlestown shortly before 11 o'clock, and proceeded down the harbor in the usual way, and at the usual speed, in charge of a licensed pilot. The pilot was on the bridge with the master and third officer. The schooner was seen by the master and pilot of the steamer, from the bridge, while she was making her first starboard tack, towards East Boston, and they then determined upon their course for passing and avoiding her, which was to wait until she should have come about on the port tack, and crossed the steamer's bows towards South Boston, and then pass under her stern. In pursuance of this determination, the steamer was slowed until after the schooner had run out her starboard tack, and crossed the steamer's bow on her port tack, and then started up to pass under the schooner's stern; but she had scarcely started when the pilot and master of the steamer perceived that the schooner was unexpectedly tacking again, right off the steamer's starboard bow. The steamer was at once stopped, and immediately afterwards her helm was put hard a-port, and her engines were reversed at full speed for three minutes before the collision. The port side of the schooner came against the steamer's bow, which cut into her about two feet, and the schooner sunk. At the time of collision the steamer had been almost stopped. There was much evidence introduced on behalf of the steamer that her efforts to avoid the schooner, even after the latter tacked so unexpectedly when close to the steamer's starboard bow,

would have been successful, had the schooner held her starboard tack, but that the schooner, just as she was crossing the steamer's bow, luffed up in the wind, lost her headway, and drifted on to the steamer. Witnesses called for the schooner, however, denied that she, at this time, did luff into the wind, and lose her headway.

The opinion rendered in the district court by Nelson, District Judge, was as follows:

"It plainly appears from the evidence in the case that the collision was caused by no fault of those in charge of the Philadelphian, but was caused solely by the gross negligence of the master of the Lizzie Williams, in coming about upon the starboard tack, when on the southerly side of the channel, and running across the bows of the steamer, for which change of course no necessity or excuse is shown."

Frederic Dodge, for appellants.

Lewis S. Dabney and Frederic Cunningham, for appellee.

Before PUTNAM, Circuit Judge, and WEBB and ALDRICH, District Judges.

PER CURIAM. Upon careful examination of the evidence, as presented by the record of these cases, and full consideration of the able argument for the appellants, the court perceives no error in the conclusion of the district judge. The testimony in behalf of the steamer comes from intelligent witnesses, who were in position to know fully the measures taken to avoid a collision, in respect to which they testify, and shows that every precaution required of those navigating the steamer, for the avoidance of the collision, was promptly exercised. The failure of witnesses looking on from remote points, or even of those aboard the schooner in motion, to observe or to know such precautions, cannot overcome this clear consent of evidence from the witnesses who co-operated in those precautionary maneuvers. The schooner, beating out of Boston harbor, where the working channel for large ocean steamers, like the Philadelphian, is narrow, while she had a right to tack when necessary or highly prudent, should still have taken some care to see that, by tacking, she did not make it impossible for either sailing or steam vessels following her to keep clear, and, if practicable, should have held on her tack long enough to avoid such result. That in this case the schooner could safely, and ought to, have stood longer on her port tack, we think, is clear. If the witnesses for the libelants are correct in denying any vacillation in the navigation of the schooner, then it is plain that the whole trouble was caused by her sudden and unnecessary tacking, whereby she so threw herself in the path of the steamer as to make collision inevitable. If, on the other hand, at the time she tacked, there was room for her, by holding her course, to go clear, but by hesitation, and first luffing, and then falling off, she lost the very short time when she could have safely crossed the steamer's bow, the fault was still hers. But we are of opinion that the witnesses in behalf of the steamer are mistaken about the schooner's luffing and falling off, and that the whole evil was caused by the schooner's improperly and unnecessarily tacking across the steamer's bow, and in so close proximity that she could not be avoided. Decree of the district court affirmed.

NEWMAN v. SCHWERIN.

(Circuit Court of Appeals, Sixth Circuit. May 8, 1894.)

No. 161.

1. DESCENT AND DISTRIBUTION—ACTION BY SOLE DISTRIBUTEE.
The sole distributee of an intestate, who does not allege that there is no administrator and no creditor, cannot maintain a bill against the intestate's agent, who, in enforcing a judgment in favor of the intestate, purchased lands of the judgment debtor on execution sale, and refuses to account, whether the recovery sought be a money decree, or a recovery of the land, or an interest therein as realty.

2. APPOINTMENT OF ADMINISTRATOR AD LITEM—REVIEW OF INTERLOCUTORY DECREE.
Under Act Tenn. 1889, giving chancery courts special power in a proceeding therein to appoint an administrator ad litem, if there is no executor or administrator, or if he is interested adversely, an interlocutory decree making such appointment, although it recites that it appears that there is no administrator or executor, cannot be sustained, when brought up for review by appeal from the final decree, in the absence of any allegation or evidence in the record to support such recital.

3. PARTIES—ACCOUNTING—BENEFICIARIES UNDER TRUST.
By a clause in a power of attorney to sell certain lands and enforce certain judgments, the maker of the instrument bound himself to divide the proceeds, three-fourths among the heirs of his deceased brother, one-fourth to be retained by himself. He died intestate, leaving said heirs of his deceased brother his own heirs at law. *Held*, that they were necessary parties to a bill to reach lands held by the attorney named therein as proceeds of enforcement of a judgment under said power, whether said lands were to be regarded as personalty or realty for purposes of descent and distribution.

4. REMOVAL OF CAUSES—TIME OF APPLICATION—WAIVER OF OBJECTION.
In a suit between citizens of different states, although the petition for removal is not filed until after a demurrer is interposed in the state court, if no motion to remand on that ground is made in the circuit court, the objection is waived, and cannot be made on appeal.

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

This was a suit by Lena Newman against Morris Schwerin for an accounting. The circuit court dismissed the bill. Complainant appealed.

John J. Tracy and John H. Cother, for appellant.

Pritchard & Sizer, for appellee.

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

LURTON, Circuit Judge. This bill was filed in the chancery court for Cumberland county, Tenn. The object of the bill was to have an accounting with the defendant, Schwerin, as attorney in fact for Samuel Newman. The power of attorney was as follows:

"State of Mississippi, County of Hinds.

"Be it known that I, Samuel Newman, of the county and state above named, do hereby constitute and appoint M. Schwerin, of the city of Newark, state of New Jersey, my attorney in fact, with the following powers: (1) To sell, convey, lease, or rent any and all the land that I own, or in which I have any interest, situated and being in the counties of White, De Kalb, and

Putnam, in the state of Tennessee. (2) To sell, assign, execute, or enforce a certain judgment or decree rendered in the year 1860 in my favor, against the North American Coal & Transportation Company, by the chancery court of White county, in the state of Tennessee, or any other judgment or decree rendered by said court in my favor, condemning the sale of any land. (3) In case it should be necessary to resort to legal proceedings in order to recover possession of said land, or to enforce or to execute said decree or decrees, the said Schwerin is hereby authorized to sue in my name, and to do all things necessary to accomplish these desired ends. (4) It is, however, expressly stipulated and agreed that the said Schwerin is to receive no pay from me for his services, and he is to pay and be responsible for all costs, expenses, and risks incurred by him while in the execution of his powers. (5) In case the said Schwerin should be successful in the enterprise by us contemplated, and be able to sell said lands and enforce said decrees, then he is to reimburse himself for all legitimate expenses by him incurred; and the rest of the proceeds I hereby bind myself, and promise, to divide into four equal parts, three of which shall be distributed among the heirs of my deceased brother, Charles Newman, and one shall I retain myself.

"Witness my signature, this the sixth day of February, 1886.

"Samuel Newman."

The bill, in substance, alleged that, in pursuance of the power therein conferred, the defendant had instituted a suit upon the judgment mentioned therein in the chancery court of White county, Tenn., and that on May 12, 1886, a decree had been obtained in favor of said Samuel Newman and against the said North American Coal & Transportation Company for the sum of $58,000 and costs of suit; that said Schwerin, still acting under his said agency and trust, had caused an execution issuing on said judgment to be levied on a number of tracts of land in Cumberland county, Tenn., as the property of the judgment debtor; that at the sale thereof under said writ and levy the lands thus levied on had been sold for a sum aggregating $38,740, and sheriff's deed executed to the several purchasers; that said Schwerin had by virtue of his said agency credited on the said judgment an amount equal to the aggregate of the sums bid on said lands, and paid to the sheriff, in money, a sum equal to the costs and expenses of sale; that parts of the lands thus sold had been bought by one G. J. Kemp, whose bid aggregated $13,600, another part had been sold to one B. F. Newman for the sum of $10,450, and the remainder had been sold to the defendant Schwerin, who bid them in for the sum of $14,960; that none of the purchasers had paid to either the sheriff or said Schwerin any part of their said bids,—the said Schwerin, as attorney in fact, waiving such payment, and crediting the decree as if the money had been paid; that under instructions from said Schwerin, the sheriff had executed deeds to the several purchasers, reciting the facts as to amount of bid and manner of payment; that, subsequently, both Kemp and Newman had conveyed the parcels so bid in by them to the defendant, who, the bill charges, "now claims to be the owner of all of said lands, in fee simple, free from all equitable claims or liens in behalf of any person." It further alleges that Schwerin has never accounted for the proceeds of said sale, "and utterly refuses to recognize the right of Samuel Newman to any money paid thereon, or any claim to or lien upon the said lands."

The complainant, Mrs. Lena Newman, is a citizen and resident of the state of Mississippi, of which state said Samuel Newman was a citizen and resident at the time of his death, in 1889, being a date subsequent to all the transactions above stated. Samuel Newman died intestate, and without issue, and without ever having had any settlement of the matters aforesaid with his said agent. Complainant is the widow of said Newman. Under the law of descent and distribution of the state of Mississippi, the widow of a husband dying intestate, and without children or representatives of children, is entitled to take his entire estate, real and personal, after payment of his debts. Code Miss. § 1545. The theory of complainant's bill is that she, as sole distributee, under the law of Mississippi, is entitled to maintain this bill, and recover and appropriate to her own use any sum due to her deceased husband by the defendant, Schwerin, by reason of the acts of the said Schwerin under his said trust and agency.

The prayer of the bill was that Morris Schwerin be made a party defendant by publication, he being a nonresident of the state of Tennessee, and a citizen and resident of the state of New Jersey; that she have decree against him for the sum of $38,740, and interest thereon, that being the aggregate sum for which the lands levied on had been sold, and the sum credited on said judgment as the result of said sales, less such sums of money as said Schwerin had properly expended in and about the execution of his power of attorney; and that an equitable lien be declared to exist in favor of complainant in the lands so acquired by said Schwerin. Publication was accordingly made. The defendant appeared, and filed a demurrer, which was as follows:

"Lena Newman vs. Morris Schwerin.

"In the chancery court, at Crossville, Tennessee, the defendant, Morris Schwerin, comes and demurs to the bill filed against him in the above-styled cause, and assigns the following grounds of demurrer: (1) This court has no jurisdiction of the cause, the defendant being a nonresident of the state of Tennessee, and there being no attachment of property against him. (2) The suit is brought to recover a debt alleged to be due Samuel Newman from the defendant, Morris Schwerin, and should have been brought by said Newman's administrator or personal representative. His widow or heir has no right of action. (3) The bill alleges that the defendant holds the lands described in the bill in trust for Samuel Newman; and, if that be true, then the right of action would descend to said Newman's heirs at law, and complainant could only maintain her suit if her husband had died, leaving no heirs at law capable of inheriting, which the bill does not charge. Wherefore, the defendant prays the judgment of the court whether he shall make any other or further defense to complainant's bill."

Before the demurrer was finally disposed of, the complainant, under leave, amended her bill by a prayer for an attachment, and upon her application she was appointed administratrix ad litem of the said Samuel Newman. From thence she seems to have been regarded as complainant in her character as administratrix ad litem, as well as in her character as distributee, though no formal order was made so amending her bill. Presumably as a consequence of this appointment, the demurrer of defendant was then overruled. After this action of the court an order was made that upon the return of

an attachment levied on the property of defendant, Schwerin, publication should be again made for him, requiring his appearance to the next September rules. In view of the general appearance already made by the defense on the merits presented by the second and third grounds of demurrer, this second publication seems to have been a work of supererogation. An attachment did issue, and was levied on certain real estate as the property of said Schwerin, and publication was made in accordance with this order. At the time named in this second publication the defendant filed his petition for a removal of the cause to the United States circuit court, which, upon consideration was allowed. After the removal the defendant filed his answer. The cause was finally heard on the pleadings and proof, and the bill dismissed, with costs.

The ground upon which this decree was based does not appear in the decree, and no opinion was filed. The contention of counsel for appellee is that the suit cannot be maintained, for want of proper parties, and that the second and third grounds of demurrer should have been sustained. We are clearly of opinion that the complainant cannot sustain this bill as sole distributee. The claim she asserts is an asset belonging to the estate of Samuel Newman. A distributee, as such, cannot maintain a suit against one indebted to an intestate. This is the well-settled general rule in Tennessee. The supreme court of that state, in the case of Thurman v. Shelton, 10 Yerg. 382, upon this question, said:

"Can distributees recover their distributive portions without an administrator of the estate of their intestate? We are clearly of opinion that they cannot. Personal property was, by the common law, considered of so little value that no provision was made for its descent to the heirs at law of the owner. Indeed, up to 22 and 23 Charles II.,—the date of the passage of the statute of distributions,—an administrator was entitled exclusively to enjoy the residue of the intestate's effects, after the payment of the debts and funeral expenses. 2 Williams, Ex'rs, 906. This being the case, whoever can get possession of personal property upon the owner's dying intestate can hold it against any person, save a creditor or administrator. To the first, he is liable as an executor de son tort; to the second, because he is the representative of the deceased, upon whom the law casts his rights to the personal estate, to be held by him for the payment of debts, and, since the passage of the statutes of distributions, for distribution among the next of kin of the intestate. A distributee stands in neither of these relations, and therefore cannot sue for the personal property of the intestate, nor demand a distribution of it from any person save the administrator."

To the same effect is the case of Brown v. Bibb, 2 Cold. 439.

In the case of Brandon v. Mason, 1 Lea, 616, and Christian v. Clark, 10 Lea, 630, it is said that the principal reason why a distributee cannot maintain suit to recover assets belonging to an intestate's estate is the interest of creditors, and their prior right to protection, and that in equity a distributee might, under special circumstances, maintain suit as such, where it was clearly shown there were no creditors. The doctrine of those cases is relied upon by complainant. The cases are not applicable. In the first place, the bill does not show that there is no administrator, and, in the second place, there is no allegation that there are no creditors. Neither are there any special circumstances which justify any court

of equity in making an exception to the general rule of the common law. Clearly, if the defendant is to be held liable to his principal for the collection of $38,740 under his power of attorney, the personal representative of that principal should be before the court. But it is said that the appointment of complainant as administratrix ad litem by the decree of the state chancery court obviates all difficulty. That decree was an interlocutory decree made in this cause, and is just as much subject to review on this appeal as is the final decree. That decree is as follows:

"May 6, 1891.

"Lena Newman, Complainant, vs. Morris Schwerin, Defendant.

"In this cause, it appearing that there is no administrator of the estate or executor of the will of Samuel Newman, deceased, named in the bill herein, the above-named complainant, Lena Newman, is hereby appointed administratrix ad litem of such estate for the above-entitled cause, and that no bond be required of her as such administratrix, but said administratrix shall receive or take into her possession no funds or moneys arising from this proceeding until the further order of the court."

The recital in this decree that, "it appearing that there is no administrator," is unsupported by any fact in the transcript. No such allegation is made in the bill, and no such fact appears by affidavit or otherwise.

Under the law of Tennessee the general subject of administrations is committed to the county courts, which, as probate courts, are courts of general jurisdiction, with all the powers formerly exercised by the ordinary under the English law. Under the general grant of authority, it has been held that the county courts of that state had the power to appoint an administrator ad litem, or for any other special and limited purpose authorized by the practice of the English probate courts. McNairy v. Bell, 6 Yerg. 302; Jordan v. Polk, 1 Sneed, 428. By act passed in 1889, special power was conferred upon the chancery courts of the state to appoint an administrator ad litem "in any proceeding" in a chancery court "where the estate of a deceased person must be represented, and there is no executor or administrator of such estate, or the executor or administrator thereof is interested adversely thereto. * * * Such appointment to be made whenever the facts rendering it necessary shall appear in the record of such case, or shall be made known to the court by the affidavit of any person interested therein." The bill in this case did constitute "a proceeding" in the chancery court, "where the estate of a deceased person must be represented," within the meaning of the act. Denning v. Todd, 91 Tenn. 422, 19 S. W. 228; Pritch. Wills, § 569. The entire absence from the transcript of any allegation or evidence that there was no administrator, or that he was interested adversely, is fatal to the interlocutory decree appointing complainant administratrix ad litem. It may be that, upon a collateral attack, it would be presumed that the court had made the appointment upon sufficient and proper evidence. But upon a direct appeal the transcript should show a state of facts making it proper that such an appointment should be made. The appointment of a general administrator operates to vest in him the

entire title to all the personalty of the deceased within the limits of the jurisdiction. Under the ecclesiastical law, no power existed in the ordinary, after such an appointment, and while the administrator was capable of acting, to withdraw any part of the power or title conferred, and vest a part in another person. This was expressly determined, in a most lucid opinion by Chief Justice Marshall, in the case of Griffith v. Frazier, 8 Cranch, 9. Under the Tennessee statute the power to make such a limited appointment was conferred only upon the express condition that there was no administrator, or that the administrator was incapacitated from acting by reason of an adverse interest. Unless the record in a direct appeal show that one or the other of these conditions existed, the appointment of an administratrix ad litem for the purpose of conducting the particular suit must be held irregular and ineffectual.

There is another objection to proceeding in the present state of this record. The fifth paragraph of the power of attorney under which defendant was acting contains a provision whereby the maker of the instrument, after all legitimate expenses have been paid, binds himself to divide the proceeds of all lands recovered or moneys realized "into four equal parts, three of which shall be distributed among the heirs of my [his] deceased brother, Charles Newman, and one shall I retain myself." The record shows that the persons described as heirs of his brother, Charles, are the same persons who, under the law of descent of Tennessee, are the heirs at law of Samuel Newman. Whether the lands sought to be subjected under complainant's bill be regarded as personalty or realty, for purposes of descent and distribution, the persons in whose favor a trust is declared by the fifth clause of the power of attorney, and the persons answering to the description of heirs of Charles Newman under the Tennessee statute of descent, should be parties.

It was suggested at the bar that the petition for removal was filed too late; that, after the interposition of a defense in the state court by demurrer, it was too late, under the act of 1887, to apply for removal to the federal court. The suit was one between citizens of different states, and therefore within the general jurisdiction of the circuit court. The objection that the right of removal from the state court was not asserted within the time required by the act of 1887 is an objection which may be waived. No motion to remand having been made in the circuit court, the objection cannot for the first time be made here. Railway Co. v. McBride, 141 U. S. 127, 11 Sup. Ct. 982; Railway Co. v. Cox, 145 U. S. 593, 12 Sup. Ct. 905. This very question arose in the case of Gerling v. Railroad Co. (decided Feb. 5, 1894), the opinion being by Mr. Justice Gray, who said:

"The time of filing a petition for removal of a case from a state court into the circuit court of the United States for trial is not a fact in its nature, essential to the jurisdiction of the national court, under the constitution of the United States, like the fundamental condition of a controversy between citizens of different states. But the direction as to the time of filing the petition is more analogous to the direction that a civil suit within the original jurisdiction of the circuit court of the United States shall be brought in a certain district, a noncompliance with which is waived by a defendant who does not seasonably object that the suit is brought in the wrong district.

Gracie v. Palmer, 8 Wheat. 699; Taylor v. Longworth, 14 Pet. 172, 174; Trust Co. v. McGeorge, 151 U. S. 129, 14 Sup. Ct. 286. That the jurisdiction of the circuit court of the United States over a case removed into it from a state court cannot be defeated upon the ground that the petition for removal was filed too late, if the objection is not taken until after the cause has proceeded to trial in the circuit court of the United States, has been distinctly decided by this court." 14 Sup. Ct. 539; French v. Hay, 22 Wall. 238.

The decree of the circuit court should be so modified as to dismiss the bill, because Mrs. Newman, as distributee, has no such right or title as enables her to maintain this suit, whether the recovery sought be a money decree, or a recovery of the land, or an interest therein, as realty. The administrator of Samuel Newman, as well as the heirs of both Samuel and Charles Newman, are proper and necessary parties to any suit involving the matters presented by the present bill. The costs of this court will be divided between the appellant and appellee.

BANK OF CALIFORNIA v. COWAN et al.

(Circuit Court, D. Oregon. June 1, 1894.)

No. 2,069.

1. EQUITY PLEADING—BILL—ATTACHMENT—FRAUDULENT CONVEYANCE.
In a suit to set aside a conveyance, as in fraud of complainant's attachment lien, it is sufficient to allege the issuance and levy of the attachment, and the subsequent judgment and order of sale, without alleging that an execution was issued and returned "no property found;" and it is not necessary to allege that any affidavit for attachment was filed, since the facts conferring jurisdiction on a domestic court of general jurisdiction need not be pleaded.

2. DOCKETING JUDGMENT AND LIEN.
Where there has been a levy under attachment and an order of sale in the judgment, the lien attaches, although the judgment has not been entered on the lien docket.

Suit by the Bank of California against J. L. Cowan and S. E. Cowan to set aside certain conveyances. Defendants demur.

Zera Snow, for plaintiff.
Lewis L. McArthur, for defendants.

BELLINGER, District Judge. This is a suit to set aside certain conveyances by Cowan, alleged to have been made in fraud of creditors. The bill alleges the recovery of a judgment in this court by plaintiff against defendant, and an order of sale of property attached in such action. The conveyances complained of were prior to the attachment. Defendant demurs to the complaint, and, upon the demurrer, contends that the proceedings alleged are not sufficient to show a lien under the judgment and attachment proceedings upon the land in question, and that without such showing, in order to maintain this suit as one to reach equitable assets, the complaint should show an execution issued, and a return of "no property found." I am of the opinion that the allegations of the attachment and levy and judgment are sufficient. The presumptions that obtain in favor of the judgments of a court of general

jurisdiction are such that it has become the settled practice, in declaring upon a judgment, to allege generally the rendition of the judgment, and not, as formerly, to set out the whole proceeding. 12 Am. & Eng. Enc. Law, 149h. So, too, of the attachment proceedings. It is sufficient to allege the issuance of, and levy under, a writ of attachment, and the subsequent order in the judgment directing the sale of the attached property. In my opinion, it was not necessary to allege that any affidavit was filed for attachment, so that it makes no difference that complainant says the "usual" affidavit was filed. The facts conferring jurisdiction upon a domestic court of general jurisdiction need not be pleaded, and, upon the same reason, the facts which authorize the attachment in question need not be shown. The supreme court of this state holds that a lien by attachment and execution may be obtained upon real estate, notwithstanding a prior fraudulent transfer thereof, and that the lien creditor may bring his suit to remove the obstacle of the fraudulent conveyance in the way of his legal remedy without showing that execution had issued, and been returned nulla bona, in the law action. The creditor may stop with his judgment, and proceed in equity to have the cloud removed from the title to the property to which the lien of his judgment has attached.

In this case, however, it is argued that under the act of congress, and the act of the legislature of this state of 1891, relative to the liens of judgments, the plaintiff's judgment does not constitute a lien upon the property in question; that to have that effect the judgment must have been docketed in the judgment lien docket. Without stopping to inquire whether such docketing is necessary to a lien, as between the judgment creditor and the fraudulent transferee, it is clear that in any case where there has been an attachment levied, and an order in the judgment directing the sale of the attached property, the lien exists. Section 151 of the Code provides that when the certificate of attachment is filed "the lien in favor of the plaintiff shall attach to the real property described in the certificate from the date of the attachment." "The effect of the levy of the attachment is to create a lien upon the real property, in favor of the attaching creditor, from the date of the levy." State v. Cornelius, 5 Or. 46. The demurrer is overruled.

RIEDERER v. PFAFF et al.

(Circuit Court, D. Oregon. June 1, 1894.)

No. 2,049.

CHATTEL MORTGAGE—SUBSEQUENT MORTGAGEE.

A chattel mortgage is valid without renewal, as against a subsequent mortgagee with actual notice, since he is not a mortgagee "in good faith."

Action by Ludwig Riederer against Emil Pfaff, Portland National Bank, and J. L. Hartman to foreclose a chattel mortgage.

T. J. Geisler, for plaintiff.

W. D. Fenton, for defendants.

BELLINGER, District Judge. This case is tried on a stipulation of facts. On August 17, 1892, one Emil Pfaff was indebted to the plaintiff in the sum of $3,500, secured by a chattel mortgage in Yamhill county. On that date, to further secure this debt upon chattels acquired since this mortgage was given, he executed a new chattel mortgage, which was filed in the proper records on the date of its execution. On February 6, 1893, Pfaff was indebted to one Velten for $450, to secure which, and future advances, he executed a chattel mortgage upon the property already mortgaged to complainant. At the time Pfaff gave the mortgage to Velten, he informed the latter of the existing mortgage in favor of the complainant, but stated to him, in that connection, that there was no consideration for such prior mortgage; that the same was merely intended to protect Pfaff against his creditors. The Velten note was assigned after maturity to the defendant Hartman, who now holds it. On February 18, 1893, Pfaff was indebted to one Marquam, in the capacity of trustee and agent for the defendant bank, in the sum of $296. To secure this debt, Pfaff gave Marquam a third chattel mortgage on the property in question, at the same time informing Marquam of complainant's mortgage, and making the same representations respecting it that were made to Velten.

There was no renewal of complainant's mortgage within the year, and the question is, did the complainant lose the priority of his lien over the mortgages of the defendants by his failure to file the renewal affidavit provided by statute? I am of the opinion that he did not lose his prior right by such failure to renew.

In this state, it is provided that a chattel mortgage shall cease to be valid, "as against the creditors of the person making the same or subsequent purchasers or mortgagees in good faith after the expiration of one year from the filing of the same," unless an affidavit of renewal is filed within 30 days next preceding the expiration of the year. Those from whom defendants took their mortgages did so with actual notice of complainant's lien. In its results, "good faith" is synonymous with "conscience." It embraces those obligations which are imposed upon one, in dealing with property, by the circumstances surrounding it at the time. It is not questioned but that, at the time defendants' mortgages were taken, the property was subject to complainant's lien; that Pfaff held it subject to complainant's right. That right continues until cut off by a superior right,—by a right which, in conscience, is entitled to preference. It is fundamental that such preference cannot be acquired by any one having notice of the existing right. Lord Hardwicke laid it down that "the taking of a legal estate after notice of a prior right makes a person a mala fide purchaser. Le Neve v. Le Neve, 2 White & T. Lead. Cas. Eq. (4th Am. Ed.) 109. Undoubtedly, it is an act savoring of fraud for a person who has received actual, direct notice of another's right to go on, and knowingly acquire the property, in violation of that other's right." Pom. Eq. Jur. § 591. The result does not, however, depend upon fraud in the subsequent purchaser, who may intentionally assume the position of subsequent holder, as was done in this case. Having done so the failure of the

prior mortgagee to comply with the technical rule of the statute, requiring him to file a renewal affidavit, creates no equities in such subsequent purchaser. The words "good faith," in the statute, are therefore synonymous with "without notice." Bank v. Sprague, 21 N. J. Eq. 536; Sayre v. Hewes, 32 N. J. Eq. 655. At the time that Pfaff informed the second mortgagees of the existing mortgage, he informed them that such mortgage was a fraudulent and void one. The mortgagees, under these circumstances, were not justified in relying upon Pfaff's explanation of the existence of the complainant's mortgage. They are chargeable with such representations as were against his interest, but they cannot avail themselves of communications in his own favor. Except as to such of the property as was not included in the prior mortgage, the decree will be for the complainant. The expenses incurred by the defendants in taking possession of the property must be borne by them.

PAXSON et al. v. BROWN et al.

(Circuit Court of Appeals, Eighth Circuit. May 7, 1894.)

No. 261.

1. APPEAL—OBJECTIONS NOT RAISED BELOW—SECONDARY EVIDENCE.
   Errors assigned in admission of secondary evidence cannot be considered on appeal where the only objection made at the trial was to an entire deposition, part of which was admissible, and there was no exception to the ruling thereon.
2. VENDOR AND PURCHASER—RECORD AS NOTICE—DESTRUCTION OF RECORD.
   Mansf. Dig. Ark. §§ 670, 671, provides that the record of a deed as required by law shall be constructive notice "from the time the same is filed for record;" that the recorder shall indorse on every such deed the time "when the same is filed for record;" and that no deed for conveyance of real estate shall be valid against a subsequent purchaser for a valuable consideration, without actual notice thereof, unless such deed "shall be filed for record," as prescribed. *Held*, that proof of the existence of the recorder's certificate of filing, indorsed on a deed afterwards burned, is sufficient evidence that it had been "filed for record," and the burning of the record does not detract from the effect of such filing as notice to subsequent purchasers.
3. ASSIGNMENT FOR BENEFIT OF CREDITORS—PROPERTY CONVEYED—PARTNERSHIP REAL ESTATE.
   An assignment by copartners for benefit of creditors granted "all the copartnership estate, property, assets, and effects, choses in action, claims, and demands," of the firm, and contained a covenant by them to execute and deliver such further instruments as might be lawful for accomplishing the objects expressed; and the schedule of assets attached included certain land in another state, which had been bought and paid for by the firm, and deeds thereof taken to one partner for convenience. *Held*, that all the legal title and equitable interest of such partner in the land were conveyed, and the covenant estopped him from ever claiming them.
4. ESTOPPEL IN PAIS — ACQUIESCENCE IN ASSIGNMENT FOR BENEFIT OF CREDITORS.
   Such assignment was acquiesced in by the partner in whose name the deeds for the land were taken, for many years, during which the trust was fully executed, large sums having been expended by the assignees in protecting the title to the land, and it was purchased and paid for by third parties on the faith of the assignment, and the proceeds applied to

the payment of the debts of the firm. *Held* that, the assignment being valid at common law, such partner and his heirs, and those claiming under them with notice of the assignment, were estopped from claiming the land, as against purchasers from the assignees, on the ground of non-compliance with statutes relating to assignments, either of the state where the assignment was executed or of the state where the lands were situated.

5. BONA FIDE PURCHASER—NOTICE.
One knowing that certain lands were claimed by another, through a title derived from a former owner, purchased a quitclaim deed thereof from the latter's heirs. His agent, to obtain such deed, was informed by the heirs of assignments for creditors by their ancestor, and for many years neither he nor they had exercised ownership or claimed any interest in the land. *Held*, that the purchaser was put on inquiry for the contents of such assignments, and was chargeable with notice of all the facts disclosed by the record thereof.

6. ESTOPPEL — RECITAL IN DECREE — RELIANCE ON FALSE STATEMENT AS TO TITLE.
A recital in a decree that the party obtaining and recording it derives title to lands from a certain source does not estop one claiming under him from deraigning title from the true source, as against strangers to the decree, not purchasing under such party or in reliance on such recital.

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

This was a suit by J. N. Brown against Charles Paxson and the Iowa & Arkansas Land Company to remove clouds on the title to certain lands. Complainant having died, the suit was continued in the names of Sarah Brown, Ida B. Brown, Mariah N. Glassgow, Sarah E. Kennedy, Nancy Gaston, and Bertha J. Klinskneith, a minor, by William Klinskneith, her next friend, complainant's widow and heirs, and a decree in their favor was rendered. Defendants appealed.

December 11, 1888, J. N. Brown filed a bill in the court below in which he alleged that he was the owner of certain unoccupied lands in St. Francis county, Ark.; that he derived his title from Barnett Graham, through a general assignment for the benefit of his creditors made by William G. Lane to Frederick N. Lawrence and L. M. Wiley, March 4, 1861; and that the appellants were making unfounded claims to own the same land, and had recorded certain deeds thereof, which constituted clouds upon the complainant's title, and he prayed that the title to these lands might be quieted in him, and the clouds removed. The appellants answered that the complainant, Brown, was not the owner of these lands; that they were; and that they derived their title from the heirs of Barnett Graham and from the heirs of William G. Lane; and prayed that the title to the lands be quieted in them, and that the deeds under which the complainant claimed be adjudged to be clouds on their title and removed. The complainant, Brown, died, and this suit was continued in the name of the appellees, his widow and heirs at law.

The appellees took the depositions of Frederick N. Lawrence, the sole surviving assignee of William G. Lane, and of Henry Vanderzee, who purchased these lands from the assignee. From these depositions it appeared that, while Barnett Graham had conveyed the lands to Lane, they were purchased and paid for by a copartnership styled "William G. Lane & Co.," of which he was a member; that the title was taken in his name for them, as a matter of convenience; that William G. Lane & Co. made a voluntary assignment for the benefit of their creditors to the same assignees as did William G. Lane, and on the same day; that the assignment of William G. Lane & Co. purported to convey these lands to the assignees, while that of William G. Lane did not; and that Henry Vanderzee, through whom the appellees claim title, pur-

chased them of Frederick N. Lawrence, as sole surviving assignee of William G. Lane & Co., and not as assignee of William G. Lane, but, through abundance of caution, took a deed from him as assignee of the firm, and also as assignee of Lane, the individual. Thereupon, May 1, 1892, the appellees filed an amended bill, deraigning their title through the assignment of William G. Lane & Co.; and the appellants answered, denying the validity of this title, and alleging that they were innocent purchasers for value from the heirs of Graham and from the heirs of Lane. A replication was filed, and, after final hearing, the court below rendered a decree for the appellees for the relief they sought.

It is conceded that Barnett Graham owned these lands. The title of the appellees is derived from him as follows: Barnett Graham and wife conveyed these lands by warranty deeds to William G. Lane, and these deeds were recorded in the county where these lands were situated. The lands were purchased by William G. Lane & Co., and William G. Lane had no beneficial interest in them except as a member of that firm. March 4, 1861, all the members of the firm of William G. Lane & Co. joined in a general assignment of their firm property to Frederick N. Lawrence and L. M. Wiley for the benefit of their creditors. The land in dispute was a portion of about 25,000 acres of Arkansas lands referred to in the schedule filed under this assignment. The assignment was made, filed, and recorded in New York City, where William G. Lane & Co. were conducting their business. This firm owed Henry Vanderzee $70,000, and he subsequently became practically the only creditor, and acted as the clerk of the assignees. He testifies positively that this assignment and the assignment of W. G. Lane were recorded in St. Francis county, Ark., and Lawrence, the assignee, testifies that he believes that they were so recorded, but that he has no documents to prove it. Subsequent to 1861, and during the war of the Rebellion, the records of St. Francis county were burned. L. M. Wiley died prior to 1873. Prior to that time, Lawrence, as assignee, expended about $10,000 in paying taxes upon these lands and redeeming them from forfeitures. In 1873 he sold them, as assignee of William G. Lane & Co., to Henry Vanderzee, and made a deed to him, as sole surviving assignee of William G. Lane, and as sole surviving assignee of William G. Lane & Co., which was dated January 7, 1873, and was recorded in St. Francis county, February 8, 1873. December 6, 1875, Vanderzee sold the lands in dispute in this suit to T. B. Mills for 50 cents an acre, and conveyed them to him by a deed which was dated on that day, and was recorded in St. Francis county, February 27, 1877. The title thus acquired by Mills passed by subsequent conveyances, duly recorded, to J. N. Brown, the original complainant in this action, prior to January 21, 1877.

The title of the appellants is derived from Barnett Graham as follows: Graham died prior to 1883. July 5, 1883, the widow and heirs of Graham made a deed of the lands in dispute to G. W. Miller, which was recorded in St. Francis county, September 29, 1883. August 8, 1883, the appellant Charles Paxson, as trustee for the Iowa & Arkansas Land Company, purchased these lands of Miller for $3,000, and the latter made a deed of them to Paxson, dated on that day, and recorded September 29, 1883. William G. Lane died in 1885. September 4, 1888, the appellant Paxson, as trustee, bought from the heirs of William G. Lane, for $600, a quitclaim deed of these lands, dated on that day, which was recorded October 24, 1888.

J. M. Moore and J. W. House filed a brief for appellants.

John B. Jones filed a brief for appellees.

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.

The record in this case presents but a single question for our consideration, and that is whether or not the evidence read at the hearing below warrants the decree for the appellees.

We have not failed to notice that in the assignment of errors the appellants allege that the court below committed error in permitting a certain decree of the circuit court of St. Francis county, state of Arkansas, to be read in evidence, in permitting the assignments of William G. Lane and William G. Lane & Co. to be read in evidence, and in allowing the appellees to read in evidence the deposition of Joseph W. Martin. But rule 24 of this court (1 C. C. A. xx., 47 Fed. xi.) requires the brief of the appellant to contain:

"First. A concise abstract, or statement of the case, presenting succinctly the questions involved, and the manner in which they are raised."

The brief of the appellants fails to state how the questions suggested by these alleged errors of the court in admitting evidence were raised, and a careful perusal of the record discloses the fact that they never were raised at all. There is no exception to any ruling of the court on these questions, and the only objection to any of this evidence is to the entire deposition of Mr. Martin, "for incompetency and irrelevancy" simply. A portion of that deposition proves that the deeds from Barnett Graham to William G. Lane were destroyed by fire. That testimony was certainly competent and relevant to make parol proof of the contents of those deeds competent; hence the entire deposition could not have been rejected. It is true that in this deposition Mr. Martin testified that each of these deeds had a certificate of its record in St. Francis county attached to it, that seemed to be regular and to be made by the recorder of that county; but this portion of the deposition was not singled out and objected to on the ground that this was not the best evidence of the record of these deeds, nor was any objection made to it except the general objection to the entire deposition which we have quoted, and no exception was taken to the ruling upon that objection. The result is that these assignments of error are baseless. All the evidence in this record was before the lower court, and is before this court for its consideration. All objections that any of this evidence was not the best evidence of the fact sought to be established that the case permitted have been waived, and the secondary evidence, if any, must be considered in determining the issues. When secondary evidence is offered, opposing counsel may not stand by in silence and permit it to be introduced, and subsequently be heard to say that the fact it tends to prove is not established because the best evidence was not produced. In such cases it is not improbable that the best evidence would have been produced if objection had been made to the secondary evidence when it was offered; and if no objection is then made, while there is yet time to produce other evidence, counsel cannot be heard to object on that ground when it is too late to produce it.

We turn to the consideration of the only question remaining: Does the evidence warrant the decree for the appellees? The appellants maintain that it does not, on three grounds:

First. Because they were purchasers for a valuable consideration from Miller, the grantee of the heirs of Graham, without notice of any deed from Graham to Lane.

Second. Because the assignment of William G. Lane & Co. was insufficient to convey the title Lane obtained from Graham, and hence their deed from the heirs of Lane conveyed it to them.

Third. Because they are purchasers for a valuable consideration from the heirs of Lane, without notice of the assignment of William G. Lane & Co. to Lawrence and Wiley.

The first contention rests on the statutes of Arkansas (Mansf. Dig. §§ 670, 671), which provide that:

"Sec. 670. Every deed, bond, or instrument of writing, affecting the title in law or equity to any property, real or personal, within this state, which is or may be required by law to be acknowledged, or proved and recorded, shall be constructive notice to all persons from the time the same is filed for record in the office of the recorder of the proper county; and it shall be the duty of such recorder to endorse on every such deed, bond, or instrument, the precise time when the same is filed for record in his office.

"Sec. 671. No deed, bond, or instrument of writing, for the conveyance of any real estate, or by which the title thereto may be affected in law or equity, hereafter made or executed, shall be good or valid against a subsequent purchaser of such real estate for a valuable consideration, without actual notice thereof, * * * unless such deed, bond, or instrument, duly executed and acknowledged, or approved, as is or may be required by law, shall be filed for record in the office of the clerk and ex-officio recorder of the county where such real estate may be situated."

The contention is that Miller purchased of the heirs of Graham, and the appellant Paxson purchased of Miller in 1883, for a valuable consideration, without actual notice of the deeds from Graham to Lane made in 1860, and that the latter deeds were not recorded. But Mr. Martin testified that each of the deeds from Graham to Lane had the regular certificate of the recorder of St. Francis county that these deeds were recorded upon it, and that the deeds themselves have been burned. In the absence of objection that this was not the best evidence, this testimony was certainly competent, and it was sufficient evidence of the existence and of the contents of these certificates, in the absence of evidence to the contrary. The certificates then existed. It was the official duty of the recorder to indorse such certificates on all deeds filed for record in his office. Section 670, supra. His certificates thus made in the discharge of his official duty were competent evidence that these deeds had been filed for record. Parsons v. Boyd, 20 Ala. 112, 120; Dubose v. Young, 10 Ala. 365, 368; Thorp v. Merrill, 21 Minn. 336, 339. In this way the proof established the fact that the deeds from Barnett Graham to W. G. Lane had been filed for record prior to 1872, when they were burned; and under section 670, supra, they became constructive notice to Miller and the appellants of their contents from the time they were so filed. It is true that the record of these deeds had been burned, but that fact did not detract from the effect of their filing for record as notice, because the grantee, Lane, had done his whole duty when he filed them in the office of the recorder of the proper county to be recorded. From that time he was within the terms and the reason of the statute, while the rule of caveat emptor threw upon the purchaser from his grantor the burden of loss from fire, flood, or the carelessness of officials. Shannon v. Hall, 72 Ill. 354, 355; Gammon v. Hodges, 73 Ill. 140, 141; Heaton v.

Prather, 84 Ill. 330, 349; Fitch v. Boyer, 51 Tex. 336, 349; Armentrout v. Gibbons, 30 Grat. 632. It follows that neither Miller nor the appellants took any title under the deeds from the heirs of Graham, because Graham had no title when he died, and the original record of his deeds to Lane was constructive notice to Miller and the appellants in 1883, when they bought.

The second ground on which the appellants rely to reverse this decree is that, as against William G. Lane, the assignment of William G. Lane & Co. was insufficient to convey any title to these lands to the assignees, and through Lawrence, their survivor, to Vanderzee and the appellants claiming under him, because (1) it did not sufficiently describe the lands to identify and convey them; (2) the assignment statutes of New York (Laws N. Y. 1860, c. 348) were not complied with, in that the schedule of assets filed, as required by the statutes, within 20 days after the filing of the assignment, was not sworn to by the assignors, nor was any bond filed by the assignees before this land was sold; and (3) the statutes of Arkansas relating to general assignments for the benefit of creditors (Mansf. Dig. § 305) were not complied with, in that the assignees never filed any inventory of the assigned property in the office of the clerk of the court exercising probate jurisdiction in that state, nor gave any bond to the state of Arkansas, as required by those statutes, and in that the assignment itself provided that the assignees might sell the property assigned at public or private sale, while the statutes of Arkansas require assignees to make public sales of all such property.

So far as the sufficiency of the description in this assignment to convey this land is concerned, it must be borne in mind that the proof was that these lands were bought and paid for by the firm and deeds of them taken to William G. Lane from Barnett Graham for convenience. The assignment was executed by William G. Lane and all the other members of the firm of William G. Lane & Co., and by its terms the assignors "do hereby grant, assign, transfer, and set over unto the said parties of the second part all the copartnership estate, property, assets, and effects, choses in action, claims, and demands, whatsoever situated, of the said firm or copartnership of William G. Lane & Co.," in trust to sell the same at public or private sale, and to apply the proceeds to the payment of the debts of the firm; and they "hereby confer upon the parties of the second part all powers and authority necessary and proper for conveniently and effectually executing the trust hereby created, which it is lawful for them to grant to the said parties of the second part; and they hereby covenant to execute and deliver to the parties of the second part such further instruments as may be lawful for accomplishing the objects expressed by these presents, and as may be advised by counsel for that purpose." In the schedule of assets attached to this assignment, signed by William G. Lane and the other members of the firm, is this entry: "Land in St. Francis county, Arkansas, deed from Barnett Graham, cost $39,199.69." In our opinion, the grant contained in this instrument was ample to convey all the legal title and

all the equitable interest William G. Lane had in these lands, and the covenant was itself sufficient to estop him from ever claiming them.

Was this assignment void for a failure to comply with the assignment laws of New York and Arkansas? So far as the mode of executing this instrument in order that it might convey this land in Arkansas was concerned, there is no doubt that the lex rei sitae—the law of that state—must govern. But a comparison of the assignment with the laws of that state in this regard demonstrates the fact that it was signed, sealed, and acknowledged in strict compliance with their provisions, and thus became an instrument in writing affecting the title to real estate in that state, which was entitled to be recorded, under section 670 of Mansfield's Digest.

So far as the objections that the assignors and assignees did not comply with all the provisions of the assignment laws of New York are concerned, we remark that there is no evidence in this record that the schedule of assets which the assignors filed in due time under the New York statutes was not sworn to; nor is the schedule itself in the record for our inspection, though there is a short abstract from it; nor is there any evidence that the assignees did or did not file the bond required by the New York statutes. It would seem in this barren condition of the record that the established facts that the assignees managed this property under the assignment for 12 years without objection, and that the surviving assignee sold and conveyed it as such, would raise the presumption that the statutes of New York were fully complied with in these respects, and that this was in all respects a valid assignment under the laws of New York. Acts done which presuppose the performance of other acts to make them legally operative are presumptive proof of the latter. Lincoln Tp. v. Cambria Iron Co., 103 U. S. 412, 416; Bank v. Dandridge, 12 Wheat. 64, 70; Omaha Bridge Cases, 10 U. S. App. 98, 189, 2 C. C. A. 174, 240, 51 Fed. 309, and cases cited; Union Water Co. v. Murphy Flat Flume Co., 22 Cal. 620, 629; City of Lincoln v. Sun Vapor Street Light Co., 59 Fed. 756, 8 C. C. A. 253.

It would seem, too, that the statutes of Arkansas relative to the filing of the inventory and the bond of the assignee relate to domestic assignments,—to assignments made in that state only,—and have no application to an assignment made in another state in accordance with its laws. Barnett v. Kinney, 147 U. S. 476, 483, 13 Sup. Ct. 403; In re Paige & Sexsmith Lumber Co., 31 Minn. 136, 138, 16 N. W. 700; May v. Bank, 122 Ill. 551, 556, 13 N. E. 806; Halsted v. Straus, 32 Fed. 279, 280; Bentley v. Whittemore, 19 N. J. Eq. 462.

But we do not propose to consider these questions. We rest this decision on broader ground. It is not material here whether or not this assignment might have been avoided by objecting creditors. It was a valid assignment at common law, and it was perfectly competent for the debtors, the assignees, and all the creditors to agree that the property of these debtors should be

conveyed to the assignees in trust to be sold at private sale, and that the proceeds thus realized should be applied to the payment of the claims of the creditors, without a compliance with the assignment laws of these states. These laws were enacted for the benefit of the parties to such assignments, but all of these parties might, by agreement, waive the benefit of such laws. This the parties to this assignment did. The debtors conveyed the property to the assignees to be sold for the benefit of the creditors. The assignees accepted and executed the trust. The creditors accepted the benefits of it, and received therefrom 20 per cent. of their claims. Can any of these parties, after the execution of this trust, and while they still retain the benefits derived from its execution, repudiate the assignment, and recover back from the purchaser the lands the proceeds of which they enjoyed? William G. Lane, the assignor, lived until 1885. Prior to 1873 the assignees had expended about $10,000 in paying taxes upon, and redeeming from forfeitures of, this land. Upon his purchase in 1873, Vanderzee paid more taxes, and, before Lane died, the title under this assignment had passed through mesne conveyances to Brown, the original complainant. Neither Lane, in his lifetime, nor his heirs, after his death, ever attempted to repudiate this assignment or to claim these lands. Vanderzee was a former partner of Lane. Lawrence, the assignee, was his brother-in-law. The relations between Lawrence and the heirs of Lane were intimate and cordial, and to their honor be it said that they refused to bring suit to recover these lands when solicited to do so by the agent of the appellants in 1888, and were only induced to execute their quit-claim deed to Paxson by the false representation that he desired this deed, not to attack, but to fortify, the title under their uncle, the assignee. These heirs stood in the shoes of William G. Lane. This is a suit in equity. Could Lane, who was originally only the naked trustee of this title for his firm, have sustained any claim to this land in 1885, before his death, as against the purchasers under this assignee, after he (Lane) had made this assignment and had acquiesced in it for 24 years, until the trust it declared was fully executed, until more than $10,000 had been expended in protecting the title to the land, until the land had been purchased and paid for by third parties on the faith of the assignment, and the proceeds applied to the payment of the debts of the firm, because the provisions of these assignment statutes to which we have referred were not strictly complied with? We think not.

No principle is more salutary, none rests on more solid foundations, than that one who by his acts or representations, or by his silence when he ought to speak out, intentionally or through culpable negligence, induces another to believe certain facts to exist, and the latter rightfully acts on such a belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts, is thereby conclusively estopped to interpose such denial. This principle is salutary, because it represses fraud and falsehood. It rests on the solid foundation of our common sense

of justice, which revolts at the idea of rewarding the intentional or culpably negligent deceiver at the expense of the innocent purchaser who believed him. Cairncross v. Lorimer, 3 Macq. 828; Dickerson v. Colgrove, 100 U. S. 578, 582; Kirk v. Hamilton, 102 U. S. 68, 75; Evans v. Snyder, 64 Mo. 516; Pence v. Arbuckle, 22 Minn. 417; Crook v. Corporation of Seaford, L. R. 10 Eq. 678; Faxton v. Faxon, 28 Mich. 159.

In Cairncross v. Lorimer, supra, Lord Campbell said:

"The doctrine * * * is to be found, I believe, in the laws of all civilized nations, that if a man, either by words or by conduct, has intimated that he consents to an act which has been done, and that he will offer no opposition to it, although it could not have been lawfully done without his consent, and he thereby induces others to do that from which they otherwise might have abstained, he cannot question the legality of the act he had so sanctioned, to the prejudice of those who have so given faith to his words or to the fair inference to be drawn from his conduct."

In Dickerson v. Colgrove, supra, B. and C. were the sole heirs of the former owner of certain lands. C. conveyed them to D. Two years later D. wrote to B., and asked him if he made any claim to the premises. B. wrote to C.:

"You can tell D., for me, he need not fear anything from me. * * * You can claim all there. This letter will be enough for him. I intended to give you and yours all my property there, and more, if you need it."

D. learned the contents of this letter, and then conveyed the lands by warranty deeds to E. and others, who took possession. In an action of ejectment brought by the grantee of B., his letter was held to be an estoppel and a complete defense for the grantees of D.

In Evans v. Snyder, supra, the heirs of William Snyder, Sr., who died seised in fee of certain lands, brought ejectment against the purchasers thereof under an administrator's sale, and proved that there had never been any order of sale, and this was held to be a fatal defect, on the ground that such an order occupied the same relation to an administrator's sale that a judgment does to an execution sale. But the facts that this sale was made in 1866, that the proceeds of it were applied to relieve from incumbrances other lands that the heirs still retained, that no action was brought by them until 1873, and that meanwhile the purchaser had conveyed the lands by warranty deed, and they had been placed under cultivation, were held to completely estop them from claiming any title to these lands.

Upon the principle illustrated by these authorities, neither Lane nor his heirs ever had any claim to these lands at law or in equity as against the complainant, Brown, after he obtained his deed in 1876, even if the assignment was originally so fatally defective that it might have been avoided by objecting creditors, or repudiated by prompt action on the part of Lane himself. His original conveyance to the assignees, his silence for so many years, while they were spending thousands of dollars to protect the title, while Vanderzee and the successive grantees under him bought the land and paid the taxes upon it on the faith of this assignment and Lane's

long acquiescence in it, and in the sale under it by the assignee, completely estop him and his heirs from making any claim to these lands.

Finally, the appellants contend that, even if the heirs of Lane could not have maintained any claim here, they are purchasers of the lands for a valuable consideration, without actual notice of the assignment by William G. Lane & Co., which they aver was not recorded in Arkansas, and hence are protected by the Arkansas recording statute. Mansf. Dig. § 671.

But an examination of the record discloses ample testimony to warrant the finding that this assignment was recorded in St. Francis county. One witness testifies positively and another with some hesitation that it was so recorded, and there is no testimony to contradict this evidence. Nor do we think, if it be conceded that it was not recorded, that there is such a lack of evidence of notice to these appellants of its existence and contents as would warrant us in reversing the finding of the court below that they were chargeable with such notice. Where the court below has considered conflicting evidence, and made its finding and decree thereon, they must be taken as presumptively correct; and unless an obvious error has intervened in the application of the law, or some serious or important mistake has been made in the consideration of the evidence, the decree should be permitted to stand. Warren v. Burt, 58 Fed. 101, 106, 7 C. C. A. 105; Tilghman v. Proctor, 125 U. S. 136, 8 Sup. Ct. 894; Kimberly v. Arms, 129 U. S. 512, 9 Sup. Ct. 355; Evans v. Bank, 141 U. S. 107, 11 Sup. Ct. 885; Furrer v. Ferris, 145 U. S. 132, 134, 12 Sup. Ct. 821.

Notice of facts and circumstances sufficient to put a purchaser of land upon inquiry is notice of all the facts that an honest and diligent inquiry would disclose, and notice to the agent delegated to negotiate the purchase is notice to the principal. The appellant Paxson purchased the quitclaim deed of these lands, on which the appellants rely, of the heirs of Lane, for $600, in the year 1888, through an agent, Williams, who conducted the negotiations for him in the city of New York. It is true that Paxson and Williams both testified that they had no notice of the conveyance of these lands through the assignment of William G. Lane & Co., but the proof is plenary that they knew that the complainant, Brown, claimed to own them through a title derived from Lane. The deed by Lawrence to Vanderzee, under which Brown claimed, was recorded in St. Francis county, and recited that Lawrence conveyed as assignee of William G. Lane and as assignee of William G. Lane & Co. Before the purchase was completed, Mr. Albert Lane, who represented the heirs, informed the agent, Williams, that William G. Lane had made three assignments,—one individually, one as a member of the firm of William G. Lane & Co., and one as a member of the firm of Lanes, Boyce & Co. These items of information, and the patent fact that for 27 years neither Lane nor his heirs had ever exercised any acts of ownership or claimed any interest in these lands, constituted ample notice to put any intending purchaser on inquiry for the contents of all the assignments William

G. Lane had signed, and it is patent that a diligent and honest inquiry must have disclosed all the facts established by the record in this case.

It has not escaped our attention that counsel for appellants claim that the appellees are estopped to claim title to these lands under the assignment of William G. Lane & Co. because Vanderzee caused a decree of the circuit court of St. Francis county, Ark., to be recorded in that county in 1874, which recited that he derived title to these lands through the individual assignment of William G. Lane. If the appellants had believed the recital in that decree, and, in reliance upon it, had bought these lands of Vanderzee or his grantees, the latter might well have been estopped to set up, against either the appellants or those claiming under them, an adverse title to these lands through the assignment of William G. Lane & Co. The authorities cited by counsel for appellants to sustain their contention here are of this character, but the appellants here refused to believe or to rely upon the statements in this decree, and they bought their quitclaim deed of the heirs of Lane because they disbelieved and refused to rely upon these statements regarding the title of Vanderzee. Here was no estoppel. The indispensable element of belief in and reliance upon the false representations is wanting. Moreover, against a stranger, a decree obtained and recorded by Vanderzee in 1874, which deraigns his title from a false source, could not estop the complainant, Brown, who acquired title under him in 1876, from deraigning his title from its true source.

And, finally, the doctrine of estoppel was not available to the appellants in this case, in any event. In delivering the opinion of the supreme court in Dickerson v. Colgrove, 100 U. S. 580, Mr. Justice Swayne well said of an estoppel in pais:

"This remedy is always so applied as to promote the ends of justice. It is available only for protection, and cannot be used as a weapon of assault. It accomplishes that which ought to be done between man and man, and is not permitted to go beyond that limit."

The heirs of Lane had no title to these lands in 1888, when the appellants purchased from them for $600. Thousands of dollars had been expended in paying the taxes upon and purchasing the title to these lands by those who had held them adversely under the deed of Lane for 27 years. The appellants cannot be permitted to use this beneficent doctrine of estoppel to divest the owners of these lands of their title, and to create in themselves a title their grantors never had and refused to claim. Manifestly, such a use of this doctrine would neither promote the ends of justice nor accomplish that which ought to be done between man and man. The decree below was right, and it must be affirmed, with costs.

It is so ordered.

LAKE ERIE & W. R. CO. v. SMITH et al.

(Circuit Court, D. Indiana. June 14, 1894.)

No. 9,049.

CONCLUSIVENESS OF JUDGMENT—JURISDICTION OF STATE AND FEDERAL COURTS.

The judgment of an Indiana court, on the appeal of a railroad company from the action of county drainage commissioners, is conclusive in respect to the benefits and damages accruing to a railroad from the improvement of an unnavigable stream which passes under the track; and although the judgment assesses benefits, but no damages, a federal court has no jurisdiction to enjoin the making of the improvement, on the ground that the company is engaged in interstate commerce, is carrying the mails, and that the use of the road will be interrupted, and the company put to great expenses in rebuilding its bridge.

This was a suit by the Lake Erie & Western Railroad Company to enjoin F. J. Smith and Robert Cluggish from constructing a ditch under complainant's tracks.

Miller, Winter & Elam, W. E. Hackedorn, and John B. Cockrum, for plaintiff.

M. E. Forkner, for respondents.

BAKER, District Judge. This is a bill for the purpose of enjoining Robert Cluggish, as drainage commissioner of Henry county, Ind., and F. J. Smith, contractor, from constructing a ditch known as "Big Buck Creek Ditch," located in portions of the counties of Henry and Delaware, in said state, in the manner in which they are engaged and threatening to construct the same. The complainant alleges that the defendants are engaged in the construction of a ditch, employing therefor a heavy dredging machine, which floats in the water of said stream, and, by means of engines and machinery, it is used for the purpose of digging out and deepening the said stream. It is alleged that the complainant is a railroad company, engaged in interstate traffic and in carrying the United States mails, and that the construction of the ditch by means of said dredging machine will require the removal of a portion of the bridge of said company which has been constructed over and across said stream, and that, by means thereof, the use of the railroad as a common carrier will be interrupted, and it will be put to large expense in rebuilding said bridge.

Upon the filing of this complaint, a temporary restraining order was issued until a further hearing could be had. Afterwards, on the 4th day of June, 1894, the defendants moved the dissolution of the temporary restraining order, and filed a number of affidavits in support of their motion. It is shown by the defendants that on the 10th day of November, 1891, Elisha Clift and others filed their petition in the circuit court of Henry county, Ind., for the establishment and construction of a ditch or drain under and pursuant to the provisions of an act of the legislature of the state approved April 6, 1885. The work contemplated the straightening, widening, and deepening of a stream and water course known as "Buck Creek" for a distance of about 14 miles, commencing in the northern

part of Henry county, and extending north and west near the city of Muncie, and ending about 2½ miles west of Muncie, and some 3 or 4 miles from where said stream empties into White river. That along the line of said ditch there are in the neighborhood of 100 landholders, or more, who would be affected by the same, and from 500 to 800 tracts of land would be affected thereby. That said landholders, including the complainant in this suit, were made parties to this proceeding, and due notice was given and served upon them of the time of the docketing of said petition, as required by law. That, at the proper time for the hearing of said petition, the same was heard by the circuit court of Henry county, and was referred, as required by law, to the drainage commissioners of said county. That thereupon the said drainage commissioners, having met at the time and place required in the order of reference, proceeded to locate the proposed work, and to determine the nature and character thereof, and to make the proper specifications and estimates in all respects as required by law, and proceeded to view and determine the amount of benefits and damages that would arise to each tract of land and roadway affected thereby, including the right of way of the complainant which the proposed ditch crosses in the bed of said stream, a short distance south of Muncie, in Delaware county. That afterwards, on the 26th day of April, 1892, said drainage commissioners filed in the court their report in writing, as required by law, showing the commencement, terminus, and course of said ditch, together with full and accurate specifications of its size, depth, and grade, the estimated cost of the same, and the amount of benefits and damages to each tract of land affected thereby, among which there were assessed to the complainant in this case benefits to the amount of $225, and no damages. That on May 5, 1892, and within 10 days after the filing of said report, the complainant in this cause appeared in said court, and filed its remonstrance against the assessments so made, on the ground—First, that the same were excessive, unfair, and inequitable, as compared with assessments made against other persons and other property found to be benefited by said ditch or drain; second, for the reason that the private drain constructed and kept in repair by the complainant along the line of its railroad furnished ample drainage for its property; third, for the reason that no benefit or advantage would accrue to the complainant commensurate with the amount of assessment made against it; fourth, for the reason that, in assessing benefits and injuries or damages to the complainant, no allowance was made of damages to it for the costs and expense to which it would be put by reason of making a proper passageway under its railroad track for said Buck creek improvement. That said remonstrance was afterwards heard by the circuit court of Henry county, and, after such hearing, it was adjudged by the court that the complainant would be benefited in the sum of $125 by the construction of said ditch, and would not be damaged in any sum whatever. The judgment so rendered by the Henry circuit court remains in full force and effect.

It is insisted by the defendants that the circuit court of Henry

county, Ind., had jurisdiction over the subject-matter and the parties, and that its judgment that no damages would accrue to the complainant is conclusive, and that the question cannot be examined in any other court in a collateral proceeding. The general principle of law is well settled that a subsisting judgment in a court which had jurisdiction of the person and subject-matter is binding, at least upon all who were parties, and constitutes a sufficient justification for all acts done in its enforcement until it is reversed or set aside by competent authority. Thompson v. Reasoner, 122 Ind. 454, 24 N. E. 223; Gray v. Brignardello, 1 Wall. 627. The state court had jurisdiction of the complainant, and also of the subject-matter of the benefits which would accrue, as well as the damages which would be suffered by the complainant in the construction of the proposed ditch. If the decision of the state court that the complainant would suffer no damage from the construction of the ditch were erroneous, the only remedy open to the complainant was by appeal to the supreme court of the state, and this court has no power whatever to determine that question. The court is bound to presume that every question which might have been litigated between these parties was properly presented to and adjudicated by the court. It was certainly competent for the state court to determine the question of damage which might be suffered by the complainant by reason of the construction of the ditch in any lawful manner, and the presumption is that the court did consider and pass upon the question.

The defendants further insist that the law of the state has conferred no power upon the drainage commissioner to expend money raised by assessment for the construction of a ditch, or for the purpose of building or repairing any bridge over the ditch so constructed by him. It has been held that a drainage commissioner appointed under the law of this state has no power, by virtue of the law, to build a bridge over a drain constructed by him, and pay for it out of the fund resulting from assessments against the landowners benefited by the construction of the drain. Rigney v. Fischer, 113 Ind. 313, 15 N. E. 594. It would seem that the authority conferred upon a railroad company, by the law of its organization, to cross any stream of water in the line of its road, coupled with the duty to restore the stream so crossed to its former state, or such state as not to impair its usefulness, applies to streams not navigable, as well as to those that are navigable, because legislative authority is as necessary in the one case as the other. Railroad Co. v. Moffitt, 75 Ill. 524. The duty of a railroad to restore a stream or highway which is crossed by the line of its road is a continuing duty; and if, by the increase of population or other causes, the crossing becomes inadequate to meet the new and altered conditions of the country, it is the duty of the railroad to make such alterations as will meet the present needs of the public. Cooke v. Railroad Co., 133 Mass. 185. Under a fair construction of section 3903, Rev. St. Ind. 1881, it is the duty of a railroad company to construct its road where it intersects any highway or stream in such manner as to afford security for life

and property; and this is so whether the way is laid out and opened before or after the construction of the railroad. Railway Co. v. Smith, 91 Ind. 119; National Waterworks Co. v. City of Kansas, 28 Fed. 921. It is not necessary in this case to determine whether this continuing duty, in the absence of the adjudication of the state court, would require the railroad company to alter and restore its bridge so as to accommodate the construction of the ditch in question or not. In my judgment, the court cannot examine the question of damage to the complainant arising from the construction of the ditch or drain, or the manner in which it is authorized to be constructed by the state court, for the reason that these questions have been passed upon by the state court; and that court, or some other court of the state, alone, has the power to review the question of damages.

From these considerations, it results that the temporary restraining order must be dissolved; and it is so ordered.

AMERICAN BOX MACH. CO. v. CROSMAN et al.

(Circuit Court of Appeals, First Circuit. May 14, 1894.)

No. 76.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

This was a suit for the specific performance of a contract by the American Box Machine Company against George A. Crosman and others, in which there was a decree (57 Fed. 1021) dismissing the bill as against Crosman and the Lynn Box Machine Company, but granting an injunction against the remaining respondents. Complainant now appeals from this decree.

William A. Jenner and Edmund Wetmore, for complainant.

Thomas W. Clarke and Niles & Carr, for defendants.

Before COLT, Circuit Judge, and NELSON and WEBB, District Judges.

PER CURIAM. In this case the plaintiff below, who is the appellant, appeals from certain parts of the decree of the circuit court. The errors assigned are as follows:

"(1) The court erred in holding that the bill of complaint be dismissed as against the defendants Crosman and the Lynn Box Machine Company, with costs. (2) The court erred in refusing an accounting of damages and profits."

As to the first assignment of error, we think it should be overruled, for the reasons stated in the opinion of the circuit judge. With respect to the second assignment of error, the court below having decreed that the remaining defendants either manufactured or sold one or more two-strip machines, or machines which may be operated as such, in violation of the agreement of January 23, 1888, and having directed a perpetual injunction to issue against

them, we think that the complainant is entitled, according to the usual course of equity, to a reference to a master. The invasion of the complainant's right having been established, and an injunction ordered, it may be presumed that there are some profits or damages to be recovered. The decree of the circuit court is modified so as to order a reference to a master to take an account of profits, and damages, if any, in addition thereto, against the defendants, except Crosman and the Lynn Box Machine Company, and in all other respects said decree is affirmed.

STONE et al. v. CLAY.

(Circuit Court of Appeals, Seventh Circuit. May 1, 1894.)

No. 117.

CONTRACTS—INTERPRETATION—RACING RULES.

Racing rules defined a "sweepstakes" as a race "for which the prize is the sum of the stakes which the subscribers agree to pay for each horse nominated," and provided that the entry, making one a subscriber, "shall be made by writing, signed by the owner of the horse," and that "a person entering a horse thereby becomes liable for the entrance money, stake, or forfeit." *Held*, that a "free handicap sweepstakes," by an entry for which, under the rules, liability was not incurred absolutely, but only on condition that the horse should not be declared out, was not a "stake race," within the meaning of a proposal for a subsequent race with extra weight for winners of stake races.

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

This was a bill of interpleader by the Washington Park Club making defendants Kinzea Stone and Thomas J. Clay, in which Dudley Allen, claiming a joint interest with Stone, was allowed to intervene. The fund was awarded to Clay. Defendants Stone and Allen appealed.

This dispute is over the outcome of a horse race. In the fall of 1889 the Washington Park Club, of Chicago, a corporation organized under the laws of Illinois, advertised among the events of the ensuing summer meeting the following proposal for a race to be run July 17, 1890, "entries to close by October 15, 1889:" "The Hyde Park Stakes. A sweepstakes for two year olds (foals of 1888); $150 each, $50 f., or only $10 if declared out on or before February 1st, or $25 by April 1st, 1890. All declarations void unless accompanied by the money. With $5,000 added. The second to receive $1,000, and the third $500, out of the stakes. A winner of any stake race of the value of $1,500 to carry 3 lbs., of two or more stake races of any value, 5 lbs. extra; maidens allowed 5 lbs. Three-quarters of a mile."

One hundred and thirty-five horses were named or entered for the race, of which 16 only ran, and of these Balgowan, owned by the appellee, Clay, was declared the winner of the first money, and Kingman, owned by the appellant Stone, was declared winner of second money. Some days later, Stone demanded first money, on the ground that Balgowan had theretofore won two stake races, and, instead of carrying in this race, as he did, only 118 pounds, should have carried 5 pounds more. His demand having been denied by the board of racing stewards, composed of officers of the club, Stone brought a suit at law against the club for the amount of the first money, less the amount of second money, which had already been paid him. Thereupon the club brought a bill of interpleader, and, the appellant Allen,

who claimed a joint interest with Stone in the winnings of Kingman, having been allowed to intervene, the court ordered the money deposited in the registry, and that the claimants present their respective statements. The issue formed between them was referred to a master, whose report, over exceptions by the appellants, was confirmed, and a final decree entered in favor of the appellee. The chief question in dispute is whether a race which Balgowan had won upon the track of the Washington Park Club, July 5, 1890, was a stake race. If it was, he had won two races of that character, and should have carried five pounds extra weight in this race. The race of July 5th was announced as follows: "A free handicap sweepstakes. For two year olds. Of $15 each, if not declared, with $600 added; the second to receive $100 out of the stakes. Entries to be made Thursday, July 3rd. Weights to be announced and declarations to be made Friday, July 4th. Three-quarters of a mile." For that race 43 horses were named, but, after the announcement of weights, 32 were declared out. Balgowan won, and his owner received of the club $665, the owner of the second horse receiving $100.

The Washington Park Club is a member of the American Turf Congress, which is governed by a code of rules known as the American Racing Rules, of which the following are more or less relevant here: "(4) Race: Any contest for 'purse,' 'stake,' premium, or wager for money, or involving admission fees, on any course, and in the presence of a judge or judges, shall constitute a race. (5) Purse: A 'purse' is a sum of money or other prize offered for a race. (6) Sweepstakes or Stake: A 'sweepstakes' is a race publicly declared open to all complying with its conditions, for which the prize is the sum of the stakes which the subscribers agree to pay for each horse nominated; and, if an additional sum of money, cup, plate, or other reward is offered to the winner, the race is still a sweepstakes, whatever may be the name given to such addition. Three subscribers, unless otherwise stipulated in its conditions, make a sweepstakes, and the race is not void so long as there is a horse qualified to start." "(8) Handicap: A 'handicap' is a race for which the horses are weighted according to their merits in the estimation of the handicapper, for the purpose of equalizing their chances of winning. (9) Free Handicap: A 'free handicap' is one in which no liability is incurred for entrance money, stake, or forfeit, until acceptance of the weight allotted, either by direct acceptance or through omission to declare out." "(14) Conditions Supersede Rules: The express conditions of a race supersede the rules of racing when they conflict. (15) Entries and Subscriptions: Entry shall be made by writing, signed by the owner of the horse, or by some person deputed by him," etc. "(31) A subscription to a stake cannot be withdrawn," etc. "(34) The death of a horse, or a mistake in the entry of a horse, when eligible, does not release the subscriber or transferee from liability for a stake or forfeit." "(37) Liability for Stakes and Forfeits: A person entering a horse thereby becomes liable for the entrance money, stake, or forfeit. A subscriber to a sweepstakes is liable for the stake or forfeit," etc.

Oliver & Showalter, for appellants.

Charles H. Aldrich and William Brace (Aldrich, Payne & Defrees, of counsel), for appellee.

Before WOODS and JENKINS, Circuit Judges, and SEAMAN, District Judge.

WOODS, Circuit Judge (after stating the case). It seems to be settled law in Illinois that horse racing is gaming, within the meaning of the statute of the state authorizing the recovery of money lost "at any gaming, or playing at cards, dice, or any other game or games." Tatman v. Strader, 23 Ill. 493; Mosher v. Griffin, 51 Ill. 184; Garrison v. McGregor, Id. 473; West v. Carter, 129 Ill. 249, 21 N. E. 782. See, also, Morgan v. Beaumont, 121 Mass.

7; Gibbons v. Gouverneur, 1 Denio, 170. In Harris v. White, 81 N. Y. 532, where the subject is considered at length, a bet or wager is defined to be "ordinarily an agreement between two or more that a sum of money or some valuable thing, in contributing which all agreeing take part, shall become the property of one or some of them on the happening in the future of an event in the present uncertain;" and, as distinguished from that, a purse, prize, or premium is defined to be "ordinarily some valuable thing, offered by a person for the doing of something by others, into the strife for which he does not enter." It having been urged in that case "that the payment of entrance fees by the defendant for his horses was a staking of so much of his own money upon the result," the court said:

"So it might have been, if the entrance fees went immediately to make up the purse trotted for. * * * The fees went into the treasuries of the associations and the prizes came out of those treasuries; but the fees were not money paid, as in Gibbons v. Goveneur, supra, for the express purpose of making a stake to be specifically trotted for, and for no other purpose, and with the previous agreement that the very sums thus paid should form the stake, and to go, the whole of it, to the winner of the race."

In West v. Carter, supra, which grew out of a race upon the track of the Chicago Driving Park Association, the supreme court of Illinois said:

"Agricultural societies, stock and other associations organized for the purpose, and having for their object, among others, the improvement of domestic animals, and to induce competition and rivalry in their importation and development, may offer premiums or purses to exhibitors of such animals, without being guilty of violating the Criminal Code. On the other hand, the law will not tolerate any shift or device upon the part of any association or individual whereby, under the pretense of bettering the condition or developing and improving the stock, gambling is intended or permitted."

It is plain enough in this case that the entrance fees, and forfeits of those whose horses were declared out, "went immediately to make up the purse" for which the race was run. They were paid or promised to be paid for the express purpose of making up the stake, and for no other purpose, and with the previous agreement that the very sums thus paid should form the stake, and go all to the winners of the race. That is the plain meaning of the proposal, and that the parties so understood it is shown by the fact that, without objection from any one, unpaid forfeit orders to the amount of $1,550 were brought into court under the bill of interpleader as a part of the fund to be disposed of. There is therefore no support for the interpretation of the proposal, so often reiterated in the brief of appellants, to the effect that the club was bound to pay to the winners of the race "a sum of money equal to $5,000, plus a sum equal to the aggregate of all entrance fees and of all forfeits,"—invoking, in order, it would seem, to avoid an imputation of invalidity under the statute against gaming, the distinction recognized by the courts in respect to champerty between contracts to give a part, and contracts to pay a sum equal to a stated part, of the proceeds of litigation; the latter being held to be valid, while the first is illegal. But that distinction, if it is not in itself a

vicious one, which, without promoting justice, has tended to bring reproach on the courts and upon the legal profession, is not one which should be extended by analogy to other subjects, especially to one concerning which, as we have seen, it has been said "the law will not tolerate any shift or device," whereby, under pretense of some lawful purpose, "gambling is intended or permitted." But, as this question has not been argued, and was not suggested at the hearing, we refrain from deciding it.

Treating the case as one of which the court may take cognizance, we agree with the position of the appellee that the race of July 5th was not a stake race, because the prize was not "the sum of the stakes which the subscribers agreed to pay for each horse nominated." Upon this point the argument for the appellant is as follows:

"In the race of July 5th, it is argued, thirty-two horses were nominated, and the persons nominating them paid nothing. But the said thirty-two were not subscribers, and did not agree to pay anything. The only persons who became subscribers, and who each, by subscribing, agreed to pay the $15 entrance fee, were the eleven who did so pay. The entry is not made—there is no contract—in a free handicap till it is signified by the nominator that the weight is satisfactory. A subscription to a race involves an agreement to pay the stake or entrance money. One is not a subscriber (rules 31, 34, 37) till he becomes bound. If, again, we say that a stake race 'is a race * * * for which the prize is the stake which the nominators agree to pay for each horse nominated,' the argument still fails, for the thirty-two did not agree to pay. No agreement to pay was made till made by the eleven who accepted the weights; and, as to them, the race became then a common sweepstakes. No one of the eleven could get out, after accepting, without forfeiting $15, the amount of the stake or entrance fee; and one or two it appears did so forfeit and pay said entrance fee."

But rule 15, entitled "Entries and Subscriptions," requires that "entry shall be made by writing, signed by the owner of the horse;" and it is the act of entry, as we understand, which makes one a subscriber. As it is expressed in rule 37: "A person entering a horse thereby becomes liable for the entrance money, stake, or forfeit;" that is to say, in a stake race he becomes absolutely liable to the extent of the prescribed forfeit, and liable for the entrance money or stake, on condition that within the time allowed his horse shall not be declared out; but in the free handicap, to which class the race of July 5th belonged, while he does not become absolutely liable at first for any sum, he does, by entering his horse, become liable for the entrance fee on condition that his horse shall not be declared out. In other words, there is absolute liability on the part of the subscriber only in the stake race, but in both the stake race and the free handicap there is a conditional liability; the condition in one, the same as in the other, being that the horse shall not be declared out.

It is therefore ordered that the decree below be affirmed.

ROBSON v. MISSISSIPPI RIVER LOGGING CO.

(Circuit Court, N. D. Iowa, E. D. April 2, 1894.)

1. CONTRACTS—MUTUALITY—SUBJECT-MATTER—PERFORMANCE.
A contract between plaintiff and defendant recited that plaintiff owned timber lands tributary to two streams on which defendant was engaged in the business of driving logs, and that differences had arisen between the parties in regard to charges for services rendered by defendant; it was therefore agreed that, in consideration of a specified compensation, defendant should drive, boom, and deliver all logs put by plaintiff in the rivers in question, not to exceed a named limit annually. The parties acted under this contract until all but a small part of the timber was cut from plaintiff's land. *Held*, that defendant could not refuse performance as to the balance of the timber on the ground that there was a lack of mutuality in the contract.

2. SAME—EXCUSE FOR NONPERFORMANCE—IMPOSSIBILITY.
Plaintiff owned timber lands on the Chippewa river, and a sawmill below, on the Mississippi. Defendant logging company contracted to receive the logs, and deliver them at plaintiff's mill. To do this it was necessary to drive them down the Chippewa into a boom where they were assorted by means of pockets and formed into rafts so as to be towed by the raft boats in use on the Mississippi. The contract bound defendant, in terms, to perform these several operations, and specified "Beef Slough" boom, which was controlled by defendant, as the one into which the logs were to be driven. During the life of the contract Beef slough was filled up by the action of floods, and was no longer available for use as a boom; but defendant constructed a boom in another slough, on the west bank of the Mississippi, and the operations necessary to the delivery of plaintiff's logs could be carried on as well at this boom as at Beef slough. *Held*, that defendant could not excuse itself from further performance of the contract on the ground that it had been rendered impossible by natural causes which it could not control.

3. SAME—NONPERFORMANCE—EXCUSES.
Defendant contracted to drive, boom, raft, and deliver plaintiff's logs, and agreed that the boom charges should not exceed 60 cents per thousand feet. During the life of the contract the necessary boom charges were increased by reason of circumstances over which neither plaintiff nor defendant had any control. *Held*, that this did not excuse defendant from further performance of the contract, nor entitle it to demand a higher compensation than that contracted for.

4. BEST AND SECONDARY EVIDENCE—SCALE BOOKS—LOGGING.
"Scale books" were offered in evidence to show the quantity of timber cut from certain lands. It was shown that "camp scalers" take the measurements of logs as they are cut in the woods, and enter them upon cards; that at the close of the day these measurements are entered on the scale books; that inspectors verify the scale books by counting the logs and remeasuring a sufficient number to satisfy themselves of their correctness; and that the scale books are then sent to the owners of the logs, and payment made to the cutter according to their contents. *Held*, that the scale books are primary evidence of the quantity of logs cut.

This was an action by John Robson against the Mississippi River Logging Company, for breach of contract concerning the driving and delivering of logs upon the Chippewa river. The case was submitted to the court upon the law and evidence, a jury being waived.

The finding of facts:

(1) I find that at the date of the bringing of this action the plaintiff, John Robson, was a citizen of the state of Minnesota, and the defendant company was a corporation created under the laws of the state of Iowa.

(2) I find that for a number of years prior to 1882 the defendant company

was engaged in the business of running and driving logs and timber down the Flambeau and Chippewa rivers, in the state of Wisconsin, to the Mississippi river; including in such business, logs and timber owned by the defendant, and logs and timber owned by third parties.

(3) I find that prior to 1882 the general mode in which the said business was carried on was as follows: The logs and timber were placed by the owners thereof on the banks or in the water of the said Flambeau and Chippewa rivers, and the tributaries thereof. The driving of the logs down the river was performed by the defendant corporation, or by the Chippewa Lumber & Boom Company, which latter company was under the control and management of the defendant. When the logs reached Beef Slough boom, which was situated on the lower part of the Chippewa river, they were taken possession of by the Beef Slough Boom Company, and were run into the boom managed by said company; and the logs belonging to the different owners were separated from the common mass, and run into pockets. Having been then assorted, they were then brailed, and formed into rafts, in proper condition to be taken in tow by the raft boats which conveyed them to their several points of destination upon the Mississippi river.

(4) I find that for a number of years prior to the year 1882 the plaintiff, John Robson, had been engaged in the lumber business, upon the Mississippi river; that he had a sawmill at Lansing, upon that river, and that he brought the logs sawed at the mill from the lands tributary to the Flambeau and Chippewa rivers in Wisconsin; that he owned a quantity of timber lands tributary to these streams, from which he annually cut a number of logs, and that he also bought logs from other persons, or bought the right to cut logs from lands owned by other persons, and tributary to the streams above named; that for a number of years prior to 1882 all the logs cut or bought by the plaintiff in the regions tributary to the Flambeau and Chippewa rivers were driven for him by the defendant company, or by the Chippewa Lumber & Boom Company.

(5) I find that certain differences and disputes in regard to the handling of said logs, and the prices to be paid therefor by plaintiff, having arisen thereupon, on the 23d day of August, 1882, the plaintiff and defendant entered into a contract in writing, of the following term and effect:

"Articles of agreement made and entered into this 23rd day of August, 1882, by and between the Mississippi River Logging Company, a corporation organized under the laws of Iowa, party of the first part, and John Robson, party of the second part, witnesseth: Whereas, the party of the second part owns a large quantity of pine lands tributary to the Chippewa and Flambeau rivers and their branches in Wisconsin, and now has a large quantity of sawlogs and timber in said streams, and expects to cut annually hereafter and deliver in said streams, a large quantity of sawlogs and timber, to be driven to market, down said streams, to the Mississippi river; and whereas, the said party of the first part is engaged in the business of driving logs down said streams, to Beef slough, for other parties; and whereas, differences having arisen between said parties hereto, and between the party of the second part and the Chippewa Lumber & Boom Company (which is controlled by the party of the first part), in respect to the running and driving of logs: Now, therefore, for the purpose of settling all said differences, and providing for the future, it is mutually agreed as follows: First. Said party of the first part, in consideration of the premises, and of the promises of the said party of the second part hereinafter mentioned, agrees to take possession and control of all logs and timber which the party of the second part shall deliver in said Chippewa river, below east and west forks thereof, and all that shall be delivered in said Flambeau river, at or below the north and south forks of said streams, and to drive the same, at its own cost, charges, and expense, down said streams, to and into Beef Slough boom, not exceeding an average of twenty-five millions of feet annually, said logs to be driven each season with all reasonable dispatch, and with as much care and facility as it shall drive its own logs. The logs of the party of the second part now in said streams are to be driven by said first party under this agreement. Any charges to be paid the Chippewa Lumber and Boom Company, or any other company, person, or persons, on account of said logs, or any of the same, between the aforesaid forks of said streams and said

Beef Slough boom are to be paid by said party of the first part. Second. And the said party of the first part, in consideration of the premises, further undertakes and agrees that the charges of the said Beef Slough Boom Company shall not exceed sixty cents per thousand feet for booming, assorting, and delivering in pockets, and watching the said logs of the said party of the second part at all the mills on the Chippewa river. Third. And the party of the first part, in consideration of the premises, further undertakes and agrees to brail and deliver to the said second party, in a proper and usual manner, his said logs, ready to be taken in tow by boat after the same are turned out into pockets, by said Beef Slough Boom Company, and to do the same with all reasonable dispatch. Fourth. And the said party of the second part, in consideration of the premises, promises and agrees to pay to the said first party, annually, at the close of each season's business, for taking the care, control, and delivering said logs into Beef Slough boom, as agreed as aforesaid, the sum of two hundred and fifty dollars, and for brailing and delivering said logs, ready for the towboat, twenty-five cents per thousand feet. And said party of the second part also further agrees to return to the said party of the first part the brailing lines used in brailing said logs, unless the same shall have been three times used. Fifth. In case the said party of the second part associates any person or persons with him, as partner or partners, in such lumbering business, this agreement is to stand, apply, and operate in respect to such partnership. But no logs are to be handled by said party of the first part, under this agreement, except such as shall be owned by said party of the second part, or by him and others as partners. The cost of scaling the said logs as the same are turned into said Beef Slough boom is to be paid equally by the parties hereto. Witness our hands and seals this 23rd day of August, 1882.

Mississippi River Logging Co.
"F. Weyerhauser, Pt.
"John Robson."

(6) I find that after the date of the contract, and up to April 4, 1889, both parties recognized their contract to be in full force, and the defendant company took charge of and handled all logs delivered to it by plaintiff in accordance with its provisions.

(7) I find that on April 4, 1889, the defendant company notified the plaintiff, by a letter addressed to him, and received in due course of mail, that it would no longer be bound by said contract, the said letter reading as follows:

"Chippewa Falls, Wis., April 4th, 1889.

"Mr. John Robson, Winona, Minn.—Dear Sir: You will please to take notice that the Mississippi River Logging Company elects to, and does hereby, terminate the contract made with you for driving your logs on the Chippewa and Flambeau rivers, in the state of Wisconsin, and for fitting said logs at Beef slough for transportation down the Mississippi, being the contract bearing date August 23rd, 1882, all the provision of which are hereby terminated, and will not be hereafter considered binding between the parties. If you do not receive your logs at Beef slough when delivered in the pockets, and fit them for transportation, it will be taken for granted that you elect to have this company act for you in that regard, charging therefor same as for like services done for others.

"Yours, respectfully, Mississippi River Logging Co.,
"By F. Weyerhauser, Prest."

(8) I find that since said 4th day of April, 1889, and as a consequence of the refusal of the defendant company to further handle, drive, or care for the logs owned by plaintiff for the prices named in the contract, the plaintiff has been compelled to pay larger sums for the performance of the work necessary therefor; such additional payments amounting to 38½ cents per 1,000 feet, subject to reduction of $250 per year, the contract price for driving. And I further find that plaintiff paid the sum of $350.27 as an extra charge for brailing in 1889, in addition to the total of 38½ cents increase.

(9) I further find that at the date of the contract in question, to wit, August 23, 1882, the plaintiff had upon the banks or in the waters of the Flam-

beau and Chippewa rivers, below the forks thereof, logs and timber to the amount of 14,901,430 feet, according to bank scale.

(10) I find that since the said 23d day of August, 1882, the plaintiff has cut from the lands by him owned at the date of the contract, and placed in the waters of the Chippewa and Flambeau rivers, as provided in said contract, timber to the amount of 97,848,024 feet at bank scale, and that there was in April, 1889, standing uncut upon said lands, the further amount of 3,869,000 feet of pine timber, at bank scale, and 724,000 feet of hemlock timber.

(11) I find that since the date of said contract the plaintiff has placed in the waters of said Chippewa and Flambeau rivers, 36,190,366 feet of logs cut from lands other than those owned by plaintiff at the date of the contract, and that the defendant has driven, cared for, and delivered those logs to plaintiff, receiving pay therefor at the contract prices.

(12) I find that the evidence fails to show that in so handling the timber described in the last finding, the defendant was misled in regard to the source whence this timber was procured, or that it acted under any mistake of fact.

(13) I find that in 1884 an extraordinary flood occurred in the Chippewa river, which brought about a change in the channel of the river near the entrance to Beef slough, and resulted in the filling up thereof. The defendant company made all reasonable efforts and expenditures to keep open said slough, and the entrance thereto, but without avail; and finally, in 1889, Beef slough was wholly abandoned, and since then it has not been used in connection with the logging business on the Chippewa river.

(14) I find that when it became apparent that Beef slough was becoming unfit for booming purposes a company was organized, under the laws of the state of Minnesota, for the purpose of creating and managing a boom at West Newton slough, on the west bank of the Mississippi river, and booming facilities costing in excess of $100,000 were then created; and the logs coming down the Chippewa river have since then been run into, and handled in West Newton slough, instead of Beef slough.

(15) I find that the relations existing between the West Newton Boom Company and the defendant company are substantially the same as those existing between the defendant company and the Beef Slough Company.

(16) I find that by the use of the facilities created at West Newton slough the logs driven down the Chipppewa river can be boomed, brailed, formed into rafts, and be delivered to towboats for transportation down the Mississippi river, but the expense thereof is somewhat in excess of what the same work cost at Beef slough.

(17) I find that the defendant failed to handle, as it was required to do under the contract, the sum of 42,238,799 feet of pine timber, and that the additional cost for handling the same, which plaintiff has been compelled to pay, or will be compelled to pay, equals the sum of $15,611 over and above the cost at contract rates.

J. A. Tawney and Henderson, Hurd, Daniels & Kiesel, for plaintiff.
J. J. Jenkins and H. H. Hayden, for defendant.

SHIRAS, District Judge. Upon the final argument of this case, it was urged by counsel for defendant that the facts developed in the evidence are such as to show that the contract, when applied to its subject-matter, must be held to be one terminable at the option of the defendant. I do not think the evidence presents the question in any aspect other or different from the one considered when the case was submitted on demurrer, and when it was held that the contract was not one terminable at will. See opinion, 43 Fed. 364. I adhere, therefore, to the views therein expressed upon this question.

It is further contended that the contract does not, in terms, bind the plaintiff to cut or deliver any timber, and that, therefore, the

defendant is not to be held bound by the contract, for want of mutuality. There are cases wherein, by the terms of the contract, only one party is bound to do any act or anything in the nature of performance; and in this class of cases, so long as the contract remains executory, and in the absence of any recognized consideration, it is held that they cannot be enforced, for want of mutuality. The case at bar does not fall within this rule. In substance, the contract was to the effect that if the plaintiff would, within a reasonable time, cut and deliver in the Chippewa river and Flambeau river the timber standing upon the lands owned by plaintiff at the date of the contract, and tributary to the named rivers and their branches, the defendant company would receive, care for, drive, and deliver the same, as provided in the contract, for the compensation therein named. The evidence shows that ever since the date of the contract the plaintiff has been cutting the timber upon the lands referred to in the contract, placing the same in the waters of the Chippewa and Flambeau rivers, and has in fact so cut and placed much the greater part of the timber on said lands. For some seven years and more the defendant received the timber thus cut, handling the same according to the terms of the contract, and received the compensation stipulated to be paid for the services rendered. From and after April 4, 1889, the defendant refused to further receive or handle the remaining portion of the timber under the terms of the contract, although the plaintiff continued to cut and place the same in the waters named in the contract. Thus it appears that performance of the contract was entered into by both of the parties thereto. The larger part of the timber has been cut, received, and delivered, and the defendant has received the benefits of the contract in regard thereto. It will not do to now claim that the contract can be avoided, in regard to the small portion of timber not yet cut, on the ground that the contract is simply executory, or that there is a want of mutuality therein. As to the timber heretofore cut and placed in the waters of the Chippewa and Flambeau rivers, the defendant company, by taking possession thereof, and driving and delivering the same, became entitled to demand, and could enforce, payment from the plaintiff of the sums he agreed to pay for the services rendered. It must be kept in mind that this contract was not to the effect that the defendant company would drive and care for all lumber delivered to it, year by year, by plaintiff. The subject-matter of the contract was the timber standing upon the lands owned by plaintiff upon the Chippewa and Flambeau rivers, and the logs in the streams at the date of the contract. What the parties bargained about was the handling of this timber, and the price to be paid therefor; and, the contract having been made, both parties entered upon the performance thereof. The plaintiff commenced cutting and delivering the timber, and paid, from time to time, the contract price for the portions received, handled, and delivered by the defendant; and the latter received, handled, and delivered the timber, without objection, up to April 4, 1889. At that date the contract was not wholly executory, but, on the contrary, it had been partly and largely

performed by both parties. It was then, in fact, in process of performance by both parties, and each had reaped a benefit therefrom. Under such circumstances, it was not open to the defendant to cease performance on its part on the ground that when the contract was signed there was a want of mutuality, because the plaintiff was not bound to cut any of the timber standing upon his land. Even if it be admitted that under this contract there was no obligation binding the plaintiff to cut the timber on his land, and to deliver it to the defendant, for the purpose of the contract, yet it is clear that both parties assumed that the timber would be cut, and the evidence shows that the plaintiff has in fact performed, in this particular, all that the defendant could reasonably demand, and the latter, for years, accepted the timber cut, and handled the same, under the provisions of the contract; and thus the contract went into full force, and became binding upon the parties thereto. Thus, in Storm v. U. S., 94 U. S. 76, wherein was involved the question of the liability of a contractor and his sureties for the nonperformance of a contract to furnish certain supplies, it was objected that the contract was not mutually binding, was therefore without consideration, and hence was void. The court overruled the objection, saying that:

"Beyond doubt, the written agreement went into operation, and it is not even suggested that the department and division commanders ever expressed any disapproval of its terms or conditions. * * * Suppose it to be true that the quartermaster general might terminate it, if he should see fit. It is a sufficient answer to the suggestion to say that he never did interfere in the matter, and that the contract continued in full force and operation throughout the whole period for which the necessary supplies were purchased by the United States in open market. Where the defendant has actually received the consideration of a written agreement, it is no answer to an action brought against him for a breach of his covenants in the same to say that the agreement did not bind the plaintiff to perform the promises on his part therein contained, provided it appears that the promises in question have in fact been performed in good faith, and without prejudice to the defendant. Add. Cont. (6th Ed.) 15; Morton v. Burn, 7 Adol. & E. 25. Agreements are frequently made which are not, in a certain sense, binding on both sides at the time when executed, and in which the whole duty to be performed rests primarily with one of the contracting parties. * * * Cases often arise where the agreement consists of mutual promises, the one promise being the consideration for the other; and it has never been seriously questioned that such an agreement is valid, and that the parties are bound to fulfill their respective obligations."

In the case now before the court, it may be true that the defendant company could not perform its agreement to drive and deliver the logs unless they were cut and placed in the streams by the plaintiff, and that the contract, in terms, does not bind the plaintiff to cut any logs whatever; but this only shows that in that particular the agreement of the defendant was dependent upon the prior action of the plaintiff, and it has never been held that because the covenant or agreement of the one party cannot be performed until the other has taken the necessary action, therefore the contract is not enforceable. The contract in question expressly recites, and the evidence shows, that when the contract was entered into the plaintiff then had in the waters of the Chippewa and Flambeau rivers a large quantity of logs, already cut, and ready for driving. In regard to these

logs the plaintiff was not required to do anything further, in order to bring them within the purview of the contract; but the defendant company was expressly bound to take possession of and care for these logs, and the plaintiff was bound to pay the stipulated price therefor. Furthermore, as the plaintiff, from time to time, cut and placed in the rivers named in the contract other logs from the lands included in the contract, the obligation rested upon the defendant company to care for the same as in the contract provided, and in consideration therefor the plaintiff became bound to pay the stipulated sums for such services. Moreover, it is stated in the contract that differences had arisen between the parties in interest in regard to the running and driving logs, and the evidence shows that a suit was pending in regard thereto. These differences, and the litigation based thereon, were settled, as part of the contract entered into by the parties, and, of itself, this constituted a recognized, valid consideration, sufficient to support the contract; and, that being supported by a sufficient consideration, then the obligation of the defendant company to receive, drive, care for, and deliver the logs became performable as the logs were cut and placed in the waters of the Chippewa and Flambeau rivers, and the refusal of the defendant company in April, 1889, to further receive and drive logs cut from the lands included in the contract cannot be justified on the ground of want of consideration, or of lack of mutuality.

Objection is also made to the enforceability of the contract on the ground that there is no time fixed within which the plaintiff can be required to cut the logs upon his lands, and that the defendant company might, therefore, be required to be prepared, at large expense, to drive and care for the logs for an unlimited time in the future. When the time of performance is not fixed, in express terms, in a contract, the rule is that it must be had within a reasonable time; and, in determining what is a reasonable time, regard is had to the situation of both parties. In legal effect, the contract between the parties requires of the plaintiff that he shall cut all the timber he intends to have driven under this contract within a reasonable time. If the plaintiff should delay the cutting of any portion of the timber for an unreasonable time, it would be held that thereby he had lost the right to demand performance on part of the defendant. It is not claimed that in fact there has been any delay in this particular on part of the plaintiff. When the defendant sought to terminate the contract, in the spring of 1889, it was then engaged in driving logs down the Chippewa river, and it still continues in the same employment. There is no force, therefore, in the suggestion that a heavy burden might be placed upon the defendant if the contract is held enforceable, by reason of the fact that no time is named for its final completion, because the plaintiff can claim only a reasonable time in which to cut the timber in question, and it is not claimed that the plaintiff has not exercised due diligence in this particular.

On behalf of the defendant, it is further claimed that, granting that the contract was originally valid and enforceable, nevertheless, by reason of the effect of the high water occurring in 1884 in the

Chippewa river, the entrance to Beef slough became filled up with sand, and it became impracticable to continue the use of the slough for booming purposes, and thereby the contract was rendered substantially impossible of fulfillment, and as this impossibility of fulfillment is due to the operations of nature, beyond the control of the defendant, it excuses the defendant from further performance. Counsel for the defendant cite in their brief many cases wherein exceptions are recognized to the doctrine formerly held, that, where the duty or obligation sought to be enforced was imposed by law, then impossibility of performance was a good defense, but that, where the duty was one created by the contract of the parties, then impossibility of performance was not an excuse for nonperformance, unless it was so provided in the contract. The general rule now prevailing is that stated by the supreme court in Railway Co. v. Hoyt, 149 U. S. 1–14, 13 Sup. Ct. 779, wherein it is said:

"There can be no question that a party may, by an absolute contract, bind himself or itself to perform things which subsequently become impossible, or pay damages for the nonperformance; and such construction is to be put upon an unqualified undertaking, where the event which causes the impossibility might have been anticipated and guarded against in the contract, or where the impossibility arises from the act or default of the promisor. But, where the event is of such a character that it cannot be reasonably supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words, which, though large enough to include, were not used with reference to the possibility of, the particular contingency which afterwards happened."

Assuming for the moment that the filling up of the entrance to Beef slough rendered the contract impossible of fulfillment, can it be said that the possibility thereof was not within the knowledge of the parties? Is it not a fact known to all persons engaged in business upon the Mississippi river and its tributaries, like the Chippewa, that changes in the channel are constantly taking place; that sandbars are created in some places, and are washed away in others; and that there is not only a possibility, but a probability, that, in the course of years, deflections in the current will take place, of such magnitude as to open new outlets for the passage of the water, and to close those formerly existing? Can any one travel along the Mississippi or Chippewa rivers, and not see convincing evidence of the liability of these changes taking place? These changes are not alone caused by very high floods, but are also the result of the constant action of the waters in these streams. Can it, therefore, be fairly claimed that the closing up of the entrance to Beef slough was such an unlikely event that it could not have been anticipated, and have been provided for in the contract of the parties? But, however this may be, is it true, in fact, that the closing of the entrance to Beef slough prevented a fulfillment of the contract on part of the defendant? The determination of this question involves the construction of the contract as a whole, which, in turn, requires the reading of the terms of the contract in the light thrown thereon by the situation and relation of the parties when the agreement was made. The recital in the contract, and the other evidence in the case, show that at the date of the contract, and prior thereto,

the defendant company was engaged in the business of driving logs down the Chippewa river, some of which were delivered to mills upon that river, but the larger part were taken to the Mississippi river, and there delivered, ready for rafting, to the owners thereof. It further appears that the defendant company, through its control over the Chippewa Lumber & Boom Company, and the Beef Slough Boom Company, had practically the control or monopoly of the business of driving, booming, and delivering logs upon the Chippewa river. It further appears that the plaintiff owned a sawmill situated at Lansing, on the Mississippi river, and had for years drawn his supply of logs from the lands tributary to the Chippewa river and its branches. These logs came, not only from land owned by him, but also from land owned by others. To get the logs thus cut upon the lands tributary to the Chippewa river down to plaintiff's mill, at Lansing, it was absolutely necessary that the same should be driven down the Chippewa, and thence be rafted down the Mississippi river to Lansing. The several steps necessary to convert the trees growing upon the lands of plaintiff and others tributary to the Chippewa river into logs, and to convey them to the mill of plaintiff, are: First, the cutting the trees into logs, and placing them in the waters of the river and its tributaries, ready for driving; second, driving the same down the Chippewa, and forming them into rafts proper to be moved down the Mississippi river; and, third, rafting them down the Mississippi. It appears from the evidence that for years prior to the date of the contract the work of driving the logs owned by plaintiff, and of forming them into rafts ready for rafting down the Mississippi, had been performed by the defendant company, and the other companies controlled by it. Differences had arisen, however, between the parties, as to the prices to be charged, and perhaps as to other matters, and litigation in regard thereto was pending. In order to settle these past differences, terminate the litigation, and to provide for the future, the parties entered into this contract of August 23, 1882. It is clear that the purpose of the plaintiff was to contract for the driving of his logs, for the placing the same into rafts, and the delivery to him of the logs, ready for rafting, upon the waters of the Mississippi. This included the driving the logs down the Chippewa, the gathering them together by the agency of booms and pockets, the construction into rafts, and the delivery to plaintiff in proper form to be taken in tow by the raftboats in use upon the Mississippi river. The defendant company, on its part, agreed to take possession of the logs, when delivered in the waters of the Chippewa and Flambeau rivers, and to brail the same, and deliver them in the form of rafts, ready to be taken in tow by the boats used for that purpose. To accomplish the delivery of the logs in the form of rafts, the logs must be driven down the Chippewa river, be collected in booms, and, by the use of pockets, be selected from other logs, and, when selected, be brailed, and formed into rafts. It is entirely clear that it was not understood that after the logs were taken possession of by the defendant company, when placed in the waters of the named rivers, they again came into the possession or under the control of the

plaintiff until they were formed into rafts ready for the towboat. Therefore, it is apparent that it was understood that during the driving, booming, and brailing of the logs, they were under the supervision of the defendant company. It is doubtless true that the expectation of the parties was that the driving, booming, and pocketing of the logs would be done through the agency of the Chippewa Lumber & Boom Company and the Beef Slough Boom Company; but nothing in the contract contained shows that it was the intent of the parties that the work must be done by these companies, and no other, nor does the contract limit or define the boom or pockets within which the logs must be formed into rafts. There is nothing in the mere language of the contract which compels the defendant to use any particular agency in the driving, booming, pocketing, brailing, and delivering of the logs, and there is nothing in the purpose sought to be accomplished which requires such a construction to be placed on the contract. Certainly, it would not be open to the plaintiff to refuse to receive a raft composed of logs by him owned, offered for delivery by defendant on the waters of the Mississippi, simply because the logs had not been driven by the Chippewa Lumber & Boom Company, or had not been boomed and pocketed by the Beef Slough Boom Company, or had been boomed, pocketed, and brailed upon the north branch of the Chippewa river, instead of in Beef slough. The defendant company performs its contract, in substance, if it takes possession of the logs, causes them to be driven, and forms them into rafts proper for towage on the Mississippi river. The mere agencies by which the result is reached are immaterial. If the defendant company can devise a method by which it can collect the logs, and form them into rafts, at the proper place of delivery, other than by means of booms and pockets, it is at liberty so to do, without being chargeable with a breach of its contract. The substantial purpose of the contract was to provide for getting the logs of plaintiff, after they were cut and placed in the waters of the Chippewa and Flambeau rivers, down to the Mississippi river, and there forming them into rafts fitted for being transported to plaintiff's mill. This being so, is it not clear that the change in the channel of the Chippewa river, whereby Beef slough ceased to be available for booming purposes, cannot be said, in any fair sense, to have prevented the fulfillment of the defendant's contract?

The use of the slough for booming purposes was a mere means to the end proposed by the contract, and, if the end proposed can be reached by other means, it cannot be said that the fulfillment of the contract is impossible. If the result of the flood of 1884 had been such as to change the course of the Chippewa river so that it ceased to flow into the Mississippi river, or if the character of the river had been so changed that it could no longer be used for logging purposes, then we would have had a state of facts to which the rule contended for by the defendant company would be applicable. It would then be apparent that the defendant company could not receive the logs of plaintiff in the waters of the Chippewa river, and drive them to the Mississippi river, and such a change in the

actual situation might have the effect of terminating the contract. What is the actual situation in this respect? The Chippewa river continues to be an affluent of the Mississippi, and, as heretofore, the timber cut on lands adjacent thereto is driven down that stream without difficulty. The defendant company, since 1884, and at the present time, has been and is engaged in driving the logs owned by it and by others down the river to the Mississippi, and in brailing the same ready for rafting. There is no change in the work accomplished by it. There have been changes in the mere agencies employed, but not in the character nor the ultimate result of the work done. Under the terms of the contract in question, there was no obligation upon the defendant company to continue the booming, pocketing, and brailing in the appliances used for that purpose when the contract was signed. So long as it performed the work expected of it, the means employed might be changed at its own option. If Beef slough had not filled up, but a more advantageous place for booming and brailing the logs had been discovered, the plaintiff could not have insisted upon the defendant company continuing to use Beef slough, or the boom and pockets therewith connected. All he could insist upon was that the logs should be driven, brailed, and delivered to him ready for rafting down the Mississippi. Neither could plaintiff object to the defendant company aiding in organizing another company to supervise the booming of the logs, so long as the work was actually done in accordance with the requirements of the contract. The evidence shows that when the entrance to Beef slough commenced filling up, and after it had been demonstrated that it could not be reopened by any reasonable outlay, the defendant company sought another location for booming purposes. This was found in West Newton slough, upon the west bank of the Mississippi river. It does not appear that it was impossible to create a boom upon the North channel of the Chippewa river; and certainly, if a boom had been there placed, the plaintiff could not have objected to its use in the reception of his logs. The location at West Newton slough being deemed the more favorable one, it was selected, and a corporation was organized under the laws of the state of Minnesota for the purpose of preparing the boom and its appliances; and the practical results show that the boom thus located serves its purpose fully as well as the one formerly in use in Beef slough. It thus appears that by the use of the West Newton boom the defendant company can fully perform its contract with plaintiff. It can receive, drive, brail, and deliver in rafts, all the logs cut by plaintiff on lands owned by him tributary to the Chippewa river. Why should it be excused from so doing?

It is said, in argument, that the booming expense is greater at West Newton slough than it formerly was at Beef slough, and that this increased expense ought not to be put upon the defendant. It will be noticed that the charges to be paid by plaintiff for driving the logs, and for brailing and delivering them ready for rafting, are fixed absolutely in the contract, but the charge for booming is not thus fixed. It is agreed that the boom company charge

shall not exceed 60 cents per 1,000 feet; thus showing that it must have been understood that this charge was an uncertain one, and might be varied by circumstances. The defendant company agreed, in effect, that it would pay all charges in excess of 60 cents, and if the charge exceeds that amount it cannot complain. Some one must pay the amount in excess of 60 cents. Why should the burden be taken from the defendant, and be placed upon the plaintiff, when the former agreed to be responsible therefor? It is clear that when the contract was made the parties understood that the boom charges were liable to fluctuations. It was agreed that, up to 60 cents, the plaintiff would pay them. If they passed above that figure, then the defendant would become liable to plaintiff for the excess. The fact that they may exceed the limit does not create an equity or right in the defendant to be excused from paying the excess. The fact that the charge is imposed by the West Newton Boom Company, instead of the Beef Slough Company, is of no significance. The plaintiff did not transfer the work from the one company to the other. The defendant company, not the plaintiff, is responsible for the change in the company doing the work, and for the substitution of the one company for the other, and the change for which it is responsible cannot be relied upon as ground for refusing to further perform its contract. I find nothing in the changes brought about by the substitution of West Newton slough for Beef slough as the location for the boom used for brailing the logs driven down the Chippewa river, nor in the transferring of the work from the one boom company to the other, which would justify the court in holding that thereby the defendant company was relieved from further liability under the contract. The contract of the defendant has not, in any substantial particular, become incapable of performance; and the changes in the location of the boom and its appliances are only such a change in the mere means used to accomplish the purpose contracted about as must be held to have been within the fair contemplation of the parties when they entered into a contract which they knew must continue in force for a number of years. I hold, therefore, as a conclusion of law upon the facts of the case, that the defendant company had no legal right to refuse further performance of the contract in question, as it did in April, 1889, and that by so doing it became liable to respond in damages to plaintiff for the injuries thus caused him.

Before passing to a consideration of the facts bearing upon the question of the damages, there is another legal proposition presented by the counterclaim pleaded by the defendant. The evidence shows that after the signing of the contract, and up to April, 1889, the defendant company drove, and delivered to the plaintiff, a large quantity of logs cut from lands not owned by plaintiff at the date of the contract, and charged therefor, and has been paid, only the contract prices for the services thus rendered; and in the counterclaim it is pleaded that, in fraud of defendant's rights, the plaintiff caused it to receive and drive these logs in the belief that they were cut upon plaintiff's lands, and were therefore within the contract. It appears from the entire evidence that before and at

the date of the contract the defendant was engaged in running logs for the plaintiff without regard to the ownership of the land from which they were cut. After the date of the contract the plaintiff delivered all logs by him owned, to be driven the same as he had done before the date of the contract. Taking the entire evidence of the contract, it cannot be otherwise than that the defendant knew it was receiving all the logs owned by plaintiff, regardless of the lands from which they were cut. It must have known that plaintiff had been accustomed to purchase stumpage and logs from other landowners. It knew that the plaintiff was not engaged in driving and booming logs, and therefore all of his logs, no matter whence procured, must pass into its possession, and be driven by it. Without question or objection, it received all the logs belonging to plaintiff, and charged and was paid the one price therefor. When this suit was before the court upon demurrer, the defendant took the position that, so long as the contract was in force, it would be obliged to receive and care for all logs delivered by plaintiff, not exceeding the yearly limit of 25,000,000 feet, so long as plaintiff could procure logs from any sources that were tributary to the Chippewa and Flambeau rivers. There is nothing in the evidence tending to show that the plaintiff ever represented or stated that the logs placed in the waters of the named rivers were cut only upon lands owned by the plaintiff at the date of the contract. The logs placed in the rivers were all taken possession of by the defendant company; were driven, brailed, and rafted by it; and the bills for services were made out by it, and the same were paid by plaintiff. If it was the intent of the defendant company to make a difference in the rate charged for the logs cut from lands other than those owned by the plaintiff, it should have done so when the services were rendered. There is nothing in the history of the case, as developed in the evidence, that would justify the finding that the plaintiff had misled the defendant company, or that the action of the latter in driving all the logs owned by plaintiff, and charging the contract rates therefor, was induced by any lack of knowledge on its part of the actual situation of affairs. I therefore hold that the defendant company has failed to prove its counterclaim, and it cannot set off against the damages of the plaintiff any further charge for driving, handling, and delivering the logs by it received and delivered prior to April 4, 1889.

This brings us to the question of the quantity of timber which the defendant company wrongfully refused, in April, 1889, to receive and handle under the contract. A preliminary question arises upon the proposition that the scale books offered in evidence by the plaintiff are not competent, not being the best evidence upon the point of the quantity of logs cut from plaintiff's land. The evidence shows that as the logs are cut in the woods they are scaled—that is, measured to ascertain their contents—by persons known as "camp scalers," and the measurements are entered upon cards. At the close of the day the measurements thus taken are entered upon the scale book. From time to time, inspectors visit the camps, and verify the contents of the scale books by counting and remeasuring a sufficient

portion of the logs to satisfy them of the correctness of the books. If errors are detected the book is corrected. After verification and correction by the inspectors, the scale book is sent to the owner of the logs, and payment is made to the log cutters and handlers according to the contents of the book, which is thus made the evidence upon which the owner of the logs must make payment to his employes. It is clearly to the interest of the logowner that these scale books shall not show the cutting of any greater number of logs than the facts will justify. The mode by which the entries are made on the scale book is such as to assure accuracy therein. The parties who cut and haul the logs, and the owner, who is to pay for the cutting and hauling, act upon the contents of the books, and deem them to be proper evidence of the facts therein stated. That which is received and acted upon by persons engaged in any line of business as competent evidence is ordinarily admissible when the same fact becomes a matter of inquiry in judicial proceedings. It would seem, therefore, that the scale books should be admitted in evidence, unless it appears that there is better evidence within the power of plaintiff to produce. It is said that the camp scalers should have been hunted up, and their testimony be introduced, in order to show the number of logs, and the contents thereof, cut on plaintiff's land during the time in controversy. What is sought to be proved is the result, in number and quantity, of the logs cut. When the scalers made the count and measurement, two records thereof were made,—one in the memory of the scaler, the other in the scale book. Which is now the best evidence? Years have elapsed. The entries on the scale books remain unchanged. They are now just what they were when originally made. Can the same be said of the record made upon the memory of the scalers? If the scalers had been produced and had testified that in the years past they had counted and measured a large quantity of logs, and had at the time entered the results upon scale books prepared for the purpose, and that, as they now remembered it, the number and quantity were so and so, but, upon the production of the scale books, they showed a different quantity and measurement, which should control? The rule requiring the production of the best evidence of which the case is susceptible is intended to guard against fraud and mistake, and to aid in arriving at the truth. That evidence which is the least liable to mislead is the best evidence; and it cannot be maintained that there is more reliable evidence of the number and quantity of the logs cut upon plaintiff's land than the scale books wherein the entries were made from day to day by the camp scalers, and which were revised and corrected by the inspectors. The books were properly identified, and the inspectors who revised them at the different camps testified to their correctness; and, under these circumstances, I hold that the books cannot be excluded upon the ground that it appears that there is better evidence adducible upon the question of the number and quantity of logs cut by plaintiff, and placed in the waters of the Chippewa and Flambeau rivers. According to the entire evidence, it appears that at the date of the contract, to wit, August 23, 1882, there were then in the streams logs, which the defendant was bound to

handle, under the contract, to the amount of 14,901,430 feet. The total feet afterwards placed in the streams, from all sources, up to and including the season of 1890–91, was 134,038,390 feet, according to the bank scale measurement. It is strenuously claimed on behalf of the defendant that owing to the loss of logs, from various causes, and differences in the mode of scaling, the measurement at the time of delivery, which is known as the "boom scale," will always fall short of the bank scale, and that a deduction of 12½ per cent. from the bank scale should be made therefor. That some allowance should be made for lost logs, and the like, cannot well be denied; but I think the estimate of 12½ and 15 per cent., made by some of the witnesses, is entirely too high. If an allowance of 5 per cent. is made, to cover all the differences that should be reasonably expected to exist between the bank and boom scales, in my judgment, it would not be far from the correct percentage of difference. Making a 5 per cent. deduction, it follows that, of the 14,901,430 feet of logs in the streams at the date of contract, there should be delivered, at boom scale, the amount of 14,225,859 feet. Of the total amount of 134,038,390 feet of logs put in the streams after the date of the contract, about 73 per cent. thereof were cut from lands owned by plaintiff at the date of the contract, or the sum of 97,848,024 feet, at bank scale. At the date of the breach of the contract, to wit, April 4, 1889, there was standing, uncut, on plaintiff's land, 3,869,000 feet of pine timber, at bank scale. The aggregate of these two amounts, or the sum of 101,717,024 feet, represents the timber cut, bank scale, covered by the contract, in addition to that in the streams, as above stated. Reducing this aggregate to boom scale, by subtracting 5 per cent., we have the sum of 96,631,173 feet, which, added to the 14,225,859 feet in the streams at date of the contract, gives us the final total of 110,857,032 feet as the amount of timber covered by the contract at boom scale, and which the defendant was bound to drive, handle, and deliver at contract prices. It is admitted that, of all the logs taken possession of by defendant, there was delivered up to April 4, 1889, at boom scale, the sum of 93,997,580 feet, being logs derived from all sources; and, as the estimate is that 73 per cent. of the total came from lands owned by plaintiff at the date of the contract, it follows that 73 per cent. of the total delivery, or the sum of 68,618,233 feet, is to be credited as delivered under the contract, leaving a difference of 42,238,799 feet, upon which the plaintiff has or will be called upon to pay prices exceeding those named in the contract. The excess charged for driving, brailing, and scaling amounts to 38½ cents per 1,000 feet, from which is to be deducted the contract price of $250 per year for driving. It is also admitted that in 1889 the plaintiff paid an extra 5 cents per 1,000 for brailing 7,005,490 feet, or the sum of $350.27. Thus we find that the excess of 38½ cents per 1,000 on the total amount of logs not driven and handled under the contract, to wit, 42,238,799 feet, amounts to $16,261, from which is to be deducted the sum of $1,000 for four years' driving at the contract price of $250 per year, the difference being $15,261 to which must be added the $350.27, excess paid in 1889, thus giving a final total of $15,611. As part of the pay-

ments are yet to be made, it is probably fair to date the allowance of interest from the commencement of the suit, to wit, November 29, 1889; or, in round numbers, interest will be allowed for four years and four months, making the total amount of damages $19,669.85. It was admitted on the trial that of the charges in excess of the contract rates, which are allowed as damages, there is due the defendant company the sum of $3,460; and as plaintiff, having been allowed damages for this excess, is bound to pay them to the defendant, the amount should be deducted from the total damages as above stated, thus leaving a net sum due plaintiff of $16,209.85, for which judgment in his favor is ordered against defendant.

CLEVELAND, C., C. & ST. L. RY. CO. v. ZIDER.

(Circuit Court of Appeals, Seventh Circuit. May 1, 1894.)

No. 127.

1. APPEAL—GENERAL EXCEPTION TO CHARGE.
   Under a rule of court requiring a party excepting to a charge to state distinctly the several matters of law to which he excepts, objections to instructions given cannot be considered on a general exception to the charge as an entirety.
2. SAME—GENERAL EXCEPTION TO REFUSAL OF INSTRUCTIONS.
   An exception to the refusal of "each and all" of instructions requested, consisting of a series of propositions submitted as one request, is not available.
3. CUSTOM AND USAGE—NEGLIGENCE—RAILROAD CAR ON SIDE TRACK.
   An employe of a car company, working on one of its cars placed on the side track of a railroad, was killed by the railroad company's switching engine running into the car. In an action against the railroad company therefor, the complaint alleged that the car company's unfinished cars were accustomed to be placed, with defendant's knowledge and consent, on its side tracks, to be there finished and made ready for shipment. *Held*, that evidence of an agreement between the companies for the use by the car company of the side tracks as a delivery track, but not for constructing or completing cars thereon, was immaterial, as it was not inconsistent with the alleged custom, and the railroad company would be bound to act in reference to such custom, whether it originated in an agreement or grew up independently.
4. SAME—DUTY TO GIVE NOTICE OF DANGER.
   Whether, under the circumstances, deceased should have given notice to the men in charge of defendant's engine of his being at work on such car, was a question for the jury; and, in view of the alleged custom, the presence of new cars on the track might be considered a sufficient notification, during the ordinary hours of labor, that workmen were probably engaged on them.

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

Action by Alcinda O. Zider, administratrix of the estate of Henry A. Zider, deceased, against the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, for causing the death of plaintiff's intestate. The jury found a verdict for plaintiff, and judgment was entered thereon. Defendant brought error.

This was an action by the defendant in error against the plaintiff in error for the benefit of the widow and minor children of the intestate, whose death is alleged to have been caused by the negligent and wrongful acts of the

servants of the railway company. The action was commenced in the circuit court of Montgomery county, Ill., and removed thence to the court below, which, upon the verdict of a jury, gave the plaintiff judgment for $5,000. According to the averments of the complaint, the deceased was an employe of the Litchfield Car & Machine Company, a corporation engaged in the manufacture of railway cars at Litchfield, upon premises adjoining the defendant's railway, there being upon the grounds of the car and machine company railway tracks connected with the side tracks and main tracks of the railway company. Unfinished cars manufactured by the car and machine company were accustomed to be placed, with the knowledge and consent of the defendant, upon its side tracks, to be there finished and made ready for shipment on the defendant's road; and it is charged, in substance, that while the plaintiff's intestate was lawfully at work upon and under a car so placed for completion, of which the defendant then and there had notice, the defendant, by its servants in charge of a switching engine, carelessly, and with great force and violence, ran the locomotive and cars thereto attached against the car under which the deceased was at work, causing his death, without contributory fault on his part.

The instructions of the court to the jury contained the following clause, upon which error has been assigned: "The important and controlling question in this case is one of fact; and it relates to the notice or warning which should have been given by the defendant's servants in charge of the engine and cars before driving or running the same in contact with and striking the new standing cars on the delivery track, on one of which deceased was at work when he was injured. Before running its engine or cars onto this delivery track where deceased was at work, defendant should have given such signal or notice of warning as was reasonably calculated to apprise the deceased of danger; and, if such signal or notice was given, then the defendant would not be liable; but, if it was not given, then the defendant would be liable. Whether or not it was given is a pure question of fact, to be determined by you from all the evidence which has been introduced, either by the plaintiff or the defendant."

The bill of exceptions, not conforming to rule 10 of this court, shows only a general exception to the charge as an entirety.

John T. Dye (Evans Woollen and James A. Connolly, of counsel), for plaintiff in error.

James M. Truitt and G. L. Zink, for defendant in error.

Before WOODS and JENKINS, Circuit Judges, and BAKER, District Judge.

WOODS, Circuit Judge (after making the foregoing statement). The objections to the instructions given cannot be considered, because the proper exception was not taken.

And under the decisions in Beaver v. Taylor, 93 U. S. 46, and Worthington v. Mason, 101 U. S. 149, the objection seems to be well made that the exception to the refusal of instructions is not available, because a series of propositions was submitted as one request, and no exception taken to the refusal of any one of them severally. According to the bill of exceptions, "each and all of the requested instructions the court refused to give, to which refusal the defendant then and there excepted." That is to say, there was one request, one refusal, and one exception. If it was intended to save an exception to the refusal of a particular one of the 11 propositions offered, or to the refusal of each one of them separately and severally from the others, the bill of exceptions should have been framed accordingly.

We are of opinion, however, that there was no error in refusing

any of the instructions asked. It is evident that, in instructing the jury, the court proceeded upon the assumption that the plaintiff in error had authorized the car and machine company and its employes to place unfinished cars upon its side track, and it is insisted on behalf of the defendant in error that the evidence to that effect was without conflict and clear; but in the brief for the plaintiff in error it is said "that there was evidence tending to prove the contrary, and the defendant company was at least entitled to have the question left to the jury, under such instructions as the first, fifth, and eighth, which were refused." No reference, however, has been made in the brief or otherwise to the pages of the record where that evidence is to be found, and without such aid we are neither bound nor disposed to search for it. The party who alleges error must demonstrate it. It is insisted, however, that the court excluded testimony touching the subject, which, if admitted, would have shown that the car and machine company were entitled to use the side track of the defendant only for the purpose of delivering completed cars. The plaintiff in error, as the record shows, offered to prove by its agent Burtner "the existence of an agreement between himself, as representative of the C., C., C. & St. L. R. R. Co., and Mr. Maris, superintendent of the Litchfield Car and Machine Company, giving that company the right to use this track as a delivery track for their cars when completed; and that such agreement did not embody the right to use the track for the purpose of constructing or completing cars thereon." But if the agreement had been proved, as proposed, it would have presented or implied nothing inconsistent with the custom of finishing upon the track cars which had been placed there for that purpose before they were ready for delivery to the defendant, for its own use or to be transferred to other roads. The parties were bound to act in reference to that custom, whether it originated in an agreement or grew up independently. If, therefore, the rejected evidence had been admitted, it ought not to have affected the result. It is to be observed, too, that the proffered evidence and the preliminary statements of the witness, as they appear in the record, do not show when the agreement was made, or that it was in force when the wrong complained of was committed.

The second of the instructions requested is faulty in assuming that, under the circumstances developed in evidence, the plaintiff's intestate should have given notice, by signal or otherwise, to the men in charge of defendant's locomotive, of his being at work upon one of the cars on the track, when, at most, that was a question for the jury; and also in assuming that, in the absence of such notification, the defendant was under no duty to apprehend the presence of the plaintiff in the place of danger, and to avoid harming him. In view of the custom which prevailed of putting incomplete cars on the track to be finished while standing there, the jury might have considered the presence of new cars on the track as a sufficient notification during the ordinary hours of labor that workmen were probably engaged upon the cars, and were entitled to warning of any movement affecting their safety.

Objection was made to "statements made by counsel for the plaintiff in regard to testimony claimed by counsel for the plaintiff to be in evidence;" but, while the record shows the subject, it does not show the substance or character of the statements complained of, and for that reason presents no question for our consideration.

It was not material error to refuse the request to instruct the jury that it had nothing to do with the conduct of the defendant's engineer on any other occasion than the one in question. The jury was instructed with sufficient clearness that, in order to be entitled to recover, the plaintiff must have proved the defendant guilty of the wrongful acts of negligence or default set forth in the declaration, and it is not to be supposed that in that respect the jury could have misapprehended the issue.

By adducing testimony in its own behalf, the plaintiff in error waived its exception to the overruling of its motion that the evidence adduced in behalf of the plaintiff in the action be withdrawn from the jury, and a verdict directed in behalf of the defendant.

The judgment below is affirmed.

AUBURN SAV. BANK v. HAYES.

(Circuit Court, N. D. New York. May 17, 1894.)

INSOLVENT NATIONAL BANK—PREFERENCE OF SAVINGS BANK—FEDERAL QUESTION.

The question whether a savings bank should be paid in full by an insolvent national bank, pursuant to the state law (Laws N. Y. 1882, c. 409, § 282; Bank v. Davis, 26 N. Y. Supp. 200, 73 Hun, 357), or pro rata, as provided by the Revised Statutes (sections 5236, 5242), *held*, upon a motion to remand, to be a controversy "arising under the laws of the United States." Tehan v. Bank, 39 Fed. 577, distinguished.

This was an action by the Auburn Savings Bank against Frank N. Hayes, as receiver, etc., originally commenced in a state court. The plaintiff now moves to remand.

Underwood & Storke, for the motion.

Bacon, Briggs, Beckley & Bissell, opposed.

COXE, District Judge. The plaintiff is a savings bank and had a deposit of $19,700 in the First National Bank of Auburn at the date of its suspension. This action was commenced in the supreme court of New York to recover the balance due upon said deposit after all dividends have been paid. The defendant, who is receiver of the insolvent bank, removed the action to this court. The plaintiff now moves to remand.

Section 282, c. 409, Laws N. Y. 1882, gives a preference to savings banks having deposits in insolvent banks. The state court has decided that this law, as re-enacted, is applicable to national banks. Bank v. Davis, 73 Hun, 357, 26 N. Y. Supp. 200. Section 5236 of the United States Revised Statutes provides for the payment of ratable dividends to the creditors of insolvent national banks on all

claims properly proved or adjudicated, and section 5242 prohibits preferences. The question, then, is whether the plaintiff shall be paid in full pursuant to the state law, or pro rata as provided by the sections of the Revised Statutes referred to. This, it seems to me, is a controversy "arising under the laws of the United States." Were it not for the state law, the plaintiff would, of course, be paid ratably with the other creditors. Whether or not the state can legislate in this manner with reference to national banks is a question which the federal courts and not the state courts should decide. To give the state courts sole jurisdiction to determine whether state legislation is in conflict with the national bank act would, to say the least, tend to throw the national system into confusion. The doctrine of Tehan v. Bank, 39 Fed. 577, is hardly applicable to the present cause. In the Tehan Case there was no federal question because the rule of the common law applicable to that controversy was controlling alike upon the state and United States courts. Here on the contrary the construction of a United States statute is involved. The plaintiff may be right as to the interpretation of this statute, but that its construction is involved there can be no doubt. Whatever defense the defendant has depends upon the sections referred to. The question presented by this motion is not what the construction of these sections should be, but whether the state courts or the United States courts should construe them. I am of the opinion that this power belongs to the United States courts. Sowles v. Witters, 43 Fed. 700; Grant v. Bank, 47 Fed. 673; Walker v. Richards, 55 Fed. 129. The motion is denied.

MULTNOMAH COUNTY et al. v. OREGON NAT. BANK et al.

(Circuit Court, D. Oregon. June 1, 1894.)

No. 2,091.

BANKS AND BANKING—INSOLVENCY—PREFERENCE—COUNTY—TRUSTS.

A county whose funds are deposited in a bank that fails has no preference over other depositors, as to the bank assets, where the identity of the funds deposited by the county has been lost. San Diego Co. v. California Nat. Bank, 52 Fed. 59, disapproved.

Action by the county of Multnomah and the city of Portland against the Oregon National Bank and W. W. Catlin, its receiver.

C. A. Dolph and John H. Hall, for Multnomah county.

G. W. Hazen, for city of Portland.

F. V. Holman and John M. Gearin, for defendants.

BELLINGER, District Judge. This is a suit to decree certain deposits of money made by the sheriff in the bank to be the property of the county, that such bank and its receiver hold the same as trustees for the benefit of the county, and that the county have a lien upon all the moneys, choses in action, and other property in said bank to the amount of $149,280.05, the aggregate of the

deposits so made. The city of Portland intervened as a complainant, praying like relief with the county, to secure the sum of $14,574.65 of its funds, deposited in the bank by the city treasurer. Answers were filed to these complaints, all the material portions of which are excepted to.

The vital question presented by these exceptions is the question, can the county and city whose funds have been wrongfully commingled with the funds of the bank, and paid out, secure a preference over other creditors or a lien on the property of the bank in the hands of an assignee? It is settled that a person may follow and reclaim his property, wrongfully appropriated by another, so long as he can find it. If its form has been changed, he may follow the substantial equivalent of his property, in whatever form. The property into which his own has been changed is impressed with a trust in his favor. But the great weight of authority is against any extension of the rule beyond this. The cases most relied upon by the complainants were those in the supreme court of Wisconsin, but, since the argument, defendant has called my attention to the case of Silk Co. v. Flanders (decided in the supreme court of Wisconsin in March of this year) 58 N. W. 383, which overrules former decisions upon this question, and declares the doctrine that when trust money becomes so mixed up with the trustees' individual funds that it is impossible to trace and identify it as entering into some specific property, the trust ceases; that the court will go as far as it can in thus tracing and following trust money, but when, as a matter of fact, it cannot be traced, the equitable right of the cestui que trust to follow it fails. The recent cases of Slater v. Oriental Mills (by the supreme court of Rhode Island) 27 Atl. 443, and Association v. Austin (supreme court of Alabama) 13 South. 908, are to the same effect. The case of Shields v. Thomas (supreme court of Mississippi) 14 South. 84, is similar to the present case in its facts. The sheriff of a county, without authority, deposited in a bank, which shortly afterwards failed, taxes collected by him, the officers of the bank knowing the character of the fund. The cash that came into the hands of the receiver of such bank was less than the amount of such fund, and it did not appear that the fund, or any part of it, came into the receiver's hands, either in its original form or as a part of the mass of the bank's assets. The court refused to make the payment of such fund out of the assets in the receiver's hands a charge upon such assets precedent to the claims of other creditors of the bank. These are all recent and well-considered cases, and each of them contains a large number of citations in support of the conclusion reached.

Among the cases against these authorities is that of San Diego Co. v. California Nat. Bank, 52 Fed. 59, also a recent case. In this case Judge Ross says:

"The ordinary creditors became such voluntarily. They deposited their money with the bank with their eyes open. But the money of the complainant was deposited by its officers and received by the bank, not only without the knowledge of the complainant, but contrary to law. To put the complainant on the same terms with the ordinary creditors is to make the former

share in a loss to which it did not voluntarily subject itself, and to give to the latter a share in money which never in equity became the property of the bank. This is certainly not just."

Notwithstanding the respect in which I hold the opinion of Judge Ross, I cannot adopt this view in the face of the cases that hold the other doctrine. The correctness of his conclusion as to the injustice of giving the general creditors of the bank a share in the money, which never in equity became the property of the bank, cannot be questioned. But this is not what happens in the cases under consideration. It does not appear that the money for distribution includes any part of that belonging to the involuntary creditor. If this did appear, the lien of such creditor would attach, and he would have his preference. The fact that the money of such creditor or cestui que trust cannot be traced to the fund sought to be charged is the reason that the preference is refused. If his money has been paid out, or has otherwise disappeared, it would not be just that he should take, to the exclusion of the general creditors of the bank, who are in no way responsible for the bank's delinquency, and whose deposits may comprise the entire fund which such creditor seeks to appropriate to his exclusive use. His so-called right of preference, in other words, cannot in justice extend to the property of others. The theory of preference does not apply in these cases. There is no preference by reason of an unlawful conversion. The so-called right to be preferred in the case of a wrongful conversion is a right of ownership,—a right of property; a right which lays hold of the property whether in its original or in a substituted form; a right which follows the property so long as it can be ascertained to be the same property or its product, and only does so because the property to be reached can be ascertained to be the same property or its product. When the means of ascertainment of the identity of property or proceeds fail, the right fails. I therefore conclude that neither the county of Multnomah nor the city of Portland is entitled to the preference claimed. The exceptions to the answers, so far as they relate to the questions decided, are overruled.

BOARD OF SUPERVISORS OF PRESQUE ISLE COUNTY et al. v. THOMPSON.

(Circuit Court of Appeals, Sixth Circuit. May 8, 1894.)

No. 136.

1. SCHOOL DISTRICTS—DE FACTO CORPORATION.
   The exercise for many years, under an act for the incorporation of a school district, of all the franchises and privileges of such a corporation, constitutes the district a de facto corporation, under the law of Michigan; and its legal existence cannot be questioned, in a collateral proceeding, on the ground that the act of incorporation was unconstitutional.

2. SAME—EXTENT OF DISTRICT.
   In the absence of constitutional restriction in that respect, the incorporation of a school district containing 180 square miles is not invalid, although general statutes provide for organization of districts not to exceed nine sections in extent.

8. SAME—SCHOOL INSPECTORS.
Const. Mich. art. 11, § 1, providing for election of township officers, among them a "township clerk, who shall be ex officio school inspector," does not render invalid an act incorporating a school district, which transfers part of the functions of such school inspector to a board to be elected by the people of the district.

4. SAME—DIVISION OF DISTRICT—APPORTIONMENT OF DEBT.
Part of the territory embraced in a township constituting a school district was severed therefrom, and organized into new townships, by act of the legislature; but by a subsequent act it was restored to the school district, and provision was made for detaching therefrom any of the new townships on apportionment of the indebtedness of the original school district. *Held* that, unless apportionment was made as so provided, the new townships were liable to creditors of the original district for debts contracted while their territory was part of it, even though de facto school districts in such new townships continued the current administration of school affairs.

5. SAME—ENFORCEMENT OF JUDGMENTS AGAINST DISTRICTS.
How. Ann. St. Mich. §§ 5109–5113, prescribing proceedings for collection of judgments against primary school districts by the judgment creditor filing a certified copy of the judgment with the town supervisor, who shall proceed to assess the amount, apply to judgments against a district incorporated by an act which makes all general laws relating to primary schools applicable in the district; and a judgment creditor of such district, who has complied with those requirements, need not make the school board parties to proceedings for mandamus to compel payment, and require them to certify the judgments to the supervisor, as required by such act for levy of taxes to pay bonded indebtedness by installments.

6. MANDAMUS—LEVY OF TAXES TO PAY JUDGMENT AGAINST SCHOOL DISTRICT—APPORTIONMENT.
A writ of mandamus to compel the levy of taxes, by several townships, to pay judgments against a union school district, need not specify how the amount shall be apportioned between them, where the law prescribes the mode of apportionment.

7. SAME—OBJECTIONS TO PETITION—WRIT OF ERROR.
An objection to a petition for mandamus, that it does not show that respondents were requested to perform the duty sought to be enforced, and refused to do it, is not available on writ of error, where, from circumstances appearing in the record, a refusal to comply with such duty must be conclusively inferred against them, and where the objection is first taken in their supplemental brief in the court of appeals.

8. SCHOOL DISTRICTS—OFFICERS—SERVICE OF PROCESS.
An act incorporating a school district provided for the election of a "president, secretary, and treasurer," whose powers and duties other than those specified should "severally be the same as those of the moderator, assessor, and director" in districts organized under general laws. *Held*, that this imposed on the secretary the duties and powers of the assessor, including power to receive service of summons for the district, although the duties of the secretary, expressly defined in the act, corresponded with those of the director under the general laws.

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

This was a writ of error to reverse an order of the circuit court for the eastern district of Michigan directing the issue of a peremptory writ of mandamus to compel the levy of a tax to pay three judgments against a school district in the county of Presque Isle, in Michigan.

Charles H. Thompson, the plaintiff below, filed his petition, averring: That he had recovered in the court below three judgments, aggregating $8,297.08, against the Union school district of the township of Rogers, in the county of Presque Isle. That said judgments were recovered in 1889 and 1891 upon bonds issued in 1871 by said school district under the authority of the legislature of Michigan. That the said school district, in 1871, and at the time of filing the petition, embraced congressional townships, town 34, range 4 E.; town 34, range 5 E.; town 34, range 6 E.; town 35, range 4 E.; town 35, range 5 E. That when the bonds were issued these congressional townships were all included within the municipal township of Rogers, but that at the time of filing the petition they were parts of different municipal townships, as follows: Town 34 N., range 5 E., constituting Belknap township; town 34 N., range 4 E., constituting Bismarck township; town 35 N., range 4 E., constituting Moltke township; town 35 N., range 5 E., constituting part of Rogers township; and town 34 N., of range 6 E., constituting a part of Posen township. That the judgments were wholly unpaid. That on August 12, 1892, duly-certified copies of the judgments were served personally upon the supervisors of the above-named townships, and upon the clerk of Presque Isle county. That according to law the board of supervisors of said county would meet on October 10, 1892, to levy taxes for the ensuing year, and that the petitioner was justly apprehensive that the board would meet and adjourn without making provision to satisfy the judgments. The prayer was for a writ against the board of supervisors of the county, the county clerk, and county treasurer, and against the supervisors and town treasurers of the above-named townships.

The various respondents filed different answers, but the defenses made were the same. They denied the validity of the judgments on the ground—First, that the union school district named as defendant had no legal existence, because organized under an unconstitutional law; and, second, that the last of the three judgments was not based on any service upon any proper officer of said alleged district. Second. They averred that the effect of the acts of 1875 and 1879, which created the townships of Belknap, Moltke, Bismarck, Posen, and re-created the township of Rogers, was to remove all these townships from the jurisdiction of the union school district, and to relieve them from liability for its indebtedness, and that, after their creation, school systems were organized in the townships of Belknap, Posen, and Moltke and Bismarck, under general laws, without interference by said union school district. Third. They averred that an act of the Michigan legislature, of 1885, purporting and attempting to re-create and reorganize the Union school district of the township of Rogers, to consist of all its original, and some additional, territory, was unconstitutional and void. Fourth. They averred that the assessed valuation of property in the different townships was not uniform, and that it would be unjust to apportion the tax in proportion to such valuation.

The case was heard on the petition and answers, and a peremptory writ was issued, "commanding the board of supervisors to immediately convene and assemble, and charge against the townships of Rogers, Moltke, Bismarck, Posen, and Belknap, in said county, the sum of $8,297.08, with interest to the 30th day of November, and costs of this proceeding, said costs being fixed at the sum of —— dollars and —— cents, and levy said amount upon lands and personal property in the several townships."

The act of 1871, establishing the Union school district of the township of Rogers, in its first section, provided that the congressional townships already specified above should "constitute one school district which shall be a body corporate by the name and style of Union School District of the Township of Rogers and by that name may sue and be sued, and shall be subject to all the general laws of the state, relative to corporations, so far as the same may be applicable; and such district shall have all the powers and privileges conferred upon school districts by the general laws of this state, all the general provisions of which, relating to common or primary schools shall apply and be in force in said district, except such as shall be inconsistent with this act or with the by-laws and ordinances of the board of education hereinafter mentioned, made in purusance of this act." The third section provided for the election of a board of education of three trustees, who should elect from their

own number a president, secretary, and treasurer whose powers and duties should "severally be the same as those of the moderator, assessor and director in school districts organized under the general laws of this state." By sections 11 and 12, the board, when authorized by a vote of a majority of the legal voters at a meeting called for the purpose, was given power to purchase sites for school houses, and to build them, and to issue bonds running for 20 years to pay for the same. A statement of the sum thus borrowed was required to be filed with the supervisor, showing the amount to be raised each year; and it was made the duty of the supervisor to cause such sum "to be assessed on the real and personal property of said district on the first general tax roll thereafter made," and the township treasurer was given the same power to collect this as other taxes.

By No. 80 of the Public Acts of Michigan of 1875 (page 118), the county of Presque Isle was organized, or rather reorganized (see Ashley v. Board, 8 C. C. A. 455, 60 Fed. 55), and the townships of Presque Isle, Posen, Belknap, Moltke, and Rogers were created. The township of Rogers had been organized before 1871, but this act changed its territory by carving out of the original township the others above named.

By No. 387 of the Local Acts of Michigan of 1885 (page 572), the act of 1871, establishing the Union school district of the township of Rogers, was amended. By the amendment, all the original territory, and some additional congressional townships, were included in the district, and provisions were made for apportioning the indebtedness to new townships organized and detached from the school district. The substance and effect of the act are fully stated in the opinion.

In section 5109 (3), How. Ann. St., under the general title of "Primary Schools," it is provided that no execution shall be issued against a school district, but that the judgment shall be collected as follows:

"Sec. 5110 (4). Whenever any final judgment shall be obtained against a school district, if the same shall not be removed to any other court, the assessor of the district shall certify to the supervisor of the township and to the director of the district the date and amount of each judgment with the name of the person in whose favor the same was rendered and if the judgment shall be removed to another court, the assessor shall certify the same as aforesaid, immediately after the final determination thereof against the district.

"Sec. 5111 (5). If the assessor shall fail to certify the judgment as required in the preceding section, it shall be lawful for the party obtaining the same, his executors, administrators, or assigns, to file with the supervisor the certificate of the justice or clerk of the court rendering the judgment, showing the facts which should have been certified by the assessor.

"Sec. 5112 (6). If the district against whom any such judgment shall be rendered, is situated in part in two or more townships, a certificate thereof shall be delivered as aforesaid to the supervisor of each township in which such district is in part situated.

"Sec. 5113 (7). The supervisor or supervisors receiving either of the certificates of a judgment as aforesaid shall proceed to assess the amount thereof, with interest from the date of the judgment to the time when the warrant for the collection thereof will expire, upon the next township assessment roll in the column for school taxes; and the same proceedings shall be had, and the same shall be collected and returned in the same manner as other district taxes."

Section 22 of Act No. 200 of the Session Laws of 1891, which prescribes the mode of levying and collecting all taxes in Michigan, requires the board of supervisors, at their October session in each year, to examine the assessment rolls in each township of the county, and adjust and equalize the valuations of real estate in each township so that they shall be upon a uniform and equal estimate; and then the rolls are to be delivered to the supervisor, to be filed in his office. By section 24, the supervisor of each township is required to file with the county clerk all certificates showing taxes to be raised for township, school, highway, drain, and other purposes before the annual October meeting of the supervisors. By section 25, the board of supervisors is required to examine the certificates showing the moneys to be raised for township, school,

and other purposes, and determine whether the same are in proper form, and legal. They are required to direct that such amounts proposed to be raised as are authorized by law shall be spread on the assessment rolls of the proper townships.

Section 27 requires each supervisor to proceed and assess the taxes apportioned to his township in proportion to the valuation entered by the board of supervisors in the assessment roll of the township of the year. By section 28, the supervisor is required to deliver the assessment roll thus prepared, and annex a warrant, signed by him, commanding the township treasurer to collect the taxes assessed therein.

Atkinson & Carpenter, for plaintiffs in error.

Henry M. Duffield, for defendant in error.

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

TAFT, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The first objection to the issuance of the writ is that the defendant named in the judgment, the Union school district of the township of Rogers, is nothing but a name, and has no corporate existence. Therefore, it is said that the judgment is a nullity, and cannot be enforced by levying taxes, or in any other way. The existence of the district is denied on the ground that the act purporting to create it was unconstitutional. The district, for five years at least, exercised all the franchises and privileges of such a corporation throughout the territory embraced by its act of incorporation; and that, too, without any objection from those who lived in the congressional townships, which were, in 1875, created into separate municipal townships. Moreover, since 1871 until the present time, the district has exercised its franchises in so much of its original territory as remained in the township of Rogers after Belknap and the other townships were set off from it. This constitutes the district a de facto school district, under the law of Michigan, whatever the irregularities in its origin; and its legal existence after this lapse of time cannot be questioned, especially in a collateral proceeding, like that of a suit for a debt. Section 5037 of Howell's Annotated Statutes provides, among other things, that "every school district shall in all cases be presumed to have been legally organized when it shall have exercised the franchises and privileges of a district for a term of two years; and such school district and its officers shall be entitled to all its rights and privileges and immunities and be subject to all the debts and liabilities conferred upon school districts by law." School Dist. No. 3 of Everett Tp. v. School Dist. No. 1 of Wilcox Tp., 63 Mich. 51, 29 N. W. 489; Stockle v. Silsbee, 41 Mich. 615, 2 N. W. 900; Clement v. Everest, 29 Mich. 19; Fractional School Dist. v. School Inspectors, 27 Mich. 3. The foregoing statute and authorities have application to primary school districts established by school inspectors under general laws. The first section of the act, creating the district whose existence is here in question, made all general laws relating to primary schools applicable to it, and so would seem to bring the district within the saving operation of the statutory limitation. But the

statute is merely declaratory of a principle established by the supreme court of Michigan before its enactment. People v. Maynard, 15 Mich. 463; Stuart v. School Dist., 30 Mich. 69. In the last case, which was a suit to enjoin a tax, brought by a taxpayer, the powers exercised by a school district under a special act were attacked on the ground that the act had not been passed with constitutional formalities. The supreme court, speaking by Mr. Justice Cooley, held that while section 5037, above quoted, did not, in terms, apply, it was, in principle, strictly applicable. In the case of Ashley v. Board, 8 C. C. A. 455, 60 Fed. 55, where the defense to a suit against a county on bonds was that when the bonds were issued the county had no existence, because the law organizing it was unconstitutional, this court held that, if there was a county de facto, its illegal origin and organization could not be used to impeach its obligations. Judge Severens, speaking for the court, summed up our conclusions as follows:

"But it is needless to multiply authorities. They are substantially, if not all together, agreed upon the proposition that when a municipal body has assumed, under color of authority, and has exercised for any considerable period of time, with the consent of the state, the powers of a public corporation, of a kind recognized by the organic law, neither the corporation nor a private party can, in private litigation, question the legality of its existence."

Without respect, therefore, to the validity of the law of 1871, it is manifest that there was an actual corporate entity, against which judgment could be rendered. Against what territory it could be enforced is, of course, a different question.

But, even if the question is open, we have no doubt that the act of 1871, creating the Union school district of the township of Rogers, was constitutional. It is first said that it was of too large extent, because it contained 180 square miles. The provisions in the constitution of Michigan with reference to school districts are sections 4 and 5 of article 13, as follows:

"Sec. 4. The legislature shall within five years from the adoption of this constitution provide for and establish a system of primary schools whereby a school shall be kept without charge for tuition at least three months in each year in every school district in the state and all instructions in said school shall be conducted in the English language.

"Sec. 5. A school shall be maintained in each district at least three months in each year. Any school district neglecting to maintain such school shall be deprived for the ensuing year of its proportion of the income of the primary school fund and of all funds arising from taxes for the support of schools."

Here there is obviously no restriction in respect to the size of the school district. That is left wholly to the legislature. It is true that, before and after the adoption of the present constitution of Michigan, the General Statutes provided for the organization of school districts by the people, which were not to exceed nine sections in extent (Simpkins v. Ward, 45 Mich. 561, 8 N. W. 507), but it would be most unwarranted to construe such a legislative policy to be a constitutional limitation. No decision of the supreme court of the state has been cited which justifies it. On the contrary, that court seems to have recognized that the power of the legislature, in creating school districts of large size by special act, is unlimited.

In Johnston v. Cathro, 51 Mich. 80, 16 N. W. 241, the question was of the validity of a tax imposed upon property in the unorganized territory of Montmorency county, as part of the school district of Long Rapids. The validity of the tax was asserted under an act to incorporate the public school district of the township of Long Rapids; and it was held that the school district thus created by a special act included, not only the township of Long Rapids, in Alpena county, but also all the territory of the adjacent county of Montmorency, which had previously been attached to the township of Long Rapids for judicial and other purposes, and that the tax should be assessed against it all.

Another section of the constitution (section 1, art. 11) is cited to show the invalidity of the act of 1871. That section provides that:

"There shall be elected annually on the first Monday of April, in each organized township, one supervisor, one township clerk, who shall be ex officio school inspector, one commissioner of highways, one township treasurer, and one overseer of highways for each highway district, whose powers and duties shall be prescribed by law."

It is said that the supreme court of Michigan has construed this article to prevent any legislation which shall deprive the officers named in the section of functions ordinarily discharged by such officers, and that, as school inspectors possess authority in relation to schools within the township, this act of 1871, which takes away much of the authority of school inspectors, and places it in a new board of education, is void. The cases referred to are those of Hubbard v. Springwells, 25 Mich. 156; Allor v. Wayne Co., 43 Mich. 102, 4 N. W. 492; Board of Park Com'rs v. Common Council of Detroit, 28 Mich. 228–229. All that those cases hold is that under the constitution of Michigan, as shown by the section above quoted, and others, it is a cardinal principle that local matters in townships, cities, and villages shall be under the discretionary control of officers selected by the people of the local municipality, and not of officers appointed by state authority. This act of 1871 did not deprive the school inspectors of Rogers township of all their functions in that township, and, even if it did curtail them somewhat, it transferred them to a board of trustees elected by the people of the district. In Saginaw Tp. v. School District No. 1, 9 Mich. 540, the supreme court were not disposed to question the validity of the establishment of a school district in the city of Saginaw, in which the township inspectors exercised no authority whatever, but all control was lodged in three school inspectors elected by the new district. And so in School Dist. v. Dean, 17 Mich. 223, the right of the legislature, by special act, to reduce and materially modify the functions of township school inspectors, was upheld.

The second objection to the writ of mandamus is that the act of 1871 was repealed by the act of 1875, establishing the county of Presque Isle, and organizing Belknap, Bismarck, Posen, and Moltke townships out of territory embraced within Rogers township and the union school district. This act is said to have so broken up the union school district that there is no organization left to answer

for its obligations. The new Rogers township is said not to be the successor of the old.

In People v. Ryan, 19 Mich. 203, it was held that the organization of a new township severed its territory from the school district within which it was formerly embraced, and that there was no general principle of law which charged the property within the new township with the obligation to pay the debts of the old school district created before the separation, but that there must be special legislation to create such a liability. It may be conceded that the act of 1875 had the effect to sever from the Union school district of Rogers the territory included in the new townships, and to limit its extent to the township of Rogers, as newly defined. Moreover, it is too well settled for discussion that where territory is taken from one municipal corporation, and is attached to or created into another, the liabilities of the old corporation do not follow the severed territory, unless there is some special legislation effecting such a result. The old corporation remains liable for the whole debt. It is only when the entire territory of one municipality is absorbed by another that the debts of the extinguished corporation are necessarily assumed by the absorbing municipality. Mt. Pleasant v. Beckwith, 100 U. S. 514; Turnbull v. School Dist., 45 Mich. 496, 8 N. W. 65; Maltz v. Board, 41 Mich. 547, 49 N. W. 920; Halbert v. School Dist., 36 Mich. 421; Brewer v. Palmer, 13 Mich. 104. It therefore follows that unless, in the act of 1885, there is some special legislative provision by which the townships set off by the act of 1875 were made liable for the union school district debts, the remedy of the judgment creditor in this case is against the township of Rogers alone. Of course, the contention that the present township of Rogers is not the same as the old township corporation of the same name cannot be sustained.

The first section of the act of 1885 is as follows:

"Section 1. The people of the state of Michigan enact, that act number four hundred and eight of the Session Laws of Eighteen Hundred and Seventy-One, entitled 'An act to organize the Union School District of the Township of Rogers,' be amended in section one, that a new section be supplied and added to stand in the place of section nineteen (19) and that two sections be added thereto, to be known as sections twenty and twenty-one, and that the act so amended shall read as follows: Section 1. That township thirty-four, ranges four, five and six east, and township thirty-five north of ranges four and five east, and township thirty-six north of ranges two, three, four and five east, and township thirty-seven north of ranges two east, which are now embraced in the limits of what is now known as the township of Rogers in the county of Presque Isle, constitute one school district, which shall be a body corporate by the name and style of the Union School District of the Township of Rogers, and by that name may sue and be sued and shall be subject to all the general laws of this state relative to corporations so far as the same may be applicable; and such district shall have all the powers and privileges conferred upon school districts by the general laws of this state, all general provisions of which relating to common or primary schools shall apply and be in force in said district except such as shall be inconsistent with this act, or with the by-laws and ordinances of the board of education hereinafter mentioned, made in pursuance of this act."

The effect of this act was to restore to the union school district the territory taken from it by the organization of the new townships

by the act of 1875. The extent of the district, as above defined, certainly includes all the territory so set off. But it is said the act was inoperative because it was evidently passed by the legislature in ignorance that the new townships had been set off, and new school districts organized in them. This is an assumption which cannot be sustained. The purpose of the act was twofold—First, to include in the union school district some new territory in the new township of Rogers; and, second, to make provision by which the debts incurred by the union school district should be borne by all the territory within its limits when the debt was incurred. Accordingly, section 19 was added to the act, as follows:

"Whenever any township now or hereafter to be organized, wholly or in part, from the territory embraced in such school district, and from said township of Rogers, shall by resolution of its own board declare that it deems it expedient to have its territory detached from said school district the same shall be detached and set off therefrom upon the conditions contained in section twenty of this act being complied with."

And section 20 provided the machinery for apportioning the indebtedness in the proportion that the assessed valuation of the territory detached bore to that of the entire territory of the district at the time of the separation, and for collecting the sum thus found due from the new township, which was required to raise it by taxation, and pay it to the union school district in five annual installments. The language of section 19 is most significant: "Whenever any township now * * * organized * * * deems it expedient to have its territory detached from said school district, the same shall be detached upon the conditions" set forth in section 20. Such language could have application only to the townships of Belknap, Bismarck, Moltke, and Posen, because they only satisfy the description. Until the conditions are complied with, the territory remains in the union school district. This is the necessary implication. But it is said the school districts of the new townships have entirely ignored this law, and it has no effect, because the territory is actually detached in de facto school districts, and has been for five years since the passage of the act, and for ten years before. The object of the act was not to disturb the new school districts, so much as to make the new townships provide for the indebtedness which they left for the old school district with diminished resources to pay; and we are not inclined to defeat that object of the act by permitting those whom it was intended to cover to completely nullify it. We can give effect to it by holding that the result of the act is to keep within the territory of the old union school district the townships set off from Rogers township, for purposes of taxation, to pay the debts due when the severance took place, or, in other words, that the necessary implication from the act is that any territory set off from the union school district is liable to its creditors for debts contracted when a part of it, as if still a part of it, unless provision for their payment was made by the mode provided in section 20.

We are aware that it has been held by the supreme court of Michigan that where territory has been set off from school dis-

tricts under a law enjoining the officers of the two parts to apportion the indebtedness, and the officers have failed in their duty, the creditors have no recourse, except against the old district. The conclusion is based on the ground that the right of recovery by apportionment belongs to the old district, and not to the creditors. Turnbull v. School Dist., 45 Mich. 496, 8 N. W. 65; Maltz v. Board, 41 Mich. 547, 49 N. W. 920. But the difference between the provision for apportionment there considered and that in the act of 1885 is that in the latter the separation is made conditional on the apportionment. In the case cited, apportionment was not made a condition of separation, but was only enjoined as a duty on the municipal officers.

The case of School Dist. v. Parris (Mich.) 56 N. W. 925, has no application to the question here under consideration. The case was this: The supervisor of the present township of Rogers had been directed by the board of supervisors to put a certain amount on his assessment roll for the union school district in that township. He refused to do so on the ground that the amount should be apportioned to parts of the district in the other townships cut off by the act of 1875, and restored by the act of 1885. The supreme court of the state issued a mandamus against him to compel him to levy the tax against the lands of the district in the township of Rogers, holding that the assessment was not discretionary with him, but was a ministerial duty determined for him by the action of the board of supervisors, which he had no power to question. The court does say, in passing, that the effect of the act of 1875 was to take the new townships out of the union school district, and it is earnestly pressed that the necessary implication from this remark is that the act of 1885 did not restore, for school purposes, the new townships to the union school district. This remark was not necessary to the decision of the case, and, if it is to be given the meaning claimed for it, it is in direct conflict with the decision of the same court in Auditor General v. McArthur, 87 Mich. 457–465, 49 N. W. 592, where an assessment for school purposes in this same union school district was enjoined at the suit of a taxpayer, and held to be void, because not levied on the townships of Moltke, Bismarck, and Posen. But, even if it should be true that the act of 1885 has not destroyed the school districts of the new townships for the current administration of school affairs, it clearly has had the effect to impose a liability upon the new townships for the payment of the debts of the old union school district contracted before the severance, so long as the conditions of separation provided in the act have not been fulfilled. It was within the power of the legislature to impose such a liability, and it was clearly its intention to do so.

It is next objected to the writ that the school board of the union school district should have been made respondents, and required to make a certificate that the amount of judgments is due, and file it with the supervisor. This is the course enjoined by sections 10 and 12 of the act of 1871 for the levy of taxes to pay bonded indebtedness when funds to meet that indebtedness are raised by annual

installments. But we think that sections 5109–5113 of Howell's Annotated Statutes, prescribing the course to be taken for the collection of judgments against primary school districts, have application to the judgments here sought to be enforced. These sections are quoted above, in the statement of this case. They provide that the assessor of the school board of the district against which final judgment has been taken shall certify the fact to the supervisor of the township; that, failing this, the judgment creditor may himself file a certified copy of the judgment with the supervisor; that the supervisor shall proceed to assess the amount of the judgment, with interest to the date of the expiration of the warrant for collection, on the next township assessment roll, in the column for school taxes; and "that the same proceedings shall be had and the same shall be collected and returned in the same manner as other district taxes." Section 5112 provides that, if the district is situated in part in two or more townships, a certificate of the judgment shall be filed with the supervisor of each. The petition shows that these sections have been complied with by the plaintiff below,—the judgment creditor.

It is truly said that these provisions apply to judgments against primary school districts, but the first section of the act of 1871 makes all the general laws of the state relating to primary schools applicable and in force in the union school district created by that act, when not inconsistent therewith. Chapter 7 of title "Primary Schools," in which sections 5109–5113 appear, is part of the general laws referred to, and contains nothing inconsistent with the provisions of the act of 1871. We have had some doubt whether, under section 5113, it was necessary for the supervisors to file the certificate of the judgments with the county board of supervisors, and invoke the board's action, as required in section 22 et seq. of the general tax laws (Act No. 200 of 1891) in the case of all other school and township taxes. Read alone, section 5113 would seem to negative the propriety of such a course, and to make it the duty of the supervisor to assess the amount of the judgment without consulting the board of supervisors. But we think that the general legislative scheme of taxation in Michigan is that all taxes, of whatever kind, state, county, and township, shall be submitted to the board of supervisors for their examination and revision with reference to form and legality, and that one of the steps necessary to any legal assessment for taxation is the direction of the board of supervisors to the supervisor of the township to make it. Section 5090, How. Ann. St., of the general primary school laws, provides that the township supervisor shall assess the taxes voted by every school district, and certified to him by the township clerk and the district school board, upon the taxable property of the district, and shall place the same on the next township assessment roll. Its language as much excludes the necessity for referring such certificates to the board of supervisors of the county as section 5113, and yet there can be no question that, under the general tax laws, such certificates must be referred by the supervisor to the board of supervisors for their action. The board of supervisors and the county

clerk, as well as the supervisors of the five townships liable for the judgment, and the township treasurers, who must collect the tax, were therefore properly made respondents to the petition for mandamus, and included in the writ.

The next objection is that the writ does not specify how the amount of the judgment shall be apportioned between the townships. The writ does not say, but the law does. The assessment is to be levied on all the territory of all the school district as if the new townships had not been cut off from it; that is, it is to be levied on each tract of land in proportion to its assessed value. It follows that the amount is to be apportioned between the townships, according to the assessed valuations of the land embraced within the district in each township, shown by the township assessment rolls, on which the assessments for these judgments are to be entered. Had the new townships apportioned the indebtedness under the act of 1885, valuations at a different date would then have been a proper basis for apportionment; but, as they did not see fit to do so, they are to be treated as still a part of the union school district for the payment of these judgments, with the liability which that imposes. Complaint is made that valuations are not uniformly assessed in the various townships, and that gross injustice will be done by an apportionment in accordance with them. The contention is wholly untenable. The law expressly makes it the duty of the board of supervisors to equalize assessed valuations in the various townships, and state and county taxes are apportioned on those valuations. We cannot suppose that the board has not properly discharged its duty. If there is any injustice in the valuations, the township injuriously affected has ample remedy by application to the board of supervisors.

The next objection to the issuance of the writ is that the petition does not show that any of the respondents were requested to do their duty in respect of these judgments, and refused or failed to do it; and the case of U. S. v. Boutwell, 17 Wall. 604, is much relied on to sustain the objection. In that case a mandamus proceeding was begun against Mr. Boutwell, as secretary of the treasury. The supreme court of the District of Columbia denied the application, and the case was carried on error to the supreme court of the United States. While the case was pending there, Mr. Boutwell retired from office, and Mr. Richardson was appointed to succeed him. Counsel for the plaintiff in error moved to substitute Mr. Richardson as respondent for Mr. Boutwell. The motion was denied on the ground that the proceeding in mandamus was a personal action against the incumbent of an office, and he only could be punished for disobedience. In the course of the discussion of the character of the action, Mr. Justice Strong used this language:

"Hence, it is an imperative rule that, previous to making application for a writ to command the performance of any particular act, an express and distinct demand or request to perform it must have been made by the relator or prosecutor upon the defendant, and it must appear that he refused to comply with such demand, either in direct terms, or by conduct from which a refusal can be conclusively inferred."

The action in that case was therefore held to have abated. In the case at bar, it appears by averment in the petition, which is not denied, that the plaintiff below filed a certificate of his judgments with the supervisors of the townships in which the union school district lay, and with the clerk of the county board of supervisors, and that no money has since been paid on the judgments. The record also discloses that all the respondents filed answers denying the right of the plaintiff to have his judgment paid by taxation. It seems to us that from these circumstances a refusal to comply with their duty must be conclusively inferred against the respondents. In the Boutwell Case, it will be observed that when the ruling was made there was nothing at all before the court, either in evidence or pleading, to show that Mr. Richardson would not, if requested, have done that which the plaintiff was seeking to compel him to do. The objection that the petition does not show a demand and refusal must be taken promptly, or it will be waived by answer and argument on the merits. Tapping on Mandamus (page 287) says:

"The objection as to neglect of demand, or the absence of a refusal, should, in order to prevent waste of time, be made in the first instance, viz. on showing cause against the rule for the writ, and cannot be made after the merits of the case have been discussed. In Reg. v. Gamble, 3 Perry & D. 122 (Mich. Term, 3 Vict.) Lord Denman, C. J., announced that the court of queen's bench had come to a resolution not to entertain an objection to a rule for a mandamus on the ground that there had been no refusal to do the thing required by the writ, unless such objection should have been taken at the outset of the argument, in showing cause." Reg. v. Bristol & E. Ry. Co., 4 Q. B. 171; Reg. v. Eastern Counties Ry. Co., 10 Adol. & E. 531, 545.

In the Boutwell Case the objection was made on behalf of Richardson at the time of the motion to make him a party. Here, so far as the record shows, the objection was not made below at all, and it was not made in this court until counsel for plaintiffs in error filed a supplemental brief. This is much too late.

The only other objection to the writ which needs notice is directed to the last of the three judgments upon which the writ issued. The judgment shows that the summons was served upon the secretary of the union school district, and that the judgment was taken by default on this service. Section 5108, How. Ann. St. (which, as we have seen, applies to this union school district), provides for service upon a school district by leaving the summons with the assessor of the district at least eight days before the return day thereof. Section 3 of the act of 1871 provided for the election of a president, secretary, and treasurer, who should severally hold their offices for one year, "and their powers and duties shall severally be the same as those of the moderator, assessor and director organized under the general laws of this state, except varied by the provisions of this act." The word "severally," here, is used with the same meaning as "respectively," and this imposes the same duties and powers on the secretary as are discharged and exercised by the assessor. The power to receive service, therefore, for the school district, was with the secretary, and the school district was properly brought into court by such service. It is true that those duties

of the secretary which are expressly defined in the act of 1871 correspond with those of the director, as they are defined in the General Laws. The order of names, as they appear in the act, may have been a mistake, but "ita lex scripta est." For the purpose of service, the secretary of the union school district was the same as the assessor of a primary school district.

The order of the circuit court, issuing the writ of mandamus, is affirmed.

LOUISVILLE & N. R. CO. v. WARD.

(Circuit Court of Appeals, Seventh Circuit. May 1, 1894.)

No. 114.

1. JUDGMENT—MOTION IN ARREST—DEFECT IN PLEADING.
A complaint against a railroad company for personal injuries to an employé, caused by a hole in its track, alleged that defendant, "by its servants," knew, or should have known, the condition of the track, but did not show that the servants referred to were not fellow servants of plaintiff. *Held*, that this was not ground for a motion in arrest, the complaint being sufficient irrespective of that allegation.

2. TRIAL—INSTRUCTIONS—STATING ISSUES.
A statement, in an instruction upon the burden of proof, that defendant has interposed a general denial, is not objectionable as an assumption that such denial is the only defense interposed, especially where other parts of the charge sufficiently present the other defenses.

3. SAME—DIFFERENT POINTS INVOLVED.
An instruction on a particular point or phase of a case is not erroneous merely because it does not cover some other point or phase,—even one correlative in character.

4. SAME—DETERMINING WEIGHT OF EVIDENCE.
Where the testimony is conflicting, it is error to refuse to instruct upon the mode of determining the preponderance of the evidence.

5. MASTER AND SERVANT—NEGLIGENCE OF FELLOW SERVANTS—SAFETY OF PLACE OF WORK.
Although a switchman and track repairers work in the same yard, and for the same general purpose of maintaining and operating the railroad of their common employer, if an injury to the switchman is caused by the trackmen negligently leaving a dangerous hole in the track, their negligence is attributable to the employer, in view of his positive duty to provide a reasonably safe place for the switchman's work, the measure of which duty is not changed by having it attended to by others. Railroad Co. v. Baugh, 13 Sup. Ct. 914, 149 U. S. 368, followed.

6. SAME—CONTRIBUTORY NEGLIGENCE—COUPLING CARS.
The fact that a switchman, injured while coupling cars, by reason of a hole in the track, might have selected another place to make the coupling, if he desired, will not defeat his recovery for the injury, unless he knew, or ought to have known, of the danger incurred.

7. SAME—FAILURE TO USE COUPLING STICK—INSTRUCTIONS.
In an action against a railroad company by a switchman for injuries received while coupling cars, alleged to have been caused by a hole in the track, it appeared that he had neglected to use a coupling stick, as required by the rules of the company. *Held*, that refusal of an instruction requested, that if he was injured by reason of such neglect he could not recover, was error, although a charge was given that, to entitle him to recover, it should appear that the hole in the track was the sole cause of the injury.

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

This was an action by John Ward against the Louisville & Nashville Railroad Company for personal injuries. The jury found a verdict for plaintiff. A motion by defendant in arrest of judgment was denied, and judgment for plaintiff was entered on the verdict. Defendant brought error.

J. M. Hamill, for plaintiff in error.

A. R. Taylor, for defendant in error.

Before WOODS, Circuit Judge, and BAKER and SEAMAN, District Judges.

WOODS, Circuit Judge. The motion in arrest of judgment was properly overruled. Though inartistically drawn, the declaration, which is in trespass for a personal injury received by the plaintiff while employed as a switchman in the yard of the defendant at East St. Louis, by reason of a hole in the track, in which his foot was caught, shows a cause of action, and, if the allegations are in any particular imperfect, the verdict cured the defect. The one objection made to the complaint is directed to the averment "that the defendant, by its servants having charge of keeping said track in repair knew, or by the exercise of ordinary care would have known, of said defective condition of the track in time to have repaired same, and averted the injury to the plaintiff, yet they neglected to do so." But if it be true, as it is insisted, that the servants here referred to, for all that is averred, may have been fellow servants, for whose conduct or negligence the company was not responsible to the plaintiff, it is not material, because, irrespective of that allegation, the complaint is good against a motion in arrest, if not good even upon demurrer. After a description of the track at and near the place of the injury, it is charged that the defendant was negligent in maintaining the track in the dangerous and defective condition which caused the injury. If the defendant did not know of the defective condition of its track, and under the circumstances its lack of knowledge was not culpable, it is not true that it had been negligent as charged; and it was therefore competent to prove what was necessary in that respect to establish the defendant's responsibility.

In instructing the jury the court said: "The defendant has interposed a general denial of all acts of negligence, and in this suit the pleadings throw the burden upon the plaintiff," etc.; and it is urged that this statement erroneously assumed that a denial of all acts of negligence was the only defense interposed, when in fact the defendant was insisting that the plaintiff was injured by his own negligence and by the negligence of fellow servants. This part of the charge was intended to locate the burden of proof, and not to constitute a formal statement of the issues, though it was accurate enough for that purpose, as the defendant had interposed only the plea of not guilty. Besides, other parts of the charge cor-

rectly and sufficiently presented the question of contributory negligence.

If the court erred in not instructing upon the doctrine that a servant has no remedy against the master for an injury caused by the negligence of fellow servants, it is not because of the mere omission to speak on the subject, but because of the refusal of the court to give special instructions which were asked. A proper instruction upon a particular point or phase of a case cannot be said to be erroneous merely because it does not cover some other point or phase, even though it be correlative in its character. For instance, the court, in this case, instructed "that the duty was imposed by law upon the defendant to use reasonable care to prevent an accident to the plaintiff;" but that did not involve, as is contended, an assumption that the plaintiff was not bound to use care to avoid danger. There was, however, no omission to instruct clearly and fully upon the latter point. The jury was instructed, not only that the plaintiff "must have exercised ordinary care and watchfulness in the manner of making the coupling," which is criticised as limiting his diligence to the act of coupling alone, but was told, further and generally, that he must have been, when the injury occurred, "in the exercise of due care for his own safety." If an instruction in any respect more explicit was desired, it should have been asked.

Of the special instructions asked and refused, the most important, not covered by the charge given, was the following:

"If the plaintiff and the section men working on defendant's road, who worked on the track in the East St. Louis yards, were in the employment of the same master, and engaged in the same common employment, in carrying on the same general business of the defendant, they were in law fellow servants of the same master; and, if the plaintiff was injured by the negligence of any of the section men who worked on defendant's road in the East St. Louis yards, then he cannot recover."

Numerous decisions on the subject have been cited, but the rule declared by the supreme court in Railroad Co. v. Baugh, 149 U. S. 368, 13 Sup. Ct. 914, is claimed to be broader, more comprehensive and far-reaching than any heretofore announced by that court. We therefore quote from the opinion in that case portions which we deem to be especially pertinent to the present case. On page 383, 149 U. S., and page 914, 13 Sup. Ct., after stating the doctrine of the Ross Case, 112 U. S. 377, 5 Sup. Ct. 184, that the conductor of a train has the control of a distinct department and represents the master, the court says:

"But this rule can only be fairly applied when the different branches or departments of service are, in and of themselves, separate and distinct. Thus, between the law department of a railway corporation and the operating department, there is a natural and distinct separation,—one which makes the two departments like two independent kinds of business, in which the one employer and master is engaged. So, oftentimes, there is in the affairs of such corporation what may be called the manufacturing or repair department, and another strictly operating department. These two departments are, in their relations to each other, as distinct and separate as though the work of each was carried on by a separate corporation."

And on page 386, 149 U. S., and page 914, 13 Sup. Ct.:

"Again, a master employing a servant impliedly engages with him that the place in which he is to work, and the tools or machinery with which he is to work, or by which he is to be surrounded, shall be reasonably safe. It is the master who is to provide the place and the tools and the machinery, and, when he employs one to enter into his service, he impliedly says to him that there is no other danger in the place, the tools, and the machinery, than such as is obvious and necessary. Of course, some places of work and some kinds of machinery are more dangerous than others, but that is something which inheres in the thing itself, which is a matter of necessity, and cannot be obviated. But, within such limits, the master who provides the place, the tools, and the machinery owes a positive duty to his employé in respect thereto. That positive duty does not go to the extent of a guaranty of safety, but it does require that reasonable precautions be taken to secure safety; and it matters not to the employé by whom that safety is secured, or the reasonable precautions therefor taken. He has a right to look to the master for the discharge of that duty, and if the master, instead of discharging it himself, sees fit to have it attended to by others, that does not change the measure of obligation to the employé, or the latter's right to insist that reasonable precaution shall be taken to secure safety in these respects. Therefore, it will be seen that the question turns rather on the character of the act than on the relations of the employés to each other. If the act is one done in the discharge of some positive duty of the master to the servant, then negligence in the act is the negligence of the master; but, if it be not one in the discharge of such positive duty, then there should be some personal wrong on the part of the employer before he is held liable therefor."

After quoting here from the opinion in Railroad Co. v. Moore, 29 Kan. 632, 644, the court adds:

"It would be easy to accumulate authorities on these propositions, for questions of this kind are constantly arising in the courts. It is enough, however, to refer to those in this court. In the cases of Hough v. Railway Co., 100 U. S. 213, and Railroad Co. v. Herbert, 116 U. S. 642, 6 Sup. Ct. 590, this court recognized the master's obligation to provide reasonably suitable place and machinery, and that a failure to discharge this duty exposed him to liability for injury caused thereby to the servant, and that it was immaterial how or by whom the master discharged that duty. The liability was not made to depend in any manner upon the grade of service of a coemployé, but upon the character of the act itself, and a breach of the positive obligation of the master."

While the exact question in that case was whether or not, under the circumstances stated, the engineer in charge of the locomotive was, in respect to the fireman who was hurt, a representative of the master, or only a fellow servant, the portions of the opinion which we have quoted enunciate very clearly—and, for us, authoritatively—the propositions that the master employing a servant impliedly engages that the place in which he is to work shall be reasonably safe; that he owes a positive duty to his employe in that respect; that if, instead of discharging that duty himself, he sees fit to have it attended to by another, that does not change the measure of his obligation; that the question of the master's responsibility turns rather on the character of the act than on the relation of the employés to each other, and no matter by whom done, if the act is one in the discharge of some positive duty of the master, then negligence in the act is the negligence of the master. It is not material, therefore, that the switchman, who in this instance was injured, and the track repairers, whose negligence caused the injury, worked in the same yard, and for the same general purpose of maintaining and operating the railroad of their common employer. It was a duty which

under implied contract, the railroad company owed to the switchman, to keep the yard and tracks where he was employed to do his work—hazardous enough under the most favorable conditions—in a reasonably safe condition; and if the trackmen to whom the discharge of that duty was intrusted negligently left in the track, and between the ties, which they had recently been ballasting, a dangerous hole, which caused the injury complained of, their negligence was attributable to the plaintiff in error, and the case was properly submitted to the jury without reference to the question of responsibility for injuries caused by fellow servants.

The court was asked, and refused, to give the following instruction:

"If you believe from the evidence that the plaintiff voluntarily selected and chose the place where he went in between the cars to make the coupling, when, if he had desired so to do, he could have selected another place to make the coupling, then he cannot recover."

There was no error in refusing this, and another instruction substantially like it, because they left out of view the inquiry whether the plaintiff knew, or ought to have known, of the danger incurred by making the attempt where it was made.

Though the testimony in the case was conflicting, the court gave no instruction touching the credibility of witnesses and the weight of evidence, and refused the following asked by the appellant:

"In determining where the weight or the preponderance of the evidence lies, you cannot arbitrarily, and without cause, disregard or set aside the evidence of any of the witnesses whose testimony has not been successfully contradicted or impeached; but you should carefully and impartially weigh the evidence of all of the witnesses whose evidence has not been successfully contradicted or impeached,—taking into consideration their manner and bearing on the witness stand, their means of knowledge about the matters to which they have testified, and what interest, if any, they have in the matters involved in the controversy,—and from all these circumstances, as well as from the number of witnesses who have testified to one or more facts at issue in this case, determine where the true preponderance of the evidence lies, and render your verdict accordingly."

No objection to this request has been pointed out, and we perceive none.

By the rules of the railroad company, coupling sticks were required to be furnished to switchmen, couplers, and freight-train brakemen, and the coupling of cars by hand strictly forbidden. The defendant in error admitted his knowledge of the rules in this respect, and testified that he had been supplied with a coupling stick, that he did not use it, and that when he was hurt he was attempting to make the coupling by hand. Upon these facts the court was asked, but refused, to instruct that if the plaintiff was injured by reason of his neglect to use the coupling stick he could not recover. On this subject a number of cases are cited by the plaintiff in error, including Wolsey v. Railway Co., 33 Ohio St. 227, 229; Lyon v. Railroad Co., 31 Mich. 420; Gardner v. Railroad Co., 58 Mich. 584, 26 N. W. 301; Russell v. Railroad Co., 47 Fed. 204. But it is insisted, on the other hand, that these authorities are not applicable, because, under the charge which the court gave, the verdict necessarily means that the accident was caused solely by the hole in the track, and that

the coupling stick was in no way connected with it. While the court did instruct to the effect that, to entitle the plaintiff to recover, it should appear that the hole or depression between the ties was the sole cause of the injury, it is impossible to say that if the further instruction asked had been given the jury would not have found that the plaintiff's neglect to use the coupling stick, and his undertaking to effect the coupling by hand, were efficient contributory causes. The instruction asked should have been given, and if there were considerations—of which, however, no suggestion has been made here—tending to show that in this instance the failure of the plaintiff to comply with the rules of the company was not culpable, or did not contribute to the injury, they should have been submitted to the determination of the jury.

The judgment is reversed, and the cause remanded, with instructions to grant a new trial.

IRON SILVER MIN. CO. v. CAMPBELL et al.

(Circuit Court of Appeals, Eighth Circuit. May 7, 1894.)

No. 356.

NEW TRIAL AS OF RIGHT—ACTION FOR POSSESSION OF REAL PROPERTY.

Code Civ. Proc. Colo. 1887, § 272, provides that in an action to recover possession of real property, "whenever judgment shall be rendered against either party," he may, before the next term, pay the costs recovered, and on his application the court shall grant a new trial, "and neither party shall have but one new trial in any case as of right without showing cause." *Held* to apply to a defeated party in such an action, who has never had a new trial of his case as of right, under that statute, regardless of the number of new trials he may have had for cause.

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

This was an action by Peter Campbell and others against the Iron Silver Mining Company for possession of certain real property. A judgment for plaintiffs was reversed on appeal to the supreme court, and a new trial ordered. 10 Sup. Ct. 765. On the new trial the jury found a verdict for plaintiffs, and judgment for them was entered thereon. Defendant made a motion to vacate the judgment, and for a new trial as of right, which was granted (56 Fed. 133), but subsequently the order thereon was vacated. Defendant brought error.

Joel F. Vaile (Edward O. Wolcott and Frank W. Owers, on the brief), for plaintiff in error.

Thomas M. Patterson, for defendants in error.

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

SANBORN, Circuit Judge, delivered the opinion of the court.

Is the defeated party in an action for the recovery of the possession of real property entitled to a new trial as of right, under the Colorado statutes, after a second judgment has been rendered against him on the verdict of a jury in a case in which the first

judgment to the same effect had been reversed, and a new trial granted for cause?

The statutes of Colorado provide that the distinct forms of actions and suits heretofore existing are abolished, and that every action shall be prosecuted in the name of the real party in interest. Colo. Code Civ. Proc. 1887, §§ 1, 3. Section 265, c. 23, of this Code, provides that:

"An action to recover the possession of real property may be brought in any case where an action of ejectment or a writ of right might have been brought at common law, or in any case where the plaintiff claims a legal estate in real property or lands, in fee, or for life, or for years, or claims the legal right to occupy and possess the same. * * *"

And section 272 of the same chapter provides that:

"Whenever judgment shall be rendered against either party, under the provisions of this chapter, it shall be lawful for the party against whom such judgment is rendered, his heirs or assigns, at any time before the first day of the next succeeding term, to pay all costs recovered thereby, and upon application of the party against whom the same was rendered, his heirs or assigns, the court shall vacate such judgment and grant a new trial in such case, and neither party shall have but one new trial in any case as of right without showing cause. And after such judgment is vacated, the cause shall stand for trial, the same as though it had never been tried. * * *"

It is now well settled that litigants in the national courts are entitled to the same rights and remedies under this statute as those in the state courts. Miles v. Caldwell, 2 Wall. 35; Smelting Co. v. Hall, 106 U. S. 86, 88, 1 Sup. Ct. 128.

May 21, 1885, Peter Campbell, W. Y. Suydam, Charles S. Thomas, Betty Wheeler, and Martha E. Allen, the plaintiffs below and the defendants in error in this court, recovered a judgment in the circuit court for the district of Colorado against the Iron Silver Mining Company, the defendant below and the plaintiff in error here, in an action to recover the possession of the real property described in their complaint in this action. No application was made to vacate this judgment under this statute, but a writ of error was sued out of the supreme court to reverse it. April 28, 1890, this judgment was reversed for error by the supreme court, and a new trial was ordered. April 3, 1893, after a new trial pursuant to the order of the supreme court, and upon the verdict of a jury, a second judgment in favor of the plaintiffs below was rendered in the circuit court. Before the first day of the term next succeeding the rendition of this judgment, the plaintiff in error paid all the costs of the action, and thereafter made a motion to vacate the judgment, and for a new trial, as of right, under section 272 of the Code of Colorado, supra. May 20, 1893, that motion was granted by the circuit court, Judge Thomas presiding. His opinion appears in 56 Fed. 133. July 22, 1893, the circuit court, in which other judges were then presiding, vacated the order of May 20, 1893, and directed the judgment of April 3, 1893, to stand. This order is assigned as error, and will first be considered.

The fiction by which John Doe and Richard Roe were made to represent the plaintiff and defendant, respectively, in an action of ejectment at common law permitted any number of actions of this

character to be maintained between the same parties in interest after verdict and judgment. The litigation terminated only when the unsuccessful party tired of his futile efforts, or when a court of equity, after repeated trials at law resulting in like verdicts and judgments, enjoined the unsuccessful party from harassing, by future actions in ejectment, him who had recovered these judgments. The effect of section 3 of the Code of Colorado, which required actions in ejectment to be prosecuted in the name of the real party in interest, was to put an end to this practice. Under that section, standing alone, the first verdict and judgment in ejectment, as in other cases, unless it was set aside or vacated for cause, would be conclusive of the rights of the parties, that were, or might have been, there litigated. The action of ejectment, or, as the Colorado Code has it, the "action to recover the possession of real property," is the favorite action in which to try the title to such property. Real property has long been held in higher esteem among the English-speaking nations than any other form of property, and the titles to it have been guarded with jealous care. The legislature of Colorado, in common with those of nearly all the other states that abolished the fiction that prevailed in the action of ejectment, evidently deemed the title to real property too sacred to be risked upon the result of a single trial. Doubtless, they feared that the real owner might sometimes lose the first trial through some unknown defect in his own title, that to know was to remedy, or, through some apparent but groundless title in his opponent, that to be seasonably apprised of was to defeat. To guard the real owner against these evils the legislature of Colorado provided that every party against whom a judgment was rendered in an action to recover the possession of real property should be entitled to another trial of his case, as of right, provided he paid the costs before the next succeeding term, and properly applied for it, and provided he had not already had a new trial as of right in the same case. Section 272, supra.

In the case before us, judgment was rendered aagainst the plaintiff in error April 3, 1893. Before the next succeeding term, it paid the costs, and then seasonably applied for another trial as of right, under this statute. It had never before applied for or obtained a new trial as of right, in this case. It is difficult to see why these facts did not bring this case clearly within the letter and spirit of this statute, and why they did not impose upon the circuit court the imperative duty of vacating the judgment, and granting the new trial.

It is urged in opposition to this view that the plaintiff in error had the right to a vacation of the judgment of May 21, 1885, and to a new trial then, under this statute, and that, as it did not exercise that right, it has lost the right to a vacation of the judgment of April 3, 1893. It is doubtless true that the mining company had the right to have the judgment of May 21, 1885, set aside, under this statute, and that, as it did not exercise that right by paying the costs before the term next succeeding its rendition, it lost that statutory right to set that judgment aside. If the supreme

court had affirmed that judgment in 1890, when it reversed it, it would then have been too late for the plaintiff in error to have paid the costs, and laid the foundation for an application to vacate that judgment as of right, under the statute, because it would then have been subsequent to the first day of the next succeeding term after its rendition. This was decided, and this was all that was decided, by this court, in Iron Silver Min. Co. v. Mike & Starr Gold & Silver Min. Co., 56 Fed. 956, 6 C. C. A. 180.

But the plaintiff in error is not seeking to set aside the judgment of May 21, 1885. That judgment was reversed for cause by the supreme court, and the mining company never applied to the circuit court to take any action regarding it under this statute. The judgment, and the only judgment, that the plaintiff in error ever asked that court to vacate under this statute was that rendered April 3, 1893. The statute does not confine the right of the defeated party to the first judgment against him, but expressly provides that he shall have the right "whenever judgment shall be rendered" against him, if he has not before exercised the right. The right of the unsuccessful party to a new trial under this statute, without showing cause, is an additional right or remedy peculiar to the action to recover the possession of real property. The statute which gives it does not deprive him of any right to a new trial for error, or for any cause that would have entitled him to it in a case of another class, or that would have entitled him to a new trial in an action of ejectment, in the absence of this statute. He may exhaust all his remedies for obtaining a new trial for cause, and then, if he fails, he may demand it as of right, provided he pays the costs within the time limited by the statute and makes his demand in the manner prescribed thereby. This is made clear by the provision in section 272 that "neither party shall have but one new trial in any case as of right without showing cause." "Expressio unius est exclusio alterius." This is a plain declaration that the new trial the defeated party obtains by showing cause shall not be counted against his right to one new trial under this statute without showing cause.

Our conclusion is that, under section 272 of the Colorado Code of Civil Procedure (1887), the defeated party in an action to recover the possession of real property, who has never had a new trial of his case as of right, under that statute, is entitled to the vacation of any judgment rendered against him, and to a new trial of his case, without showing cause, if he pays the costs before the first day of the term next succeeding the rendition of the judgment, and makes proper application therefor, regardless of the number of new trials he may have had for cause. Smelting Co. v. Hall, 106 U. S. 86, 88, 1 Sup. Ct. 128; Smale v. Mitchell, 143 U. S. 99, 12 Sup. Ct. 353; Iron Silver Min. Co. v. Mike & Starr Gold & Silver Min. Co., 56 Fed. 956, 6 C. C. A. 180; Landon v. Townshend (Sup.) 18 N. Y. Supp. 552; Gibson v. Manly, 15 Ill. 140; Rees v. City of Chicago, 40 Ill. 107; Railway Co. v. McBroom, 103 Ind. 310, 2 N. E. 760; Gilman v. Circuit Judge, 21 Mich. 372; Butterfield v. Walsh, 25 Iowa, 263.

Various rulings of the court upon the trial are assigned as error in this record, but the counsel for the defendants in error strenuously insists that the questions argued under these assignments were never fairly presented to the trial court. The conclusion we have reached on the question already considered necessitates a new trial of this case, in any event, and renders it unnecessary to consider any other question.

The order of July 22, 1893, which vacated and set aside the order of May 20, 1893, vacating the judgment of April 3, 1893, and granting a new trial, is reversed, with costs; and the case is remanded to the circuit court, with instructions to grant a new trial, in accordance with the order of May 20, 1893.

UNITED STATES v. NATHAN.

(District Court, N. D. Iowa, W. D. May 30, 1894.)

1. POST OFFICE—OBSCENE LETTER.
   An obscene letter constitutes nonmailable matter (25 Stat. 496), although no obscene matter appears on the envelope.
2. SAME—INDICTMENT—SCIENTER.
   Where an indictment for the mailing of obscene matter charges that defendant "knowingly deposited in the post office an obscene letter," the word "knowingly" qualifies the whole act charged, and it is not necessary to allege that he knew the letter to be obscene. U. S. v. Clark, 37 Fed. 106, followed.

Indictment against William J. Nathan for mailing an obscene letter. Defendant demurs.

Cato Sells, Dist. Atty., for the United States.
Argo, McDuffie & Argo, for defendant.

SHIRAS, District Judge. The indictment in this case is based upon the second section of the act of congress approved September 26, 1888 (25 Stat. 496), and charges that the defendant did knowingly deposit in the post office of the United States, at the town of Granvelle, Sioux county, Iowa, for mailing and delivery, a certain envelope, containing an obscene, lewd, and indecent letter. The demurrer presents the question whether the mailing an obscene letter inclosed in an envelope is within the inhibition of the statute if nothing obscene, indecent, or improper is written upon the outside of the envelope. The second section of the act of September 26, 1888, amends section 3893 of the Revised Statutes, and the first section amends the act of June 18, 1888; and, as the statutes now stand, the first section declares all matter, otherwise mailable, upon the envelope or outer cover or wrapper of which, or any postal card, upon which, are found any delineations, epithets, terms, or language of an indecent, lewd, lascivious, obscene, libelous, scurrilous, defamatory, or threatening character, or calculated, by the terms, manner, or style thereof, to reflect injuriously upon the character or conduct of another, to be nonmailable. The general purpose of this section is plain. It is to prevent the postal facilities

of the United States from being used as a means for the publication of obscene, lewd, libelous, defamatory, or threatening matter, tending to injure the character of any citizen. Sending through the public mails a package or letter upon the cover or wrapper of which, or a postal card, on which, is written, printed, stamped, or delineated any libelous or defamatory matter, would be a publication of such matter, because it would be open to the inspection of all through whose hands it would pass, in the course of transmission, through the mails. This section is intended to protect the citizen from the possible injury which might be caused him by the publication, in the manner indicated, of libelous, lewd, defamatory, or threatening matter. This possible injury can only arise when such matter is brought within the knowledge of a third party, and hence the section is confined to matters upon the outside of which is found the prohibited delineations, epithets, writing, etc.

A libelous, defamatory, or threatening letter, if inclosed in a wrapper, envelope, or other cover, whereby its contents are kept from the knowledge of third parties, would not fall within the inhibition of the first section of the statute, because the evil this section is mainly aimed at would not arise unless the libelous or defamatory matter is in some way brought to the knowledge of a third party. If, therefore, the indictment in this case was based upon the first section of the act of 1888, it would be faulty, in that it appears that the lewd and obscene letter was inclosed in an envelope, and it is not averred that any nonmailable matter appears upon the envelope. The indictment, however, is based upon the provisions of the second section, which declares that "every obscene, lewd, or lascivious book, pamphlet, picture, paper, letter, writing, printing, or other publication of an indecent character, * * * whether sealed as first class matter or not, are hereby declared non mailable matter," etc. The evil resulting from obscene or lascivious literature, whatever its form may be, arises as well when it is read by the one to whom it may be mailed as when read by third parties, and the second section of the act is intended to prevent the use of the mails for forwarding to any one any of the prohibited matter named in the section. In other words, the evil intended to be prevented by the section is created by the delivery of the prohibited matter to the party to whom it may be addressed, and the section is intended to prevent the carrying and delivery through the mails and by the postal facilities of any of the matter named in the section. A lewd, obscene, or lascivious book is not mailable under the provisions of this section, and it cannot be made mailable by sealing it in an envelope or otherwise wrapping it up. So, also, a letter of an obscene, lewd, or lascivious character is nonmailable, and it cannot be made mailable by placing it in an envelope. As applied to letters, the language of the statute is as follows: "Every obscene, lewd, or lascivious letter, whether sealed as first class matter or not, is hereby declared to be nonmailable." Under this section of the statute, the inquiry is, what is the character of the book, pamphlet, picture, paper, letter, writing, print, or other

publication proposed to be deposited in the post office for transmission? If the matter offered for mailing is in itself obscene, lewd, or lascivious, then the postal authorities are forbidden to receive it. It is nonmailable, and its character in this respect cannot be changed by placing it in a cover, wrapper, or envelope, or by sealing it as first-class matter. I am aware that there is not unanimity in the rulings upon this question. In U. S. v. Wilson, 58 Fed. 768, Judge Morrow held that the amendment of September 26, 1888, did not, in this respect make any change in the statute as it was when it was construed by the supreme court in U. S. v. Chase, 135 U. S. 255, 10 Sup. Ct. 756, wherein it was held that a sealed and addressed letter is not a "writing," within the meaning of the act of July 12, 1876. In U. S. v. Andrews, 58 Fed. 861, Judge Ross takes the contrary view, and, in my opinion, clearly shows that the amendment of September 26, 1888, was intended to place obscene, lewd, or lascivious letters among the class of nonmailable matter, not by reason of what might be upon the envelope or wrapper thereof, but by reason of the character of the letter itself. This being the proper construction of the second section of the act of 1888, it follows that the indictment charges an offense against the defendant, in that it charges him with knowingly depositing in the named post office an obscene letter, for the purpose of having the same transported and delivered through the mail to the person to whom the letter is addressed.

It is further urged in support of the demurrer that the indictment is faulty in that it is not averred that the defendant had knowledge of the contents of the letter or envelope by him placed in the post office. The indictment follows the language of the statute, and charges that the defendant did knowingly deposit in the named post office an obscene letter, and the point made is that it is not averred that defendant knew the character of the letter, the same being contained in an envelope. In U. S. v. Clark, 37 Fed. 106, the same question was passed upon by Mr. Justice Brewer, then circuit judge for this circuit, it being therein held that an indictment charging the defendant with knowingly depositing in the post office, for mailing and delivery, a certain lewd and obscene picture, was sufficient, as it would be held that the word "knowingly" qualifies the full act charged to be done, and is not limited to the mere act of depositing in the post office. Following this ruling, it must be held that the indictment in the present case is sufficient in this particular, and the demurrer is therefore overruled.

ZIMMERMAN v. UNITED STATES.

(Circuit Court, S. D. New York. April 18, 1894.)

CUSTOMS DUTIES—CLASSIFICATION—COTTON BRAIDS.

Braids composed of 95 per cent. of cotton and 5 per cent. of other materials, commercially known as belonging to the class of "cotton braids," though bought and sold under the specific names of "cotton hat

braids," "cotton fancy braids," "cotton straw braids," etc., and used in the manufacture of hats, *held* to be dutiable at 35 cents per pound, under paragraph 354 of the tariff act of October 1, 1890, and not at 20 per cent. ad valorem, under section 4 of said act, as a nonenumerated manufactured article, nor at 40 per cent. ad valorem, under paragraph 355, as a manufacture of cotton not specially provided for, nor at 40 per cent. ad valorem, under paragraph 354, as "cotton gimps, galloons, webbing, goring, suspenders and braces," nor free of duty, under paragraph 518 of the free list of said act, as claimed by the importer.

(Syllabus by the Court.)

Application by John Zimmerman, importer, for a review of a decision of United States general appraisers concerning certain importations of braids made by him in 1890 and 1891, affirming the decision of the collector at the port of New York.

The importations were classified for duty by the collector under the provisions for "cotton cords, braids, boot, shoe, and corset lacings," contained in paragraph 354, schedule I, Act 1890 (26 Stat. 593). The importer protested, as stated in the syllabus.

Hess, Townsend & McClelland, for importer.
Henry C. Platt, U. S. Atty.

TOWNSEND, District Judge (orally). It appears that, while the braids are exclusively used for making hats, yet they are cotton braids in fact, and are generally and commercially known as "cotton braids," although they are also known as "cotton hat braids," and a certain pattern is known as the "Belgrade pattern." It seems to me that the construction contended for by the importer would nullify the operation of the statute (paragraph 518), by admitting braids suitable for making hats, irrespective of their composition,—whether of wire, paper, leather, or whalebone, for example,—and that therefore, this construction could not have been intended by congress; and a further suggestion in support of this view seems to be afforded by the limiting clause (in paragraph 518), in which all "similar manufactures" are limited as to the material of which they are composed. I can see no reason why, if the limitation is applied to the general term "similar manufactures," it should not also be applied to the braid, especially in view of the fact already suggested,—that the other view admits of other materials, such as have been mentioned. The construction contended for by the government seems to be further in harmony with the intention of congress as manifested by other acts, and in accordance with the construction applied by the courts in similar cases. I therefore think that the decision of the board of general appraisers should be affirmed. Decision affirmed.

UNION SWITCH & SIGNAL CO. v. JOHNSON RAILROAD SIGNAL CO.

(Circuit Court of Appeals, Third Circuit. May 24, 1894.)

No. 18.

1. AUTHORITY OF AGENT TO SELL PATENT—INTERPRETATION OF POWER OF ATTORNEY.
   A power of attorney which, in consideration of a prescribed royalty, appoints the donee sole agent in the United States "for the purpose of working and developing the business of said patents," with power to "negotiate the sale of the said patents upon terms to be agreed upon," does not give the agent power to grant an exclusive license, which would transfer substantially the entire interest in the patent; but it does authorize him to grant nonexclusive licenses to manufacture and sell.

2. ASSIGNMENT OF PATENT—INTERPRETATION OF CONTRACT.
   A contract which purports to convey, for a prescribed royalty, the sole and exclusive right and license to make, use, and sell in the United States the improvements covered by a patent for the full term thereof, is in substance a virtual if not an actual sale. 59 Fed. 20, affirmed.

3. UNAUTHORIZED SALE BY AGENT—RATIFICATION.
   The sale, by an agent who had authority to grant nonexclusive licenses only, of an exclusive license transferring in substance the entire patent, may be held good as a nonexclusive license, when the licensees have been misled by the ambiguous language used by the principal in conferring power on the agent, and especially when the principal has long recognized them as licensees, although, in so doing, he was unaware that their license purported to be exclusive.

4. POWER OF ATTORNEY—CONTRACT IN ATTORNEY'S NAME—VALIDITY.
   It seems that when a contract which may be made by parol is put in writing, merely for convenience and certainty of proof, as in the case of a nonexclusive license to make and sell under a patent, the fact that the writing purports to be made under a power of attorney, but is executed by the attorney in his own name, will not render the contract void.

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

This was a bill by the Johnson Railroad Signal Company against the Union Switch & Signal Company, for infringement of letters patent No. 241,246, issued to Frederick Cheeswright, for "improvements in electric railroad signal apparatus." Cheeswright, by a power of attorney, which is set out in the opinion, constituted one Yeomans his attorney in fact in the matter of the patent, and defendant claims under a conveyance by Yeomans, dated March 21, 1882. Plaintiff claims title to the same patent under a power of attorney from Cheeswright to Henry Bezer, dated October 31, 1889, and an absolute assignment of the patent from the latter. The case was heard in the circuit court on a motion for leave to file a cross bill, and for an order for substituted service (43 Fed. 331). Afterwards, a motion by the cross complainant for an order for an injunction was denied (51 Fed. 85). A decree was finally rendered for complainant (59 Fed. 20). Defendant appealed.

George H. Christy and S. Schoyer, Jr., for appellants.
George W. Miller and Wm. R. Blair, for appellees.

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

BUTLER, District Judge. The plaintiffs filed a bill against the defendants for infringement of the Sykes patent for "improvement in electric railroad signal apparatus," granted to Frederick Cheeswright (assignee of the inventor, Sykes), numbered 221,246, dated May 10, 1881. The defendants answered denying the right set up and, under a claim of title and charge of infringement by the plaintiffs, filed a cross bill. Issues were duly formed and proofs taken; and after hearing a decree was entered in the plaintiffs' favor—for an injunction, and an account of profits since October 31, 1889.

From this decree the defendants appealed, and filed the following specification of errors:

"(1) That the court erred in finding that the original complainant, the Johnson Railroad Signal Company, had a good title to, or was the lawful owner of the patent for infringement of which the suit was brought, and as such could maintain an action against this appellant for the infringement thereof.

"(2) That the court erred in not finding that this appellant, the Union Switch & Signal Company, was the lawful owner of, or had a good title to the exclusive right under the patent for an alleged infringement of which the suit was brought.

"(3) That the court erred in finding that the assent of Frederick Cheeswright was essential as a condition precedent to the validity of the right and title claimed by this appellant.

"(4) That the court erred in finding that the proofs failed to show that Cheeswright assented to, or ratified the instrument of March 21, 1882, under which this appellant claims the exclusive right under the patent sued on, or that he acquiesced therein after knowledge.

"(5) That the court erred in not finding that the proofs show that Cheeswright had knowledge of the said instrument of March 21, 1882, and that he acquiesced therein after knowledge.

"(6) The court further erred in finding that the grant of exclusive license from D. M. Yeomans to this appellant, by instrument dated March 21, 1882, was a sale of the patent.

"(7) The court erred in failing to hold that a grant of an exclusive right under a patent was a proper and lawful method of working and developing the business of the patent in question.

"(8) The court erred in construing the instrument of September 10, 1881, executed under the hand and seal of Cheeswright to D. M. Yeomans, and in pursuance of which, the said Yeomans, by the said instrument of March 21, 1882, conveyed to the appellant an exclusive right to the use of the patents therein described, to be a power of attorney merely, and that the same created an agency personal to the said Yeomans alone, and not to his assigns, and, therefore, not transferable.

"(9) The court erred in not holding that the instrument of September 10, 1881, was a valid vesting in Yeomans of the rights and interests therein described, for the purposes in said instrument mentioned, and that said rights and interest so vested were irrevocable.

"(10) The court erred in finding or holding that the right or license under the patent in suit, granted to this appellant by the Yeomans' instrument of March 21, 1882, was revoked or terminated under the authority purported to be granted to one Bezer by Frederick Cheeswright.

"(11) The court erred in holding that the instrument executed by Yeomans on March 21, 1882, was not binding upon Frederick Cheeswright.

"(12) The court further erred in not holding that the attempted revocation by Cheeswright, by the instrument dated October 31, 1889, of Cheeswright to Henry Bezer, was ineffective, as against the appellant.

"(13) The court erred in not finding that the alleged revocation by Cheeswright, by the instrument dated October 31, 1889, or by his alleged agent, Bezer, was ineffective as against this appellant prior to notice of revocation duly given to this appellant.

"(14) The court further erred in not holding that by the instrument of September 10, 1881, the said Yeomans acquired an interest which was irrevocable by the said Cheeswright.

"(15) The court erred in finding that this appellant had done any act in infringement of the patent sued on.

"(16) The court erred in not finding and holding that the Johnson Railroad Signal Company had infringed the letters patent in suit, and violated the exclusive rights vested in this appellant, as set forth in the cross bill.

"(17) The court erred in allowing an accounting of all sums of money due from this appellant under the instrument in writing between defendant and D. M. Yeomans, dated March 21, 1882, and unpaid on October 31, 1889.

"(18) The court erred in failing to find the original complainant was estopped by the acts of certain of its officers from bringing the original action against this appellant, or from asking for an injunction or an accounting or other relief therein.

"(19) The court erred in allowing complainant costs under the original bill.

"(20) The court erred in failing to sustain the cross bill, and in not granting to this appellant the relief therein prayed or grantable thereunder, with costs.

"(21) The court erred in failing to dismiss the original bill for want of jurisdiction in equity."

It is unnecessary to consider these assignments separately. Collectively, they present the following questions:

First. Have the plaintiffs title? If they have, then,

Second. Have the defendants rights under it? Other subordinate questions raised will be considered in answering these.

As respects the first, we agree with the circuit court; the plaintiffs have title, and no more need be said on the subject at present.

As respects the second question we are unable to agree with that court. We believe the defendants acquired rights under the patent, through their contract with Yeomans, which still exist. To determine what the rights are requires a construction of Cheeswright's contract with Yeomans, which is as follows:

"To All to Whom These Presents shall Come:

"I, Frederick Cheeswright, of St. Dunstan's Buildings, St. Dunstan's Hill, in the city of London, notary public, proprietor and assignee of 'Sykes' Patent Lock and Block-Signals for Railways,' under and by virtue of patent for the United States of America, dated the 26th April, 1881, and numbered 240,622, and patent also for the United States of America, dated the 10th May, 1881, and numbered 241,246, do hereby for myself, my heirs, executors, administrators and assigns, appoint D. M. Yeomans, esquire, of Lexham Gardens, South Kensington, London, gentleman, my sole agent for the United States of America, for the purpose of working and developing the business of the said patent in those parts, for and in consideration of a payment to be well and truly made by the said D. M. Yeomans to me, the said Frederick Cheeswright, my heirs, executors, administrators and assigns, as royalty, of four pounds per lever, British money, for every lever fitted upon any railway in the United States to which 'Sykes' System of Signaling' may be attached or connected, with power for the said D. M. Yeomans to negotiate the sale of the said patents, upon terms to be agreed upon.

"In witness whereof I have hereunto set my hand and seal, this 10th day of September, one thousand eight hundred and eighty-one.

"[Seal.] Frederick Cheeswright."

This language, as the circuit court justly says, "is somewhat indefinite; and involved the exercise by Yeomans of a reasonable degree of discretion." The instrument is not a simple power of attorney; it has many of the characteristics of an exclusive license. Yeomans is to "work and develop the business of the patent

* * * for and in consideration of the payment" of four pounds for each lever used. By the terms "work and develop," the parties contemplated the employment of such means as are commonly used to render patents valuable to their owners. These means are various. One of them is by sale of the patent; another is by manufacturing and selling the patented article; another is by granting licenses, and thus inducing others to manufacture and sell. The first was withheld by the terms of the contract. The second was not, we may assume, contemplated. The capital required to enter upon such manufacture, advantageously, was doubtless beyond Yeomans' control; and if it was not, he could hardly be expected to employ it in such manufacture under an authority which, as the defendants claim and the court has found, was liable to be revoked at Cheeswright's will. The third was therefore probably the only available means open to him, or contemplated by either party. Yeomans consequently entered into contract with the defendants. He undertook to give them an exclusive license, embracing the entire territory covered by the patent, and running for the full period of its life. We agree with the circuit court that this was a virtual, if not actual sale, and was therefore in excess of his authority. What constitutes a sale of a patent, as an abstract question, need not be discussed. It is sufficiently considered in Nellis v. Manufacturing Co., 13 Fed. 451; Pickhardt v. Packard, 22 Fed. 532; Waterman v. MacKenzie, 138 U. S. 252 [11 Sup. Ct. 334]; 2 Rob. Pat. § 763; and Curt. Pat. pp. 241–243. The terms of Cheeswright's contract with Yeomans leave no doubt in our minds that Cheeswright did not intend to confer authority to transfer substantially the entire interest in the patent, as such exclusive license, if enforced, would do.

We also unite in the view that the exercise of this excess of authority was not ratified by Cheeswright. While his correspondence and testimony show that he knew the defendants had acquired privileges under the patent they do not show that he was aware of their extent, or the claim set up under them.

It follows that the defendants have not an exclusive right to the use of the patent; and that their cross bill cannot be sustained.

It does not follow, however, that the plaintiffs' bill can be sustained. As we have seen, and as the circuit court held, Yeomans had authority to grant nonexclusive licenses to manufacture and sell. In our judgment he had authority to do anything and everything usually done in rendering a patent profitable short of selling it. This we think is the plain import of the language used. The restraint upon his authority is imposed in plain terms, and is limited to selling alone. Why, therefore, should not Yeomans' contract with the defendants be held available to transfer what he had authority to convey—a nonexclusive license to manufacture and sell? A deed for a fee, where the grantor has a life estate only, is none the less available for the transfer of this. The plaintiff cannot be injured by such construction of the contract; and equity plainly requires it. The defendants, in taking the transfer, acted in good faith, as the circuit court has found; and they have continued to act in good faith under it. Their mistake respecting Yeomans'

authority is attributable to Cheeswright's indefinite and ambiguous language; and as before remarked, the error, with the license so construed, can do him and his assignees no harm; while to the defendants, who were thus misled into the expenditure of money and the preparation for an extensive business, it may result in serious loss, and certainly would if we adopted the plaintiffs' views. Furthermore Cheeswright was cognizant for years, that they had acquired rights under the patent—at least that they were manufacturing and selling, presumably under license, and not only did not object, but recognized their rights, and claimed to be paid the royalties thus earned. It is true he was unaware (so far as appears) that the license was exclusive in terms; but that is unimportant here. The justice of this view is, to a limited extent, conceded; and the decree, in consequence, relieves the defendants from liability for infringement prior to the revocation of Yeomans' authority. But why should the effect of the license be so limited—why should the revocation annul it? It was granted while the authority was in full force. The defendants were not agents or attorneys of Yeomans, and liable to be affected by his dismissal. They are purchasers of a license without limitation as to time, and irrevocable. As well might it be said that railroad companies purchasing signals and rights to use them would lose the fruits of their purchases by the subsequent annulment of Yeomans' authority. Granting that Yeomans' authority might be revoked (and we believe it might under the doctrine of Willcox & Gibbs S. M. Co. v. Ewing, 141 U. S. 627 [12 Sup. Ct. 94]), all acts previously done in pursuance of it remain in force.

It is urged that Yeomans' contract with the plaintiffs is fatally defective because the paper witnessing it is not in Cheeswright's name. The paper recites the power of attorney and is made in pursuance of it. The objection is purely technical, without color even of substance. Rarely has this doctrine been applied in modern times to a case where the instrument bore evidence that it was executed in pursuance of the power, without the court feeling called upon to excuse itself for doing so. Still if the defendants' right grew out of the paper alone, —that is if the license could only be created by writing,—the defective execution (if it is defective) would present difficulty. The right does not, however, grow out of the paper, but out of the contract, of which the paper is evidence simply. The law does not require such a paper to create or support a license; Walk. Pat. (2d Ed.) § 303; 3 Rob. Pat. §§ 806, 809; Buss v. Putney, 38 N. H. 44; Potter v. Holland, 4 Blatchf. 206 [Fed. Cas. No. 11,329]; Baldwin v. Sibley, 1 Cliff. 150 [Fed. Cas. No. 805]; Jones v. Berger, 58 Fed. 1006. Where a paper is used it is simply for convenience and certainty of proof. The authorities cited by the plaintiffs, relate to the defective execution of papers for the transfer of land, patents, etc., where the writing is essential to the transfer. No case is cited in which the technical rule there stated has been applied to any other paper. We need not determine, however, whether this distinction is well founded or not; for if the paper in question was necessary to support the license, and its execution is defective, the defect has

been cured by Cheeswright's conduct. He recognized and acted upon the license. His correspondence and testimony—saying nothing of Yeomans' testimony—show this very plainly. He was unaware of the terms in which it was expressed, and the claim set up under it, but it may be assumed that he was aware the terms were not more favorable to himself than the construction we have placed upon those used; for as we have seen the license when thus construed is consistent with the power granted to Yeomans, and is the most available means of doing what he desired to accomplish,—in other words it is such a license as he authorized, and knew was most likely to be granted.

Until Yeomans' authority was revoked and the defendants had knowledge of it, their settlements with him were a discharge of liability. For any moneys which may have become due since, settlement must be made with the plaintiffs. How the account stands we are not called upon to determine. The parties disagree about it, and the question is one principally of figures. If there is anything due the courts of the state have jurisdiction and afford adequate remedy. The suit is not based on such a claim.

The decree must therefore be disaffirmed and the bill dismissed with costs. The case is remanded to the circuit court to carry out this order.

SHOEMAKER et al. v. MERROW.

(Circuit Court of Appeals, Third Circuit. May 18, 1894.)

No. 14.

1. PATENTS—INFRINGEMENT SUIT—EFFECT OF ADMISSIONS IN INTERFERENCE PROCEEDINGS.
   A party to an interference proceeding practically withdrew from the contest by means of a stipulation by which he agreed that the preliminary statement of the other party should be accepted as evidence on the question of priority, that no additional evidence should be received, and that the matter should be decided on this evidence alone, without argument. A patent having been issued to his opponent, he accepted a license thereunder. *Held*, that the stipulation amounted to an admission of priority of invention, sufficient, as evidence in a subsequent suit for infringement, to show prima facie that the successful party in the interference was the first inventor.

2. SAME—WITHDRAWAL OF CLAIM—ESTOPPEL.
   One who retires from an interference proceeding, and withdraws his claim for the specific element forming the subject of the interference, is thereafter precluded from claiming such element under his patent. 59 Fed. 120, reversed.

3. SAME—LIMITATION OF CLAIMS—CROCHETING MACHINE.
   The Merrow patent No. 428,508, for a crocheting and overseaming machine, construed, and *held* not infringed. 59 Fed. 120, reversed.

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

This was a suit by Joseph M. Merrow against John Shoemaker and others for infringement of letters patent No. 428,508, issued to complainant May 20, 1890, for a "crocheting or overseaming machine." The circuit court rendered a decree dismissing some of the

defendants, but in favor of the complainant as to the others. The opinion is reported in 59 Fed. 120, and contains a full statement of the facts. Defendant appealed.

Joseph C. Fraley and S. S. Hollingsworth, for appellants.

Joseph B. Church, for appellee.

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

BUTLER, District Judge. No statement of the case is necessary to an understanding of what we propose to say, and none therefore will be made. Of the numerous errors assigned the following only need be noticed:

"(7) The circuit court erred in not holding that the conduct of the complainant, Joseph M. Merrow, in the matter of the interference declared in the United States patent office between the application of said complainant and the application of said George D. Munsing and the application of Thomas J. Holton and Frank Malsch, constituted an admission against interest by the said complainant which is competent evidence against him of the fact of prior invention by said George D. Munsing of the subject-matter in issue in said interference. (8) The circuit court of the United States for the eastern district of Pennsylvania erred in not holding that any construction of said first, second, third, and fourth claims of said letters patent No. 428,508, dated May 20th, 1890, which would include the defendants' machine, would render the said claims invalid by reason of the fact that prior to the invention by the said complainant, Joseph M. Merrow, of the subject-matter of the said claims, a machine, substantially identical with the defendants' machine had been known to and used by George D. Munsing, of and at Minneapolis, Minn."

We may adopt all the circuit court has said, except what relates to the defense based on Munsing's patent. That patent covers everything embraced in the claims before us. The effort to distinguish it by reference to the fact that these claims are broader in terms than those of Munsing is we think futile. The invention shown and claimed is the same. While Merrow's claims do not specify the "finger," as Munsing's do, they embrace it by implication. That Merrow so understood is shown by the fact that he never made a machine without it (or its plain equivalent), and by his assertion that the respondents' machine, which contains the "finger" as a necessary element, is an infringement. But, furthermore, Munsing's ninth claim says nothing about the "finger," and, consequently, is as broad even in terms as Merrow's. If it be conceded, however, that the omission of the latter to specify the "finger" as an element distinguishes his patent from Munsing's, then it must also be conceded that it distinguishes the respondents' machine from Merrow's, for theirs contains the "finger," will not operate without it, and is identical with Munsing's.

The only question, therefore, is, did Munsing anticipate Merrow? The proofs show that Merrow, Holton & Malsch, and Munsing severally made application for patents for "crocheting machines,"—the first on September 1, 1887, the second on September 8, 1888, and the third on October 17, 1888,—consisting of similar combinations, containing nothing new (at least as respects the claims under consideration) but the substitution of an "intermitting feed mechanism"

(which admits of two or more stitches being taken in the same place) for the old mechanism which fed continuously, after each stitch. The patent office, after expressing doubt of the patentabilty of either, declared interferences—first, between the former two applicants, and, second between all three. While certain of the respective claims only were named in the issue formed, those named embrace substantially everything covered by the invention. As between Merrow and Holton & Malsch, the decision was in favor of Merrow. This result lost Holton & Malsch their place in the other contest, and it proceeded between Merrow and Munsing alone. After taking testimony, the parties entered into a contract as follows:

"It is hereby stipulated and agreed by and between the parties hereto that the sworn statement of George D. Munsing, executed on the 20th day of September, 1889, and filed for record in this cause September 24th, 1889, be received and accepted as evidence on his behalf on the issues of priority of invention now pending between the parties hereto, with the same force and effect as though regularly taken upon notice, and duly filed in this case; that no further or additional evidence shall be taken or received; that the case shall be taken up and decided at the earliest possible moment by the examiner of interferences, without argument, and upon the evidence contained in said sworn statement."

The sworn statement of Munsing, referred to above, is as follows:

"That he conceived the invention set forth in the declaration of interference on or about the 1st day of December, 1882; that on or about the 1st day of June, 1883, he made drawings of the invention; that on or about the 1st day of June, 1883, he first explained the invention to others; that on or about the 15th day of July, 1883, he begun work on a full-sized machine embodying such invention, which machine was completed about the 10th day of November, 1884, and that on or about the 10th day of November, 1884, he successfully operated said machine, and that he has since built other machines embodying said invention, and has used the same; that he has made no models except full-sized working machines."

Thus Merrow withdrew from the contest, and permitted—indeed, assisted—Munsing to make out his case, and obtain a patent, under which he (Merrow) was to have an exclusive license, paying a royalty of $10 for each machine manufactured thereunder. It is unnecessary to pass upon the question of estoppel, which the respondents base on this conduct. It is sufficient to consider its effect as evidence on the question of priority. We regard it as an admission of Munsing's priority, and his consequent right to a patent. The inference seems reasonable that Merrow proceeded far enough with the contest to discover that a continuance would result disastrously to him, then abandoned it, and united with Munsing to obtain a patent for their joint benefit. This inference finds support in Merrow's testimony. Any other view seems inconsistent with his conduct. Why, otherwise, should he abandon a contest thus entered upon and prosecuted nearly to its close, and subject himself to the payment of a royalty on the machines to be manufactured, if he was the first inventor, and consequently entitled to the monopoly of such manufacture without paying tribute to anybody? It is said he was tired of the contest, and therefore compromised. Men do not commonly tire of such contests until their hopelessness is discovered.

We see little evidence of compromise in the transaction. Munsing got the patent; and, although Merrow got a license under it, he got it at a pretty large price. But, whatever may have induced his action, it should be regarded as an admission of Munsing's priority, fully sufficient to make out a prima facie case against him. If he could have answered this, it was his privilege to do so, and he would no doubt have done it. As he did not, we must hold it to be decisive.

But suppose it was not shown that Munsing anticipated him, and his patent was consequently held to be valid. The result would be the same. His claims in such case would necessarily be so construed as to exclude the "finger" and its equivalents. After withdrawing a specific claim for this element, in favor of Munsing, he would be precluded from setting it up. His patent, if valid, is for the combination minus the "finger,"—a device whose novelty consists in dispensing with this element. The respondents, as before suggested, do not infringe such a device; for they use the "finger," and their machine will not work without it.

The decree of the circuit court is therefore disaffirmed, and the bill must be dismissed with costs.

GAMEWELL FIRE-ALARM TEL. CO. et al. v. MUNICIPAL SIGNAL CO.

(Circuit Court of Appeals, First Circuit. April 11, 1894.)

No. 43.

1. PATENTS—ANTICIPATION—PRIOR STATE OF THE ART.
   The Noyes patents, Nos. 359,687 and 359,688, for improvements in municipal signaling apparatus, whereby an alarm is sounded on receiving emergency signals, but not on receiving ordinary signals, each device being a combination of a multiple transmitter adapted to send signals of either class automatically, a single receiving instrument, and an alarm which responds to signals of one class, and not to others, the method of the first patent being by varying the strength of the current, and that of the second by varying the duration of current impulses, were not anticipated by prior patents for similar devices which either lacked a multiple transmitter, or, if having such a signaling apparatus, employed independent registers, which were dispensed with by the single receiver of the patents. 52 Fed. 464, affirmed. Putnam, Circuit Judge, dissenting as to the second patent, on the ground that it was void because covered by the claims of the first.

2. SAME—ANTICIPATION—EVIDENCE.
   Evidence of experimental use, merely, of a device, the model of which is not produced, and which was not known to a subsequent inventor, is insufficient to show anticipation of his patent.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

This was a suit by the Municipal Signal Company against the Gamewell Fire-Alarm Telegraph Company and others for infringement of certain patents. The circuit court rendered a decree for complainant (52 Fed. 464), and defendants appeal.

Charles N. Judson, Causten Browne, and Richard N. Dyer, for appellants.

Fish, Richardson & Storrow, for appellee.

Before PUTNAM, Circuit Judge, and NELSON and WEBB, District Judges.

NELSON, District Judge. This is a suit brought upon letters patent No. 359,687 and No. 359,688, both dated March 22, 1887, granted to Bernice J. Noyes, as assignor to the plaintiffs. Infringement is alleged of the first two claims of No. 359,687, and of all the five claims of No. 359,688. Both patents relate to improvements in municipal signal apparatus. The first patent (No. 359,687) describes a municipal signal apparatus, the purposes and objects of which are substantially as follows: As is usual with such mechanism, there is a central station, where messages, alarms, and the like are received, and there are substations in the shape of boxes, located at various points throughout the city or town. From these boxes it is desirable that two classes of alarms shall have the capacity of being sent. One class of alarms is of such a nature that they need immediate attention, and, to draw the attention of the attendant to these alarms, it is arranged that, when such alarms are received, a bell shall be rung, so that the attendant shall see what the want is. The other class of messages consists of those to which no immediate attention need be paid, the record of which merely needing supervision at the end of the day. These objects are carried out by substantially the following mechanism: At the central station there is arranged in one circuit a recorder, the circuit of which is controlled by a relay in the main circuit, which will respond either to a total break in the circuit or to a reduction in the current strength, the relay having a strong retractor, which moves the armature backward, and completes the local circuit of the recorder for all these current changes. Another relay is included in the main circuit, which is not as sensitive, and which responds only to total breaks in the circuit. This relay controls the local circuit, having a bell in it. The operation is as follows: If a message is to be sent which is merely to be recorded, a current is sent over the main line, of reduced strength, and the recorder of the local circuit is operated alone, thus making a record of message, but not ringing the alarm. If it is desired to send from a box a message requiring an alarm, then the circuit is broken in the main line, and both the recording instrument and the bell circuit are operated, and the attendant's attention is immediately called to the fact that an urgent message is being received. Thus, by having two relays differently adjusted to the main line, and a signal box capable of sending either total makes or breaks, or currents of diminished strength, messages can be received on the recorder without ringing an alarm, or they can be accompanied by an alarm, and the character of the message—whether it requires an alarm or not—will be determined by the implement used to send in the alarm. The second patent (No. 359,688) seeks to accomplish identically the same purpose, but in a different way. Instead of

having instruments in the main circuit responsive to changes in the strength of the current in the circuit, it has instruments and connected mechanism responsive to makes and breaks which differ in time. Thus a series of short breaks in the main circuit will act on the recorder, and record a message, without giving any alarm; but, if it is desired to send in an alarm accompanying the message, this is accomplished by a long break, which, by the operation of suitable clockwork, closes the alarm-bell circuit, and calls attention to the fact that a message requiring immediate attention is being recorded. Thus the mechanism of this last patent accomplishes identically the same result as the mechanism of the first patent, by means of long and short breaks, while the first patent accomplishes it by means of breaks and changes of current strength in the circuit.

The principal defense set up in this case is that in view of the state of the art as shown in certain patents which were prior in point of time to the Noyes patent, and in view, also, of the so-called "Wood Device," there was nothing patentable in the Noyes apparatus. The first patent relied upon by the defendants is one granted to J. W. Stover, July 26, 1881. That was a patent for improvements in telegraph relays, so that certain signals may be sounded in one relay, and certain other signals coming over the same line may be sounded on another relay,—one relay operating always; the other operating when the proper current change is sent over the line. The apparatus for accomplishing this result consists of two coils, one about the other, the outer one of which is a primary, and the inner one a secondary, coil, together with two armatures so set that by a change in the current the sounder of one circuit will alone be operated, or the sounders of both circuits will be operated. The patent says:

"A sudden increase or decrease in the strength of the primary current, without actually interrupting it, will set up induced currents in the secondary coil, and operate the polarized armature, and thus signals may be sent through the main circuit, which will be received upon the receiving instrument M, and not upon the receiving instrument m."

This device plainly differs from the Noyes invention in having two separate and independent receiving instruments. It also lacks a multiple transmitter, which forms a part of the Noyes combination.

The Field patent of June 19, 1883, is also relied on as anticipating the Noyes invention. The scope of this patent is set forth with great clearness in the opinion of the court below. It is for a district telegraph apparatus for recording stock quotations, and is so constructed that the operator may accompany any message with an alarm signal. Two magnets are used, one neutral and the other polarized. The neutral, or printing magnet is operated in the usual manner by making and breaking the circuit. When, however, the operator desires to ring the alarm, he reverses the printing current, and so operates both the printing and polarized magnets, and thereby rings the alarm bell. The operator can send a message without an alarm, or he may send the same message with an alarm, depending upon his will. By the Noyes invention, every message of a certain kind must be accompanied by an alarm, while every message of a dif-

ferent kind can never be accompanied by an alarm. In the Field apparatus the operator may transmit the same message on distinct occasions, and may ring the bell on one occasion, and not on the other. The Field patent contains nothing in the nature of a multiple transmitter adapted to send messages automatically by current changes of different character, as in the Noyes invention.

Of the prior patents upon which the defendant relies, those which were issued to J. C. Wilson in 1885 and 1886 bear the closest resemblance to the Noyes system. They describe a municipal signal apparatus, with a central station and substations having the capacity of communicating with each other. The substations are provided with multiple signalling apparatus, arranged to send certain signals by a weakening in the current strength due to resistance, and other signals due to total cessations in the current. At the central station there are two relays, two recorders, each in a local circuit, with a bell in one circuit. The two relays are so adjusted that one will operate on a reduction of current strength, and the other only on a total break. The police or patrol calls operate by a reduction of current, registering on the recording instrument the patrol call. If a want call is sent in, the multiple transmitter is operated, so that the current is broken in the transmission of the message, and the record is made on a separate instrument. In this apparatus there are multiple transmitters at the substations, capable of sending messages by reductions in the current strength or total interruption, and at the central office there are two relays, one of which controls a patrol recorder, and the other controls a want or signal recorder, with an alarm bell. In these patents two registers are indispensable to its operation,—one for recording patrol calls, and one for recording want calls. Wilson states in his second patent that the reception of both patrol calls and want calls in the same instrument was objectionable, and his apparatus was designed to obviate what he considered to be that difficulty. The Noyes invention seems to have removed the objection suggested by Wilson, and consists in an improvement upon the state of the art as shown in the Wilson patents, which improvement consists in successfully dispensing with the necessity of two complete sets of registering apparatuses at the central station. The use of a single recording apparatus simplifies the central office mechanism, reduces its cost, and entails less attention and labor on the part of the attendant. It is less difficult to keep one recording instrument adjusted than two. It is also thought more convenient in practice to have all the signals recorded on one strip of paper than upon two. The Noyes apparatus has the double advantage of producing an improved result, and of doing it more cheaply and with less complicated mechanism. Of the other prior patents referred to by the defendant, it is only necessary to remark that they have still less resemblance to the Noyes invention than the Stover, Field, and Wilson devices.

In regard to the Wood device, it appears that in 1877 Wood applied for a patent upon an improvement in automatic telegraph signal instruments, which application was rejected by the patent office. His application was accompanied by a model which, it is

claimed, embodied the Noyes invention. The model itself was not produced, and the account given of it by the witnesses is somewhat confused and conflicting. The only use ever made of it by Wood was merely experimental. It was never used for any practical purpose. There is no pretense that Noyes ever knew of its existence. The evidence is wholly insufficient for the court to conclude that Noyes' invention was anticipated by the Wood device. The evidence is sufficient to prove infringement. The defendant manufactured apparatus embodying the features of the Noyes invention, set it up in its office, and offered to furnish it, or other apparatus like it, to the city of Boston. Decree of the circuit court affirmed.

WEBB, District Judge, concurs in this opinion.

PUTNAM, Circuit Judge. If the patents on which this bill is framed are to be construed as covering only detailed construction, the bill would fail on the issue of infringement for lack of evidence as to the particulars of the apparatus of the defendants (now appellants). If construed broadly, as claimed by complainant below, the substance consists in a combination of a multiple signal transmitter with a message receiving instrument at the central station, and an alarm, which latter responds to signals of one character, and not to others. As a broad invention thus defined, it has nothing which was not fully described in the prior systems of Wilson except a single receiver in lieu of two, and Field had the single receiver. When the patents in suit were taken out, this distinction, if held of any value whatever, was apparently regarded as of little consequence, because in the specifications of the first one it was said that the system described therein might be "employed to operate two independent receiving instruments at a central station." There is much ground for maintaining that a single receiving instrument was the normal condition of the art, and that Wilson adopted two only because he regarded them preferable. But, however these matters may have been, it is apparent that, when a single receiving instrument was desired in the place of two, the change could easily have been made by any person skilled in the art. There was no mystery or difficulty whatever in doing this. The entire advance made by Noyes, if he made any except in details, was in the adaption of Field's single receiver to the Wilson system, and this seems to me to have required no inventive faculty.

Therefore, if I felt at liberty to proceed in this case on my own convictions, or on my understanding of the tendency and practical effect of the decisions of the supreme court during the last few years, which have sustained so many decrees in the circuit courts holding patents invalid for want of patentable novelty, and reversed so many in which the patents have not been held invalid for that reason, and especially the tendency and practical effect of the series of cases concerning "double use," so called, beginning with Pennsylvania R. Co. v. Locomotive Engine Safety Truck Co., 110 U. S. 490, 4 Sup. Ct. 220, and ending with Knapp v. Morss, 150 U. S. 221, 225, 226, 228, 14 Sup. Ct. 81, and of the rule in Gordon v. Warder,

150 U. S. 47, 50, 14 Sup. Ct. 32, to the effect that while certain prior patents may not strictly anticipate, yet they may aid to create such a state or condition of the art as to require the restriction of a subsequent patent "closely to the devices and methods claimed" by it, I could not concur in any opinion sustaining the validity of either of these patents. But apparently the trend of this court, as shown in Folding Bed Co. v. Osgood, 7 C. C. A. 382, 58 Fed. 583, and in Herrick v. Leveller Co., 8 C. C. A. 475, 60 Fed. 80, precludes me from following my own views as above expressed. Therefore, I concur in so much of the opinion of the court as gives a broad support to Noyes' first patent.

It seems to me, however, that his second patent must have been taken out as a matter only of greater caution, through fear that, by some possible interpretation of the claims of the first, every method of using the electric currents would not be covered. To my mind, this was unnecessary; and, unless the patents are to be limited to details, the claims of the first patent cover every form of current changes particularized in either. I think, therefore, that under Leggett v. Oil Co., 149 U. S. 287, 13 Sup. Ct. 902, and more particularly and clearly under Miller v. Manufacturing Co., 151 U. S. 186, 14 Sup. Ct. 310, the second patent is void. Most assuredly has there been no infringement of the fourth claim of the second patent, which expressly unites in the combination two receivers. On so much as relates to the second patent, I know of no decision of this court which precludes my judgment.

On the question of infringement I agree fully with the conclusions of the court.

For the reasons stated, I concur touching the first patent, but dissent touching the second.

E. C. ATKINS & CO. v. PARKE et al.

(Circuit Court of Appeals, Sixth Circuit. May 8, 1894.)

No. 118.

1. PATENTS—ASSIGNMENT—CANCELLATION.
   A clause in an assignment of a patent that, if the assignee fail to make certain statements and payments within a certain time after the same become due, the assignors shall have the right, by giving notice, to cancel the exclusive privilege and grant conferred, does not authorize a cancellation by notice given at a time when no money is due.

2. SAME—SUIT BY ASSIGNEES FOR INFRINGEMENT—CROSS BILL BY ASSIGNORS.
   On a bill by the assignee of a patent against the assignors for infringement, praying for an accounting, defaults of the assignee in not complying with conditions of the assignment and other wrongs on his part, which do not authorize a forfeiture by the terms of the contract, are not grounds for a cross bill by the assignors to cancel the assignment, or to remove the cloud on their title to the patent arising therefrom, or for other affirmative relief, where all the matters complained of may be pleaded as defenses to the original bill, and damages therefor may be considered on the accounting.

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

This is a bill filed by E. C. Atkins & Co., a corporation created and organized under the laws of the state of Indiana, against Amos S. Parke and Sarah A. Parke, residents of Bay City, in the state of Michigan, for infringement of letters patent No. 333,540, issued to Sarah A. Parke, January 5, 1886, for swaging saw teeth, and for an accounting for profits and damages.

The bill avers that on the 30th of January, 1886, the patentee constituted Amos S. Parke her true and lawful attorney, to sell saw swaging machines, and transfer territorial rights to manufacture and sell the same. On February 2, 1886, the bill avers that said Amos S. Parke, as such agent, sold and conveyed to the plaintiff the right to make and sell said machines throughout the United States, excepting the states of California and Oregon, and the territory of Washington; that all interest in said patent, excepting in said states and territory, was thereby transferred and conveyed to the plaintiff. The bill further avers that the defendants, without the consent or license of the plaintiff, and notwithstanding said grant to sell, have infringed the plaintiff's rights by making, at Bay City, Mich., saw swaging machines according to the invention of said patent, and have refused to desist from such manufacture or account for their profits and damages. The bill prays for an injunction and for an account.

The answer admits that the plaintiff is a corporation; that Sarah A. Parke is the true inventor of the patent named; that she made Amos S. Parke her true and lawful attorney; but denies that said attorney did grant and convey to the plaintiff, or its representatives or assigns, the exclusive right to make and sell said machine according to said invention. But defendants admit that on said 2d of February, 1886, they did enter into a certain contract in relation to the manufacture and sale of the improvements mentioned in said letters patent, and that a copy of said contract is attached to the answer.

The defendants deny that the plaintiff has substantially complied with the terms of said contract, and deny that, by a substantial compliance with the material conditions thereof, all right and title to said letters patent is vested in the complainant. The defendants deny that they have infringed by manufacturing said saw swaging machines, or that the plaintiff had any right or title in and to said improvements described in said letters patent at the time said bill was filed, and, at that time, deny the plaintiff had any interest in the profits of said machines, made under said patent, and deny that the plaintiff had any right to make and vend such machines.

The defendants admit that said Amos S. Parke, after the termination of the contract marked "Exhibit A," as hereinafter stated, on or about the 29th day of January, 1889, did begin to make at Bay City saw swaging machines, and has made about 60 of such machines, but deny that they were unlawfully made in violation of the plaintiff's rights.

(1) Defendants claim that said contract of February 2, 1886, was not an unconditional sale or transfer of the defendants' title, but was only a conditional sale, liable to be terminated by default of the plaintiff, at the election of the defendants.

(2) That said plaintiff was in default by failing to comply with the stipulations in said contract, and same was not in force at the time of the wrongs complained of.

(3) That plaintiff has failed to comply with the condition of said contract by neglecting to fill orders for said machines; that, on the day said contract was made, said defendants gave an order to the plaintiff for twenty-five of said machines, but plaintiff failed to fill said order until about July 8th, following, when ten of said new swages were sent; that repeated orders were sent for said machines, but not filled; and that the defendants thereby lost sales of the same, as they had contracts for the sale of the same.

(4) That plaintiff failed to manufacture said machines as fast as the demands of trade required, and as it agreed to do.

(5) That from February 2, 1886, to January 26, 1888, plaintiff had made and put on the market not to exceed 60 of said machines, and had not sent to defendants to exceed 30, though there was ready sale and an active demand for the same.

(6) That, by said plaintiff's failure to make and place said machines on the market, the defendants lost the sale of a large number, and the profits on the same.

(7) That the plaintiff made what machines were manufactured in a defective and unworkmanlike manner, so as to injure the sale of the same, and, of the 30 sent to defendants, 10 were so defective that they could not be sold, and were returned to the plaintiff; that, out of the 60 machines made and put on the market, 42 were returned, as appeared by the plaintiff's letter (marked "Exhibit B"), and the defendants charge they were returned because of defective make; that from February 2, 1886, to January 26, 1888, the defendants had orders for machines which would have been filled by machines returned if they had been well made.

(8) That plaintiff failed to promote sales by refusing to advertise; that defendants furnished cuts which were not used; that portions of said invention which related to swaging band saws' teeth were wholly omitted; that, though the plaintiff manufactured various articles in lumber and working of wood, and advertised largely, in none of said advertisements is said improvements shown.

(9) Plaintiff was interested in the Hinkly machine, used for similar purpose, and therefore did not work in good faith under said contract, but made inferior machines to retard their sale.

(10) That plaintiff has forfeited its rights, failed to make reports and pay royalties; that from the 2d of February, 1886, no report of sales was made until March 17, 1887.

(11) That on the 26th of January, 1888, the plaintiff having forfeited its rights under said contract, defendants elected and did declare the contract forfeited, by written notice served on the plaintiff.

(12) Defendants charge that plaintiff was interested in another saw swaging machine, and entered into a contract to control the machines made under the Parke patent for the purpose of preventing said machine from being put on the market, and that said contract was a fraud on its part.

(13) That, since the making of said contract, plaintiff has caused to be made and put on the market other saw swaging machines, and did all in its power to prevent the Parke machines coming onto the market.

(14) Defendants claim the patent described in No. 333,540 to be of great value and use to the public, and, if manufactured and sold, would be a source of great revenue to the defendants and benefit to the public, and, if complainant is permitted to prevent the manufacture and sale, defendants will be irreparably injured.

Defendants submit the plaintiff is entitled to no relief, and pray for the same benefit by their answer, as though they had filed a cross bill or a demurrer.

Chester Bradford, for appellant.

James Van Kleeck, for appellees.

Before TAFT and LURTON, Circuit Judges, and RICKS, District Judge.

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

This case was first heard upon the pleadings and evidence by Circuit Justice Brown, while district judge for the eastern district of Michigan. In an oral opinion, which we find printed in the record, he held that the written instrument of February 2, 1886, set forth in the bill, was an assignment of the patent, and vested the legal title thereto in the assignee, which is the plaintiff corporation, described as E. C. Atkins & Co. He further proceeded to consider whether, without a reassignment or a cancellation of the agreement by a judicial decree, the assignors could claim that they were exonerated from liability as infringers. His conclusion was that:

"Where a patentee contracts for the use or sale of the patented article upon the payment of certain royalties, that he cannot, as against such licensee,

maintain a suit for infringement simply upon the ground that the licensee has failed to pay the agreed sum. It was said in Hartell v. Tilghman, 99 U. S. 547–555, that in such cases the patentee can establish his royalty, and sue at law, and recover every month or every year for what is due. He may also file a bill in chancery to have the license annulled or set aside, because of the difficulties placed in the way of its fair execution by the defendant. It was held, however, that he could not abandon the contract, treat it as a nullity, and charge the defendants as infringers liable as trespassers under the act of congress. 'We do not agree,' says Mr. Justice Miller, 'that either party can, of his own volition, declare the contract rescinded, and proceed precisely as if nothing had been done under it. If it is to be rescinded, it can only be done by a mutual agreement, or by the decree of a court of justice. If either party disregards it, it can be specifically enforced against him, or damages can be recovered for its violation; but, until so rescinded or set aside, it is a subsisting agreement, which, whatever it is or may be shown to be, must govern the rights of these parties in the use of complainant's process, and must be the foundation of any relief given by a court of equity.' * * * These authorities demonstrate that, if this had been a mere license to the plaintiff, the defendants could not have treated it as a nullity, by reason of the failure of the plaintiff to make reports or to conform to the contract in other particulars, and treat it as an infringer. Much less could it do so where it conveyed the legal title to the party by assignment to the plaintiff, since such breach would not operate in any way to revest the legal title in the defendants, or enable them to maintain suit upon the patent."

The learned judge then expressed a doubt whether, in view of the breaches of the agreement made by the assignee, and after written notice of a cancellation given by the assignors, the former could maintain a suit for infringement against the patentee. Having such doubt, and desiring to afford the assignors all rights and relief to which they were entitled under the contract and the law, he made an order staying proceedings in the pending case for 30 days, and allowing the defendant to file a cross bill. Thereupon such a cross bill was filed. In it all the material averments set out in the answer were repeated, and additional allegations made charging the defendant with default in not complying with the conditions of said contract, and that, because of such default, the complainants elected to and did terminate and cancel said contract; and further charging that the defendant, E. C. Atkins & Co., had lost all right, title, and interest to said letters patent under said assignment, because of their breach of its conditions.

To this cross bill the defendant corporation made very full and explicit answer to the charge of want of energy on the part of the defendant in manufacturing said machines, and placing the same upon the market. The defendant avers that the complainants were fully aware of the manner in which said business was being prosecuted, and that one of the complainants, Amos S. Parke, spent a considerable period of time at the defendant's works, and expressed himself as substantially satisfied with the manner in which the contract was being carried out; that they employed parties selected by complainants to manufacture the swages covered by the invention; and that, with said employment and skill, the complainants, through A. S. Parke, expressed themselves as satisfied. The defendant denies all charges of giving preference to other swage machines and being interested in the same, and avers that it acted in good faith in making and putting upon the market said machines.

The defendant further claims that all royalties and reports were made in substantial compliance with the contract, and that, if there were any informalities in such reports, or delay in making the same, objections thereto were waived by the acceptance of such royalties and reports by the complainants. The defendant further avers that such royalties and reports were accepted after notice of the cancellation of said contract by complainants. Defendant avers that said contract is still in full force, and was not canceled or rescinded by complainants' pretended notice of January 26, 1888.

Replication was duly filed. The parties stipulated to submit the case upon the pleadings under the cross bill, and upon the evidence taken under the original bill and answer.

The case came to a final hearing before Judge Swan, whose opinion is set forth in the record. In the opinion of Judge Brown, from which we have quoted, in that part ordering a stay of proceedings and allowing the defendants to file a cross bill, he stated that the evidence showed that "the plaintiff [the assignee under the patent] has been guilty of a breach of the very agreement under which he claims title to the patent," and therefore expresses doubt as to his right to maintain the suit for an infringement against the patentee. Judge Swan says: "This conclusion, reached upon the same proofs which are here presented, it will be unseemly to disregard or overrule. It practically leaves nothing for decision."

We do not understand Judge Brown to have intended, by the remark quoted, to pass definitely upon the evidence relating to that issue presented by the pleadings. The evidence on that subject was so voluminous, and the conclusion to be reached from it so important, that it is not to be supposed that he would so summarily have disposed of it. No facts are stated and no reasons given to support the conclusion. He had previously stated in the most positive terms, that the title to a patent conveyed by a written assignment, such as that exhibited to the answer, could not be revested in the assignor by a breach of the contract on the part of the assignee, so as to enable the former to maintain a suit upon the patent. He had quoted approvingly the opinion of Mr. Justice Miller in Hartell v. Tilghman, in 99 U. S. 547, that the only way to rescind such a contract was by a mutual agreement, or by the decree of a court of justice; and that, until so rescinded or set aside, it is a subsisting agreement, which, whatever it is or may be shown to be, must govern the rights of the parties, and must be the foundation of any relief given by a court of equity.

Considering the opinion in all its parts, we are therefore justified in concluding that, by the remark quoted, the learned justice did not intend to decide that there had been such a breach of the contract by the assignee as authorized its cancellation by mere notice of rescission by the assignors. The evidence would not support such a conclusion. The sixth clause of the agreement, under which the assignors claim the power to rescind, provides that, if the assignee shall fail to make the statements and payments called for by a preceding clause of the contract within 10 days from the time the same shall become due, then the assignors shall have the right to cancel

the exclusive privilege and grant conferred, by giving notice of such intent. This is a clause providing for the forfeiture of title, and the condition upon which the forfeiture is to accrue must, of course, be strictly construed in favor of the assignee. The condition precedent to forfeiture could not be fulfilled unless there was a failure to make both the reports and the payment within the time required. The evidence conclusively shows that when the assignors attempted to cancel the contract, in January, no money was due from the assignee. Whatever the delinquency as to reports, therefore, the condition of forfeiture was not fulfilled.

The other wrongs complained of in the cross bill are not made conditions authorizing or working a forfeiture by the terms of the contract. They are all wrongs which the complainants, in the cross bill, have pleaded as matters of defense to the original bill, or which may be so pleaded if they ask to be permitted to do so. The original bill prays for an accounting, and in such accounting, before the master, all damages claimed for the wrongs alleged can be considered, and the proper relief allowed, if covered by the proof. They are not of a character to entitle complainants to affirmative relief by a cross bill. In the court below, it was held by Judge Swan that the cross bill could be sustained, in order to relieve complainants from the cloud upon their title to the letters patent. Inasmuch as we have already found that the evidence did not show that the conditions named in clause 6 had been broken as claimed, it follows that there is no cloud upon the title to be removed.

Various other errors are assigned by the appellant, not necessary to consider in view of the conclusion already stated.

For the reasons given, the decree of the circuit court must be reversed, the cross bill be dismissed, the injunction now in force be dissolved, and the case be remanded for further proceedings under the original bill.

REECE BUTTON-HOLE MA. CO. v. GLOBE BUTTON-HOLE MA. CO. et al.

(Circuit Court of Appeals, First Circuit. April 20, 1894.)

No. 72.

1. PATENTS—LIMITATIONS—EQUIVALENTS.
   Where the essence of an invention in respect to buttonhole machines is the production of an automatic relative motion between the stitching mechanism and the plate, whereby the buttonhole is stitched along one side, and then about the eye and along the other side, which constitutes a broad and meritorious invention, the fact that the specifications and claims speak of a movement or traveling of the stitching mechanism only will not prevent the application of the doctrine of equivalents, so as to cover a machine which accomplishes the same result by moving the plate while the stitching mechanism remains stationary. 54 Fed. 884, reversed. Winans v. Denmead, 15 How. 330, applied.

2. SAME—EFFECT OF AMENDING CLAIMS.
   The rejection of a claim and its amendment, where there is no direct issue of novelty or invention, and the amendment comes in incidentally and in reference to an incidental matter, does not necessarily exclude a liberal interpretation or the application of the doctrine of equivalents, when the invention is a broad one. 54 Fed. 884, reversed.

3. SAME—VALIDITY—INFRINGEMENT—BUTTONHOLE MACHINES.
The Reece patent, No. 240,546, for improvements in buttonhole machines, construed, and claims 5, 11, 12, 13, and 18 *held* valid, and infringed. 54 Fed. 884, reversed.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

This was an action by the Reece Buttonhole Machine Company against the Globe Buttonhole Machine Company and others for infringement of letters patent Nos. 240,546 and 349,359, to John Reece, for buttonhole sewing machines. The latter patent was withdrawn in the court below before the hearing. The circuit court dismissed the bill (54 Fed. 884), and the complainant appealed.

The claims of patent No. 240,546, which were in controversy, are as follows:

5. In a buttonhole sewing machine, a framework for the needle bar and looper, and a bedplate to hold the material, combined with two cams and with mechanism between the said cams and framework, whereby the needle bar, by the movements imparted to it longitudinally and laterally of a buttonhole by the said frame, is caused to travel backward in a substantially straight line until near the eye of a buttonhole, then backward and outward and inward, then forward and inward, to follow the contour of the edge of the enlarged eye part of the buttonhole, and then forward substantially in a straight line along the other side of the buttonhole, as set forth.

11. In a buttonhole sewing machine, a clamp and bedplate to hold the material, the framework, a, the buttonhole cutting device connected therewith, combined with a cam disk to operate the said buttonhole cutter, to cut a slit in the material held by the clamp, and then to move said framework longitudinally upon said bedplate to remove the blade of the cutter from above the clamp, substantially as described.

12. The framework, a, and bedplate, a', and the cloth-clamping mechanism, movably connected with the bedplate, combined with the cutting bed and means for moving the cutting bed and frame longitudinally with relation to the cloth-clamping mechanism, the said cutting bed being provided with inclines or projections to act upon the clamp and spread the buttonhole as the relative positions of the bedplate and framework are changed longitudinally, substantially as described.

13. The main shaft, a^3, the belt pulley loose on the said main shaft, the disk or pulley, r^4, fixed to said shaft, and means to connect it with or disconnect it from the loose pulley, the stopping-levers and its spring, the movable framework, which carries the needle and looper mechanisms, and means to move the said framework, in combination with the controlling bar, whereby the belt pulley is disengaged from the fixed pulley, r^4, to enable the shaft, a^3, to remain at rest while the belt pulley continues to run loosely on the said shaft, substantially as and for the purposes set forth.

18. The frame of a sewing machine constructed with two arms, one arm carrying above the cloth plate a reciprocating needle bar having a periodical rotary motion, and the other arm carrying below the cloth plate a looping mechanism having a rotary motion in unison with that of the needle bar, substantially as described.

Lange & Roberts and Fish, Richardson & Storrow, for appellant.

Clarke & Raymond, Chauncey Smith, and Charles E. Mitchell, for appellees.

Before COLT and PUTNAM, Circuit Judges, and NELSON, District Judge.

PUTNAM, Circuit Judge. The bill in this case was framed with reference to two patents, but one was withdrawn before the hear-

ing in the court below, so that all we now have to consider are claims 5, 11, 12, 13, and 18 of No. 240,546, issued to John Reece, April 26, 1881. The main question relates to the proposition that this patent can in no event cover a machine of which the frame is stationary and the plate moves. It grows out of the fact that in the specifications and claims are many expressions indicating that the frame moves and the plate is fixed. A part of the preamble is as follows:

"This invention relates to sewing machines for stitching buttonholes, and is an improvement upon that class of the said machines wherein the stitching mechanism is made to travel first along one side of the buttonhole slit, then about the eye, and along the other side of the slit."

The fifth claim also contains the following: "Whereby the needle bar, by the movements imparted to it longitudinally and laterally of a buttonhole by the said frame, is caused to travel backward." Other expressions of like character appear, with more or less positiveness and fullness, in nearly all the other claims, and in various parts of the specifications; and nowhere throughout the patent is found any indicating that the frame might be fixed and the plate movable.

Theoretically, an inventor, in taking out a patent under the statutes of the United States, subtracts and adds nothing from or to his actual invention. The proceedings recognize his incipient ownership, and theoretically they constitute only a division of time, by which there is carved out of the entire estate a holding for a period of years for the inventor, and the fee is left to the public. Thus his patent is not at all akin to the king's grant, which must be expressed "ex speciali gratia, certa scientia, et mero motu regis," or be interpreted against the subject who receives it. Except for the provisions which, for public interests, require in a patent a description and claim, the same unrestricted rules of the common law would protect an inventor's statute right as are relied on to support a trade-mark or business good will. Nevertheless, with reference to patents, the courts are necessarily subject to the restraints arising from the incorporation into them of the description and claim which the statutes require. In interpreting these, however, the rule must be accepted that it is to be presumed the inventor did not intend to split up his invention. This is only an application of the ordinary rule of interpretation that transactions are to be construed in the light of all the circumstances and of the apparent purposes of the parties to them. Specifications and claims have not yet fallen into such settled forms as to enable the courts to construe them, in any considerable part, with such certainty as they construe many words and phrases in formal instruments at the common law; but, on the whole, the entire subject-matter must be taken together for effectuating the true purpose of the transaction, as contracts and wills, which are so frequently drawn informally, are usually construed. The ordinary rule that if by a literal construction an instrument would be rendered frivolous and ineffectual, and its apparent object frustrated, a different exposition will be applied if it can be supported by anything in it, requires that words which re-

late to what may be held nonessentials, however much multiplied, shall not be permitted unnecessarily to control the sense. For the most part, such words are merely illustrative, or are used through inadvertence. On the other hand, it is true that words and phrases which might have been omitted on the presumption that they relate to nonessentials, may be introduced in such direct and positive manner as to leave the courts no option except to regard them as affecting the objects and limitations of the instrument in question. Especially may this be so when words which otherwise might be regarded as unimportant are introduced by the way of amendment. This is a common rule, which perhaps has been illustrated more frequently with marine insurance policies than elsewhere. There is no doubt that if into an instrument which has been prepared and submitted additional words are subsequently introduced by mutual consent, greater effect may sometimes be attributed to such words than otherwise would be given them; for they then become the immediate language selected by the parties, and may be assumed to have been especially within their intention. The leading rule which we have given has been constantly restated by the text writers and the courts as having full application to patents. They make use of such expressions as "ut res magis valeat quam pereat;" that "a patent should be construed in a liberal spirit, sustaining the just claims of the inventor;" that the titles by which patents are held "should not be overthrown upon doubts or objections, capable of a reasonable and just solution in favor of their validity;" that "in construing a patent the court will remember that the specification and claims are often unskillfully drawn;" and that "the claim shall be construed, if possible, to sustain the patentee's right to all that he has invented." It is true the general rules we have stated include the subordinate principle, which applies everywhere, that they are not to be "carried so far as to exclude what is in the patent, or to interpolate anything which it does not contain." It is impossible, however, to carry this to the extent of applying to patents as fully as it is applied to instruments in general, the maxim, "Enumeratio unius exclusio alterius." With the aid of the doctrine of equivalents, the courts are constantly engrafting on specifications and claims what they do not contain in the same sense in which the letter of ordinary instruments is required to contain matter on which the parties rely. To extend, in disregard of this fact, the rule against interpolations to any particular case, requires either that the patent relate to such mere matters of form or detail that interpretation by exclusion becomes just and reasonable, or that the specifications and claims be so phrased as in fact to contain a clearly intended exclusion, or the equivalent thereof. In the opinion of the court, the ingenious presentation of the defense in this case overlooks this last principle. The defense claims, that, on account of the numerous expressions to which we have referred, the patentee was limited to machines in which the frame travels and the plate remains at rest. It must be conceded that, taking these specifications and the claims as a whole, they show that Reece had present

in his own mind, at the time of his application, a machine with a movable frame and a fixed plate. But, if this is all there is of it, and if this is sufficient to establish the defense, the question arises, where does the doctrine of equivalents come in?

The most important parts of the case at bar are within the four corners of the principles we have stated. The court has no doubt that Reece was the inventor of nearly everything, if not everything, demanded by the Reece Buttonhole Machine Company in the case at bar, and was entitled to a patent therefor; and the question is whether, by reason of the peculiar phraseology of his specifications and claims as first drawn, or by reason of the making of certain amendments during the progress of his application through the patent office, Reece, notwithstanding the rules of interpretation entitle him to a favorable construction, has limited himself to a mechanism in which the frame travels; or whether, if he has thus expressed the literal terms of his patent, he has further so limited himself as to deprive himself of the benefit of the law of equivalents with reference to a machine in all respects a copy of his actual invention as shown in his patent, except as to the nonessential characteristic that the frame remains at rest, and motion is given to the plate. There may be reasons for finding that Reece was the inventor of the entire machine, with numerous functions, in somewhat the same way in which Morley was such inventor, as determined in Sewing Mach. Co. v. Lancaster, 129 U. S. 263, 9 Sup. Ct. 299. It is, however, so clear that Reece's claims do not cover the machine as a whole, but only various parts of it, that all the propositions made in his behalf having a different aspect fail to assist us. Yet Reece was clearly far in advance of those who preceded him, and entitled to the full benefit of whatever may be deduced from that fact.

In Manufacturing Co. v. Adams, 151 U. S. 139, 144, 14 Sup. Ct. 295, the court said:

> "But when, in a class of machines so widely used as those in question, it is made to appear that at last, after repeated and futile attempts, a machine has been contrived which accomplishes the result desired, and when the patent office has granted a patent to the successful inventor, the court should not be ready to adopt a narrow or astute construction, fatal to the grant."

This applies directly to the facts of the case at bar. In Miller v. Manufacturing Co., 151 U. S. 186, 14 Sup. Ct. 310, the court, in laying down the latest, and, to our thinking, the best, expression of the rule touching so-called "pioneer patents," used the following language:

> "The range of equivalents depends upon the extent and nature of the invention. If the invention is broad, or primary in its character, the range of equivalents will be correspondingly broad, under the liberal construction which the courts give to such inventions."

The practical effect of this defense is to maintain, in substance, that the entire novelty of Reece's fifth claim, which we will use for illustration, turns on the fact that the plate is fixed and the frame moves. In other words, Reece stands no better, practically, on the construction put by the defense on this claim, than if he had found

a stitching mechanism in all respects the same as that invented by him, with all the elements which go into it, but anticipating him, and had combined it with a fixed plate. As the principle of his stitching mechanism is clearly such that the relative movements between it and the plate are essential, while the absolute movements—that is, whether the plate moves or the frame moves—are nonessential, the proposition of the defense, if maintained, destroys, through the phraseology of the application and claims touching matters thus nonessential, the entire value of this most important, useful, and hitherto profitable invention. A suggestion of such triviality as is involved in a construction which will produce such a result cannot be well accepted.

Among all the cases brought to our attention we have seen none that goes to this extent with reference to the class of inventions described in the extract from Miller v. Manufacturing Co., ubi supra. The citations which we have made from Manufacturing Co. v. Adams, ubi supra, and Miller v. Manufacturing Co., ubi supra, and others which we will hereafter make use of, ought plainly to lay out of the case all rules of interpretation found in the decisions of the courts or in text-books which appertain solely to inventions plainly and essentially narrow, and ought thus to sift out easily, and render it unnecessary for us to examine, a considerable number of the authorities brought to our attention. We lay aside at this stage all decisions growing out of the fact that amendments were made in the application on its passage through the patent office. This includes Union Metallic Cartridge Co. v. U. S. Cartridge Co., 112 U. S. 624, 5 Sup. Ct. 475, and all others of that character. We do not mean by this, however, to reject, in considering this first question, what was thus made new; but we take the specifications and claims as they now stand, without reference to the fact that they were changed at any stage. We also lay aside all those in which the court, after all, with the aid of the entire case, came down to the essence of the invention, and held in substance that the claims covered it fully. Among others of this class appear to be Brooks v. Fisk, 15 How. 212; Klein v. Russell, 19 Wall. 433; Vulcanite Co. v. Davis, 102 U. S. 222; Bene v. Jeantet, 129 U. S. 683, 9 Sup. Ct. 428; and Gordon v. Warder, 150 U. S. 47, 14 Sup. Ct. 32. This sifting leaves, however, a number of cases which, if they stood alone, might be regarded as carrying so far the effect of a literal construction of specifications and claims as would compel us to find for the defense on the proposition in question. Those on which the defense relies which use the most striking expressions are Keystone Bridge Co. v. Phoenix Iron Co., 95 U. S. 274; Fay v. Cordesman, 109 U. S. 408, 3 Sup. Ct. 236; Manufacturing Co. v. Sargent, 117 U. S. 373, 6 Sup. Ct. 931; and Dryfoos v. Wiese, 124 U. S. 32, 8 Sup. Ct. 354. And we may also add Burns v. Meyer, 100 U. S. 671, and Huber v. Manufacturing Co., 148 U. S. 270, 13 Sup. Ct. 603. Another extreme case of the same character is Brown v. Manufacturing Co., 6 C. C. A. 528, 57 Fed. 731, decided by the court of appeals in the sixth circuit. Against these cases it is sufficient to put Winans v. Denmead, 15

How. 330. That, so far as concerns the case at bar, this decision is still recognized as law, is apparent from the fact that it is cited, without disapproval of any part of it, in Sewell v. Jones, 91 U. S. 171, 183; Eddy v. Dennis, 95 U. S. 560, 569; Werner v. King, 96 U. S. 218, 230; Electric Co. v. La Rue, 139 U. S. 601, 606, 11 Sup. Ct. 670; and Hoyt v. Horne, 145 U. S. 302, 309, 12 Sup. Ct. 922. In Werner v. King and Hoyt v. Horne it is cited and accepted with reference to the very pith of the matters which we are now considering. It will be noticed that Winans v. Denmead is thus reaffirmed at later dates than the cases on which the defense relies, and that it comes much closer to the case at bar than any one of them is too apparent to need any explanation at length. In fact, the analogy is as close as could be expected to be found in any cases whatever. Winans v. Denmead related to the peculiar construction of cars for the transportation of coal, and the patent was granted in 1847, after the enactment of all the statute provisions the existence or re-enactment of which the defense can rely on. Railroad Co. v. Mellon, 104 U. S. 112, 118. The specifications in Winans v. Denmead described only a conical form, and the claim (page 342) was, by its letter, strictly limited to the frustrum of a cone. There was nothing whatever in the patent to show that the patentee ever had in his mind any form except the conical. The alleged infringement was by use of the octagonal form. Yet the court made the clear distinction appearing on page 343, as follows:

"Undoubtedly there may be cases in which the letters-patent do include only the particular form described and claimed. Davis v. Palmer, 2 Brock. 309, Fed. Cas. No. 3,645, seems to have been one of those cases. But they are in entire accordance with what is above stated. The reason why such a patent covers only one geometrical form is not that the patentee has described and claimed that form only; it is because that form only is capable of embodying his invention; and, consequently, if the form is not copied, the invention is not used. Where form and substance are inseparable, it is enough to look at the form only. Where they are separable, where the whole substance of the invention may be copied in a different form, it is the duty of courts and juries to look through the form for the substance of the invention,—for that which entitled the inventor to his patent, and which the patent was designed to secure. Where that is found, there is an infringement; and it is not a defense that it is embodied in a form not described, and in terms claimed by the patentee."

The court further remarked—which is a general rule, applicable to the case at bar—as follows:

"Patentees sometimes add to their claims an express declaration to the effect that the claim extends to the thing patented, however its form or proportions may be varied. But this is unnecessary. The law so interprets the claim without the addition of these words."

It is not necessary for us to reconcile case by case the expressions relied on by the defense, which, as interpreted by it, are not in harmony with the conclusions or the expressions in Winans v. Denmead. Very likely they can all be harmonized by following out the distinctions made by us in our references to Manufacturing Co. v. Adams, ubi supra, and Miller v. Manufacturing Co., ubi supra, and by noting the peculiar circumstances of each case. In fact, we think there is nothing to be deduced from any of the decisions

which goes beyond the illustrative paragraph in Walker on Patents (2d Ed. § 350), as follows:

"But where a patentee states in his specification that a particular part of his invention is to be constructed of a particular material, and states or implies that he does not contemplate any other material as being suitable for the purpose, it is not certain that any other material will be treated by a court as an equivalent of the one recommended in the patent."

However this may be, Winans v. Denmead leaves sufficient room for the application to the case at bar of the general rules of construction, and those relating to equivalents, which we have stated.

Some of the most important inventions in special arts have come from persons unskilled in those arts, and who, therefore, had no knowledge of the possible equivalents; so that it would involve improbability to assume that they had present in their own minds, at the time of the application, any matters of form except those incorporated in it. The rules cited from Winans v. Denmead, ubi supra, are needed to protect not only this class, but all others who have made valuable inventions, and who, through their own ignorance, or for any other reason, have not understood, or have overlooked, possible equivalents. Without attempting the unnecessary discussion of case by case, it is enough that almost every patent in which this question can arise lies between the expressions in Winans v. Denmead, ubi supra, on the one hand, and those relied on by the defense on the other. Winans v. Denmead clearly goes as far in its direction as the case at bar. Applying the principles of construction and the law of equivalents already stated in the way in which we are bound to apply them, there is not sufficient in any or all of the expressions in the patent at bar relied on by the defense to justify us in holding that they amount to such a positive exclusion, arising either from the nature of the invention or from the necessary force of the words themselves, as will defeat a charge of infringement of all the claims in controversy, merely on account of a change in the method of producing relative movements of the parts, involving in itself no invention and producing no result essentially new.

Some of the cases relied on by the defense strengthen these conclusions by the reflex light of the distinctions they make. Snow v. Railway Co., 121 U. S. 617, 7 Sup. Ct. 1343, held the patentee strictly to the details of his combination in question, because, as shown on page 630, 121 U. S., and page 1343, 7 Sup. Ct., those details, for the reasons there stated, were essential parts. Sargent v. Lock Co., 114 U. S. 63, 5 Sup. Ct. 1021, runs back, so far as this point is concerned, to Water-Meter Co. v. Desper, 101 U. S. 332; and so, also, does Fay v. Cordesman, 109 U. S. 408, 3 Sup. Ct. 236, already cited. In Water-Meter Co. v. Desper, page 336, the court stated, touching a certain crank shaft which was in question, that it could not say that it was an immaterial part of the combination, and continued:

"The patent, as it stands, occupies very narrow ground. It requires the presence of every one of the elements specified in the combination secured by it."

On page 335 this rule of interpretation is applied generally to combinations, and in this form the rule is traced through to the latest

case named. What is meant by the word "combination," here and in Fay v. Cordesman, may not be easily determined; but it is very certain Reece invented something more than a mere combination as it existed in those cases.

The Corn-Planter Patent, 23 Wall. 181, also supports the conclusion which we have reached. The court said (page 221):

"The only pretense on which it"—that is, the alleged infringing machine—"can be claimed to be different is that the framework of which it is constructed is not the kind of framework described by Brown in his specification, namely, 'without gearing, without spoked wheels, and other expensive fixtures, and resembling a drag or sled more than it does a carriage or wagon in its main or general construction.' By this description Brown was evidently attempting to show how simply and cheaply the thing could be made, not that it was to be confined to that specific form. It might as well be contended that he intended to confine his invention to wood, and that a machine made of iron or other metal, though made in precisely the same form, would not be an infringement, because it would not have the same quality of cheapness and simplicity which he describes."

Hoyt v. Horne, 145 U. S. 302, 12 Sup. Ct. 922, is still more striking. The words in the claim in that case, "consisting in circulating the fibrous material and liquid in vertical planes" (page 304, 145 U. S., and page 922, 12 Sup. Ct.), refer back to the improvement itself, limit it grammatically and literally, and, so far as the mere letter of the claim is concerned, were apparently quite as material a part of it as the words in question in the case at bar. Yet (page 308, 145 U. S., and page 922, 12 Sup. Ct.) the court rejected them, for the reasons there stated, and which need not be recited in this opinion.

The preamble of the patent, already cited, has been brought especially to the attention of the court, in that it specifically points out the invention as relating to the class of machines "wherein the stitching mechanism is made to travel," etc. There is ground for maintaining that this word "travel," in this connection, had in mind the relative motions, as it is frequently thus used by persons accustomed to mechanical operations; and also that this part of the preamble had in mind a classification of machines as between those in which the material is held firmly to the plate and the relative movements are automatic, aided by a reciprocating needle bar, and those in which the material is turned by the hand. It is, however, not necessary to determine this. The preamble states that Reece's invention was an improvement on the class of machines which it names, whatever that class may be; but this does not exclude the truth that it would be an improvement on every other class of machines to which it could be applied. Still keeping in mind the distinction between a broad invention and a narrow one, it does not follow that because the inventor, if his invention was of the former class, declared it to be available for a certain use or machine, and had present in mind only that specific use or machine, it might be taken by others, without restriction, for other uses or other machines. On the other hand, the rule is clear that ordinarily a patentee who is first to make an invention is entitled to his claim for all the uses and all the advantages which belong to it, so far as the new application does not itself involve further invention. Roberts v. Ryer, 91 U. S. 150, 157; Stow v. Chicago, 104 U. S. 547, 550;

Miller v. Manufacturing Co., 151 U. S. 186, 201, 14 Sup. Ct. 310. The rule was laid down clearly, although perhaps as a dictum, in Electric Co. v. La Rue, 139 U. S. 601, 11 Sup. Ct. 670, already referred to. On page 606, 139 U. S., and page 670, 11 Sup. Ct., the court, in connection with a reference to Winans v. Denmead, said that a certain expression in it, which the court quotes, "amounts to a declaration that the application of the patented device to another use, where such new application does not involve the exercise of the inventive faculty, is as much an infringement as though the new machine were an exact copy of the old." Indeed, the whole of the case at bar, so far as we have gone, might, on sound principles, be put on the single proposition of what is known as the "rule of double use," so far as it can be availed of to protect the patentee of a broad invention.

We now come to the effect of the fact that the claims and specifications were amended during the progress of the application through the patent office. It must be admitted, as already said, that what is thus done may have a special weight beyond the effect of the same words appearing in the application as originally drawn, because, whatever may be inserted or stricken out under such circumstances may ordinarily be regarded as especially selected by the parties to the transaction. It is as though by agreement the phrases thus made were emphasized. Nevertheless it defeats the very essence of this rule to extend it to what was inserted inadvertently, or to push the construction of what was thus inserted in one direction, when it is plain from the whole transaction that the parties inserting were looking in another. There is a further consideration which cannot be overlooked. In transactions between private parties, and, indeed, in ordinary transactions between the public authorities and private parties resulting in contracts or grants, the rules of equity may be invoked, on a proper judicial issue, to correct or supply what is erroneous, or was omitted through inadvertence; but if the position of the defense is correct, and the decisions of the supreme court touching this point lay down so rigid a rule as the defense maintains, a patent cannot be relieved on this account and in this particular, except it be by application for a reissue, which is not a judicial proceeding, nor in any of its phases as far-reaching as the relief granted in equity with reference to other matters. Courts ought, therefore, to be the more careful, under circumstances like those at bar, to give a patentee the benefit of all the equities which can be raised in his behalf, by any reasonable implication, from what appears on the face of the amendments, or from the transaction as it passed through the patent office.

The case shows numerous amendments at various stages, but we have no occasion to consider any of them except the following: The first claim, at one stage, contained the words, "and means to change the relative positions of the bedplate and framework longitudinally." These were objected to by the examiner for the following specific reason, given by him: "As no means is shown and described for moving the bedplate relatively to the framework, as the claim would seem to imply." Thereupon the words objected to were

stricken out, and those were inserted which now appear, "and means to move such framework longitudinally upon said bedplate." For the same specified reason a similar change was made in the eleventh claim. The twelfth claim was also required to be amended by including means for moving the cutting bed and frame longitudinally, on the ground, specified by the examiner, that otherwise the combination covered by the claim would be inoperative, and incapable of accomplishing any useful result or function. The thirteenth claim, which was objected to by the examiner as being for an incomplete combination, was largely modified, the expression which now appears touching "the movable framework" being inserted, with others. The fifth claim was amended only by inserting the words "of a buttonhole" where they appear after the word "laterally." The eighteenth claim is entirely new. Whatever other amendments there were need not be noticed.

The patent office record shows no reason for requiring these amendments, so far as concerns the effect of the question we are now discussing, except those already stated. The specifications did show one method of putting the invention and all its parts into practical operation. The theory of the examiner was that the claims must be limited to correspond with the form of operation explained. The extracts which we have made from Winans v. Denmead, 15 How. 330, and other citations which might be made, establish the well-known rule that this was erroneous, unless as a mere matter of detail in the practice of the patent office, depending on the varying judgments of different examiners as to the clearness with which the operation of machines should be set out.

No question of novelty was made, and no other issue which brought to the attention of the inventor any matter of substance. In Ball & Socket Fastener Co. v. Ball Glove-Fastening Co., 7 C. C. A. 498, 58 Fed. 818, this court, in considering the principle now under consideration, said:

> "The rule touching the effect of such amendments has been several times laid down by the supreme court in patent causes, although it is only a peculiar application of the general principles of law relative to the interpretation of instruments. In the case at bar the amendments relate to the very pith and marrow of the alleged improvement, touch directly the question of novelty, and were understandingly and deliberately assented to; so that the rule of interpretation referred to undoubtedly applies."

We do not see that the law requires us at present to go any further, or to qualify this statement of the rule; although, of course, its application, where the invention is in mere matters of form or detail, would be more freely made than where it is of a broad character.

The following cases, we believe, are all where this rule has come before the supreme court, the first being Leggett v. Avery, 101 U. S. 256, decided October term, 1879, and the last Morgan Envelope Co. v. Albany Perforated Wrapping Paper Co., 152 U. S. 425, 14 Sup. Ct. 627. Leggett v. Avery, so far as it appertains to this rule, contains only dicta, as in that case there had been an actual disclaimer, on an application for a reissue, of the whole of

five claims in the original patent, and the case turned on the effect of that express disclaimer. In Sargent v. Lock Co., 114 U. S. 63, 5 Sup. Ct. 1021; Shepard v. Carrigan, 116 U. S. 593, 6 Sup. Ct. 493; Sutter v. Robinson, 119 U. S. 530, 7 Sup. Ct. 376; Crawford v. Heysinger, 123 U. S. 589, 8 Sup. Ct. 399; Watson v. Railway Co., 132 U. S. 161, 10 Sup. Ct. 45; Roemer v. Peddie, 132 U. S. 313, 10 Sup. Ct. 98; Caster Co. v. Spiegel, 133 U. S. 360, 10 Sup. Ct. 409; Yale Lock Manuf'g Co. v. Berkshire Nat. Bank, 135 U. S. 342, 10 Sup. Ct. 884; Dobson v. Lees, 137 U. S. 258, 11 Sup. Ct. 71; Corbin Cabinet Lock Co. v. Eagle Lock Co., 150 U. S. 38, 14 Sup. Ct. 28; Knapp v. Morss, 150 U. S. 221, 14 Sup. Ct. 81; and the latest case, Morgan Envelope Co. v. Albany Perforated Wrapping Paper Co.,—there were direct issues of novelty, or of interference, based on specific prior patents or pending applications, to which the inventor yielded. Therefore, in each of these cases there was a fair issue, formulated and understood by the applicant for the patent, requiring him clearly to yield directly a portion of what he claimed; and the effect of his yielding could not be mistaken. In Union Metallic Cartridge Co. v. U. S. Cartridge Co., 112 U. S. 624, 5 Sup. Ct. 475, the issue was no less distinct, although it came in a different form. It appeared that the patentee had applied on a reissue for the same subject-matter which was disallowed him by the supreme court, but the point was distinctly made by the commissioner that it involved "a substantially new and different invention" from anything embraced in the original patent. In Vulcanite Co. v. Davis, 102 U. S. 222, which was decided with express reference to Leggett v. Avery, ubi supra, it appeared (page 228) that the subject of controversy at the patent office was distinctly as to what the invention covered, and as to what claim should be allowed. The court said there could be no doubt what the patentee understood he had patented, and that both he and the commissioner regarded it to be "for a manufacture made exclusively of vulcanites." The issue was plain, formal, and essential; yet the court did not rest the case wholly on that proposition, but mainly on the ground that what occurred at the patent office tended to confirm the conclusions to which the court had otherwise arrived in interpreting the patent. In Royer v. Coupe, 146 U. S. 524, 13 Sup. Ct. 166, an entire claim was rejected, and the rejection acquiesced in. This was also apparently put on the ground of want of novelty; but, however that may have been, the essence of the transaction was plainly the same as though there had been a formal disclaimer after a patent had been obtained, as was the case in Leggett v. Avery, ubi supra. In no place has the rule been thoroughly discussed by the supreme court, and its modifications, limitations, and practical application determined. It has grown up without much discussion from Leggett v. Avery, ubi supra, which was a case on a reissue, and, as already said, involved a formal disclaimer of five specific and entire claims. Under all the circumstances, the case at bar is clearly distinguishable, in that it presented no direct issue of novelty or invention, and the amendments came in only incidentally, and in reference to an incidental matter.

In conclusion, therefore, touching all which appears on the face of the patent with reference to the movability of the frame and the fixedness of the plate, including whatever emphasis can be added by reason of the acquiescence of Reece in the amendments proposed at the patent office, we do not find enough to require us to refuse to give him the benefit of the favorable rules we have explained.

We now come to the especial consideration of the several claims. The fifth claim was the successful conclusion of numerous and expensive efforts to stitch automatically a buttonhole in the form in which it is ordinarily desired,—that is, with an eye. This had never been accomplished. Those machines whose work in stitching were automatic were unable to form the eye, and those which formed the eye accomplished this only with the aid of the clumsy and slow operation of turning the material with the hand. We do not think it necessary, either with reference to this claim or any other, to proceed at length on the question of novelty. The single fact that so valuable a patent as this, where so large interests were at stake, and such heavy expenditures had been made in vain, as is shown by the record, for accomplishing what Reece accomplished, had received the continuous and uniform acquiescence of the public and the trade for a period of nearly 10 years, and until the efforts of the respondents below, affords sufficient reason for not prolonging this opinion by an analysis of the alleged anticipatory matters, or by detailed explanations in support of our conclusions that none of them in fact anticipated Reece. This line of defense has been pressed mainly against the fifth claim, but clearly the device to which it relates accomplished what none of the older buttonhole machines accomplished, and it, its method of operation, and its purpose lie in a different field from the invention of Bonnaz, and from all the other earlier mechanisms except those appropriate to the stitching of buttonholes. The essential feature of this claim is the so-called "compound movement" given the needle bar, the result of simultaneous longitudinal and lateral motions. This alone was, of course, old and common in the arts; yet the suggestion of its application to this purpose, combined with the mechanism devised therefor, constitute a patentable invention of a fundamental character, highly meritorious, and one to be protected by a liberal construction. So far as this claim is concerned, we have no doubt that the rules which we have laid down fully apply, and that Reece is entitled to the benefit of the invention, without reference to the changed method shown in the case of producing the relative movements between the frame and the plate.

The elements specified in the fifth claim do not constitute an operative mechanism without the aid of a reciprocating needle bar, or something which will supply its need, and perhaps also not without the spreader. The eighteenth claim covers a reciprocating needle bar, and the twelfth a spreader, and each are fully explained in the specifications. The fifth claim falls within that class where reference may be made to the specifications to supply in a claim what it is plain to every one skilled in the art is a necessary incident.

Seymour v. Osborne, 11 Wall. 516, 547; Day v. Railway Co., 132 U. S. 98, 102, 10 Sup. Ct. 11. However, no question was raised on this account, and we refer to the matter simply in order to make clear our conception of the scope of the claim. Infringement of the fifth claim is hardly contested, except on the ground of the propositions touching its construction and effect which we have rejected; and, so far as concerns it, we must order a decree for the complainant below.

The eleventh, twelfth, and thirteenth claims relate to the cutting and spreading mechanisms, and the "stop" devices. Each is undoubtedly to be construed as in combination with a stitcher in a buttonhole machine; and Reece was the first to combine any of these in such way that all its elements should be operated in their proper order, by mere mechanical power. The defense urged against these claims is mainly the same as that urged against the fifth. Having disposed of what could be raised by that defense, the court considers the alleged structural differences between Reece's and the infringing machines not material. The majority of the court are of the opinion that Reece has made these operations of cutting, spreading, and stopping automatic in combination with the machine as a whole, and that his invention in that respect is so fundamental and meritorious as to require the application to the eleventh, twelfth, and thirteenth claims of the same rules which we have applied to the fifth.

In view of the state of the art, the eighteenth claim cannot be broadly construed, and it must be held to be fully limited by the words, "substantially as described." This limitation, however, relates to what concerns this particular device. Lake Shore & M. S. Ry. Co. v. National Car-Brake Shoe Co., 110 U. S. 229, 235, 4 Sup. Ct. 33. Therefore we find nothing in these words which restricts this claim to a machine in which the frame moves. To give such an effect to the word "carries" as is claimed is more for the pundit than the courts. It is as commonly used in all kindred matters to mean supporting without movement as supporting with it. We are not required to give it a narrow interpretation for the purpose of depriving the inventor of any part of his invention. Nor are we constrained by any well-settled or just rule of construction to import phraseology from other claims for the same purpose. Except in the particulars covered by these propositions, we do not understand that there is any question of infringement of this claim, even when narrowly construed.

Decree of the circuit court reversed. Case remanded to that court, with instructions to enter a decree for an injunction, and an account on claims 5, 11, 12, 13, and 18 of appellant's patent, No. 240,546, issued to John Reece, April 26, 1881, and for further proceedings in accordance with law.

BROWN MANUF'G CO. v. DEERE et al.

SAME v. DAVID BRADLEY MANUF'G CO.

(Circuit Court of Appeals, Seventh Circuit. May 1, 1894.)

Nos. 88 and 89.

PATENTS—LIMITATION OF CLAIM.

In the Brown patent, No. 190,816, for an improved coupling for cultivators, consisting of a tube or pipe box turning loosely on the horizontal ends of the crank axle, connected with a head to which the forward ends of the plow beams are bolted, and provided with means for turning it against the gravity of the cultivator in the rear, the first claim, for "the pipe box, provided with a projection adapted to co-operate with a spring, weight, or the draft, to rock the said pipe box against or with the weight of the rear cultivators or plows," cannot be construed as for a combination of the pipe box described with other parts of a cultivator named in the claim or specification, and must be limited to the particular forms of construction of the pipe box described. 51 Fed. 226, affirmed.

Appeals from the Circuit Court of the United States for the Northern District of Illinois.

These were two suits by the Brown Manufacturing Company—one against Deere & Co., and the other against the David Bradley Manufacturing Company—for infringement of a patent. The circuit court decided in favor of complainant (21 Fed. 709), but, upon a rehearing on its own motion, rendered decrees in both cases for defendants. 51 Fed. 226; Id. 229. Complainant appealed.

These suits were each brought to obtain an accounting and an injunction against infringement of the first claim of letters patent No. 190,816, which read as follows:

"Be it known that I, William P. Brown, of Zanesville, in the county of Muskingum, and state of Ohio, have invented a new and improved coupling for cultivator; and I do hereby declare that the following is a full, clear, and exact description of the same, reference being had to the accompanying drawing, forming part of this specification, in which Fig. 1 is a perspective view of the particular form of cultivator to which my coupling is to be applied; Fig. 2 is a side view of one of the couplings, looking in a line with the axle; Fig. 3 is a front view of one of the couplings, looking at right angles to the axle; Fig. 4, an enlarged transverse section through line, x, x, Fig. 3.

"My invention relates to an improved form of coupling for fastening the forward ends of the beams of plows or gangs to the axle of a wheeled cultivator. The improvement consists in the particular construction and arrangement of a tube or pipe box turning loosely upon the horizontal ends of the crank axle, and connected, through an adjustable stirrup or sleeve and bracket, with a head having a long bearing at right angles to the pipe box, to which head the forward ends of the plow beams are bolted, while the pipe box is provided with means for turning it against the gravity of the attached cultivator in the rear, whereby the said cultivators are manipulated with greater ease, as hereinafter more fully described.

"In the drawing, A represents the longitudinal bars, extending forward to form the tongue, and constituting the main frame of a wheeled cultivator, to which my invention is applied, which bars are arranged upon the elevated crank axle, B, supported upon wheels, C. Upon the horizontal parts of said crank axle, between the upright portions and the wheels, are arranged my couplings, which secure the beams of the plows or gangs, D. These couplings are constructed as follows: E are tubes or pipe boxes, which embrace the axle, B, and turn freely thereon. G is a stirrup, which is held to the pipe box, E, by means of a loop, s, and is made to rigidly connect with said pipe box by means of longitudinal ribs upon the stirrup, which engage with corresponding ribs upon the pipe box. The stirrup, however, instead of having a loop, s, may be constructed in form of a sleeve, and made to embrace pipe box.

F, in which case it will be adjusted thereon by a screw bolt, a, whose inner end may bear upon a roughened steel jib, which bites the pipe box, and prevents the sleeve from slipping. Said stirrup is formed with projecting lugs or brackets, H, which are perforated to receive a pivot bolt, b, arranged vertically and at right angles to the pipe box. Around this bolt, b, is arranged the head, I, which is made with a long bearing, to which head the forward ends of the beam are bolted. Referring to the feature of the pipe box and adjustable sleeve, I would have it understood that I do not claim such broadly, as the same idea is shown in patent No. 108,945. J is a cap fastened to the crank axle between the hub of the wheel and the pipe box, by means of a staple, c, which binds around the axle, and is fastened to the cap by nuts, d. This cap serves as a stop to the hub of the wheel, to separate the same from the pipe box; and its curved and flanged end, e, acts as a guard to keep dirt and other obstructions from the bearings of the wheel. K is a brace designed to stay the axle to the tongue; and L is a link arranged in the staple of the cap, J, to which the draft attachment is secured to properly distribute the strain upon the implement.

"From the above description, it will be seen that the gangs of cultivators have free and easy motion laterally, from right to left, on the long bearing of the vertical pivot bolt, and also a free movement vertically upon the axle (by reason of the pipe box), when it is desired to lift the cultivators, either to hang them upon the hooks of the frame, out of contact with the earth, or to raise them for any other purpose. To render the manipulation of the plows or cultivators easy, I provide an arrangement whereby either springs, weights, or the draft power may be utilized for sustaining a part of the weight of the said cultivators when they are lifted from the ground, to be hung up, or shifted laterally. In accomplishing this, I construct the pipe box, with a hooked arm, M, and arrange a stiff spring, N, of metal or rubber, upon the main frame above, so as to engage, by means of a loop, with the end of the arm, M, to rock the pipe box; and as the cultivator beam in the rear is rigidly attached to the pipe box by the stirrup or the sleeve, and its screw bolt, the spring has the tendency to rock the pipe box, and assist the driver in lifting the cultivators.

"I do not claim, broadly, the application of springs to sustain a part of the weight of the cultivator, as this is shown in my patent No. 128,701, of 1872, but I do claim a pipe box provided with an arm or projection adapted to rock the same; and, referring to this same feature, I do not limit myself to the use of a spring operating in connection with such projection, as the pipe box may be provided with a perforated flanged projection, M', to which the draft attachment may be directly fastened, and so arranged as to utilize a part of the draft to produce the same lifting effect upon the cultivators when attached above the center of the pipe, and, when below the center, assists to make the plows run deeper, and when the plows are raised out of the soil or dirt the draft on projecting flange ceases, allowing the spring to assist in lifting the plows. In the place of the flange mentioned, a counter weight may be employed for the same purpose, or a sheave or pulley may be arranged on the pipe box with a chain, to produce the same effect.

"In making use of my invention, the sleeve or stirrup and brackets can be adjusted to regulate the width between the duplicate cultivators by slackening the set screw (if a sleeve be used) that binds the same to the pipe box, or by disengaging the ribs and grooves of the pipe box and stirrup, and moving said sleeve or stirrup as desired. These ribs or the set screw, it will be seen, hold the arm, M, in an upright position to allow the spring its proper tension, and, by moving the set screw and stirrup or sleeve, the tension of the spring may be regulated as desired. The set screw, or its equivalent adjustment, also serves to hold the sleeve or stirrup and brackets rigidly in place, to give the plows or cultivators a firm and steady upright position. The length of the tube of the pipe box gives a long bearing for raising and lowering the plows, and, while causing the latter to be held steady, affords also an easy motion, and one that cannot get cramped. The length of the pivot bolt, and distance between the brackets, also permit the coupling head, I, to be sufficiently deep to prevent the rocking or swaying motion of the plows when guided by the driver; and, among other advantages, may be mentioned the small degree

of friction which is secured by the long bearings of the pipe box and the head, and also the fact that its construction is such that its bolts cannot be made too tight, and hence there is no liability of its parts being wrongly adjusted by the unskilled. With respect to counteracting the gravity of the cultivators or plows by means of the projecting flange or arm and spring, or its equivalent, it will be seen that it not only assists the plowman in operating the plows, and also in hanging them when not in use, but it also acts as a counterbalance to the tongue, and thus relieves the neck of the team from the weight of the same. It also prevents the shovels from getting dull so rapidly, for, as the under sides of said shovels do not press so hard upon the earth, the force of the earth is more nearly equalized above and below the point, and the shovel is easily worn above and below. It also assists the shovels in scouring, as they are held more uniformly and with a more elastic pressure against the face of the soil, especially when the flange, M', is used, which, when the draft is from the bottom of the same, causes the increased resistance to the shovels (which the hard places afford) to compel the draft to force the shovels deeper into said hard places, instead of skimming over the same.

"Having thus described my invention, what I claim as new is:

"(1) The pipe box provided with a projection adapted to co-operate with a spring, weight, or the draft, to rock the said pipe box against or with the weight of the rear cultivators or plows, substantially as and for the purpose described.

"(2) The combination, with the crank axle, and the gangs or plows, of the pipe box, having arm, M, the spring, N, attached to the main frame, the head, I, and the stirrup, G, or its equivalent, having brackets, H, and pivot bolt, b, and fastened to the pipe box, substantially as and for the purpose described.

"(3) The pipe box, E, having longitudinal ribs, combined with the stirrup, G, having corresponding grooves and a clamping device, substantially as described."

Of the annexed drawings the first is taken from one of the briefs in the case, and shows the coupling alone; the second is figure 2 of the patent, and shows the coupling in compination or connection with other parts of the cultivator.

Among the defenses pleaded were denials of infringement and of invention, with references to the following prior patents: No. 9,086, granted to A. H.

Fig. 1.

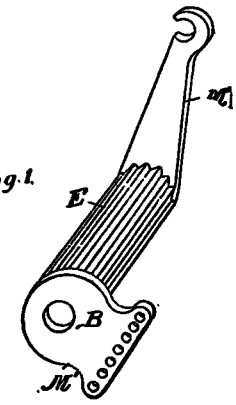
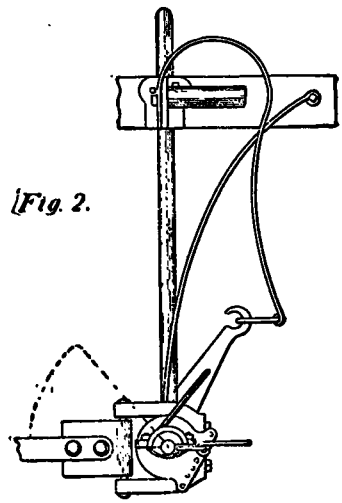


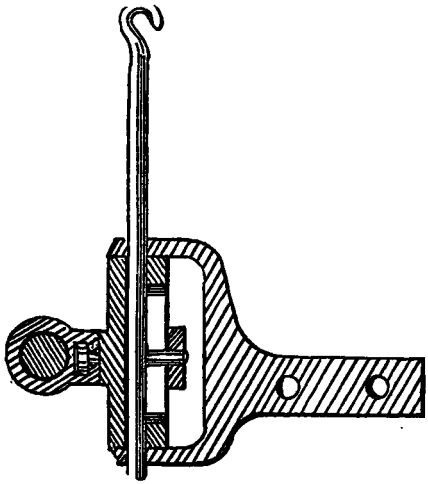
Fig. 2.



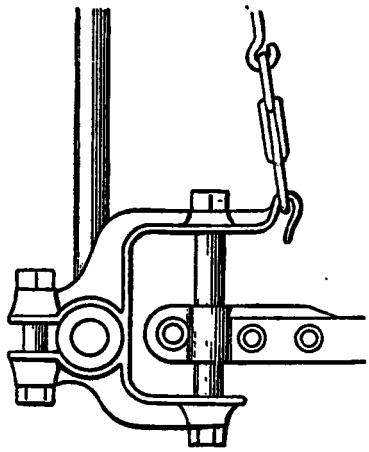
Allison; No. 26,606, to P. Monaghan; No. 45,721, to H. Jordan; No. 61,649, to A. H. Allison; No. 65,573, to J. Hollingsworth; No. 70,643, to H. K. Stoner; No. 72,456, to Philip Coonrod; No. 73,972, to Martin Heyden; No. 82,938, to B. F. and J. V. Guy; No. 96,379, to W. S. Baker; No. 108,276, to L. Luppen; No. 108,945, to D. C. Stover; No. 127,878, to William Haslup; No. 128,701, to W. P. Brown; No. 134,540, to G. A. Grove; No. 140,513, to L. Litchfield and H. S. Corbin; No. 154,666, to M. L. Gorham; No. 164,180, to A. J. Judson; and British letters patent No. 1,582, dated July 5, 1856, to Thomas Smith.

The couplings used by the appellees were made under the patents of Moore, No. 217,811, and Bradley, No. 270,629, which the appellees, respectively, own, and are illustrated by the following drawings:

Moore coupling.



Bradley coupling.



By the first decision below, reported in 21 Fed. 709, the patent was upheld; but the court—having, of its own motion, granted a rehearing—declared its final conclusion that the claim in question was not, as contended by the complainant, for a combination, but for the device, "a pipe box with a projection adapted to co-operate with a spring."

The following extracts from the brief of counsel show the chief points of the argument made here in the appellant's behalf:

"Omitting, for the present, the elements of 'weight or the draft,' the devices which are specifically named in the claim are, (1) the pipe box; (2) a projection; (3) a spring; (4) the rear cultivators or plows. Implying, as we must, a main frame, which is an element in all such machines, it is perfectly plain that, adding this, we have all the elements required to construct a working combination, and that all of them are absolutely essential. It is also true that, by the phraseology of the claim, these elements are all united together into a working combination. As to that there can be no dispute. Hence, nothing is wanting to make a technical combination of it, except the word 'combination' itself, or the word 'combined,' or the word 'arranged.' If any of these three words were in the claim, there would be no room for dispute. The word 'adapted' is the one which is used. It would seem to require no great stretch of language to construe this word 'adapted' as meaning 'arranged' or 'combined.' That, obviously, is its force, and obviously was the intent of the party who used it. How adapted? The adaptation is made by putting the things together in the way which is shown and described in the patent, and until that is done there is no adaptation made, within the meaning of the patent law. A mechanical device is 'adapted' to do its work by being actually put into co-operative relationship with such

other devices as will enable it to perform its function. This is the highest and most perfect adaptation known to the law, and when it is done a combination is made. Hence, it is submitted that the devices being named which make the combination, their co-operative relationship being described and set forth fully and specifically, and a co-operative relationship in the machine being clearly called for by the word 'adapted,' it clearly follows that the claim in question should be construed as a combination claim; the more so, because, by such construction, the invention, as actually made, will receive the proper protection.

"Let us turn now to the question of function. I have said that, as a matter of fact, the use of a weight in the Brown combination in lieu of a spring (assuming it to be usable at all) would introduce into the Brown cultivator a function previously unknown in the art. This function may be thus stated: Making a weight or spring coact or co-operate with a hand lever or handle in the manually directed movements of the cultivator shovel in such a way that the spring or weight should always be an auxiliary device, and should never be an opposing device. That thing or function was absolutely new with Mr. Brown. The co-operation of those two elements—the spring or weight, on the one hand (or include, if you please, the draft of the team), coacting with the hand lever or handle through which the cultivator shovel was manually guided in doing its work, and so as always to be a help, and never a hindrance—was unknown in the art until Mr. Brown did it. This is the final and material fact in the case; and, this fact being true, it is submitted that the validity of the Brown patent cannot be called in question. A new combination which involves a new function is always patentable.

"Weights vs. Springs. In machines which travel about from place to place, a weight is not, as a general rule, the mechanical equivalent of a spring. While Mr. Brown, when he applied for his patent, undoubtedly thought that, for the purposes of the invention in question, a weight was practically, as well as theoretically, the equivalent of a spring, the simple fact is that, in so thinking and so saying, he was mistaken. It was an error on his part,—nothing more and nothing less,—but an error which ought not to prove fatal to his patent, in view of the fact, first, that the actual invention which he made was incontestably novel, and has proven to be of great value, and in view of the still other fact that the defendants have undoubtedly used it. In many kinds of stationary machinery, weights can obviously be substituted for springs without invention, and with beneficially the same results. Where they can be so substituted, they are equivalents, and otherwise not. In most kinds of movable or portable machinery, they are not equivalents. Thus, in watches they are not equivalents, though they may be in stationary clocks. they are not equivalents in eye glasses, and a weight would be a sorry equivalent for a spring in a carriage or in a bed. Whether they are equivalents depends upon the environments. It is also submitted that the whole question of weights as mechanical equivalents was practically disposed of in the first decision in the Deere Case, and on the principle there enunciated and applied, 'Utile per inutile non vitiatur;' and to this the court very properly added: 'Whatever part of this claim may be deemed to have reference to the projection, M', it seems to me, is of no moment, for the purposes of this case at least, for it is not claimed that defendants use this part of this claim, or anything equivalent to it.' Manufacturing Co. v. Deere, 21 Fed. 709, 711. So of the weight. Neither party uses it, or ever has. For the purposes of this case, all reference to it may properly be disregarded, or it may be rejected as surplusage." * * *

"In the invention now in question, the place of hitch—that is, the place where the connection was made through which the spring acted on the cultivator beam—was changed from the cultivator beam itself, and was shifted forward to a radial arm or projection, which was made for the purpose on the pipe box. It will be remembered that the forward end of the beam is pivoted to a pipe box on the axle by a vertical joint. This vertical joint permits sidewise motion, and through the pipe box itself, turning on the axle, we get vertical motion. The problem was to hitch the spring so that it would aid the operator in the vertical movement of the beam, without interfering with the sidewise movement. In order to do this, Brown made on

his pipe box an arm, M, which extended radially out from the pipe box. To this he hitched the free end of the spring, which in his patent is marked 'N,' the other end of the spring being fixedly secured to the main frame. Hence, the Brown invention, stated in a general way, consists in hitching the spring to an arm or projection which extends radially out from the pipe box in any desired direction. * * * The invention, properly construed, takes in any place of hitch at or forward of the vertical pivot bolt by which the cultivator beam has sidewise motion. This is the only part of the invention which is now properly in controversy."

George H. Christy, for appellant.

Bond, Adams, Pickard & Jackson (John R. Bennett, of counsel), for appellees.

Before WOODS and JENKINS, Circuit Judges, and BAKER, District Judge.

WOODS, Circuit Judge (after stating the facts). We quite agree with the court below that the first claim of the patent in suit is not for a combination of the pipe box described with other parts of a cultivator named in the claim or specification, but for the pipe box itself, as a single device, designed and adapted for use in the several ways specified. The contrary contention requires that the word "adapted," as used in the claim, be given a strained and unwarranted significance. It is not even approximately synonymous with "combined;" and a substitution of the latter word would be inadmissible, unless the words "to co-operate" were omitted. If the word "arranged" were substituted, it would have the same meaning as "adapted," unless, again, "to co-operate" were omitted. We think it clear that the first claim of the patent is for "the pipe box with a projection," which projection may be adapted to co-operate with a spring, or with a weight or with the draft, for the purpose of rocking the box either against or with the weight of the plows,—one or both; and while, by the claim, the box has one projection, two illustrations, M and M', are given of projections which may be employed, and it is suggested in the specification that instead of the flange, M', a counterweight may be employed, or a sleeve or pulley may be arranged on the pipe box with a chain to produce the same effect. It is easy to see, too, that weights, instead of the spring, might be connected with the arm, M, so as to rock the box in either direction. Indeed, that arm might be lengthened, its upper end enlarged so as to constitute a weight, and a joint introduced near the box, whereby the weight could be turned forward or backward to move the box one way or the other, as desired. The specification of the patent was drawn, of course, to describe the elements and functions of the elements of all of the claims; and, when they are considered together, it is clear enough that the first claim was designed to be broadest, covering simply the pipe box with a projection, which might be in any of the forms illustrated or suggested; the third to be less broad, covering the same pipe box, except that it should have "longitudinal ribs, combined with the stirrup, G, having corresponding grooves," etc.; and the second to be yet more narrow, covering "the combination, with the crank-axle and the gangs or plows, of the pipe box having

the arm, M, the spring, N, attached to the main frame, the head, I, and the stirrup, G, or its equivalent," etc. The interpretation which we are asked to put upon the first claim would make it essentially the same as the second. The proposition of the brief is "that, for the purpose of the present case, the claim is to be construed under the law as a claim for a combination in a corn cultivator of a pipe box, a projection thereon, a spring hitched to such projection at its free end, and one or more 'rear cultivators or plows' also pivoted to the pipe box; these being so connected and combined that the spring, acting through such projection, shall co-operate with the operator in the manipulation of the beams by hand." It is only under the emergencies and "for the purpose of the present case" that such a combination could be read into the claim; but, if so interpreted, we should still be compelled to regard the claim as void of invention, or at most subject to a construction which would be too narrow to support the charge of infringement. It is not contented that the supposed combination contains any new element, or is made up of parts which had not been employed together in earlier cultivators to perform the same or similar individual functions. A new combined result is insisted upon, and one novel feature of construction is asserted, which, it is said, consists simply in changing "the place of hitch" for the spring from the plow beam, where it had theretofore been, to a projection made for the purpose on the pipe box; thereby accomplishing the alleged new result of avoiding the tendency of the spring, when attached in the old way, to resist lateral movements of the plow. "The problem," we are told, "was to hitch the spring so that it would aid the operator in the vertical movement of the beam without interfering with the sidewise movement;" and it is asserted that Brown's invention consisted in the discovery that the resistance to sidewise movements could be avoided by hitching the spring in front of the vertical bolt upon which the plow beam turns horizontally. But in the cultivators made by the appellees the spring was hitched to an extension, either of the bolt itself, or of the upper arm of the stirrup through which the bolt passed; and it became necessary, in order to maintain a semblance of infringement, to enlarge still further the scope of the claim. Accordingly, it is insisted that, properly construed, the invention includes any place of hitching at or forward of the vertical pivot bolt. But this proposition, manifestly, is not completely applicable when a weight is used in lieu of a spring; and hence it became important, if not imperative, to say, as it has been said, that while Brown thought that for the purposes of the invention "a weight was practically, as well as theoretically, the equivalent of a spring," he was mistaken in that particular. But that this assertion was unwarranted is shown by the suggestion already made, that, instead of the spring, a weight might be attached to the arm, M, without change in its construction, so as to perform the exact function of the spring, or, to accomplish the same effect, the arm itself might be lengthened, enlarged at its outer end to produce the requisite weight, and jointed near the pipe box. This last

construction would be substantially identical with the weight and lever shown in the English patent to Smith, No. 1,582, for improvement in horse rakes. Brown therefore made no mechanical mistake in treating a weight, for his purpose, as an equivalent for a spring; and, if there was mistake at all, it was because thereby the fact of anticipation by the English patent was made more evident. The attempt to distinguish between the pipe box of this patent, when moved by a lever and weight, and the pipe box of the Smith patent, with its lever and weight, because one is used in a cultivator, and the other in a horse rake, is necessarily unsuccessful. A more complete analogy in construction and function between things not identical it would be difficult readily to conceive. But following the line of the appellant's argument, and leaving out of view, for the purposes of the case, the weights and draft mentioned in the claim, and the sleeves and pulleys suggested in the specification, and considering the spring only as a fit means for performing its allotted function, our conclusion cannot be different While it is plainly true that the spring, when hitched to the plow beam, will tend to resist a lateral movement of the plow, the extent of the resistance, it is equally clear, will be proportionate to the distance of the point of attachment from the bolt upon which the beam is pivoted. To reduce the resistance, it would be only necessary, in a given case, as any intelligent person could see, to reduce that distance; and what the appellees did was to attach the spring to the bolt itself, lengthened out in order to prevent loss of power, and not, in the manner of Brown's patent, to a projection on the pipe box provided for the purpose. Once springs had been introduced into cultivators for the purpose of aiding the operator to move the plows vertically, if it can be said to have ever been a question, outside of the minds of solicitors and expert theorists, how the resistance of the springs to lateral movements could be avoided, it was a problem whose solution was always too manifestly easy to be called invention or discovery. It was a matter of the simplest reasoning and observation. It was admitted at the argument that, so long as the process consisted in diminishing the resistance by moving the place of the spring's attachment on the plow beam towards the bolt, it involved no invention; but it is claimed that Brown made an original discovery when he perceived that by passing the bolt, and making the attachment in front, the resistance was entirely eliminated. The fact is evident, but no more so to men of ordinary intelligence now than it was before Brown applied for his patent; and consequently there could be nothing patentable to Brown in the discovery, if his intelligence is to be discredited by the assumption that the perception then first dawned upon him. Practically, the supposed problem would be solved just as well by connecting the spring with the beam at a point immediately behind the pivot bolt, within a distance of three, six, or perhaps even twelve, inches. In his patent of 1872, Brown had shown another mode of accomplishing the result by pivoting the fixed end of the spring like the pivoted part of a swinging bracket.

If the claim in question can be regarded as containing invention at all, it must be limited to the particular forms of construction of the pipe box described; and, that done, infringement is not proved.

The decree below, in each case, should be affirmed, and it is so ordered.

STIRRAT et al. v. EXCELSIOR MANUF'G CO.

(Circuit Court of Appeals, Eighth Circuit. May 7, 1894.)

No. 341.

PATENTS—LIMITATION OF CLAIMS—WATER-HEATING DEVICE FOR STOVES.

The Stirrat patent, No. 357,874, for a water-heating device for stoves, in view of the prior state of the art and the modification of the claims in the patent office, must be strictly limited to the construction described, which includes, as an essential element of the combination claimed, a hollow, long center plate or a top plate of a stove having a chamber therein, through which the water to be heated is caused to pass; and hence does not cover a device containing a solid, long center plate with a water box bolted thereto. 60 Fed. 607, affirmed.

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

A. C. Fowler, for appellants.

Paul Bakewell, for appellee.

Before CALDWELL and SANBORN, Circuit Judges.

SANBORN, Circuit Judge, delivered the opinion of the court.

This was a suit for the infringement of letters patent No. 357,874, for a water-heating device for stoves and ranges, issued to the appellants Robert J. Stirrat and Robert G. Stirrat, February 15, 1887. The defense was that there was no patentable novelty in complainants' device, and that the appellee, the Excelsior Manufacturing Company, a corporation, did not infringe. The circuit court dismissed the bill on the latter ground. 60 Fed. 607.

The device of the appellants consists of the combination of the hollow, long center plate of a stove or range, with a supply pipe, which leads from the lower part of a water tank, through the wall of a stove or range, thence in front of the fire back, and is then inserted in the under side of the long center plate, near the end furthest from the source of supply, and an eduction pipe which leads to the hot-water tank and is screwed into the long center plate at the end opposite to that at which the supply pipe is inserted. The device of the appellee consists of the combination, with the solid, long center plate of a stove, of a water box, slotted lugs and bolts or screws by which it may be fastened to the long center, and a supply pipe and an eduction pipe arranged and inserted in the water box in substantially the same way in which the appellants arrange and insert the like pipes in their hollow, long

center plate. The device of the appellee is described in letters patent No. 358,123, to O'Keefe and Filley, dated February 22, 1887. In operation, the cold water is led through the supply pipe in front of the fire back, and thence, in appellants' device, through the hollow, long center, and, in the appellee's device, through the water box fastened on the under side of the long center, to the hot-water tank.

The claims and specifications of every patent must be read and construed in the light of a full knowledge of the state of the art when the patent was issued. A patent to the original inventor of a machine which first performs a useful function protects him against all machines that perform the same function by equivalent mechanical devices, but a patent to one who has simply made a slight improvement on a device that performed the same function before as after the improvement, is protected only against those who use the very improvement he describes and claims, or mere colorable evasions of it.

If Robert J. Stirrat, the inventor of the device of appellants, had been the first to discover and to reduce to practical operation a combination of pipes or water boxes or both, to be used in stoves or ranges for the purpose of heating water and tempering the heat of the long center plates or tops of stoves or ranges, and had broadly claimed for his invention the protection of the patent laws, the appellee's device would clearly have been an infringement upon his patent. On the other hand, it is not less certain that, if devices of this character had long been in use before his invention, if the machine used by the appellee, or devices so analogous to it that it required no invention to conform them to that of the appellee, had long been known and used for this purpose, and if this invention of Stirrat was nothing more than a slight improvement of well-known devices in features of construction specifically pointed out in the specifications and claims of his patent, then the appellee ought not to be charged as an infringer here. In other words, the question of infringement or noninfringement in this case must be determined by the limitations placed upon this patent by the state of the art when it was issued, and the specifications and claims of the inventor himself. McCormick v. Talcott, 20 How. 402, 405.

What, then, was the state of the art? As early as 1875 two horizontal pipes, placed against the fire back of a stove, the one above the other, and connected together in the form of an ox bow, so that the cold water should be led into the stove through the lower pipe, and back, when heated, through the upper pipe, to the receptacle for hot water, were in common use. In letters patent to Wood, No. 115,800, June 6, 1871, and to Weldon, No. 227,334, May 4, 1880, a water back for a stove or range with a partition therein extending nearly the length of the box to divide the cold water from the hot, and an arrangement for passing the pipe from each side through the wall of the stove or range, are shown. In letters patent No. 258,098, to William Miller, May 16, 1882, a fire box lined on each side with a water back having a hollow extension that supports the panel or long center of the stove or range con-

taining the fire box is shown. In the specifications to that patent Mr. Miller says:

"I am aware it is not new to support the long centers or top plates of ranges or similar cooking apparatus by a coil of water pipes extending from the front to the rear of the furnace, communicating with the water back proper and boiler of the range or stove. Furthermore, I am aware it is not new to support these long centers by means of water chambers extending completely across from the front to the rear of ranges, etc., as such devices are seen in several patents."

Letters patent No. 277,009, to Newton Cooper and Thomas E. Conwell, May 8, 1883, show the long center of a stove, with water passages in it, connected by pipes with a water reservoir. They also show water passages in other parts of the top of the stove, and describe an arrangement for connecting these with the interior of a hollow fire back, so that the water may pass through the latter and the passages in the top of the stove to and from the reservoir. In the specifications these patentees say:

"We are aware that water pipes have been placed contiguous to the under side of stove tops and to the rear sides of stove fire backs, but not entering the body of either, and we do not claim the same. In our invention the water comes directly into the body of both the top and fire back."

Thus it appears that there was no novelty in suspending pipes in front of the fire backs of stoves or ranges for the purpose of heating water; that there was no novelty in making the fire backs of stoves hollow, and heating the water therein; none in providing the long centers or tops of stoves with water passages, through which the water might circulate to and from the reservoir; none in connecting the hollow fire back with the passages in the top of the stove, so that the water might circulate from the reservoir through the stove top and the fire back, and thence to the reservoir; none in placing water pipes contiguous to the under sides of long centers of stoves; and none in connecting such contiguous pipes with the hollow fire backs or water backs proper of stoves, so that the water would circulate through the water backs and the contiguous pipes. Vide Miller, No. 258,098, supra. The appellee seems to have simply turned over the old device described by Miller and placed the pipe on the fire back, and bolted the water back to the long center. Was this invention, and, if so, was it Stirrat's?

In his original application, filed October 23, 1883, Stirrat says: "My improvement consists in forming a water passage in the long center or centers connected with the water tank by suitable pipes," and his only claim was "the long center of a stove or range, formed with a water passage therein, communicating with induction and eduction pipes." This claim was immediately rejected by the commissioner of patents, with the statement that the patent to Cooper and Conwell, supra, proved that it was old to construct a long center of a stove to form a water back; that the patents to Weldon, No. 227,334, May 4, 1880, supra, and to Wood, No. 115,800, June 6, 1871, supra, proved that it was old to construct a water back with a partition and to pass the pipes therefrom through the side of the stove; and that Stirrat's claim contemplated simply the substitution of

the construction shown by the last-named patents for that of Cooper and Conwell, which did not involve invention. The references made by the commissioner were conclusive proof that Stirrat had not made the invention he supposed he had, and he abandoned it. But the ingenuity and perseverance of his counsel, after repeatedly amending his application, extracted from the commissioner the patent in suit in February, 1887. This patent has three claims, which read as follows:

"(1) The combination, with the removable top plate of a cooking stove having a chamber therein, of an exit pipe, leading from said chamber at one end of the plate, and an inlet pipe, running parallel to the exit pipe, extending to the other end of the plate, and communicating with the chamber, substantially as described. (2) The combination, with the removable top plate of a cooking stove having a chamber therein, of an exit pipe leading from said chamber at one end of the plate, and an inlet pipe, communicating with the chamber at the other end of the plate, and extending downward horizontally and upward beneath the plate, and then parallel to the exit pipe, substantially as described. (3) The combination, with a cooking stove or range, of a hollow, long center plate, supply pipe, F, formed with horizontal section F''', and vertical sections F', F'''', and the eduction pipe, G, substantially as described."

In the specifications, Stirrat says, among other things:

"My invention relates to those water-heating devices in which the water to be heated is caused to pass through the long center and a water back. My improvement consists in features of construction hereinafter described and pointed out in the claims. * * * The long center, C, is cast with a projection having a water passage through it almost from end to end, as shown at C. The under side of the long center is tapped at C^3, and the section F''' of the water pipe screwed therein. * * * It will be seen that the construction I have shown provides a combined long center and water back."

Now, it must be borne in mind that the patent to Cooper and Conwell, supra, exhibited a hollow long center, a water passage through other parts of the top of the stove, and a combination of a water back with the hollow stove top, so that the water could pass from the reservoir through a part of the top of the stove and the water back, and thence be returned to the reservoir through another part of the stove top. The improvement in the construction shown in this patent over that of Cooper and Conwell, if any, is the combination of the water back with the hollow long center, instead of combining it with any other part of the top of the stove. It is unnecessary to consider here whether or not there was any patentable novelty in this improvement. If there was, it is difficult to see how it could extend to the device of the appellee, or how there could have been any novelty in the latter. The evils to be remedied by these devices were that, when too large a portion of the fire back of a stove was covered by water pipes or by a water back, the oven beneath would not heat evenly, and that the long center plate would warp and burn out, unless it was protected by water passing through it, or by a water pipe or box contiguous to it. The prior patents to which we have referred show that the device of keeping the long center cool by placing a water pipe or a water box directly beneath and contiguous to it was old and well known. If the two legs of the old ox-bow pipe prevented the oven from heating quickly and evenly, it must have been obvious

to any mechanic skilled in the art that, if they were raised a few inches, so that the lower one only would rest on the fire back, this evil would be remedied. It was an old and well-known device to place water boxes or contiguous pipes beneath the long center of stoves to temper their heat. (Letters patent No. 258,098 to Miller, and No. 277,009 to Cooper and Conwell, supra.) To make the upper leg of the ox bow in the form of a water box, and fasten it detachably to the long center when it had been raised from the fire back, was but to adopt this old device for cooling the center plate. The only change required to conform the old ox bow to the device of appellee was to raise it a few inches in the stove, to make the upper leg in the form of a water box, and bolt it to the long center plate. The only change required to conform the old device described in the patent to Miller as a coil of pipes supporting the long center, and communicating with the water back to that of the appellee, was to turn that device over, and to attach the water back to the long center, and let the coil of pipe rest on the fire back. There was certainly no invention—no discovery—in making these changes. They are so simple, and so obviously effective to remedy the evils complained of, that they must have occurred to any mechanic familiar with such devices who sought to remedy them. If, therefore, the claims of this patent warranted a construction broad enough to cover the device of the appellee, we should have no hesitation in holding it void for want of novelty. Atlantic Works v. Brady, 107 U. S. 192, 199, 2 Sup. Ct. 225; Vinton v. Hamilton, 104 U. S. 485, 491; Slawson v. Railroad Co., 107 U. S. 649, 653, 2 Sup. Ct. 663; King v. Gallun, 109 U. S. 99, 3 Sup. Ct. 85; Double-Pointed Tack Co. v. Two Rivers Manuf'g Co., 109 U. S. 117, 3 Sup. Ct. 105; Estey v. Burdett, 109 U. S. 633, 3 Sup. Ct. 531; Bussey v. Manufacturing Co., 110 U. S. 131, 4 Sup. Ct. 38; Phillips v. City of Detroit, 111 U. S. 604, 4 Sup. Ct. 580; Morris v. McMillin, 112 U. S. 244, 5 Sup. Ct. 218; Hollister v. Manufacturing Co., 113 U. S. 59, 5 Sup. Ct. 717; Ellbert v. Gaslight Co., 50 Fed. 205, 211.

But, in our opinion, the claims of this patent do not warrant any such construction. The claim of a specific combination or device in a patent is a renunciation of every claim to any other combinations or devices for performing the same functions that are apparent from the face of the patent, and are not colorable evasions of the combination or device claimed. The statute requires the inventor to "particularly point out and distinctly claim the part, improvement or combination which he claims as his discovery." Rev. St. § 4888. When, under this statute, the inventor has done this, he has thereby disclaimed and dedicated to the public all other improvements and combinations apparent from his specifications and claims that are not evasions of the device and combination he claims as his own. The claims of his patent limit his exclusive privileges, and his specifications may be referred to to explain and to restrict, but never to expand, them. When the claims and specifications of this patent are read in view of the state of the art to which we have adverted, and fairly construed in accordance with these established rules, no attempt to claim

the invention of such a combination as that of the appellee will be found, but a plain disclaimer of any such invention. In each of the three claims of the patent the inventor specifies and claims "a hollow, long center plate," or "the removable top plate of a cooking stove having a chamber therein," as one of the elements of his combination. In his specifications he declares that his invention "relates to those water-heating devices in which the water to be heated is caused to pass through the long center." In the device of the appellee there is no hollow long center, nor is it one of those heating devices in which the water to be heated is caused to pass through the long center. We think these claims and specifications (especially in view of the state of the art) constitute a fair disclaimer and dedication to the public of all right on the part of Stirrat to protection against any such device as that used by the appellee, and hence that the latter was guilty of no infringement in its use. Keystone Bridge Co. v. Phoenix Iron Co., 95 U. S. 274, 278; Miller v. Brass Co., 104 U. S. 350, 352; McClain v. Ortmayer, 141 U. S. 419, 424, 12 Sup. Ct. 76; Dobson v. Cubley, 149 U. S. 117, 121, 13 Sup. Ct. 796; Heine Safety Boiler Co. v. Anheuser-Busch Brewing Ass'n, 43 Fed. 786, 789; Maddock v. Coxon, 45 Fed. 578.

The brief and argument of counsel for appellants in this case are instructive and exhaustive. Every authority and suggestion that could be advantageously urged in their behalf seem to have been presented. Perhaps the strongest statement of their claim is that the only difference between the device shown in the patent and that used by the appellee is that in the former the hollow long center plate is made in one piece, while in the latter it is made in two pieces,—a solid long center plate and a water box bolted to it,—and that this simple change in construction cannot be pleaded to avoid infringement. This position would be unanswerable if Stirrat was a pioneer here, and if he had not expressly restricted his claims to a combination the essential element of which was the hollow long center. But the state of the art to which we have adverted was such when he made his invention that there was no patentable novelty in a combination of a water box bolted to the long center with the supply and eduction pipes used by the appellee, and this fact, and the specific limitations he imposed upon himself in his claims, have forced us to the conclusion that his patent was properly restricted by the court below to the special feature of construction he described and claimed, viz. the hollow long center through which the water was caused to pass in combination with the connecting pipes. The decree below must accordingly be affirmed, with costs, and it is so ordered.

OVERMAN v. WARWICK CYCLE MANUF'G CO.

(Circuit Court of Appeals, First Circuit. April 17, 1894.)

No. 71.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

This was a suit by Albert H. Overman against the Warwick Cycle Manufacturing Company to restrain the infringement of letters patent No. 331,001, granted to the complainant for a saddle for velocipedes. The bill was dismissed with costs (54 Fed. 496), and complainant now appeals.

Chamberlin, White & Mills and Edward S. White, for appellant.

John L. S. Roberts, for appellee.

Before COLT and PUTNAM, Circuit Judges, and NELSON, District Judge.

PER CURIAM. The characteristic feature of the Overman patented saddle is its adaptability for removal and replacement at pleasure. This is the essence of the invention, and constitutes the improvement over prior saddles. The defendant's saddle embodies a form of construction in which this feature is absent. This is the ground upon which the court below held that the defendant's saddle did not infringe the Overman patent. We think the court below was right, and we can add nothing to the reason so clearly stated in its opinion. Decree affirmed.

THE DAGO.

UNITED STATES v. THE DAGO.

(Circuit Court of Appeals, Fourth Circuit. May 22, 1894.)

No. 67.

BILL OF HEALTH—PORT OF DEPARTURE.

A merchant ship bound for the United States must (27 Stat. 449) procure a bill of health "from the consul or other consular officer of the United States at the port of departure." *Held*, that "the port of departure" is not the last port at which the ship stops while bound for the United States, but the port from which she cleared.

Appeal from the District Court of the United States for the District of Maryland.

This was a libel by the United States against the British steamship Dago to enforce a forfeiture. The district court dismissed the libel, and libellant appeals.

John T. Ensor, for the United States.

J. Wilson Leakin, for appellee.

Before GOFF and SIMONTON, Circuit Judges, and JACKSON, District Judge.

GOFF, Circuit Judge. This is an appeal from a decree rendered by the district court of the United States for the district of Maryland dismissing a libel filed on behalf of the United States against the steamship Dago. It was charged in the libel that the steamship had not complied with the provisions of the act of congress approved February 15, 1893, entitled "An act granting additional quarantine powers and imposing additional duties on the marine hospital service." 27 Stat. 449. It was alleged that the Dago cleared from a certain foreign port, the port of Bristol, England, for the port of Baltimore, in the United States, on the 10th of July, 1893, without having obtained a bill of health, as was required by section 2 of said act of congress; and also that, having cleared and sailed from said port of Bristol at the time mentioned, she did, on the 2d day of August, 1893, unlawfully enter the port of Baltimore, in the United States, without having obtained a bill of health, as was required by the said act of congress. The libel, which was filed August 5, 1893, sets forth that the Dago was seized by the collector of customs at the port of Baltimore, as forfeited to the United States, to be released upon the payment of not more than $5,000, the exact amount to be determined by the court. The answer of the steamship, filed September 22, 1893, claimed that she came to the port of Baltimore provided with a bill of health in all respects in accord with the requirements of the law, obtained at Newport, in Wales, her last port of departure, from Great Britain, and she insisted that no other bill of health was required of her by the law.

The said act of congress, or the parts thereof necessary to consider in connection with this case, read as follows:

"That it shall be unlawful for any merchant ship or other vessel from any foreign port or place to enter any port of the United States except in accordance with the provisions of this act, and with such rules and regulations of state and municipal health authorities as may be made in pursuance of, or consistent with this act; and any such vessel which shall enter, or attempt to enter, a port of the United States in violation thereof, shall forfeit to the United States a sum, to be awarded in the discretion of the court, not exceeding five thousand dollars, which shall be a lien upon said vessel, to be recovered by proceedings in the proper district court of the United States. In all such proceedings the United States district attorney for such district shall appear on behalf of the United States, and all such proceedings shall be conducted in accordance with the rules and laws governing cases of seizure of vessels for violation of the revenue laws of the United States.

"Sec. 2. That any vessel at any foreign port, clearing for any port or place in the United States, shall be required to obtain from the consul, vice-consul, or other consular officer of the United States at the port of departure, or from the medical officer where such officer has been detailed by the president for that purpose, a bill of health, in duplicate, in the form prescribed by the secretary of the treasury, setting forth the sanitary history and condition of said vessel, and that it has in all respects complied with the rules and regulations in such cases prescribed for securing the best sanitary condition of the said vessel, its cargo, passengers, and crew; and said consular or medical officer is required, before granting such duplicate bill of health, to be satisfied that the matters and things therein stated are true; and for his services in that behalf he shall be entitled to demand and receive such fees as shall by lawful

regulation be allowed, to be accounted for as is required in other cases. The president, in his discretion, is authorized to detail any medical officer of the government to serve in the office of the consul, at any foreign port, for the purpose of furnishing information and making the inspection and giving the bills of health hereinbefore mentioned. Any vessel clearing and sailing from any such port without such bill of health, and entering any port of the United States, shall forfeit to the United States not more than five thousand dollars, the amount to be determined by the court, which shall be a lien on the same, to be recovered by proceedings in the proper district court of the United States.

"Sec. 3. That the supervising surgeon-general of the marine hospital service shall, immediately after this act takes effect, examine the quarantine regulations of all state and municipal boards of health, and shall, under the direction of the secretary of the treasury, co-operate with and aid state and municipal boards of health in the execution and enforcement of the rules and regulations of such boards and in the execution and enforcement of the rules and regulations made by the secretary of the treasury to prevent the introduction of contagious or infectious diseases into the United States from foreign countries, and into one state or territory or the District of Columbia from another state or territory or the District of Columbia. * * * The secretary of the treasury shall make such rules and regulations as are necessary to be observed by vessels at the port of departure and on the voyage, where such vessels sail from any foreign port or place to any port or place in the United States, to secure the best sanitary condition of such vessel, her cargo, passengers and crew; which shall be published and communicated to and enforced by the consular officers of the United States. None of the penalties herein imposed shall attach to any vessel or owner or officer thereof until a copy of this act, with the rules and regulations made in pursuance thereof, has been posted up in the office of the consul or other consular officer of the United States for ten days in the port from which said vessel sailed; and the certificate of such consul or consular officer over his official signature shall be competent evidence of such posting in any court of the United States."

The only question in the case is, we think, whether or not the steamship Dago was required to obtain a bill of health at Bristol, England, at the time she cleared and departed therefrom for Baltimore, in the United States, by way of Newport, Wales. It was contended by the respondent below that, as she stopped on her way at Newport, it was only necessary to obtain a bill of health at that place. It was clearly shown by the testimony —in fact, it was admitted—that the Dago cleared from Bristol, England, via Newport, Wales, for Baltimore, in the United States, and that she was provided with a bill of health from the port of Newport, Wales, but that she did not obtain a bill of health at the port of Bristol at the time of departing therefrom, and also that she was not provided with one at the time she entered the port of Baltimore. The district court, holding that the Dago was not guilty of a breach of said act of congress, dismissed the libel. The United States petitioned for and was allowed an appeal.

The act mentioned was passed to prevent, if possible, the introduction into the United States of contagious and infectious diseases from any foreign port. It makes it unlawful for any vessel from any foreign port to enter any port of the United States except in the manner provided for by said legislation and the rules and regulations established under its provisions; and it requires any vessel at any foreign port, clearing for any port in the United States, to obtain a bill of health at the port from which it so clears and de-

parts. The regulations promulgated by the secretary of the treasury, dated February 24, 1893, in pursuance of said act of congress, are in part as follows:

"Art. 1. Masters of vessels about to depart from any foreign port for a port in the United States must procure from the United States consular or medical officer, at such port of departure, a bill of health."

The act of congress and the rules and regulations authorized by it were duly posted in the office of the consul at Bristol, England, in the manner required by law. The master of the Dago was aware that a bill of health was required, and procured it at Newport in Wales. To hold that this action on his part was a compliance with the terms of the law and regulations in such cases made and provided, would permit a vessel to clear from an infected foreign port, at which it could not properly obtain such bill of health, and by stopping on the way at another port, not infected, secure the bill of health that would enable it to enter the ports of the United States, thereby defeating the object had in view when said act of congress was enacted. It is intended by said legislation to furnish the health and quarantine authorities of this country with information relative to the sanitary condition of the ports of departure of vessels desiring to enter the ports of the United States. It is made the duty of the secretary of the treasury and of 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 the rules and regulations made by the secretary of the treasury to prevent the introduction of contagious or infectious diseases into the United States from foreign countries; and the secretary of the treasury is required to make such rules and regulations as are necessary to be observed by vessels at the port of departure and on the voyage, where such vessels sail from any foreign port or place to any port or place in the United States, to secure the best sanitary condition of such vessel, her cargo, passengers, and crew, which shall be published and communicated to and enforced by the consular officers of the United States. By the regulations so authorized and promulgated, the United States consul at the port of departure is required to certify that the vessel has complied with the rules made under the act now in question, and that the vessel leaves his port bound for a particular port in the United States. If the vessel so bound for the United States stops at other foreign ports, the consul of the United States at which such calls are made must give a similar certificate or consular visa of the bill of health, as to the passengers, their effects, and the cargo taken on the vessel at such ports, and also as to the condition of the vessel, passengers, and crew since it left the port of departure. The protection intended by the legislation is of great and universal importance, and the provisions of the rules and regulations are not severe, nor are they burdensome, but are made with due regard to the interests of all concerned, and are necessary both to the comfort of the individual citizen and the safety of the general public. We do not think the Dago complied with the requirements of said act of congress when she procured the bill of health at Newport, Wales. She should have se-

cured it at Bristol, England, her port of departure. She violated the law, and ignored the rules and regulation provided for by it. It follows that the decree of the district court for the district of Maryland must be reversed, and the cause remanded to said court for such further proceedings as may be proper; and it is so ordered.

THE EMPEROR.

THE HOWARD CARROLL.

KNICKERBOCKER STEAM TOWAGE CO. v. THE EMPEROR and THE HOWARD CARROLL.

(District Court, S. D. New York. June 13, 1894.)

1. TUGS AND TOWS—STRANDING TOW—NEGLIGENT NAVIGATION.
   A barge having run aground while in tow of two tugs, her owner brought this suit against both tugs to recover the damage. The defense was that high water was lower than usual, and that the draught of the barge had been represented as being but 20 feet, when she in fact drew more. The evidence did not satisfactorily show any misrepresentation as to the draught of the barge, and it did appear that the barge grounded forward, where her draught was not ever 19 feet 6 inches. The chart showed sufficient channel way for the barge, even with an abatement of a foot or two in the usual height of the flood tide. *Held*, that the tugs did not take the best water, and that this was the true cause of the grounding, and rendered the tugs liable.

2. SAME—TWO INDEPENDENT TUGS—ONE DIRECTING NAVIGATION — LIABILITY.
   Where two independent tugs were employed to tow a barge, and during the towing the barge was run aground, *held*, that both tugs were liable, although it appeared that the pilot of one tug was taking the direction of the navigation in the shallow waters when the barge struck.

In Admiralty.

This was a libel by the Knickerbocker Steam Towage Company, owners of the barge Andrew Jackson, against the steam tugs Emperor and Howard Carroll, for grounding the barge while in tow of the tugs.

Wing, Shoudy & Putnam, for libelant.
Samuel Park, for the Emperor.
Hyland & Zabriskie, for the Howard Carroll.

BROWN, District Judge. In the attempt of the tugs Emperor and Carroll to land the barge Andrew Jackson at Fourteenth street, East river, at about high tide, the barge was run aground twice, nearly abreast of Seventeenth street, while heading down; and afterwards, when allowed to drop up river with the flood tide, she again struck the bottom off Twenty-Fifth street. The defense on the part of the tugs is, that high water on that day was much below the usual mark, on account of previous northwest winds, and that the draught of the barge had been represented as being only 20 feet. The actual draught is proved to have been 19 feet 6 inches forward and 20 feet 10 inches aft.

I do not think that the defense is sufficiently made out. The evidence shows that the libelant's agent, in giving the order for the tugs to Mr. Eldridge, said in answer to an inquiry by telephone as to the draught: "Oh, I don't know,—about 20 feet;" no other representation as to the draught was made by the libelant. Eldridge prepared a brief card, such as is used in towing orders, for the purpose of finding tugs to fill the order, and his employe states that the card had on it the statement of "20 feet," as the draught. The masters of the tugs say that the same statement was made to them. The card was given to the captain of the Emperor, who undertook the direction of the navigation, as the captain of the Carroll had not before undertaken to land any deep draught barges at Fourteenth street. The card, however, was not preserved, and the witnesses as to its contents testified in their own exculpation.

In the absence of the card itself, I am not at all satisfied that the statement on the card was not "about 20 feet," instead of "20 feet." To establish so slight a difference, the card should be produced, or the secondary evidence be free from suspicious circumstances. Here, that is not the case. Mr. Eldridge, who wrote the card, has no recollection of writing the draught, or what, if anything, was stated about it. The water was known to be shallow. Mr. Eldridge would not be likely to misstate the representations made to him. The captain of the Emperor, who had possession of the card, testifies that when the barge struck the third time, he inquired of a person on board the barge if the draught was not over 20 feet, thinking that it must be greater than he understood it to be; and that he was told in reply that the draught was over "21 feet." Not only is this reply denied, but it is highly improbable; and had the card stated "20 feet" only, it seems to me very improbable also that the card would not have been retained by the captain of the Emperor for his own defense. The failure to preserve and produce the card is but one step short of the voluntary destruction of evidence. The captain of the Carroll, moreover, says that immediately after the barge struck first, he inquired the draught of the man on the barge, and was told it was over 21 feet; but that he said nothing about this to the captain of the Emperor, who had charge of the navigation. It seems to me extremely improbable that he would not have stated this to the Emperor's pilot immediately, if the previous statement of the draught had been "20 feet," rather than "about 20 feet." In the absence of the card, therefore, I do not place any reliance on the evidence of "20 feet" as an exact statement of the draught represented to the tugs, rather than "about 20 feet," as stated to Mr. Eldridge. The average draught was in fact only 20 feet 2 inches. The load-line figures forward and aft indicated exactly the draught of the barge at each end; and if the tugs did not notice and know the draught, it was by their own negligence.

It is probable from the testimony that the high tide was somewhat lower than usual that day; but without more definite evidence than that presented, no precise difference can be deemed

proved. No special observation was made, and the evidence on this point is of the loosest and least persuasive character possible. Whatever the fact was, the owners and masters of the tugs were aware of it at the time, and evidently had no doubt that a barge of at least 20 feet draught could be landed without danger. Yet the evidence shows that the barge was run aground forward, though her draft forward was not over 19 feet 6 inches, and amidships she could only have drawn 20 feet 2 inches. The chart in evidence shows sufficient channel way for the barge as she was, even with an abatement of a foot or two in the usual height of the flood tide; and the fact that she struck twice forward with only 19½ feet draught forward, satisfies me that the pilots did not take the best water, and that this was the true and only cause of the grounding.

As between the Emperor and the Carroll, although the navigation in the vicinity of Seventeenth street was directed by the master of the Emperor, I do not think that the relation of the Carroll in the matter was that of a mere helper and servant of the Emperor. Mr. Pastor, the employe of Mr. Eldridge, says that he engaged the Carroll as one of the tugs employed, two being required. The Carroll was, in fact, first on the ground, and she first commenced the towage in the absence of the Emperor. The Carroll's bill for the towage, as was stated in argument, and not denied, was rendered to the libelant, and not to the Emperor. It was natural, and perhaps even necessary, with two tugs, that the pilot of one should take the direction in shallow waters; and I do not think that the legal relation or responsibility of the Carroll to the libelant was changed by the fact that the Carroll relied upon the superior familiarity of the Emperor's pilot with the channel way near Seventeenth street, and submitted the direction of the navigation in that region to him. It was a matter of convenience, and part of the arrangement, between the tugs themselves, not designed to change any of the legal relations or responsibilities of either.

The libelant is, therefore, entitled to a decree against each tug for one-half the damage.

CHICAGO, M. & ST. P. RY. CO. v. WABASH, ST. L. & P. RY. CO.

(Circuit Court of Appeals, Eighth Circuit. May 7, 1894.)

No. 289.

1. CONTRACTS—PUBLIC POLICY—POOLING RAILROAD BUSINESS.
An agreement between railroad companies, by the terms of which all their roads are to be operated, as to through traffic, as if "operated by one corporation which owned all of them," and which provides for an actual division of such traffic, and, where this is not done, for a division of the gross earnings thereof, the obvious purpose being to suppress or limit competition, and to establish rates without regard to their reasonableness, is contrary to public policy, and void.

2. SAME—ENFORCEMENT OF CONTRACT—PERFORMANCE ON ONE SIDE.
One party to such illegal agreement, claiming to have performed its part thereof, cannot maintain a suit to enforce division of earnings by another party thereto, the traffic not having been divided. Brooks v. Martin, 2 Wall. 70, distinguished. Central Trust Co. v. Ohio Cent. R. Co., 23 Fed. 306, disapproved.

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

This was a suit by the Central Trust Company of New York against the Wabash, St. Louis & Pacific Railway Company and others to foreclose a mortgage on the property of the railway company. The Chicago, Milwaukee & St. Paul Railway Company filed an intervening petition for a claim under certain traffic contracts. Defendant railway company answered, and, on hearing, the petition was dismissed. The intervener appealed.

On December 5 and December 29, 1883, contracts providing, among other things, for a pooling and division of competitive traffic, were entered into by and between seven railroad companies, to wit, the Union Pacific, the Chicago, Rock Island & Pacific, the Chicago, Milwaukee & St. Paul, the Wabash, St. Louis & Pacific, the Chicago & Northwestern, the Chicago, St. Paul, Minneapolis & Omaha, and the Missouri Pacific. There were four contracts. The first was between the Union Pacific Railway Company, as party of the first part, and the Chicago, Rock Island & Pacific Railway Company, as party of the second part, and the Chicago, Milwaukee & St. Paul Railway Company, as party of the third part. The other three contracts admitted the other parties into the pool, and made some modifications and extensions of the original contract. The four contracts were in effect one, and will be so treated. The following are some of the material provisions of the contract:

The preamble declares the object of the contract to be to "make the railway system of the party of the first part substantially a part of the railway system of each of the other parties hereto, as to westward-bound traffic which will pass through Council Bluffs, in the state of Iowa, and each of the railway systems of the other parties substantially a part of the system of the party of the first part, as to east-bound traffic which will pass through the same place. * * * It is declared to be the purpose of the parties hereto by the execution of these articles, and the performance of the several covenants, promises, and agreements herein set out, to establish and operate through lines of railway, which shall connect, when the same can be done by a reasonably direct line through Council Bluffs, all points on the system of the party of the first part with all points on the several systems of the other parties (excepting the Kansas Division of the party of the first part and its railroads in the state of Kansas), including all extensions of the main lines, branches, and other railways mentioned in the preamble hereto, and all lines and branches which are now owned, controlled, or operated by either of the parties hereto in connection with any of its railways above mentioned, and which may be added thereto by construction, purchase, lease, or other-

wise, and to secure the operation of all of said lines as to such through traffic as they should be if operated by one corporation which owned all of them. * * *

"The party of the first part covenants, promises, and agrees with each and both of the other parties that it will, so far as it lawfully can, deliver to the railways of said other parties, at Council Bluffs, all eastward-bound through traffic which may be received by it for transportation to any point which can be reached with reasonable directness over any of the through lines composed of the railroads of two or more of the parties hereto passing through Council Bluffs, and that it will make all lawful and reasonable efforts to secure the transportation of all such through traffic which may be received by it for transportation over such through lines. It will divide all competitive through traffic which shall be transferred from its own railways to those of the other parties, as nearly as shall be practicable, into two equal parts, and transfer one of said parts to the railways of each of said parties for transportation to destination, or to the proper connecting line. * * *

"The rates which shall be charged for the transportation of through traffic over the through lines hereby established, for which provision has not been made in the preceding section, shall be fixed in the manner following: The established or current rate of the party of the first part, as per schedules hereto attached and made a part hereof, between the point at which traffic is received or to which it is destined and Council Bluffs, shall be added to the established or current rates of the parties of the second and third parts, as per schedules hereto attached and made a part hereof, between the points on their several lines at which such traffic is received or to which it is destined and Council Bluffs, and the sum of the two rates shall be the through rate: provided, however, that the rates upon all through traffic between competitive points which may be connected by a through line over the Northern Pacific Railroad shall be so adjusted that the rates between such points and all Chicago and Mississippi river points by way of Council Bluffs shall be as low as by way of St. Paul. * * *

"The through rates on east-bound through traffic over the lines hereby established may be reduced by the party of the first part, and the like rates on like traffic west bound may be reduced by the party of the second or third part, by whom it shall be delivered to the party of the first part, when such reduction shall be rendered necessary by competition with lines other than those hereby established. When any through rate is reduced by a party for any reason it shall immediately notify the other parties hereto of such reduction and the facts which it is claimed justified such reduction. A reduction of a rate shall continue only so long as shall be necessary because of competition. No rate shall be reduced by any party otherwise than as provided in this and preceding sections. * * *

"If any through rate shall be reduced by any party for reasons which are not satisfactory to the other parties, the rates fixed by the schedule shall be immediately restored, and maintained until a majority shall direct a modification, and all traffic transported under modified rate shall be accounted for at full rates in the division of the proceeds of the through traffic between the parties. In no case shall a schedule of rates be in any manner modified, altered, or reduced for the purpose of drawing traffic from the railways of any party hereto. If any party shall feel aggrieved because of any modification of any through rate, or of any order restoring a rate which has been cut, or by the action of any party tending to evade or in any wise impair agreed rates, the party so aggrieved may make it the basis of a complaint which shall be determined by reference as hereinafter provided. On the hearing of any such reference, the referees may affirm the order made by a majority of the parties, or direct the restoration of the rate reduced, and in a proper case make award to the party or parties injured by any evasion or unjustifiable reduction of a rate, as compensation for any damages which shall have been sustained. * * *

"If the east-bound competitive traffic actually transported by either of the parties of the second or third part, in any one month, shall not amount to the equal share to which it shall be entitled under the provisions of these articles, the balances shall be so adjusted as to give to each the proceeds of an equal

share of the gross revenue received by both for the transportation of such traffic. * * *

"To prevent confusion in the settlement of accounts, the following distances are arbitrarily established: From Council Bluffs to all points east thereof which take Chicago rates, five hundred miles; from Council Bluffs to all points east thereof which take Mississippi river rates, three hundred and forty miles. * * *

"No covenant, promise, or agreement in said original articles or in these supplemental articles contained shall be so construed as to affect or control (otherwise than by securing equality of rates, as provided in said original and these supplemental articles) through traffic specially routed, marked, and consigned by the shippers over through lines of which the Southern Pacific Railroad does now, or shall hereafter, form a part; but the rates on all through traffic between competitive points which may be connected by a through line over the Southern Pacific Railroad shall be so adjusted that the rates between such points and all Chicago and Mississippi river points by way of the Southern Pacific shall be as high as by the way of Council Bluffs. * * *

"If, at any time while this contract remains in force, the construction of new railroads, or the extension of existing ones, or the purchase or lease of railroads, or traffic or other arrangements, made by any one or more of the parties hereto, shall materially change the relations now existing between the parties with regard to traffic, the contract set out in the original and in these supplemental articles shall be so modified, altered, and amended as to establish between them, with regard to the then existing circumstances, substantially the relations hereby established between them with regard to the circumstances now existing. It is declared to be the purpose and intent of the parties to maintain the relations hereby established with regard to existing railroads and operating and traffic arrangements, and to adjust such relations to any change which may be made therein with regard to through traffic. If the parties cannot agree upon the modifications, alterations, or amendments which shall be made, if any, under the provisions of this section, the difference or differences which may thereby arise shall be determined by reference as in the original and these supplemental articles provided. * * *

"Each party will contribute to a common fund all of the gross revenue which it shall receive for the transportation of both east and west bound through traffic, hereinafter described, to or from Council Bluffs, and to and from Missouri valley, in the performance of the covenants, promises, and agreements set out in said original and supplemental articles. For the purpose of ascertaining the full amounts of the gross revenue which the parties shall severally contribute, each shall account and pay for all through traffic, both east and west bound, so transported by it, as follows: For all through traffic, except lumber, between the said Union Pacific and the Sioux City Pacific Railways and the railways of other parties hereto covered by said original and supplemental articles, which shall originate at, be destined to, or cross the Mississippi river at any point between the cities of Dubuque and St. Louis, both inclusive, at the rates for like traffic between Chicago and Council Bluffs. Through traffic which shall be transported for the government of the United States shall be accounted for at the actual rates paid for the same; that is, the regular rate, less the discounts which may be made because of land grants. When a penalty is charged on traffic for excess of weights, such traffic shall be accounted for at the regular rates for actual weight. Each party shall deliver to each of the others quarter-monthly statements showing what through traffic covered by said original articles and the supplemental articles referred to has, during the quarter month immediately preceding, been transferred over its railroads, or any of them, in what it consisted, between what stations and in what directions it was transported, and the rates charged and received therefor.

"The party of the third part hereto undertakes to account to the other parties, and pay to the common fund, provided for in the second section hereof, at Chicago rates, for all through traffic which may be received on its line, which can be lawfully transported from the point at which it shall be re-

ceived to destination or the proper connecting railway, over any of the through lines by the original articles and the supplemental articles established, with reasonable directness, through Council Bluffs, though such traffic, or some portion thereof, may not have been so actually transported: provided, however, that no greater amount of traffic to or from California points, actually transported by way of the line of the party of the third part and the Southern Pacific line, shall be reported to such common fund than the amount that shall be necessary (when added to the amount reported for other through traffic transported by the party of the third part) to make the sum equal to the proportion of the common fund to which the third party is entitled. Said common fund shall, when settlements are made between the parties in manner and form as provided in said original articles, be divided into four equal parts, one of which shall be paid to each of the parties hereto. This result shall be accomplished, so far as shall be practicable, by a physical division of the traffic to be accounted for (aided by diversion from one line to another) into four equal parts, one of which shall be transported by each of the parties hereto. When, for any reason, such division of the traffic has not been made during the month, the party or parties who shall receive an excess over the share to which it shall be entitled, as above provided, shall pay to the party or parties who shall not have received their full shares a sum or sums of money sufficient to make the division exact in producing gross revenue to the parties."

The pooling and division of traffic intended by the contracts were to be accomplished, so far as might be, by physical division of the traffic itself, between the companies, in certain fixed proportions; and, where this was not or could not be done, it was to be accomplished by pooling and division of the gross earnings of such traffic between the companies in such fixed proportions. The contract was to continue for 25 years.

In May, 1884, Solon Humphreys and Thomas E. Tutt were appointed receivers of the property, rights, and franchises of the Wabash, St. Louis & Pacific Railway Company by the circuit court of the United States for the eastern district of Missouri; and, as such receivers, they operated the railway committed to their charge until, under the decree and order of the court, the property was sold and transferred to the purchasers. The receivers acquiesced in the contracts referred to until March 31, 1887, when, by consent of all the parties, they were abandoned.

In the course of business, under the contracts, the traffic involved was not actually divided between and carried by the companies in the proportions fixed; but the Wabash, St. Louis & Pacific Railway Company, among others, actually carried more than the share allotted to it, and the Chicago, Milwaukee & St. Paul Railway, among others, actually carried less. The pool commissioner, provided for by the contracts, ascertained and made a statement of the differences, and, in making an adjustment of them, directed that the Wabash receivers should pay to the Chicago, Milwaukee & St. Paul Railway Company a sum which, after deducting admitted credits, amounted to $18,404.40; and this suit was instituted to recover that amount.

The defense is that the contract upon which the claim is based is against public policy, and void. The court below (Thayer, J.) sustained this defense, and the intervener appealed. There was no evidence of the rate fixed by the parties for the traffic involved in their contract, and no evidence as to their mode of operating under the contract beyond what is afforded by the contract itself.

John W. Cary, for appellant.

F. W. Lehmann, for appellee.

Before CALDWELL and SANBORN, Circuit Judges.

CALDWELL, Circuit Judge (after stating the facts). The design of the contract on which the appellant rests its claim is not left to presumption or conjecture. Its purpose is apparent on the face of the instrument. Its object was not to avoid ruinous com-

petition by entering into an arrangement to carry freight at reasonable rates, but its evident purpose was to stifle all competition for the purpose of raising rates. By the terms of the contract, all of the roads are to be operated, as to through traffic, "as they should be if operated by one corporation which owned all of them." These seven corporations were made one company so far as concerned their relations with each other, with rival carriers, and with the public. Between them there could be no competition or freedom of action. To the extent of the traffic covered by this contract,—and it covered no inconsiderable portion of the traffic of the continent,—each company practically abdicated its functions as a common carrier, and conferred them on a new creation, for the sole purpose of suppressing competition. Before they entered into this contract, each of these companies had the power, and it was its duty, to make rates for itself, and to make them reasonable; but, by the terms of this contract, every one of the companies was divested of all its powers and discretion in this respect. The contract removed every incentive to the companies to afford the public proper facilities, and to carry at reasonable rates; for, under its provisions, a company is entitled to its full percentage of gross earnings, even though it does not carry a pound of freight. The necessary and inevitable result of such a contract is to foster and create poorer service and higher rates. There is no inducement for a road to furnish good service, and carry at reasonable rates, when it receives as much or more for poor service, or for no service, as it would receive for good service and an energetic struggle for business.

A railroad company is a quasi public corporation, and owes certain duties to the public, among which are the duties to afford reasonable facilities for the transportation of persons and property, and to charge only reasonable rates for such service. Any contract by which it disables itself from performing these duties, or which makes it to its interest not to perform them, or removes all incentive to their performance, is contrary to public policy and void; and, the obvious purpose of this contract being to suppress or limit competition between the contracting companies in respect to the traffic covered by the contract, and to establish rates without regard to the question of their reasonableness, it is contrary to public policy, and void. Railroad Co. v. Closser, 126 Ind. 348, 26 N. E. 159; Gulf, C. & S. F. R. Co. v. State (Tex. Sup.) 10 S. W. 81; State v. Standard Oil Co. (Ohio Sup.) 30 N. E. 279; Texas & P. Ry. Co. v. Southern Pac. Ry. Co. (La.) 6 South. 888; Gibbs v. Gas Co., 130 U. S. 396, 9 Sup. Ct. 553; Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. St. 173; Salt Co. v. Guthrie, 35 Ohio St. 666; Stanton v. Allen, 5 Denio, 434; Hooker v. Vandewater, 4 Denio, 349; Chicago Gaslight & Coke Co. v. People's Gaslight & Coke Co., 121 Ill. 530, 13 N. E. 169; West Virginia Transp. Co. v. Ohio River Pipe Line Co., 22 W. Va. 600; W. U. Tel. Co. v. American Union Tel. Co., 65 Ga. 160; Sayre v. Association, 1 Duv. 143; U. S. v. Trans-Missouri Freight Ass'n, 7 C. C. A. 15, 58 Fed. 58.

But, conceding that the contract is illegal and void, the appellant asserts that it has been performed, and that the appellee is bound to account for moneys received under the contract according to its terms. This contention rests on a misconception of the character of this suit. The appellant's claim is grounded on the illegal and void contract, and this suit is, in legal effect, nothing more than a bill to enforce specific performance of that contract.

The contract contemplated two modes of pooling,—one by an actual division of the traffic, and the other by a division of the gross earnings. The traffic not having been divided, this is a suit to enforce the second method of the pool,—a division of the gross earnings; or, in other words, a pooling of the earnings. The illegal and void contract has not been executed, and the appellant invokes the aid of the court to compel the Wabash Company to execute it on its part by pooling its earnings. It may be conceded that the illegal contract has been performed on the part of the appellant, though it does not appear to have done anything more than to sign the contract. The only thing it could do towards a performance of the contract was not to compete for the business. This was a violation of its duty to the public, and illegal. But a contract performed on one side only is not an executed contract. Where an illegal act is to be done and paid for, the contract is not executed until the act is done and paid for. A court will not compel the act to be done, even though it has been paid for. Neither will it compel payment, although the act has been done; for this would be to enforce the illegal contract. The illegality taints the entire contract, and neither of the parties to it can successfully make it the foundation of an action in a court of justice. The Wabash Company performed the service that earned the money the appellant is seeking to recover. The appellant earned no part of it. There is nothing in the record to show that the appellant would have carried more or the Wabash Company less freight if the contract had never been entered into. The money demanded was received by the Wabash Company for freight tendered to it by shippers themselves, and carried by it over its own line. It was legally bound to accept the freight thus tendered, and was entitled to receive the compensation for the carriage, and cannot be compelled to pay the money thus earned, or any part of it, to the appellant on this illegal and void contract.

The case of Brooks v. Martin, 2 Wall. 70, is not in point. In that case the defendant set up an illegal contract, which had been fully performed and executed, as a defense against a demand that existed independently of the contract; whereas, in this case, the illegal contract is set up by the plaintiff as the foundation of its action. Strike this contract out, and confessedly the complaint states no cause of action; leave it in, and it states an illegal and void cause of action.

Courts will not lend their aid to enforce the performance of a contract which is contrary to public policy or the law of the land, but

will leave the parties in the plight their own illegal action has placed them. Central Transp. Co. v. Pullman's Palace Car Co., 139 U. S. 24, 11 Sup. Ct. 478; Gibbs v. Gas Co., 130 U. S. 396, 9 Sup. Ct. 553; Texas & P. Ry. Co. v. Southern Pac. Ry. Co., 41 La. Ann. 970, 6 South. 888; Morris Run Coal Co. v. Barclay Coal Co., 68 Pa. St. 173; Hooker v. Vandewater, 4 Denio, 349. We have not overlooked the case of Central Trust Co. v. Ohio Cent. R. Co., 23 Fed. 306. The opinion in that case is not supported by the authorities, and is unsound in principle.

The decree of the court below is affirmed.

SIMPKINS v. ATCHISON, T. & S. F. R. CO.

(Circuit Court, W. D. Missouri, W. D. June 11, 1894.)

No. 1,812.

1. WITNESS FEES—TAXATION OF COSTS.
   Where persons are subpoenaed as witnesses, but are not introduced to testify, the presumption is that they were unnecessarily brought to court, and their fees are not taxable against the opposite party.
2. SAME.
   Fees of persons who attend and testify, on the request of a party, without subpoena, are taxable against the opposite party.

This was an action by Foster Simpkins against the Atchison, Topeka & Santa Fe Railroad Company to recover damages for personal injuries. Defendant moved to retax the costs.

Harry K. West, for plaintiff.

Gardiner Lathrop and S. W. Moore, for defendant.

PHILIPS, District Judge. Motion is made by defendant to retax the costs taxed against the defendant for the following named witnesses: Charles Simpkins, R. M. Sharp, S. E. Sharp, Earl Hulse, and Mrs. Grace Snyder. The facts are that the plaintiff and said Charles Simpkins had pending in this court, set for trial on the same day, separate suits for injuries growing out of the same accident. Charles Simpkins was subpoenaed as a witness on behalf of his father, the plaintiff herein. He was sworn as a witness, and placed upon the witness stand. The rule having been made on motion of counsel for the separation of the witnesses, it was suggested, on Charles Simpkins taking the witness stand, that he should not testify first, provided the plaintiff himself proposed to testify. Thereat he was withdrawn for the time, and was not introduced or examined. The witnesses R. M. and S. E. Sharp also attended court, but were not introduced as witnesses in the case. It seems to be a well-settled rule of law and practice that where witnesses are subpoenaed, but are not introduced to testify, the presumption is that their testimony was not material, and that they were unnecessarily brought to court as such witnesses. The rule is not otherwise where the parties or counsel, either through a misconstruction of the pleadings or a misunderstanding of the

law arising in the case, believe that the testimony of such witnesses may become material in the progress of the trial. The fact that they are not presented to testify in the case and are not examined is conclusive that they were not material, and their presence unnecessary, and the party who thus brings them to court should be held responsible for their costs. Pugh v. Good (Or.) 23 Pac. 827; Deweese v. Smiley (Ind. App.) 27 N. E. 444; Osborne v. Gray, 32 Minn. 53, 19 N. W. 81; Pike v. Nash, 16 How. Pr. 53; Dean v. Williams, 6 Hill, 376.

Objection is made to the taxation of fees in favor of Earl Hulse and Mrs. Grace Snyder for their attendance at some other term of court than the one at which the case was tried, for the reason that no subpoenas for these witnesses are found among the files in the case; but these witnesses did attend court at said term upon the request of the plaintiff, and also appeared as witnesses and testified at the trial of the case. It is a settled rule of this jurisdiction that a witness who attends court upon the request of a party to the suit, and testifies in the case, is entitled to his fees, notwithstanding the absence of a subpoena. This rule of practice was applied by this court in the case of Pinson against this same defendant, and at the instance of defendant's counsel, and it is a poor rule that does not work both ways.

It follows that the fees of Charles Simpkins, R. M. Sharp, and S. E. Sharp are disallowed as against this defendant, and the same are taxed as against the plaintiff. The objections to the fees of Earl Hulse and Mrs. Grace Snyder are overruled, and said fees stand taxed against the defendant.

SIMPKINS v. ATCHISON, T. & S. F. R. CO.

(Circuit Court, W. D. Missouri, W. D. June 11, 1894.)

No. 1,813.

WITNESS FEES—TAXABLE COSTS.

A person subpoenaed as a witness in a personal injury case had a case of his own against the same defendant, growing out of the same accident and set for trial the same day. His case was first reached, and, by agreement, the other was made to depend on its result, without a separate trial. It appeared that he was necessarily present, looking after his own case, and as a material witness therein. *Held*, that his fee as a witness in the other case should not be taxed against the common defendant.

This was an action by Charles Simpkins against the Atchison, Topeka & Santa Fé Railroad Company to recover damages for personal injuries. Defendant moved to retax the costs.

Harry K. West, for plaintiff.

Gardiner Lathrop and S. W. Moore, for defendant.

PHILIPS, District Judge. Motion is made by the defendant in this case to retax the costs for the witness fee of Foster Simpkins. The record and evidence in this case show that the plaintiff and said Foster Simpkins had pending in this court at the same time,

and set for trial on the same day, separate actions for damages growing out of the same accident. The case of Foster Simpkins was first reached and taken up and tried (61 Fed. 999), and the case of Charles Simpkins was, by agreement of counsel, made dependent upon the result of the Foster Simpkins case, and was adjusted between them without trial. It appears, both from the statement on behalf of defendant and the affidavit of the witness Foster Simpkins, that he attended upon court looking after his own case, and was a material witness therein, and testified as such in the case. It would be no ground of exclusion of the witness fees in another case pending in the same court and at the same time that he himself had a suit pending therein, as he might well intrust the management of his case to his counsel without his presence, and if, in this case, the witness Foster Simpkins had stated in his affidavit that he would not otherwise have attended upon the court but in response to the subpoena as a witness in the Charles Simpkins case, his fees therein should be allowed him. But when it is made to appear, as it does in this case, that he would have attended upon court in his own case with or without having been subpoenaed as a witness in the Charles Simpkins case, the foundation and title to witness fees disappear, for the theory of the law in the taxation of witness fees is that the witness has withdrawn himself from his usual and ordinary avocation and business, and given his time to the attendance before the court in the case in which he is called. Allied as the two cases were, the one in favor of the father and the other the son, and growing out of the same transaction, it would be an imposition upon the common defendant for each of them to have themselves subpoenaed as witnesses, the one for the other, and claim their fees while attending upon the court as interested parties and witnesses in their own case.

For this reason the motion is sustained.

UNITED STATES v. LING.

(District Court, D. Connecticut. June 22, 1894.)

No. 1,028.

POST OFFICE—INDECENT LETTERS—INDICTMENT.

Rev. St. § 3893 (1 Supp. Rev. St. p. 621), provides that "every obscene, lewd or lascivious book, pamphlet, picture, paper, letter, writing, print or other publication of an indecent character, * * * whether sealed as first-class matter or not, is hereby declared to be non mailable matter." *Held*, that a private letter in a sealed envelope is within the prohibition of this statute if it is of an indecent character.

At Law. Indictment against Willie Ling for mailing an indecent letter.

Geo. P. McLean, U. S. Atty.

Gross, Hyde & Shipman, for defendant.

TOWNSEND, District Judge. Demurrer to an indictment for mailing an indecent letter, under section 3893, Rev. St. (1 Supp. Rev. St. p. 621), which reads as follows:

"Every obscene, lewd or lascivious book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character, * * * whether sealed as first-class matter or not, are hereby declared to be non mailable matter. * * * And any person who shall knowingly deposit, or cause to be deposited for mailing or delivery, anything declared by this section to be non mailable, * * * shall, for each and every offense, be fined."

Counsel for the accused claims that a private letter in a sealed envelope is not within the prohibition of the statute, and cites U. S. v. Warner, 59 Fed. 355, and U. S. v. Jarvis, Id. 357. The decisions in U. S. v. Clark, 43 Fed. 574, and U. S. v. Wilson, 58 Fed. 769, also sustain this view. The contrary is held in Re Wahll, 42 Fed. 822; U. S. v. Martin, 50 Fed. 918; and U. S. v. Andrews, 58 Fed. 861. The statute in question differs from the former statute in the insertion of the word "letter" between the words "paper" and "writing." An examination of the statute, and consideration of its history and of the foregoing opinions and of the decisions of the supreme court of the United States upon the questions involved herein, and especially of U. S. v. Chase, 135 U. S. 255, 10 Sup. Ct. 756, have satisfied me that congress intended, and that the rules of interpretation prescribed in such cases demand, that this statute be so construed as to embrace private sealed letters. No other reason is suggested for the insertion of the word "letter," which has a meaning in itself, distinct from the word "writing;" and the proviso "that nothing in this act shall authorize any person to open any letter or sealed matter of the first class, not addressed to himself," forcibly suggests both the protection of the privacy of the mails and the prohibition of their use for the transmission of obscene matter. The demurrer is overruled.

EDISON ELECTRIC LIGHT CO. et al. v. PACKARD ELECTRIC CO. et al.

(Circuit Court, N. D. Ohio, E. D. September 6, 1893.)

No. 5,141.

1. PATENTS—ACTIONS FOR INFRINGEMENT—PREVIOUS DECISIONS AS TO VALIDITY.
   Adjudications establishing the validity of a patent, after protracted litigation, although not controlling a circuit court in another circuit, authorize it to find the patent valid in a suit for infringement involving the same questions of fact and law.
2. EQUITY PRACTICE—PLEADINGS AS EVIDENCE—ASSIGNMENT OF PATENT.
   Averments, in a bill for infringement of a patent, that proper and valid assignments of the patent were made, are sufficient proof of title by assignment, where answer under oath is waived, and no affidavits denying the alleged transfer are offered.
3. PATENTS—INJUNCTION AGAINST INFRINGEMENT — OFFICERS AND AGENTS OF NONRESIDENT CORPORATION.
   Officers, agents, and stockholders of a corporation, made defendants and served with process in a suit for infringement of a patent by them while acting for the corporation, may be restrained from such infringement, although the corporation is not a party, and is not within the jurisdiction of the court.

This was a suit by the Edison Electric Light Company and another against the Packard Electric Company, James Ward Packard, and William D. Packard, for infringement of letters patent.

William B. Bolton and Frederick P. Fish, for plaintiffs.

E. B. Taylor, Henderson, Kline & Tolles, and A. P. Smith, for defendants.

The following cases were cited to the point that the officers, stockholders, or agents of a corporation cannot be enjoined individually from infringing a patent, when the corporation for which they act has not been served with process: Ambler v. Choteau, 107 U. S. 586, 1 Sup. Ct. 556; Osborn v. Bank, 9 Wheat. 738; Kane v. Candy Co., 44 Fed. 287; Refrigerating Co. v. Gillett, 30 Fed. 685; Mexican Ore Co. v. Mexican Guadalupe Min. Co., 47 Fed. 351; Howard v. Plow Works, 35 Fed. 743.

RICKS, District Judge. The complainants in this case file their bill to sustain the validity of the several patents therein set forth, issued to Thomas Alva Edison at the several dates named, and pray for an injunction against the several defendants named, to restrain them from infringing the aforesaid patents. The bill avers that these patents have been held to be valid by the United States circuit court of appeals for the second circuit, and by the various other circuit courts enumerated in the bill. It claims that the title to the patents set forth was duly assigned to the complainants, and offers affidavits establishing the fact that the defendants are infringers.

The first defense set up by defendants' counsel is that the patents have not been so fully sustained as to make the adjudications in the several cases named conclusive or binding upon this court. I do not understand that complainants insist that these adjudications are absolutely conclusive, but that they are authority of the very highest nature. I understand the rule to be well settled that the judgment of a circuit court in another circuit, while not controlling, is entitled to the highest consideration. Mr. Justice Miller states the rule to be thus:

"I think that the uniform course of decisions in the courts of the United States, where a previous decision has been had by a circuit court with regard to the validity of a patent, has been to treat it as of the very highest nature, and as almost conclusive in an application for injunction in another case founded on the same patent."

The complainants have established the validity of their patent by these several adjudications after a protracted litigation extending over several years, and by a very large expenditure of money. To ask this court to go through the labor to pass upon a case involving the same questions of law and fact, and to compel the complainants, in each district where an infringement may take place, to incur such additional expenditure of money, would be a great hardship. I accept the decisions of the several circuit courts named as sufficiently persuasive to authorize me to find the letters patent valid.

The next contention is that there is not sufficient proof of title by assignment of the patents to the complainants in this case. The complainants, in their bill, under oath, aver that proper and valid assignments of these patents were made. The answer of the defendants under oath is waived. Under these pleadings the answer of the defendants is not evidence in their favor as to the averments therein contained. They might have offered affidavits

denying that the title had been transferred by assignment, as claimed in the bill, which would have put the complainants upon their proof as to such assignments. Having failed in this, the averments of the bill control, and upon this point the court must find the proof satisfactory.

The question of infringement is clearly made out, so far as the New York & Ohio Company, its agents, officers, and stockholders are concerned. It is substantially conceded in the answer and affidavits that, so far as the lamp made by that corporation is concerned, the infringement is established as true. But as to the Packard Electric Company the infringement is denied. In the conclusion reached by the court, it is not necessary to pass upon the question of infringement as to this particular defendant.

The complainants further charge in their bill that the defendants, to embarrass the complainants in their remedies, conspired together, and, intending to infringe said Edison letters patent under cover of said organization, but for their individual benefit, caused to be organized and incorporated the Packard Electric Company, under the laws of the state of Ohio, and that thereafter, in pursuance of said conspiracy, "and with a view of still further embarrassing your orators," caused to be organized, under the laws of West Virginia, a corporation known as the New York & Ohio Company, with a nominal capital, and that by combination and collusion the business of manufacturing and selling incandescent lamps, in infringement of complainants' letters patent, has been conducted by William D. Packard, J. Ward Packard, and J. W. Peale, for their own personal benefit, and for the benefit of the said New York & Ohio Company; and that the said defendants have organized and operated both said corporations, not in good faith, but as an expedient to avoid the legal consequences of their acts in the infringement of said Edison letters patent, which they well knew they were infringing.

It seems, from the evidence on behalf of the defendants, that the Packard Electric Company, for the more convenient conduct of its business, made a lease of a part of its factory to the New York & Ohio Company for the purpose of enabling it to manufacture incandescent electric lamps. This business has been carried on by the New York & Ohio Company principally through the active efforts of the two Packards before named. Some proof has been offered on behalf of the complainants tending to show that this lease and business arrangement were a subterfuge and a fraud intended to embarrass the complainants by having the infringement done through an irresponsible and nonresident corporation. Serious allegations of fraud and collusion are made in the bill, which it is not necessary, for the purposes of this case, to determine. The case, upon the evidence before me, will therefore be considered removed from all question of fraud or fraudulent intent, so far as the defendant the Packard Electric Company is concerned. It must rest upon complainants' right to an injunction against those of the defendants who are infringing its patents while acting as officers, agents, employés, or stockholders of the New York & Ohio

Company. Can they be enjoined from infringing in a case in which the corporation for which they act is not made a defendant, and is without the jurisdiction of the court? That corporation was created under the laws of the state of West Virginia, and, in a patent suit, can only be sued in that jurisdiction. Can the complainants reach its officers, agents, and stockholders, and procure an injunction against them in this district, without service upon the corporation? If the complainants now prayed for full relief as against them, and asked for an accounting for profits and damages against the officers, agents, and stockholders, without service upon the corporation, and that was now the question under consideration, the case would present greater difficulties. Where the corporation is a defendant, and duly served, its officers and stockholders cannot shield themselves from liability for damages behind their corporation. While its liability may be primary, and while, if solvent, it may be first held accountable, it has been held no legal defense for stockholders or officers to insist upon such prior or exclusive liability as a shield and protection for their wrongful acts. Tyler v. Galloway, 13 Fed. 477.

But it is insisted that the complainants cannot bring their suit against the officers of a foreign corporation in this district, and by this sort of indirect proceeding accomplish what they could not do by a proceeding directly against the corporation itself. It is true the corporation cannot be sued here. It does not travel from state to state, through its officers, to confer jurisdiction wherever they may be found and served with process. A suit to establish the validity of a patent, its infringement, and to recover damages and profits for such infringement, must, under the recent legislation of congress, be brought in the state where the corporation was created, and in the judicial district where it is located, and of which it is a citizen. But in a suit of this character, where, for the present, the only relief sought is an injunction to restrain the wrongful act of infringement, may not such illegal and tortious act be restrained wherever committed? An infringement is a tort. Root v. Railway Co., 105 U. S. 189. The act done is wrong and illegal in itself, no matter by whom performed. It is wrong to make, to use, or to sell infringing devices without license from the patentee. It is wrong to do either, wherever done, or by whomsoever done. Can a corporation created in one state send its officers, agents, and stockholders into another jurisdiction, to there infringe a patent, and claim immunity from the process of a court of equity restraining such wrong, because its agents doing the illegal act are acting for it as a nonresident corporation exempt from service of process from that court? The law throws around a patentee every protection possible. The patent law contemplated that the inventor should have a monopoly of his patent, and it has undertaken to give him full and speedy relief against all who encroach upon his rights. An infringement of a patent adjudicated to be valid, and useful to the public, is declared by law to be illegal, and I think may be restrained wherever it is committed, and by whomsoever it is done, without license.

The courts have gone so far as to restrain the officers of a corporation who aided in promoting the infringing sale or use by transporting the infringing articles. In the case of Supply Co. v. McCready, 17 Blatchf. 291, Fed. Cas. No. 295, Judge Blatchford enjoined the officers of the Old Dominion Steamship Company from transporting from New York to Norfolk, Va., cotton ties which were an infringement of letters patent owned by Brodie & McComb. The corporation was a citizen of Delaware, and was not served with process, or made a defendant in the case. Its president and general freight agent were made defendants, and the restraining order was to prohibit them from accepting or transporting, as freight, any cotton ties infringing patents owned by the complainant. The defendants answered that they were only officers of a corporation, which was not sued, which was a common carrier, and, as such, transported all freight tendered, and that they could not be expected to know what articles of manufacture offered for shipment were infringements of patents, and that, therefore, an injunction of the character prayed for would be a great hardship. But Judge Blatchford met the objections, and said:

"It is entirely clear that the owners of infringing and unlicensed cotton ties, who are causing them to be transported by vessels of the Old Dominion Steamship Company, are sending them for sale and use, and are employing said company and its officers as agents and servants in promoting such sale and use. It would seem, on principle, that there ought to be no difficulty in restraining by injunction all persons, whether officers of the corporation or not, who are aiding in the promotion of the infringing sale and use, whether such persons would be liable for profits and damages or not. It has been so held by this court. Goodyear v. Phelps, 3 Blatchf. 91, Fed. Cas. No. 5,581."

The court extended relief in that case further than we are asked to do in this case. The defendants in the case cited were merely promoting the sale and use of the infringing articles by transporting them as common carriers. In this case they are active in the infringement itself, and interested, as officers and stockholders of the corporation infringing, in the profits to be realized from the illegal acts. The acts they are performing are flagrant, and the proximate cause of the injuries inflicted upon the complainants. They are illegal and tortious, and the complainants are entitled to have the infringement suppressed, without reference to whether the infringers are acting for themselves, or whether they are acting in a representative capacity for others, who are nonresidents of this district. When the act to be restrained is lawful, but becomes illegal only when performed by a certain person, the injunction can only restrain that person or his agent from doing the forbidden act; but when it is an illegal and tortious act, no matter by whom or where it is done, the perpetrator may be restrained wherever found.

Conceding, therefore, that the defendants are free from all fraudulent combinations, and have not thrown around themselves the shield of a nonresident corporation for the purpose of embarrassing the complainants in securing relief against an illegal and deliberate infringement, as alleged in the bill, I still think the complain-

ants are entitled to relief, at least to the extent of suppressing the infringement, even though it is done by the officers, agents, and stockholders of a corporation not itself made a defendant, and not amenable to the process of this court. There is no injustice or wrong done to the defendants enjoined. They are guilty of a tort in committing this infringement, or in aiding or abetting it. They are jointly and severally liable for the tort. The corporation accepts and receives the benefit of their wrongful acts. Would it be equitable to say to the complainants: "You shall not have an injunction to restrain or suppress this wrong, though it is done in this jurisdiction, and without excuse or justification; but you can have relief by going to West Virginia, and proceed against the corporation itself for a wrong done, and continuing to be done, in Ohio"? Then relief by such a long-distance proceeding would be slow and embarrassing. The law encourages no such subterfuges. Equity abhors defenses which are not based upon merit or right, but suggest evasive and embarrassing remedies for wrongs substantially conceded. A wrong is being committed daily to the complainants in this jurisdiction by at least two defendants, who are infringers, who are served with process, and who are now before the court. This court, in my judgment, has the right and power to restrain that wrong, no matter in what character or representative capacity it is done. The refusal to grant relief would work great and irreparable injury to the complainants. The allowance of the injunction will stop the wrongful acts, and the wrongdoers cannot complain because it deals with them as individuals when they are in fact agents and stockholders. The wrong will be restrained, and the complainants left to secure their remedy for damages for the infringements already made by such proceedings as the law provides.

I have carefully considered the several authorities cited by the defendants, denying to the court the right to enjoin the defendants the Packards without service upon their corporation, for which they act; but none of them, in my judgment, cover the precise question herein decided.

I have based this decision upon such broad principles that, if in error, the defendants can speedily secure relief by appeal.

The injunction is refused as to the Packard Electric Company. It denies that it ever infringed, but claims, if it did, that it was prior to 1891, and disclaims any intention to infringe in the future. This refusal of a writ is made without prejudice to complainants' right to move for an injunction, on short notice, if hereafter said defendant should manufacture a lamp which infringes complainants' patents. The injunction is allowed as to James Ward Packard and William D. Packard, who will be enjoined from making, selling, or using infringing lamps, whether acting for themselves, personally, or for the New York & Ohio Company, as officers, agents, or stockholders.

A decree may be prepared in accordance with this opinion.

LEVY et al. v. WAITT et al.

(Circuit Court of Appeals, First Circuit. May 15, 1894.)

No. 81.

TRADE-MARKS—ACQUISITION—OCCUPATION OF MARKET.

Complainants applied a name, widely known by reason of local geographical uses, to small lots of cigars manufactured and sold by them,—one in 1878, on a special order; one in 1884, in competition with a trade-mark for a limited market; one in 1885; and no more until 1889. Before the sale in 1885, defendants, without knowledge of what had been done by complainants, and in good faith, began the sale of cigars of their own manufacture under the same name, and continued extensive sales and advertisements thereof for five years without question. *Held*, that there was no such appropriation or actual occupation of the market by complainants as to entitle them to assert a right to a trade-mark, as against defendants. 56 Fed. 1016, affirmed.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

This was a suit by Amand Levy and others, constituting the firm of Levy Bros., against Henry Waitt and others, constituting the firm of Waitt & Bond, to restrain the alleged infringement of the trade-mark "Blackstone," as applied to cigars. The bill was dismissed. 56 Fed. 1016. Complainants appealed.

George L. Huntress (Morris S. Wise, on the brief), for appellants.

Payson E. Tucker and George C. Abbott, for appellees.

Before PUTNAM, Circuit Judge, and NELSON and WEBB, District Judges.

PUTNAM, Circuit Judge. The Reverend Mr. Blaxton, or Blackston, suggested a name which has become a favorite one for local geographical uses. A well-known street in Boston, on which two of the parties named in the controversy in this case conducted their business; a river, partly in Massachusetts and partly in Rhode Island (not of the first order, but so lined with manufactories and villages that it is well known throughout the United States); a canal following the line of that river (now almost a tradition, but formerly as well known as the river itself); a considerable town in the former state; and many local corporations,—bear the name of "Blackstone." From the best view of the facts of this case which could be taken for all, A. P. Holley & Son, Waitt & Bond, the defendants below, and Levy Bros., the complainants below, each without the knowledge of the acts of the others, and contrary to the caution of the courts, usually disapproving of the use of widely-known geographical names as trade-marks, of which the last example of importance is Mill Co. v. Alcorn, 150 U. S. 460, 14 Sup. Ct. 151, adopted for cigars the word "Blackstone,"—A. P. Holley & Son, for the local market at and about Woonsocket, in the state of Rhode Island; Waitt & Bond, originally for Boston and the New England states; and Levy Bros., originally for New York and the west. It is not necessary for the court to decide now whether, under the circumstances of this case, this use of a geographical name for the several limited markets described could be protected by the law, as was

done in Mouson v. Boehm, 26 Ch. Div. 398. Nor, in the view we take, need we consider the origin of the alleged rights of A. P. Holley & Son.

Levy Bros. claim priority. In 1878 they manufactured, on a special order, 5,000 cigars, with some samples, applying to them the name in question. These were intended for one Thompson, who was then doing business on Blackstone street, in Boston, and who ordered the cigars either through A. R. Mitchell & Co., of Boston, or from them; A. R. Mitchell & Co. being then either the selling agents of Levy Bros., or the only parties at Boston to whom Levy Bros. made sales of their goods. It is claimed that on this occasion this use of the name was suggested by Thompson, and that it belonged to him, rather than to Levy Bros. Thompson did not accept the cigars, and they were soon after sold by A. R. Mitchell & Co., either on their own account, or on account of Levy Bros. In the view we take of the law of trade-marks, it is not necessary to determine either of the foregoing alternative propositions, some of which came under consideration in the important case of Paine v. Breweries (1893) 2 Ch. Div. 567. No further sales of any cigars with this name were made by Levy Bros. until 1884. They claim that in the interval they kept samples on hand; but, as the cigars were not actually put on the market during the intervening period, the court considers this inconsequential, under the rules which we will hereafter state. It is undisputed that A. P. Holley & Son sold cigars under the trade-mark of "Blackstone" as early as 1881, in and about Woonsocket; and in 1884 Levy Bros. sold, either to or through A. R. Mitchell & Co., a lot of 5,000 cigars, ordered by one Cook, who also lived at Woonsocket, undoubtedly for sale in competition with the cigars of A. P. Holley & Son and in their market. The rules which we will hereafter explain make it clear that the transaction of 1878 did not establish in Levy Bros. an exclusive right, against Waitt & Bond, to the trade-mark now in dispute, and that, as the sale of 1884 occurred after the long interval of six years, it had only the effect of an incipient transaction. Moreover, as it operated as a direct interference with the market of A. P. Holley & Son, which had certainly been established as early as 1881, it was ineffectual for that reason, if for no other. Another lot of 5,000 cigars was manufactured during the same year (1884) by Levy Bros., intended for the same Cook, but they were not taken by him; and they remained in the hands of A. R. Mitchell & Co., undisposed of, until some time between the beginning of May, 1885, and the latter part of July, 1885, when they were sold by them. At the time of this sale, Waitt & Bond had already put on the market their own cigars with the name "Blackstone." Subsequent to the sale in 1884, Levy Bros. claim to have kept samples on hand, but as to that claim we make the same observations which we have made with reference to the claim touching samples between 1878 and 1884.

In April, 1885, Waitt & Bond, who were large manufacturers of cigars, doing business on Blackstone street, in Boston, put on the

market cigars of their own manufacture, with the name "Blackstone," in ignorance of what had been previously done by Levy Bros. touching the same name, and in good faith. This was not a mere experiment on the part of Waitt & Bond, but was continuously followed by extensive sales and extensive advertisements, the sales amounting in 1885 to 412,142 cigars; in 1886, to 1,151,252; in 1887, to 1,488,136; in 1888, to 2,731,560; in 1889, to 5,386,096; in 1890, to 8,291,366. As already stated, their market was in Boston and New England. In 1889, Levy Bros. commenced the continuous manufacture and sale of cigars under this name, and have manufactured and sold the same from that time to the present in very considerable amounts, mainly in New York and the west. Their bill in the present case was filed November 12, 1890, and contains the following allegations:

"And the complainants further say that, until they found a market for their said genuine Blackstone cigars in the city of Boston, the complainants had never known or heard of a cigar other than their own being sold under the name of, and known as, the 'Blackstone Cigar;' but in the summer of 1889 the complainants learned for the first time that a cigar purporting to be made by the defendants was being sold throughout New England, and particularly in the city of Boston, under the name of, and known as, the 'Blackstone Cigar.' Thereupon, the complainants at once caused an investigation to be made, and found, and therefore charge, that subsequent to the adoption by the complainants of the name or mark of 'Blackstone Cigars,' " etc.

The record shows that on July 26, 1889, Levy Bros. wrote Waitt & Bond a letter, which, with the correspondence which followed, would be sufficient, if their rights were in other respects perfect, to lay a claim as of that date.

On the best theory of the facts for the complainants, the case stands as follows: In 1878 complainants manufactured and sold one lot of 5,000 cigars, and some samples, under the name in question; in 1884, another lot of 5,000; another lot in 1885, after Waitt & Bond commenced the manufacture and sale under the same name; and no more, proved to the satisfaction of the court, until 1889. Meanwhile, in April, 1885, Waitt & Bond commenced the sale and manufacture under the name in question, and carried on the same continuously and extensively, as already explained. If there was any suggestion that Waitt & Bond knew the facts as shown by Levy Bros., and had surreptitiously made use of a name which they were well aware Levy Bros. claimed as their own, although they had not put it on the market, except as stated, there might be some ground for an equity against Waitt & Bond; but we believe no case can be found where, with intermittent offers of merchandise bearing a certain name, with such long lapses on the one side, and on the other the uninterrupted and innocent use of the same name for five years without question, and a consequent growth of an extensive and valuable business, the equity courts have interfered in favor of the former against the latter. The extensive dealings of Levy Bros., together with the fact of their relations with A. R. Mitchell & Co., whatever they were, making, through all these years, large sales of the cigars of Levy Bros. in the city of Boston, raise such a violent

presumption against Levy Bros. as to the probability of their knowledge of the course of trade of Waitt & Bond touching this cigar as renders it difficult for this court to accept as true the claim that Levy Bros. were ignorant thereof, and did not acquiesce in it. However, we do not intend to rest this case on mere presumptions, on the doctrine of laches, or on that of abandonment, which latter was so fully argued. We rest it on the conclusion that Levy Bros. never acquired any right, sufficient to enable them to assert it to the detriment of any one using the name "Blackstone" under the circumstances, and at the time, under and at which it has been used by Waitt & Bond.

It seems to have been assumed in the discussions of this case that the common-law right to a trade-mark comes more from selection or discovery than from actual occupation of the market. Browne on Trade-Marks, at various points, is relied on; and, among other expressions found therein, the following, in section 52, is stated as though it constituted the whole rule, and required no limitation:

"That is, how long does it take to adopt it? The answer is obviously this: The moment one who has selected a symbol to indicate his merchandise applies the mark to his goods, the act is complete. The avowal of his intention to adopt, his registration of the mark, and notice to the whole world, do not constitute adoption; but apply the mark to the articles for sale, and, eo instanti, the act is complete."

It may be that, according to the letter of this citation, the selection of the name "Blackstone," with a single sale, would have been sufficient to confirm in Levy Bros. the exclusive right to its use; and this independently of all questions which might arise from the fact that A. P. Holley & Son, Waitt & Bond, and Levy Bros. were practically occupying different markets. But this is not the law. The right to a trade-mark at common law must not be confused, as it too frequently is, with the prima facie right existing under registration statutes. It arises to such a limited extent from the mere matter of selection or discovery of the name or symbol used that this may be of trivial consequence. A singular illustration of this fact is found in Siegert v. Findlater, 7 Ch. Div. 801, where, as applied to Dr. Siegert's bitters, the word "Angostura," indicating the place of their origin, was not selected by him as his trade-mark, but, instead thereof, the words "Aromatic Bitters," to which he added a statement that the bitters were prepared by him at Angostura. The public, however, applied to them the words "Angostura Bitters;" so that, by the act of the public, those words became the usual designation of the article, which the court protected in the case referred to. In the well-known Trade-Mark Cases, 100 U. S. 82, in which the court held the first trade-mark registration statute to be unconstitutional, it said (page 94):

"The ordinary trade-mark has no necessary relation to invention or discovery. The trade-mark recognized by the common law is generally the growth of a considerable period of use, rather than a sudden invention. It is often the result of accident rather than design," etc.

Other positive expressions follow on the same page.

The opinion of Vice Chancellor Sir W. Page Wood, in Collins Co. v. Brown, 3 K. & J. 423, is a very good compendium of the

common law of trade-marks. So far as the case at bar is concerned, the vice chancellor expresses the principles and limitations of that branch of the law in the following words (page 427):

"The simple question in these cases is, has the plaintiff, by the appropriation of a particular mark, fixed in the market where his goods are sold a conviction that the goods so marked were manufactured by him; and if so, and if no one else has been in the habit of using that mark, another man has not the right to use that mark, so as to commit the fraudulent act of palming off his own goods as being the goods of the person who is known to have been in the habit of using it."

Many authorities could be cited, illustrating and approving these rules, and with them the principle that it is a fundamental basis of a right of action for the violation of a trade-mark that the public has been defrauded, or may be. It is frequently said that private rights in a trade-mark are only incidental to the prevention of public fraud. This peculiarly illustrates the force of the truth that, prior to the use of the name "Blackstone" by Waitt & Bond, Levy Bros. had neither made any appropriation, nor fixed in the market any conviction on the part of the public, within the terms of the citation from Vice Chancellor Wood,—especially, not to such an extent that there was any possibility of the public being defrauded by others' use of the name. Of course, we do not determine whether, if there had been by one person a willful use of a name which had been in good faith selected by another, and experimentally put on the market, or even put on the market at long intervals, as in the case at bar, equity would not interfere, or what, under the other circumstances of this case, would have been the result, if the sales by Waitt & Bond had been only experimental; but as against innocent parties, who have, through a period of years, built up an extensive business, it is clear that Levy Bros. had not, on any view of the facts, brought themselves within the law. It is therefore plain that the conclusions of the circuit court were correct. The decree of the circuit court is affirmed.

THE CITY OF NAPLES.

EUSTROM v. THE CITY OF NAPLES.

(District Court, D. Minnesota, Fifth Division. June 9, 1894.)

SHIPPING—PERSONAL INJURIES—NEGLIGENCE—GRAIN INSPECTORS.

Libelant, who was a deputy grain inspector of the state of Minnesota, went upon respondent's vessel to inspect it, as required by law, and while so engaged he fell through an open hatchway, and was injured. The vessel could not obtain a cargo of grain until it was inspected and given a certificate that it was in condition to carry grain safely, and this fact was known to the master. *Held*, that the inspection was for the benefit of the vessel, and hence such a relation existed between libelant and the vessel that it is liable for injuries to him caused by the negligence of those in charge of it.

This was a libel by Ossian Eustrom, a deputy grain inspector, against the steamer City of Naples, for damages for injuries received by falling through an open hatchway.

John C. Hollembaek, for libelant.
H. R. Spencer, for claimant.

NELSON, District Judge. It was the duty of libelant, a deputy grain inspector, under the laws of the state of Minnesota, to inspect all grain and vessels in the port of Duluth, and by usage and custom in the port of Superior. On the 22d day of May, 1893, he went on board the steamer City of Naples for the purpose of inspecting that vessel, descending from the upper or spar deck into the forward compartment, thence through a door to the main or lower deck, where he fell through an open hatchway into the lower hold, a distance of 18 to 20 feet, and was injured. On the part of libelant, testimony was introduced tending to show that he was requested by the master to inspect his vessel, and was told by him to go down by the way of the forward compartment for that purpose; that when he reached the lower or main deck he found it was dark, the upper hatches being on, and he proceeded cautiously, but, by reason of the lower deck being lighted insufficiently, he fell through the first hatchway from the bulkhead and was injured. On the other hand, the master of the steamer denies that he requested libelant to inspect the vessel, or told him to descend by way of the forward compartment, but testifies he told him to descend through the first hatchway on the upper deck, where there was a permanent stairway, and introduces his own and other testimony to show that the lower deck was well and sufficiently lighted with a large number of candles and lanterns. Claimant further insists that libelant was injured solely by his own carelessness and negligence, and not through any fault on the part of the vessel or those in charge of it; also that libelant was not connected with the vessel in such manner as to create a contract relation between them sufficient to entitle him to recover. The evidence shows that the master of the vessel knew that Eustrom was in the employ of the state of Minnesota as a grain inspector, and that it was impossible to secure a cargo of wheat unless inspection was made, and the boat declared to be in such condition that the grain could be carried with safety. It was the duty of Eustrom to inspect the vessel and certify whether or not it was in proper condition. The performance of this duty by him was for the benefit of the vessel, and I think that when he went on board for that purpose he occupied a position something more than that of a mere licensee, and that, under the circumstances, such a relation was created between him and the vessel that those in charge of it were bound to exercise reasonable precautions for his safety. At the same time, under the evidence, I am satisfied that the libelant was not free from fault, and that there was mutual negligence; hence the rule in admiralty for the apportionment of damages must prevail in this case. That the injury to libelant was serious cannot be doubted, and, while it is not fully proved to be of a permanent nature, I am of the opinion that compensation should be awarded him for the injury, and I think the sum of $2,000 would be just and proper in the premises.

THE THAMES.

BERNIER v. PHIPPS et al.

(Circuit Court of Appeals, Fourth Circuit. May 22, 1894.)

No. 61.

1. SHIPPING—INJURIES TO CARGO—SEAWORTHINESS.
A cargo of flour shipped from Baltimore to Rio on the steamer Thames was badly damaged by water which leaked through the deck. The deck rested upon iron beams, 3 feet apart, extending across the ship, braced by iron plates half an inch thick and 15 inches wide, laid diagonally across them, and bolted to them. The deck planks were not grooved where they crossed these plates, as required by rule of Lloyds, so that they should rest solidly on the beams; but thin pads of wood were laid on the beams to keep the planks from sagging between the diagonal plates, which were nine feet apart. It was shown that the deck did sag, nevertheless, thereby continually working out the calking, and that several cargoes before the one in question were damaged by water. *Held*, that the ship was not seaworthy for the carriage of flour, and is liable for the consequent damage thereto.

2. SAME.
In the hold of an iron steamship bound from Baltimore to Rio, there were stowed 17,000 cases of kerosene oil; and on top of them, on a dunnage of one-inch pine boards, were stowed 5,000 barrels of flour. When the ship reached Rio, it was found that all the flour was so saturated with the oil itself, or contaminated by its odor, that it was unfit for food. The sweating in this hold was excessive, and much water leaked into it through the deck; but there was no means of ventilation, and the hold was not opened during the whole voyage, which consumed one month. It was shown that oil and flour, in small quanties, could be shipped together without injury to the flour, but only when they were stowed in a hold which was perfectly dry and thoroughly ventilated. *Held*, that the ship was not seaworthy for the carriage of such large quantities of flour and oil in juxtaposition, and she is liable for the consequent damage to the flour.

3. SAME—STOWAGE—IMPROPER PLACE.
Inasmuch as the master designates the place within the ship where each kind of cargo is to go, when such place is improper the ship is liable for consequent damages to the cargo, although it was stowed by the freighter's stevedore.

4. SAME—BILL OF LADING—DAMAGE—NOTICE.
The bill of lading under which flour was shipped required that notice of damage should be given the shipowner within three days after unloading. The unloading was completed January 31st, and notice of damage was given February 3d. While the resulting survey was in progress, it was discovered that, in addition to damage by water, the flour was also damaged by the odor of oil shipped in the same hold, and another notice was given, and another survey ordered. *Held*, that the original notice was in time to bind the ship for the whole damage.

5. SAME—SEAWORTHINESS.
When a well-known article of commerce is received on board ship, and carried on a voyage, the master guaranties the seaworthiness of the ship for the carriage of that particular cargo.

Appeal from the District Court of the United States for the District of Maryland.

This was a libel by J. L. Phipps & Co. against the steamship Thames (J. E. Bernier, master), in which there was a decree for libelants, and respondent appeals.

George B. Adams, for appellant.

Stewart Brown and Frederick W. Brune, for appellees.

Before GOFF and SIMONTON, Circuit Judges, and HUGHES, District Judge.

HUGHES, District Judge. This is an appeal from a decree in admiralty from the district court of Maryland. The decree awarded the libelants damages, to the amount of $16,185 and costs, suffered on a shipment of 5,000 barrels of flour from Baltimore to Rio de Janeiro in the winter of 1890–91. The questions of fact arising in the case are very numerous, and they have been strenuously contested at every point. The evidence taken is unusually voluminous. The briefs are elaborate and litigious. The work of examining it all minutely has been laborious, protracted, and tedious. The case itself is a case of facts. It turns upon facts, and involves few contested points of law. It would be impracticable to present a full dissection and analysis of the evidence. The court must content itself with setting out, in the form mainly of narrative, *as* the facts of the case, those which it considers to be established by the preponderance of testimony.

The steamer Thames (J. E. Bernier, master) was a ship of 1,064 tons net, and 1,658 tons gross, 282 feet in length, and 34 feet beam. She was an iron ship, well built, and exceptionally strong and staunch, as to the hull. Her between decks had been partially fitted for passengers when first built, but she had been altered in this respect, the passenger accommodations, and the ventilators necessary to them, having been taken out. She had been converted into a ship exclusively for freight, without provision for ventilation in the hold, and in most of the between decks. The libelants, who are merchants of New York; the house of Phipps Bros. & Co., who were the consignees of the flour at Rio; and the master of the steamer,—were all British subjects; and the steamer was a British ship, flying the British flag. The flour under consideration was a part of the cargo of general merchandise which was taken on board the iron steamer Thames, partly in New York and partly in Baltimore, for shipment to Rio de Janeiro and Santos, in Brazil. The flour was taken on in Baltimore for shipment to Rio. The Thames left Baltimore on the 26th December, 1890. There were only two or three days of high wind during the voyage, and no casualties. She reached Rio on the 23d January, 1891. The flour remained on board ship until the 26th. The work of discharging it, and transferring it to a bonded warehouse in Rio, called there the "Trapische Damaio," was begun on the 26th, and completed at the end of the 31st. The consignees in Rio were the house of Phipps Bros. & Co. The agent of the owners of the steamer there was the house of Berla & Co. The cargo of the steamer, on this voyage, consisted largely of kerosene oil. This was shipped in cases, each case embracing two cans. The amount shipped was 17,000 cases or 34,000 cans of oil. This was all stowed in the hold of the steamer. The stevedore, Everett, who stowed this large quantity of oil and the rest of the general cargo of merchandise on the Thames in New York, also stowed the 5,000 barrels of flour taken on at Baltimore. The flour was stowed on top of the oil, in close juxtaposition,

on dunnage of pine boards, an inch thick and less, laid upon the oil. The compartment containing these articles was without ventilators. The voyage was across both tropics and the equator. The ship was in the torrid zone for some 20 days, under a vertical sun, in the hot season. The deck, under a blazing sun, had to be wetted daily; and it is probable that, unless the material of the deck was thoroughly seasoned, there was more or less of shrinkage, and of opening of the seams of the deck. The flour and oil under this deck were not examined during the entire voyage. On being discharged from the ship at Rio, the flour was found to be very considerably damaged. The agents of the steamer at Rio, Berla & Co., were made cognizant of the damage. Two surveys were called,—one composed of English subjects, and the other of residents, who were of other nationalities. Both of these surveys reported, in succession, that 1,872 barrels of flour were damaged by water, and all of the flour contaminated by the odor of kerosene oil; all damaged, from one cause or both, to such degree as to be unfit for use as bread. The flour was accordingly condemned, and, with the apparent concurrence of all in Rio who were concerned, was ordered to be sold. The sale was in due course made, and resulted in a loss indicated by the damages decreed by the court below. The libel charges that this damage resulted from the causes, and was of the character, indicated by the following of its clauses, which charge that the steamship was unseaworthy, and unfit for the said voyage, in these particulars, viz.:

"(a) That her decks were improperly constructed, and leaked, and let in water, into the hold and the between decks, from the sea, and when it rained, and whenever the decks were washed down, and, further, that there was a leak in said vessel, around or about the hawse pipe, through which water reached the cargo, and there were other leaks and defects in the hull of said vessel at the commencement of, and on, said voyage; (b) that she was improperly and too heavily laden, and trimmed so that she shipped more water over her decks, even in fair weather, than she should have taken in; (c) that she was insufficiently ventilated, and had no provision for such ventilation as was required for the cargo carried on that voyage; and (d) that she was improperly stowed for this voyage, and with this cargo.

"And they further say that the said cargo was negligently, improperly, and badly stowed on this voyage, in this: (a) In placing said flour and kerosene oil in juxtaposition; (b) in placing said flour and kerosene oil at all in the same compartments of said vessel, or its hold, with insufficient protection or dunnage between them; (c) in so stowing said flour and said kerosene oil in the same compartments or hold, where there was no proper provision made for ventilation.

"And libelants further say that by reason of the leakage of the decks of said vessel, and the leak around or about the hawse pipe, and by reason of the other leaks and defects in the hull of said vessel as aforesaid, sea water and rain water, and water used in washing down the decks, found its way into the hold, and between decks of said vessel, where the cargo of flour was stowed; and the said flour was damaged thereby, and rendered unsalable, the barrels being wetted and stained, and the flour in the barrels being caked and soured, and that about (2,000) two thousand of said barrels of flour were thus damaged by water. In addition to the said damage by water, libelants further say that the whole of said cargo of flour was—by reason of the improper manner of stowage above described, of the flour and kerosene oil in juxtaposition, or in the same compartments or hold, and by the lack of proper ventilation, or, indeed, of any ventilation—badly damaged by the smell of said kerosene oil, which permeated the same, rendering it offensive and unmerchantable, besides which some of said flour was damaged by leakage of said kerosene oil, and actual contact therewith."

The Thames had been repaired in Liverpool, in June, 1890, with a new deck. This work had been done under the supervision of the Lloyds. After the repairs were completed, she had been surveyed by two of the Lloyds' surveying agents, and passed by them as an iron steamer of the highest class. The weight of evidence and the result of trial established the fact, however, that the new deck which has been mentioned was defectively constructed. The deck was made of pine planks four inches thick, and of the usual width. The weight of evidence is that it was of sound material, fairly well seasoned. The fault consisted in the manner in which the deck was placed upon the irons of the ship on which they were to rest. The deck rests on iron beams laid about 3 feet apart. These are 3 to 4 inches thick by 6 to 8 inches wide (their dimensions are not distinctly stated in the evidence), set, of course, on edge, and extending across the ship at right angles with the line of the keel. These beams are braced by slabs of iron half an inch thick and about 15 inches wide, laid flat upon the upper edge of the beams, crossing and bolted to them diagonally, and reaching from the center of the deck to each side of the ship. They are called "diagonal plates" in the evidence. They are placed about 10 feet apart, from center to center. A rule of Lloyds requires that, "where diagonal plates are fitted on the beams, the deck planks [are] to be scored over the diagonal plates so as to fit close on the beams, thereby avoiding the use of wood pads" to elevate the beams to the level of the upper surface of the half-inch diagonal plates. These diagonal plates, half an inch thick, being bolted on top of the beams, prevent the deck planks from coming down flat upon the beams, unless they are notched or groved underneath diagonally over the diagonal plates, wherever they touch them, as required by the rule of Lloyds. The deck planks, when new, are four inches thick, and when let down, and bolted flat upon the beams, and notched or grooved out diagonally to fit over the diagonal plates and brace the structure, make a very firm deck, not easily strained and wrenched when the ship herself is under severe stress of the sea; one effect of such wrenching being to work the calking more or less gradually out of the seams of the deck. Obviously, too, a heavy deck resting upon those half-inch slabs of iron 15 inches wide, lying flat, 9 feet apart, and running diagonally across the beams, which form their own support, cannot be as firm and solid as if they rested on the beams themselves, and were grooved out underneath along the lines where they touch the thin plates, as required by Lloyds' rule. When the new deck was put upon the Thames, the rule of the Lloyds on this important subject was disregarded. The grooving plan was rejected and the padding plan adopted. The deck planks were not grooved and cut out over the diagonal plates, and let down firmly upon the beams, but were placed on the upper surface of the thin slabs which lay flatwise; and half-inch strips or pads of wood were laid over the top edges of the beams, to keep the deck from swagging in the space of 9 or 10 feet intervening between the slabs. It is in evidence that those thin wooden strips, in many instances, worked out of place, leaving the deck to swag in the intervals between the diagonal

plates; forming depressions for the retention of thin surfaces of water, and having the tendency to demoralize the calking, and to encourage occasional seepings of water through the seams of the deck, whether the water was from the sea washing over the deck, or from frequent wettings of the deck for cleanliness, or other purpose. The weight of testimony is that more or less calking was almost continually needed and going on during the several voyages of the Thames, made after the new deck had been constructed, anterior to that from Baltimore to Rio, to which this suit relates. The calking was omitted during this special voyage, but the omission rendered necessary a more or less thorough recalking of the deck from stem to stern, and beam's end to beam's end, while the steamer was lying at Rio. The experience of the Thames after leaving her dock at Liverpool condemns the deck which has been the subject of discussion. Her first voyage was from Swansea, Wales, to New Orleans, with a cargo of tin, part of which was damaged by water. Her next voyage was from New Orleans to Bremen, with cotton. This cargo was partially damaged by water, though not seriously. She then brought a cargo of sugar to New York from Hamburg, which was seriously damaged by water. Her next voyage after coming around from New York was from Baltimore to Rio, which is the subject of the suit now under trial, in which the damage from water affected more than 1,800 barrels of flour. The next voyage was from Rio to Philadelphia with coffee, in which the damage to cargo from water was the subject of heavy complaint. Recurring to the voyage from Baltimore to Rio, the testimony proves, beyond reasonable doubt, that, all during the voyage, water went down upon the cargo, not only through certain defective side apertures of the ship, but through seams in the general surface of the deck, from which the oakum had here and there worked itself out in consequence of the deck not resting flatly upon the beams, and not being notched over the diagonal plates which braced the beams, and which, if notched, would have braced the deck itself. The proofs show that the master of the Thames was aware that his deck leaked before he took on the 5,000 barrels of flour.

Passing now to the objection of libelants that the steamer was without provision for ventilation, and therefore unseaworthy as to perishable freights, the evidence shows that the hold of the Thames, like that of all iron steamers, was subject to excessive sweating, frequently so considerable that the water ran down the sides of the ship in streams. It shows that, for drying this heavy sweating, no ventilation was provided during the voyage, and could not be provided, on account of the omission of ventilators in the construction of the ship. With reference to this defect, much evidence was taken on the custom of shipping kerosene oil and flour in the same compartment of a ship. Nearly all the witnesses testify that the practice is objectionable to shippers generally, even when moderate quantities of oil or flour are shipped. In Baltimore it may be stated that objection is very strenuously urged against the practice by nearly all shippers, as well when the ships are well ventilated as when

they are not. This objection, however, is not generally pressed in New York, though even there pains are taken to mitigate the evils of putting oil and flour together, even in vessels adequately ventilated. Probably no instances can be cited—certainly, none were proved in this suit—of shipments of as much as 17,000 cases of oil and 5,000 barrels of flour in the same compartment of a ship, in close juxtaposition, in a large iron steamer having no appliances for ventilation, and subject to heavy sweating, for a voyage across the tropics in the middle of the hot season. It is proved in this suit that when oil and flour, in moderate quantities, are stowed together in the same compartments of well-ventilated iron steamers, under circumstances preventing the odor of the oil from incorporating itself into the flour by long and undisturbed contact, then, in such cases, when the flour is taken out of the ship, and exposed to the open air, the odor of the oil will pass off, and become imperceptible, in a few hours. But the hold of the Thames, having been closed against ventilation for 30 days in a tropical voyage, during which it was kept continually damp from the drippings of water through a defective deck, and by heavy sweatings from the sides of the iron ship, presents a very different case from any that was shown in the evidence taken in New York and Baltimore on this subject.

The question whether the libelant is not barred by the act of his own stevedore is well settled. If the stowing be improperly done, the freighter for whom he stows is responsible. But it is the practice for the master to designate where the cargo, and each part of it, is to go, and the stevedore must accept the places he designates. Then, if damage results from the designation of improper places for the several parcels of cargo, the ship is responsible. That the flour of the libelants, shipped on the Thames, was damaged by water and oil, does not admit of doubt. The reports of the two surveys called in Rio to make examination of its condition are emphatic on that subject. All the witnesses examined at Rio, several of whom had personal knowledge by inspection of the facts, corroborate the finding of the surveys. All parties at Rio, whether interested pro or con in the question, seemed to accept the fact of damage without question after the two surveys held at the Trapische Damaio, or bonded warehouse, had made their report. Expressions of some of the individual witnesses on the subject of damage to the flour are given as follows: One witness said:

"All the barrels, whether with or without external signs of damage, had a strong smell of kerosene oil, the effect of which was to vitiate the flour and render it almost unsalable."

The purchaser of the flour testified that:

"In its totality, the damage was from salt water and kerosene, some more, some less; all of them presenting signs of damages, and from part of the barrels not even one-third of the flour being fit to be employed."

Another witness said:

"All the 5,000 barrels smelled of kerosene, and were not damaged by being in contact with the oil itself. With the barrels that were damaged by water, the smell was fixed in the exterior part; with the sound barrels, the smell was mainly stronger in the center of the barrels."

A witness who saw the flour after its arrival at Rio said that the damage was—

"Caused by the leakage of the deck, and by kerosene being spilled on the barrels. The most of the barrels were black, and I could see the water dripping through the seams of the deck. The contents of some of the barrels were swelled, and the flour appeared through the broken staves like dough."

Other such statements could be given, if any doubt could remain of the flour being damaged to a degree that rendered it unmerchantable as an article of food.

It is complained in behalf of the appellant that the proceedings under which the condemnation and the sale of the flour at Rio were made were irregular, and not binding. There is, indeed, no affirmative proof that those proceedings were in accordance with the custom of that port, or of the ports of Portuguese countries generally. But the proceedings were, to all appearance, formal, regular, and valid, and they were acquiesced in as valid by the shipping and mercantile community in which they were had. There was no objection made by Berla & Co., the ship's agents, and nothing but a mere formal counter notice of protest was entered by Capt. Bernier against a protest of damage which had been made by the consignees of the flour. The general acquiescence, and this special silence, establish a practically conclusive inference of the regularity of the sale. The libel in this case was filed on the 6th day of June, 1891, and the decision below was rendered on the 7th day of April, 1893, after an interval of 20 months, or 22 months after the judicial sale complained of. Certainly a silent acquiescence in these proceedings by the claimant for so long a period, and failure to take affirmative evidence to invalidate the sale, operate potentially to confirm the inference of regularity already existing The court does not entertain a doubt but that the best interests of all parties to the transaction were subserved by the sale of the damaged flour that was made after its condition had been judicially determined.

It is contended by appellant that the notice of damage was not given within the three days prescribed by the bill of lading. The facts do not sustain this contention. The unloading of the ship, and transfer of the flour to the Trapische Damaio, were concluded on the night of the 31st of January, and the notice of damage, to Berla & Co., was given on the 3d of February. While the first survey was fulfilling its mission, and after it was discovered that the flour was damaged by the odor of oil, as well as by water, another notice was given to Berla & Co., and another survey ordered. We think the original notice of damage was in time to bind the ship.

It is competent, under the existing law of Great Britain, for common carriers on British ships of the goods of British subjects to exempt themselves, by express contract, from responsibility for losses occasioned by the negligence of their own servants. In the case at bar, it is contended that the Thames should not be held responsible for the damage to the flour, caused, as it was, by leakage and the odor of oil, inasmuch as the case falls within the terms of the bill of lading under which the flour was shipped. This might be a good

defense, if it were true. The third paragraph of the bill of lading[1] provides in its first clause that the carrier shall not be liable for damages occasioned by several causes, which it enumerates, even when produced by the negligence of the master and crew. The schedule of causes thus given does not include leakage, sweating, and smell, for damage to which the ship is made exempt by the second clause from liability in general, but not if it is the result of negligence on the part of her officers and crew. The question, therefore, in this case, simply resolves itself into the form whether or not the damage to the flour from odor and leakage was the result of negligence on the part of the master and owners, which is substantially the same as the main questions in the case, and depends upon them. These will now be examined:

Whether or not the steamer Thames was seaworthy, as to the leakage of her deck, is one of the important questions of the case, nearly 2,000 barrels of the libelants' flour having been damaged by that cause. It is difficult to believe that a staunch, tight deck could result from the manner in which this deck was constructed. The great and just reputation of Lloyds would seem to be at fault in this instance, in which its agents ignored a very important rule of its own enactment, though it may be a solitary one. It is not easy to divine how large, wooden, deck planks, laid and unsubstantially fastened down upon the flat sides of half inch slabs of iron, which themselves are laid diagonally, nine feet apart, upon the beams underlying the deck of the ship, could constitute a floor or deck sufficiently firm under the tread to prevent more or less springing of the floor, and solid enough to hold the calking from working out of the seams of the deck when the ship is in the buffets of the sea. Such a deck rests necessarily upon elastic supports. The beams of this ship were stout enough, but it is impracticable to brace slabs of iron, called here "diagonal plates," half an inch thick, fifteen inches wide, and laid flat and diagonally, nine feet apart, over the ship's beams, to receive the deck planks so as thereby to secure a firm, solid deck. The weight of proof is decided that the deck of the Thames did leak, not probably in every seam or square foot or square yard, but in every considerable part, and that this leakage,

[1] Third paragraph of bill of lading: "[First clause.] It is also mutually agreed that the carrier shall not be liable for loss or damage occasioned by cause beyond his control; by the perils of the sea, or other waters; by fire, from any cause, or wheresoever occurring; by jettison; by barratry of the master or crew; by enemies, pirates, or robbers; by arrest or restraint of princes, rulers, or people, riots, strikes, or stoppage of labor, or by claims of ownership by third parties; by explosion, bursting of boilers, breakage of shaft, or any latent defect in hull, machinery, or appurtenances, or unavoidable accident thereto by collisions, stranding, or other accidents of navigation, of whatsoever kind, even when occasioned by negligence, default, or error in judgment of the pilot, master, mariners, or other servants of the said company. [Second clause.] Nor for heating, decay, putrefaction, evaporation, or smell from other goods, rust, vermin, sweat, change of character, drainage, leakage, rain, spray, breakage, or any loss or damage arising from the nature of the goods, or the insufficiency of packages; nor for land damage; nor for the obliteration, errors, insufficiency, or absence of marks, numbers, address, or description; nor for risk of craft, hulk, or transshipment; nor for any loss or damage caused by the prolongation of the voyage."

which was in the form of trickling, was almost constant when water passed over the deck, during the voyage. This constant cause of dampness in the hold reinforced the sweating of the iron hull throughout the voyage, and rendered the porous barrels of flour more susceptible to receive and retain the all-pervading odor of the oil than if the hold had been comparatively dry. The particular question here is whether or not, in respect to leakage, the Thames was a seaworthy ship for the carriage of the 5,000 barrels of flour which she had on board. The term "seaworthy" is relative. A ship leaky in her deck may be seaworthy for carrying stone, iron, coal, and very many other things even more valuable in respect to avoirdupois. But it cannot legitimately be contended that a ship is seaworthy, as to perishable articles, when it leaks in such a manner and degree as to cause damage to a very large proportion of such articles by a process plain to all on board, and obvious throughout the voyage; the damage to flour in this case showing itself, in several instances, in the form of paste oozing through the cracks of the barrels. A ship may be seaworthy as to one sort of cargo, and unseaworthy as to another. When a customary and well-known article of commerce is received on board ship, and carried on a voyage, the master guaranties the seaworthiness of his ship for taking charge of that article. As to her cargo, seaworthiness is that quality of a ship which fits it for carrying safely the particular merchandise which it takes on board. The ship is impliedly warranted to be seaworthy quoad that article, and, if damage occurs in consequence of the unfitness of the ship for carrying that article, the ship is liable, and cannot exonerate itself by proving the non sequitur that it is capable of carrying safely, and without damage, some other article of a different character.

Coming to the question whether or not this steamer was seaworthy for the purpose of carrying oil, and such a perishable article of food as flour, in the same compartment, without the flour being contaminated by the odor of the oil, here the meaning of the word "seaworthiness" is again to be discriminated. Small quantities of oil and flour may be stowed together with greater impunity than large quantities, as well in ventilated as unventilated compartments. Even very large quantities of oil may be carried in juxtaposition with flour, without permanent injury, if the compartment receiving them be well ventilated, whereas, if it be not ventilated at all, much smaller quantities of flour would be irretrievably ruined. The teaching of the evidence is that the odor of oil in flour, if the apartment in which they have been stowed together has been ventilated, generally passes off after longer or shorter exposure to the air. But the case at bar was a different one from any mentioned in the evidence. Here was the extraordinary quantity of 17,000 cases of oil placed directly underneath the extraordinary quantity of 5,000 barrels of flour. Here was a total absence of the instruments of ventilation, as well as a total neglect of inspection during the whole voyage. The two substances were stowed together in a hold that was always damp, and filled with a damp atmosphere from two joint causes,—the heavy sweating of the sides of the ship, and the

trickling leakage of the defective deck. The case at bar is out of the pale of comparison with any of the cases of the shipment of oil and flour in the same compartment, referred to in the evidence taken on this subject. No case was mentioned in the evidence of as large a shipment as 5,000 barrels of flour and 17,000 cases of oil having been put together in an entirely unventilated compartment. If such a usage as the shipment of these two commodities together was proved, it was done with reference to smaller shipments, and to ventilated vessels. Such an extraordinary case as the one at bar does not seem to have been in the minds of witnesses. The district judge found as facts, and summed up the evidence on this point, as follows:

"On the whole testimony, it appears that it is well known that although, on some steamers to South America, oil and flour were stowed in the same compartment, there were doubts as to its being proper stowage; and it appears that, when it had been done, it was in ventilated compartments, and with moderate quantities of oil, and that it had never before been done with a great quantity of oil, and in an entirely unventilated hold."

In respect to the manner of establishing a custom of shipping and stowing in vessels these two commercial substances, it is not sufficient merely to prove that more or less moderate quantities of flour and oil are habitually shipped in the same compartments of vessels. It is not sufficient to prove that large quantities are shipped in juxtaposition in well-ventilated ships. It is possible that there may be cases, distinguished by special circumstances, in which the courts would hesitate to hold that a ship was unseaworthy, for the purpose of carrying flour and kerosene oil in juxtaposition, merely for lack of ventilation. But the question, in every particular case, is on the circumstances which itself presents. In the case at bar the special, concrete, practical question is whether or not this steamer was, as to ventilation, a seaworthy ship for carrying, without damage from the pungent odor of oil, 5,000 barrels of flour stowed in close contact with 17,000 cases of kerosene oil, on a voyage from Baltimore to Rio de Janeiro, lasting a month, in the middle of the hot season, under a vertical sun, across both tropics. It was not the duty of the shipper, or of his stevedore, to look after ventilation. They do not traverse the seas or the tropics, or take thought of their effect upon cargoes. It was the duty of the master to put his ship and her appointments in such condition that the flour could be taken without damage on that particular voyage. Knowing, or presumed to know, all the conditions attending the voyage, the appellant received that flour, and designated the place of stowing it on his ship.

It is impossible to peruse the testimony describing the manner and degree of the damage which this flour sustained, and escape the conviction that, bad as the effect of the leakage of the deck was on a large portion of this flour, that resulting to all of it from the complete absence of ventilation was greater. In point of fact, most of the damage to the flour did accrue from want of ventilation. The flour did contract odor to a degree that rendered it not only unfit, but unsafe, to be eaten. It was formally condemned and sold as a damaged article. It was purchased, not for food, but for starch,

or some use other than of food. It was rejected by the firm which ordered it. The whole of it was refused because of the odor of oil, and about three-fifths of it for that reason alone. The ship was staunch. She accomplished her voyage safely and in good time. There was no casualty of the sea. Yet an immense mass of what had been as good flour as any known to the markets of the world was damaged; destructively damaged for food; damaged by the odor of the oil with which it was in contact; damaged from the absence of all provision of ventilation. How can this unseaworthiness, from the nonexistence of implements absolutely necessary to the proper equipment of the ship, be claimed to be a "peril of the sea?" It is plain to us that this ship, for the purpose of this voyage, and the safe carriage of this flour, in close contact with this great mass of oil, was unseaworthy, for the want of ventilation. We hold that the Thames, with its leaky deck, its absolute destitution of the means of ventilation, with its holds filled with 17,000 cases of kerosene oil and 5,000 barrels of flour, continually dampened by leakage and sweat, was unseaworthy for the carriage in sound condition of this flour in close juxtaposition with so great a mass of oil on a voyage across the tropics. The decree of the district court must be affirmed.

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Upon insolvency of a bank, in which county funds have been deposited, the county has no preference over other depositors, where the

identity of the county funds has been lost.—Multnomah County v. Oregon Nat. Bank (C. C.) 912.

C., in order to obtain a credit in his personal account with a bank of which he was the president, procured the defendants, a banking firm, to discount his individual note, credit the amount to the bank, and notify the bank that he had deposited the amount with them to the credit of the bank. The bank had previously given C. credit for the amount, and, after being notified by the defendants that the deposit had been actually made with them, allowed C. to overdraw his account. Thereafter, and while his account with the bank was overdrawn, C., in his official character as president, authorized the defendants to charge the note to the account of the bank, and the defendants did so. *Held*, in a suit by the receiver of the bank to recover the deposit, that unless expressly authorized to do so the president of the bank could not use the funds of the bank to pay his personal obligation, and, there being no proof of such express authority, the authorization given by him to the defendants was not a defense to the claim.—Chrystie v. Foster (C. C. A.) 551.

The receiver of an insolvent national bank (Rev. St. § 5242) has no right to pay a county whose funds have been deposited in the bank, in preference to other depositors. — Spokane County v. Clark (C. C.) 538.

Trust moneys mingled with depositor's funds without notice to the bank may be recovered without set-off of debts due the bank from the depositor.—Fisher v. Knight (C. C. A.) 491.

Bequest.

See "Wills."

Bill of Exceptions.

See "Exceptions, Bill of."

Bona Fide Purchasers.

See "Vendor and Purchaser."

Bonds.

Of city, see "Municipal Corporations."

Bottomry and Respondentia.

See "Shipping."

BUILDING AND LOAN ASSOCIATIONS.

On dissolution for insolvency, borrowers *held* entitled to credit on their loans for the unearned portion of their premiums, but not for fines and assessments paid on their stock. — Towle v. American Bldg., Loan & Inv. Soc. (C. C.) 446.

Cancellation.

Of contracts, see "Equity."

CARRIERS.

See, also, "Railroad Companies;" "Shipping."

Accident to train resulting from negligence does not excuse interstate carrier from unloading animals every 28 hours.—Newport News & M. Val. Co. v. United States (C. C. A.) 488.

A carrier engaged in interstate commerce cannot complain because a connecting carrier discriminates, in the matter of prepayment of freight and mileage, between goods coming from different localities over the first carrier's line. 24 Stat. 380, § 3.—Oregon Short-Line & U. N. Ry. Co. v. Northern Pac. R. Co. (C. C. A.) 158.

The Northern Pacific Railroad Company is not forbidden by its charter to make such discriminations.—Oregon Short-Line & U. N. Ry. Co. v. Northern Pac. R. Co. (C. C. A.) 158.

Charter Party.

See "Shipping."

CHATTEL MORTGAGES.

A chattel mortgage is valid without renewal, as against a subsequent mortgagee with actual notice, since he is not a mortgagee "in good faith."—Riederer v. Pfaff (C. C.) 872.

CHINESE.

Merchant must be excluded (Act Cong. Nov. 3, 1893) where it appears that his business was conducted under a firm name.—In re Quan Gin (D. C.) 395.

Merchant must furnish evidence required by Act Cong. Nov. 3, 1893, although he may have departed from the country before that act was passed.—In re Yee Lung (D. C.) 641.

Laborer convicted of felony liable to deportation for failure to register within one year. Act Nov. 3, 1893.—United States v. Chew Cheong (D. C.) 200.

Act Nov. 3, 1893, excepting laborer convicted of felony from privilege of registration within extended time, not ex post facto. — United States v. Chew Cheong (D. C.) 200.

Circuit Court.

See "Courts."

Circuit Court of Appeals.

See "Courts."

City.

See "Municipal Corporations."

Classification.

See "Customs Duties."

COLLISION.

Ferryboat maneuvering to get into slip *held* not bound to continue fog signals after arriving inside line of piers.—Hoboken Ferry Co. v. The Princeton (D. C.) 116.

Resulting from breaking of tiller rope, which had been inspected, appeared sound, and was operated carefully, *held* due to inevitable accident.—The Olympia (C. C. A.) 120; Weeks v. Wilson Transit Co., Id.

The burden is on steamer to show inevitable accident, where the breaking of her tiller rope results in a collision.—The Olympia (C. C. A.) 120; Weeks v. Wilson Transit Co., Id.

Between steamer and schooner unnecessarily tacking across the steamer's bow in a narrow channel, and so near that the steamer could not avoid her.—The Philadelphian (C. C. A.) 862; Lewis v. Trant, Id.; Wiley v. Same, Id.

Between steamers.

Steamship O. *held* in fault for not reversing as soon as it was perceived that the steamship C. was not answering her helm so as to go to port, a tide rip known to officers of O. preventing the C. from obeying signal.—The Oceanic (D. C.) 338; Smith v. Occidental & Oriental Steamship Co., Id.

Steamers failing to give signals required by the inspectors' rules, which would have prevented the misunderstanding as to each other's intentions which caused a collision, *held* both in fault.—The Car Float No. 16 (C. C. A.) 364; McCullough v. New York, N. H. & H. R. Co., Id.; New York & N. Steamboat Co. v. The Transfer No. 4, Id.

A ship under steam having another on the starboard hand is bound to keep out of the way, although the approaching ship would not actually cross, but strike her amidships. Act March 3, 1885, rule 16.—The Oceanic (D. C.) 338; Smith v. Occidental & Oriental Steamship Co., Id.

A tug unnecessarily proceeding so near ferry slips as to be unable, on a temporary disabling of her engine, to keep out of the way of a ferryboat coming out on her starboard hand, although the ferryboat reversed before the collision, *held* not entitled to damages against the ferryboat.—Dentz v. The Fanwood (D. C.) 523.

A tug *held* not in fault for omitting to stop and reverse to avoid a steamship approaching on her port hand in a situation justifying the supposition that the steamship would go under her stern or stop.—Winnett v. The Delaware (D. C.) 525.

Tugs and tows.

Tug incumbered by car floats discovering another on a crossing course, on her starboard hand, should immediately reverse.—Thames Towboat Co. v. Central R. Co. of New Jersey (D. C.) 117.

A tug, with a tow alongside, and a ferryboat, *held* both in fault for a collision between the ferryboat and the tow, at night, near the ferry slip,—the tug for having no separate lookout, for navigating too near the slip and embarrassing the ferryboat's entrance, and for failing to give alarm signals; the ferryboat for failing, after giving her own signals, to pay attention to the movements of the tug.—Murray v. The Chicago (D. C.) 521; Pennsylvania R. Co. v. The Volunteer, Id.

Steamboat attempting to cross ahead of a tow despite opposing signals *held* liable.—Myers Excursion & Nav. Co. v. The Richard Peck (D. C.) 336.

Disturbance of water sufficient to damage tow met in narrow channel *held* to show that steamer did not properly reduce speed.—The Columbia (C. C. A.) 220; Upper Delaware River Transp. Co. v. Sullivan, Id.

Evidence.

Testimony of those co-operating in precautions of one vessel to avoid collision is not overcome by failure of witnesses on other vessel or at remote points to observe such precautions.—The Philadelphian (C. C. A.) 862; Lewis v. Trant, Id.; Wiley v. Same, Id.

Damages.

Average charges legally assessed against cargo at the foreign port of destination, for a negligent collision, although not allowable on adjustment of average under our law, may be recovered by the cargo owner from the ship as damages for the collision.—Insurance Co. of North America v. The Energia and The Wild Pigeon (D. C.) 222.

Common Carrier.

See "Carriers."

Condemnation Proceedings.

See "Eminent Domain."

CONSTITUTIONAL LAW.

Taxation.

An assessment for back taxes (Rev. St. Ohio, § 2781), without notice to the taxpayer, constituting a cloud on the title to his realty, and a lien on his property, enforceable by distraint, is a deprivation of property without due process of law.—Meyers v. Shields (C. C.) 713.

Acts Kan. 1887, c. 214, relating to improvements of county roads, is an unconstitutional (article 2, § 21) delegation of the taxing power.—Parks v. Board of Com'rs of Wyandotte County (C. C.) 436; First Nat. Bank of Lansdale v. Same, Id.

County warrants issued pursuant to the unconstitutional law are void.—Parks v. Board of Com'rs of Wyandotte County (C. C.) 436; First Nat. Bank of Lansdale v. Same, Id.

Proceedings for assessment for back taxes, judicial in their nature, when conducted by a county auditor disqualified by a direct pecuniary

interest in the result, because entitled to a commission on such taxes (Rev. St. Ohio, § 1071), are not due process of law.—Meyers v. Shields (C. C.) 713.

CONTEMPT.

Where the members of a labor organization combine and confederate for the purpose of enforcing their demands by the seizure of their employers' property, or to prevent other men, by force and intimidation, from entering such employment, they are guilty of a crime; and, where such acts violate an injunction, they will be punished for contempt of court.—Lake Erie & W. Ry. Co. v. Bailey (C. C.) 494.

CONTRACTS.

See, also, "Assignment for Benefit of Creditors;" "Carriers;" "Chattel Mortgages;" "Deed;" "Insurance;" "Master and Servant;" "Partnership;" "Principal and Surety;" "Sale;" "Vendor and Purchaser."

A railroad pooling contract, the evident object of which is to stifle competition for the purpose of raising rates, is void, as contrary to public policy.—Chicago, M. & St. P. Ry. Co. v. Wabash, St. L. & P. Ry. Co. (C. C. A.) 993.

Courts will not enforce an illegal contract for division of railroad earnings, at the suit of one party thereto claiming to have performed its part thereof.—Chicago, M. & St. P. Ry. Co. v. Wabash, St. L. & P. Ry. Co. (C. C. A.) 993.

A provision, in a proposal for a horse race, that winners of "stake races" shall carry extra weight, *held* not to apply to a winner of a "free handicap."—Stone v. Clay (C. C. A.) 889.

Strict performance as to time *held* waived when prevented by default of other party.—Standard Gaslight Co. v. Wood (C. C. A.) 74.

Plaintiff owned timber lands on the Chippewa river, and a sawmill below, on the Mississippi. Defendant logging company contracted to receive the logs, and deliver them at plaintiff's mill. To do this it was necessary to drive them down the Chippewa into a boom where they were assorted by means of pockets and formed into rafts so as to be towed by raft boats in use on the Mississippi. The contract bound defendant in terms to perform these several operations, and specified "Beef Slough" boom, which was controlled by defendant, as the one into which the logs were to be driven. During the life of the contract Beef slough was filled up by the action of floods, and was no longer available for use as a boom; but defendant constructed a boom in another slough on the west bank of the Mississippi, and the operations necessary to the delivery of plaintiff's logs could be carried on as well at this boom as at Beef slough. *Held*, that defendant could not excuse itself from further performance of the contract on the ground that it had been rendered impossible by natural causes which it could not control.—Robson v. Mississippi River Logging Co. (C. C.) 893.

Defendant contracted to drive, boom, raft, and deliver plaintiff's logs, and agreed that the boom charges should not exceed 60 cents per thousand feet. During the life of the contract the necessary boom charges were increased by reason of circumstances over which neither plaintiff nor defendant had any control. *Held*, that this did not excuse defendant from further performance of the contract, nor entitle it to demand a higher compensation than that contracted for.—Robson v. Mississippi River Logging Co. (C. C.) 893.

A contract between plaintiff and defendant recited that plaintiff owned timber lands tributary to two streams on which defendant was engaged in the business of driving logs, and that differences had arisen between the parties in regard to charges for services rendered by defendant; it was therefore agreed that, in consideration of a specified compensation, defendant should drive, boom, and deliver all logs put by plaintiff in the rivers in question, not to exceed a named limit annually. The parties acted under this contract until all but a small part of the timber was cut from plaintiff's land. *Held*, that defendant could not refuse performance as to the balance of the timber on the ground that there was a lack of mutuality in the contract.—Robson v. Mississippi River Logging Co. (C. C.) 893.

Danger of forfeiture of government contract for delay in work by subcontractor *held* not, as matter of law, so great as to justify resumption of work by original contractor.—Mundy v. Stevens (C. C. A.) 77.

Conveyances.

See "Chattel Mortgages;" "Deed;" "Fraudulent Conveyances;" "Sale;" "Vendor and Purchaser."

COPYRIGHT.

A copyright owner, after parting with title to copyrighted books under an agreement restricting their use, is not entitled, under the copyright laws, to restrain sales in violation of the agreement.—Harrison v. Maynard, Merrill & Co. (C. C. A.) 689.

CORPORATIONS.

See, also, "Banks and Banking;" "Carriers;" "Insurance;" "Municipal Corporations;" "Railroad Companies;" "Telegraph Companies."

Service of process on, see "Writs."

Contract of corporation by agent is admissible in evidence, without proof of its ratification by any formal corporate act.—Scofield v. Parlin & Orendorff Co. (C. C. A.) 804.

The validity of "calls" made by a British corporation for unpaid stock is to be determined by the British law.—American Pastoral Co. v. Gurney (C. C.) 41.

Defaulter on "calls" for unpaid stock in British corporation not liable for interest in absence of notice.—American Pastoral Co. v. Gurney (C. C.) 41.

Not essential that resolution of directors of British corporation authorizing "calls" for unpaid stock should name person, time, and place in relation to payment.—American Pastoral Co. v. Gurney (C. C.) 41.

When corporation is in receiver's hands, stockholder cannot sue on behalf of the corporation without first asking the court to order the receiver to sue.—Swope v. Villard (C. C.) 417.

A stockholder suing on behalf of the corporation should not only allege that he asked the directors to sue, and they have refused, but when and how the request was made, and whether the refusing directors are still in office. —Swope v. Villard (C. C.) 417.

COSTS.

Expense of maps necessarily used at trial are taxable.—Lillienthal v. Southern Cal. Ry. Co. (C. C.) 622.

Fees and mileage of witnesses attending without subpoena are not taxable.—Lillienthal v. Southern Cal. Ry. Co. (C. C.) 622.

Court Martial.

See "Army and Navy."

COURTS.

See, also, "Removal of Causes."

Action may be brought against foreign corporation in district of plaintiff when such corporation is subject to jurisdiction of state courts. —Dinzy v. Illinois Cent. R. Co. (C. C.) 49.

Action against nonresident defendant in state of Iowa need not be brought in division of district in which plaintiff resides.—Dinzy v. Illinois Cent. R. Co. (C. C.) 49.

Amount in controversy is the whole amount to be certified, and not amount to be certified to each county, upon injunction of certificate by board of tax appraisers.—Western Union Tel. Co. v. Poe (C. C.) 449.

Where defendant answers the charge of infringing a patent by setting up a license which he holds by assignment, and which plaintiff claims is unassignable, the federal court has jurisdiction.—Walter A. Wood Harvester Co. v. Minneapolis-Esterly Harvester Co. (C. C.) 256.

A federal court of equity may apply a remedy by injunction against the collection of an illegal tax expressly provided by a state statute, notwithstanding the statute also gives a remedy at law.—Meyers v. Shields (C. C.) 713.

Such court may relieve against the illegal assessment of back taxes made by a state statute a lien on real estate, as a cloud on the title. —Meyers v. Shields (C. C.) 713.

The lease of a state railroad by a foreign corporation, under an act (Ga. Nov. 12, 1889) which made the lessee a corporation of the state, *held*, for jurisdictional purposes, to make such lessee a citizen of that state.—Western & A. R. Co. v. Roberson (C. C. A.) 592.

A federal court has not jurisdiction of a suit against two corporations of the same state, brought by a corporation of another state, where the interests of one of the defendants in the controversy are identical with those of the complainant, and it is a proper, even though not a necessary party.—Pittsburgh, C. & St. L. Ry. Co. v. Baltimore & O. R. Co. (C. C. A.) 705.

The federal courts may assume jurisdiction of proceedings to contest a will under the laws of Oregon when the amount in controversy and citizenship of the parties furnish ground for such jurisdiction.—Richardson v. Green (C. C. A.) 423.

Suit on penal bond exceeding $2,000 must be dismissed when plaintiff's evidence shows that he claims less than that sum.—Cabot v. McMaster (C. C.) 129.

Injunction denied by federal court where illegal assessment of tax is less than $2,000.—United States Exp. Co. v. Poe (C. C.) 475; American Exp. Co. v. Same, Id.

Circuit court of appeals.

The circuit court of appeals cannot review the action of the district court (Rev. St. § 4980) in refusing to dismiss, for want of jurisdiction, a suit brought by the assignee.—In re Briggs (C. C. A.) 498; Hutchins v. Briggs, Id.; Same v. Tate, Id.

Circuit courts.

The supervisory jurisdiction of circuit courts over bankruptcy proceedings (Rev. St. § 4986) is not impaired by the act (March 3, 1891, § 4) creating the circuit court of appeals. —In re Briggs (C. C. A.) 498; Hutchins v. Briggs, Id.; Same v. Tate, Id.

Circuit court may entertain petition to review refusal of the district court to remove assignee. Rev. St. § 4986.—In re Briggs (C. C. A.) 498; Hutchins v. Briggs, Id.; Same v. Tate, Id.

A circuit court has no authority to award interest on a court of claims judgment, which does not provide therefor, after such judgment is paid.—Walton v. United States (C. C.) 486.

Decisions of state courts.

Decisions of state courts on validity of contracts limiting liability of telegraph companies for mistakes, etc., in messages, are not binding on federal courts.—Western Union Tel. Co. v. Cook (C. C. A.) 624.

Rule that contributory negligence shall not be complete bar to statutory action for negligence *held* binding upon federal court when rule grows out of language of statute and construction thereof by state court—Byrne v. Kansas City, Ft. S. & M. R. Co. (C. C. A.) 605.

Conflicting state and federal jurisdiction.

A receiver of a railroad appointed by a federal court cannot be compelled to litigate garnishment proceedings in state courts brought to reach wages of his employes in his hands.—In

re Barnard (C. C.) 531; United States Trust Co. of New York v. Omaha & St. L. Ry. Co., Id.

Such proceedings need not be restrained by injunction, but the receiver may be directed to take no part therein after filing an order of the court that, if the garnishment be further prosecuted, the claim be not paid by him, or out of funds in his hands.—In re Barnard (C. C.) 531; United States Trust Co. v. Omaha & St. L. Ry. Co., Id.

CUSTOM AND USAGE.

Proof of an agreement relating to the same subject, but not inconsistent with an alleged custom, *held* immaterial, on a question of liability for negligence in acting without regard to the existence of such custom.—Cleveland, C., C. & St. L. Ry. Co. v. Zider (C. C. A.) 908.

In view of a custom of placing unfinished cars on a side track to be completed, the presence of new cars on such track may be considered by a jury as sufficient notification to those in charge of a locomotive on the track that workmen were probably engaged on the cars during ordinary working hours.—Cleveland, C., C. & St. L. Ry. Co. v. Zider (C. C. A.) 908.

CUSTOMS DUTIES.

Tissue paper having certain colors, in stripes and plaids, printed or stamped thereon, *held* dutiable as "tissue paper, white or colored." Act Oct. 1, 1890, par. 419.—Kraft v. United States (C. C.) 398.

Truffles *held* to be dutiable at 45 per cent. ad valorem as "vegetables of all kinds, prepared or preserved, including pickles and sauces of all kinds, not specially provided for." Act Oct. 1, 1890, par. 287.—Park v. United States (C. C.) 398.

Flint glass bottles, molded, and holding more than one pint, are dutiable at one cent per pound, under paragraph 103, Act Oct. 1, 1890, and not at 60 per cent., under paragraph 105.—Smith v. Mihalovitch (C. C. A.) 399.

The provision of paragraph 104, Act Oct. 1, 1890, that certain glassware shall not pay a less duty than 40 per cent. ad valorem, cannot be applied on appeal, where the record does not show that the duty imposed is less than that rate.—Smith v. Mihalovitch (C. C. A.) 399.

Cucumbers and cauliflower, packed in salt, *held* dutiable as "vegetables * * * prepared or preserved, including pickles and sauces of all kinds." Act Oct. 1, 1890, par. 287.—Alart v. United States (C. C.) 500.

All artists' colors are dutiable under paragraph 61 (Act Oct. 1, 1890) of the paint and color schedule.—Rich v. United States (C. C. A.) 501.

An edition of illustrated supplements, issued in Germany, under the title "Lustige Blaetter," printed for the "German New York Sunday News," and having the distinctive title "New Yorker Lustige Blaetter," *held* not free from duty as "periodicals," under paragraph 657, act Oct. 1, 1890, but properly dutiable under schedule M, par. 423, as printed matter, at 25 per cent. ad valorem.—In re New York Daily News (C. C.) 647.

Ladies' gloves, 14 inches or less in extreme length, manufactured from the skins of immature kids, imported from Germany, and described as "schmaschen, low quality," *held* properly dutiable under schedule N, § 458 (Act Oct. 1, 1890) as "schmaschen" gloves at $1.75 per dozen pairs.—In re Holzmaister (C. C.) 645.

Silk veils or veilings in the piece, with borders upon them, and a distinctly marked line between the borders, designating where they were to be cut off, *held* to be dutiable at 60 per centum ad valorem as "wearing apparel." Act Oct. 1, 1890, par. 413.—Oppenheimer v. United States (C. C.) 283.

Ornaments made of glass and wire, and known as "jet trimmings," are dutiable as "manufactures of glass." Act Oct. 1, 1890, § 108.—Goldberg v. United States (C. C. A.) 91.

Braids used in the manufacture of hats composed of 95 per cent. of cotton and 5 per cent. of other materials, commercially known as "cotton braids," though bought and sold as "cotton hat braids," etc., *held* to be dutiable at 35 cents per pound, under paragraph 354 of the tariff act of October 1, 1890.—Zimmerman v. United States (C. C.) 938.

DAMAGES.

See, also, "Collision;" "Death by Wrongful Act;" "Shipping."

Where, after lapse of a reasonable time for reconditioning damaged cargo, the market price is the same as at the time when the goods should have been delivered in sound condition, there can be no recovery for loss through a subsequent fall in market value.—The Timor (D. C.) 633; Nordlinger v. Nelson, Id.

Dangerous Premises.

See "Negligence."

DEATH BY WRONGFUL ACT.

The question whether deceased suffered mental or bodily pain, where death was instantaneous, is a question for the jury, where such pain is, under the statute (Code Tenn. Mill. & V. § 3134), an element for which damages can be recovered.—Western & A. R. Co. v. Roberson (C. C. A.) 592.

$1,000 allowed for a daughter 4½ years old, in good health, at the time of her death.—The Oceanic (D. C.) 338; Smith v. Occidental & Oriental Steamship Co., Id.

$10,000 allowed (California) in the case of a man 32 years old, in good health, and earning $1,500 a year.—The Oceanic (D. C.) 338; Smith v. Occidental & Oriental Steamship Co., Id.

DEED.

Under a recording act (Mansf. Dig. Ark. §§ 670, 671) making the record of a deed constructive notice from the time the deed is filed for record, the subsequent burning of the record does not detract from the effect of such filing as notice.—Paxson v. Brown (C. C. A.) 874.

Defective Appliances.

See "Master and Servant."

DEMURRAGE.

A provision, in a bill of lading, requiring delivery of the cargo "as soon as possible," does not admit of detention of the vessel to suit the convenience or business purposes of the consignee.—Egan v. Barclay Fibre Co. (D. C.) 527; Smith v. Same, Id.

DESCENT AND DISTRIBUTION.

A bill to compel an accounting by an intestate's agent of assets of the estate cannot be maintained by the sole distributee, as such, not alleging that there is no administrator and no creditor.—Newman v. Schwerin (C. C. A.) 865.

Discrimination.

In freight charges, see "Carriers."

Documents.

See "Evidence."

DURESS.

A settlement of salvage charges obtained by the vessel owner by violence and threats is not binding on the salvor.—Lowndes v. The Ernest M. Munn (D. C.) 694.

Duties.

See "Customs Duties."

EJECTMENT.

Receiver's receipt and register's certificate issued for part of original mining claim after abandonment of remainder *held* valid as evidence of title.—Last Chance Min. Co. v. Tyler Min. Co. (C. C. A.) 557.

Validity of such receipt and certificate not affected by failure to have new survey, after abandoning part of claim.—Last Chance Min. Co. v. Tyler Min. Co. (C. C. A.) 557.

EMINENT DOMAIN.

Party claiming under contract necessarily assuming right of eminent domain estopped to deny such right.—Coe v. Aiken (C. C.) 24.

Equity has power to determine whether amount of land taken is needed, but will act liberally.—Coe v. Aiken (C. C.) 24.

Fraudulent or illegal intent no ground, in equity, of setting aside adjudication.—Coe v. Aiken (C. C.) 24.

Uncertainty of location does not invalidate adjudication if it can be made certain.—Coe v. Aiken (C. C.) 24.

Question as to the value of land before and after the building of a railroad *held* irrelevant under the laws of the territory of Washington.—Spokane Falls & N. Ry. Co. v. Ziegler (C. C. A.) 392.

EQUITY.

See, also, "Injunction;" "Subrogation."

Laches not imputed to plaintiff in suit to set aside a will when commenced immediately after probate and rights of third persons were not involved.—Richardson v. Green (C. C. A.) 423.

Complainants *held* not guilty of laches in suit to rescind purchase of mines a year after the sale.—Mudsill Min. Co. v. Watrous (C. C. A.) 163.

Rescission of contract.

Evidence *held* sufficient, in suit to rescind contract for purchase of mines, that samples had been "salted" by defendant.—Mudsill Min. Co. v. Watrous (C. C. A.) 163.

Tender of money paid must be made and kept good to maintain suit to rescind release.—Vandervelden v. Chicago & N. W. Ry. Co. (C. C.) 54.

Right to rescind purchase of mines *held* not waived under the circumstances.—Mudsill Min. Co. v. Watrous (C. C. A.) 163.

Evidence that defendant "salted" samples in prior negotiations with third persons *held* admissible in suit to rescind contract for purchase of mines.—Mudsill Min. Co. v. Watrous (C. C. A.) 163.

Pleading.

Setting a demurrer and plea for hearing waives the objection that the defendant has waived the right to set up the defense pleaded.—Farmer's Loan & Trust Co. v. Chicago & N. P. R. Co. (C. C.) 543.

In pleading a lien created by attachment, it is enough to allege the issue and levy of the attachment, and the subsequent judgment and order of sale, without alleging the filing of an attachment affidavit.—Bank of California v. Cowan (C. C.) 871.

The omission to allege probate in a suit to set aside a will is cured by the admission in the answer.—Richardson v. Green (C. C. A.) 423.

Failure of a bill for injunction against collection of a tax to aver that plaintiffs have property within the distraining process for collection thereof may be amended, after submission of the cause.—Meyers v. Shields (C. C.) 713.

ERROR, WRIT OF.

See, also, "Appeal;" "Exceptions, Bill of;" "New Trial."

Defects in a writ of error, in that a seal is wanting, and in its return without being attached to the transcript, are amendable. Rev. St. § 1005.—Cotter v. Alabama G. S. R. Co. (C. C. A.) 747.

ESTOPPEL.

A partner in whose name title to lands bought by the firm was taken for convenience *held* estopped, by long acquiescence in an assignment by the firm for benefit of creditors conveying such lands, to assert a claim thereto for noncompliance with local assignment laws, the assignment being good at common law.—Paxson v. Brown (C. C. A.) 874.

Erroneous reference to the date of a notice terminating a license, in a letter by the licensor to the receiver of the licensee's assignee, *held* not ground of estoppel, for lack of evidence that the receiver relied on the letter, and was injuriously misled thereby.—Comer v. Felton (C. C. A.) 731.

Parties claiming lands under one who obtained and recorded a decree deriving his title from a false source are not estopped to deraign title from the true source, as against others who did not purchase in reliance on such decree.—Paxson v. Brown (C. C. A.) 874.

EVIDENCE.

See, also, "Ejectment."

A federal court will take judicial notice of the acts providing for the construction, operation, and leasing of a state railroad, as such acts are regarded as public acts.—Western & A. R. Co. v. Roberson (C. C. A.) 592.

Evidence of failure to deny liability for the debt sued for may be rebutted by proof of want of knowledge thereof.—National Bank of Commerce v. First Nat. Bank (C. C. A.) 809.

Letter received by mail in answer to another letter is presumed to be the letter of the person whose name is signed to it.—Scofield v. Parlin & Orendorff Co. (C. C. A.) 804.

Testimony that the conduct of an employe in a particular line of duty was very imprudent, given by a witness having little opportunity for observation, without stating the facts on which the opinion was based, *held* incompetent to show his unfitness to be so employed.—Ardmore Coal Co. v. Bevil (C. C. A.) 757.

The qualification of a witness as an expert is largely within the discretion of the trial judge.—Mutual Fire Ins. Co. v. Alvord (C. C. A.) 752.

Physician testifying to extent of personal injuries may state what patient said in describing his condition, especially when the bodily examination supports his statements.—Union Pac. Ry. Co. v. Novak (C. C. A.) 573.

Whether one brakeman was sufficient to control gravel train by handbrakes alone *held* a proper subject for expert evidence.—Union Pac. Ry. Co. v. Novak (C. C. A.) 573.

"Scale books" were offered in evidence to show the quantity of timber cut from certain lands. It was shown that "camp scalers" take the measurements of logs as they are cut in the woods, and enter them upon cards; that at the close of the day these measurements are entered on the scale books; that inspectors verify the scale books by counting the logs and remeasuring a sufficient number to satisfy themselves of their correctness; and that the scale books are then sent to the owners of the logs, and payment made to the cutter according to their contents. *Held*, that the scale books are primary evidence of the quantity of logs cut.—Robson v. Mississippi River Logging Co. (C. C.) 893.

Conversations prior to a written contract for sale of goods are inadmissible to contradict its express and unambiguous provisions as to the quality of the goods to be delivered or the time for removal thereof.—Empire State Phosphate Co. v. Heller (C. C. A.) 280.

Letter containing an admission of the execution of a contract, and offering to compromise the claim made under it, is admissible as evidence of the execution of the contract.—Scofield v. Parlin & Orendorff Co. (C. C. A.) 804.

EXCEPTIONS, BILL OF.

See, also, "Appeal."

A bill of exceptions, filed after the term at which judgment is entered, does not become part of the record, unless so filed by consent of parties, or by rule or order of the court.—United States v. Carr (C. C. A.) 802.

EXECUTORS AND ADMINISTRATORS.

The appointment by a chancery court of an administrator ad litem, authorized only when there is no executor or administrator (Act Tenn. 1889), although it recites that fact, cannot be sustained on appeal, where no allegation or evidence of the fact appears in the record.—Newman v. Schwerin (C. C. A.) 865.

Experts.

See "Evidence."

Express Companies.

Taxation, see "Taxation."

FALSE IMPRISONMENT.

Defendant procured, from a judge having jurisdiction, a warrant for plaintiff's arrest, which was directed to the sheriff of any county in the state. It was delivered to the sheriff of

S. county, who arrested plaintiff outside of his county, and took him to a third county to be identified before bringing him to S. county. *Held*, that there was no trespass for which defendant could be held liable in an action for false imprisonment.—Knight v. International & G. N. Ry. Co. (C. C. A.) 87.

Federal Courts.

See "Courts."

Fees.

Of witness, see "Witness."

Fellow Servant.

See "Master and Servant."

Foreclosure.

Of railroad mortgage, see "Railroad Companies."

FRAUD.

See, also, "Fraudulent Conveyances."

Representations that ore contained certain average of pure silver *held* not mere expressions of opinion, where samples had been "salted."—Mudsill Min. Co. v. Watrous (C. C. A.) 163.

FRAUDULENT CONVEYANCES.

See, also, "Assignment for Benefit of Creditors."

A conveyance leaving the grantor in full possession and management of his property, and with a material interest therein, *held* void.—Orman v. English & Scottish Mercantile Investment Trust (C. C. A.) 38.

General Average.

See "Shipping."

HABEAS CORPUS.

The question whether facts proven are in law sufficient to sustain the charge cannot be tested by habeas corpus proceedings.—Ex parte Rickelt (C. C.) 203.

Pending appeal from denial of writ, custody of prisoner cannot be disturbed, on second application, though he is daily required to perform hard labor.—In re McKane (C. C.) 205.

HEALTH.

The port from which a vessel clears for the United States is "the port of departure" at which she must obtain a bill of health. 27 Stat. 449.—United States v. The Dago (C. C. A.) 986.

HORSE AND STREET RAILROADS.

See, also, "Carriers."

Where a horse is standing near a street car and is excited, the ringing of the car gong violently so as to scare the horse may constitute negligence.—Philadelphia Traction Co. v. Lightcap (C. C. A.) 762.

HUSBAND AND WIFE.

One caring for insane abandoned wife can recover from husband without averring that his credit was relied on.—Davis v. St. Vincent's Inst. for Insane (C. C. A.) 277.

Imports.

See "Customs Duties."

INDIANS.

The act (May 2, 1890, § 31) extending certain statutes of Arkansas to the Indian Territory includes all the provisions of the chapters enumerated, unless they are locally inapplicable, or in conflict with that or other existing acts of congress.—Ardmore Coal Co. v. Bevil (C. C. A.) 757.

Infringement.

Of copyright, see "Copyright."
Of patent, see "Patents for Inventions."

INJUNCTION.

Infringement of copyright, see "Copyright."

Federal courts have jurisdiction to enjoin an illegal tax when injunction will prevent multiplicity of suits.—Western Union Tel. Co. v. Poe (C. C.) 449.

Federal courts have no jurisdiction to enjoin a tax because illegal.—Western Union Tel. Co. v. Poe (C. C.) 449.

Preliminary injunction refused (defendant being required to give bond and make periodical statements) in circuit where patent had been sustained by court of appeals, in view of the character of the evidence.—Norton v. Eagle Automatic Can Co. (C. C.) 293.

Instructions.

See "Trial."

INSURANCE.

Provision that loss must be paid 60 days after satisfactory proof of loss does not give the com-

pany 60 days in which to object to proof of loss.—Hamilton v. Phoenix Ins. Co. of Hartford (C. C. A.) 379.

Rights of a mortgagee under a policy made payable to him, and providing that he should not suffer for any act or neglect of the mortgagor, *held* not affected by the mortgagor's obtaining other insurance in excess of the amount permitted by the policy.—Mutual Fire Ins. Co. v. Alvord (C. C. A.) 752.

Question whether demand for appraisal was made within a reasonable time *held* to be a question for the jury.—Hamilton v. Phoenix Ins. Co. of Hartford (C. C. A.) 379.

Suit on a policy is not precluded by a mere provision for arbitration in case of disagreement.—Mutual Fire Ins. Co. v. Alvord (C. C. A.) 752.

Suit on a policy providing for arbitration in case of disagreement may be maintained notwithstanding a submission and award thereon, where the submission reserves the rights of both parties, and is not in accordance with the requirements of the policy.—Mutual Fire Ins. Co. v. Alvord (C. C. A.) 752.

Forfeiture of a mutual benefit certificate after the accident which caused the insured's death *held* not to relieve the association from liability. —Burkheiser v. Mutual Acc. Ass'n of the Northwest (C. C. A.) 816.

INTEREST.

Judgment rendered by court of claims, under authority of a special act, against the United States for collision with government pier, does not bear interest, when such act does not specially authorize it.—Walton v. United States (C. C.) 486.

On return of mandate without provision as to interest, the same should be allowed from the filing of the bill.—Nashua & Lowell R. Corp. v. Boston & Lowell R. Corp. (C. C. A.) 237.

INTERPLEADER.

Bill must show that each defendant has some claim, legal or equitable, upon the fund.—Pusey & Jones Co. v. Miller (C. C.) 401.

Invention.

See "Patents for Inventions."

Judge.

See "Courts;" "Removal of Causes."

JUDGMENT.

Recitals in a judgment entered after answer withdrawn *held* no evidence of date of location of mining claim.—Last Chance Min. Co. v. Tyler Min. Co. (C. C. A.) 557.

Judgment of state court, on appeal by railroad company from drainage commissioners, is conclusive as to benefits and damages, and a federal court has no jurisdiction to enjoin the improvement on the ground of interruption of interstate commerce and [illegible]—Lake Erie & W. R. Co. v. Smith (C. C.) 885.

A motion in arrest should not be granted because of an imperfect allegation in a complaint which, irrespective thereof, is sufficient.—Louisville & N. R. Co. v. Ward (C. C. A.) 927.

Judicial Notice.

See "Evidence."

Jurisdiction.

See "Courts."
In admiralty, see "Admiralty."

Laches.

See "Equity."

LANDLORD AND TENANT.

Question whether or not buildings were required for railroad purposes within condition of lease, how determined.—Coe v. Aiken (C. C.) 24.

Leases.

See "Landlord and Tenant."

Liens.

See "Maritime Liens;" "Mechanics' Liens."

LIMITATION OF ACTIONS.

A statute of limitations of one country does not become a bar as an extinguishment of the debt, in the courts of another country, unless the parties reside in the country of the statute during the whole period of limitation.—Canadian Pac. Ry. Co. v. Johnston (C. C. A.) 738.

LIS PENDENS.

Amendment of bill after demurrer has been sustained thereto relates back to the filing of the bill, so far as the doctrine of lis pendens is concerned.—Cotton v. Dacey (C. C.) 481.

Attachment after bill is filed, but before process is served on the attaching creditor, followed by judgment in the attachment suit after process on the bill has been served, does not give the attaching creditor any priority in the equities in the land which the bill seeks to enforce.—Cotton v. Dacey (C. C.) 481.

MALICIOUS PROSECUTION.

Conviction prima facie evidence of probable cause, although new trial granted, and nolle subsequently entered.—Knight v. International & G. N. Ry. Co. (C. C. A.) 87.

MANDAMUS.

A writ to compel payment, by several townships, of judgments against a union school district, need not specify the mode of apportionment, where that is prescribed by law.—Board of Sup'rs of Presque Isle County v. Thompson (C C. A.) 914.

MARITIME LIENS.

Contract for machinery not maritime where supplied when the vessel was "building."—Johnson Engineering & Foundry Co. v. The Paradox (D. C.) 860.

Lien for supplies furnished while vessel is in the marshal's hands only allowed to the extent of the marshal's share of the proceeds.—Hoffman v. The Nebraska (D. C.) 514.

Repairs furnished in port of sister state without necessity may create lien under state statutes, but not under maritime law.—Hoffman v. The Nebraska (D. C.) 514.

Liens for repairs and supplies arising under laws of different states are of equal rank.—Hoffman v. The Nebraska (D. C.) 514.

Lien is not waived by taking note and mortgage which expressly state that the lien is not waived.—Hoffman v. The Nebraska (D. C.) 514.

A state statute giving a lien on a vessel for advances made for procuring necessaries or for insurance does not include advances made to pay a debt for insurance premiums for which no lien existed.—Higgins v. The Allianca (D. C.) 507.

MASTER AND SERVANT.

Railroad company *held* not responsible for negligence of servants when under control of third person.—Byrne v. Kansas City, Ft. S. & M. R. Co. (C. C. A.) 605.

Master *held* not liable where fireman was injured by turning of loose step in descending from locomotive.—Texas & P. Ry. Co. v. Patton (C. C. A.) 259.

That a switchman, injured while coupling cars by reason of a hole in the track, might have selected another place to make the coupling, will not defeat his recovery for the injury, unless he knew, or ought to have known, of the danger incurred.—Louisville. & N. R. Co. v. Ward (C. C. A.) 927.

Negligence of servants to whom the master intrusts the making reasonably safe the place in which another servant is to work is attributable to the master, without reference to any question of the responsibility of fellow servants.—Louisville & N. R. Co. v. Ward (C. C. A.) 927.

A railway company is liable for injuries to a brakeman by negligence of a conductor in the management of the train on which both are employed, when under the company's rules the conductor has charge and control of the train, and of all persons employed on it, and is responsible for its movements.—Canadian Pac. Ry. Co. v. Johnston (C. C. A.) 738.

The answer of a railway company in an action against it for personal injuries, averring that plaintiff was in the employ of the company when injured, and that his injuries were caused by negligence of his fellow servants, *held* binding on the company as an admission of its servants' negligence.—Kansas & A. V. Ry. Co. v. Morton (C. C. A.) 814.

Court cannot submit question of negligence to jury, where there is no evidence of negligence other than that assumed by injured employe.—Texas & P. Ry. Co. v. Minnick (C. C. A.) 635.

Direction of a verdict for defendant, in an action against a railroad company for the death of an employe by derailment of a train, *held* proper, the evidence failing to show that the condition of the track, as to which alone negligence on defendant's part was charged, caused the derailment.—Cotter v. Alabama G. S. R. Co. (C. C. A.) 747.

The master of a steamboat, while in command and directing her movements, is a vice principal of the owner, and not a fellow servant of the engineer.—The Car Float No. 16 (C. C. A.) 364; McCullough v. New York, N. H. & H. R. Co., Id.; New York & N. Steamboat Co. v. The Transfer No. 4, Id.

Burden of proving contributory negligence is on defendant, but such negligence bars recovery, whether appearing from plaintiff's or defendant's evidence.—Union Pac. Ry. Co. v. Novak (C. C. A.) 573.

Contributory negligence of night watchman found dead *held* question for jury on inference from facts proved, although there could be no positive proof on the subject. Act Mass. 1887, c. 270.—Griffin v. Overman Wheel Co. (C. C. A.) 568.

Question of negligence and contributory negligence, where a gravel train got beyond control on down grade, *held* one of fact for jury.—Union Pac. Ry. Co. v. Novak (C. C. A.) 573.

Refusal of an instruction, in an action against a master for injuries to an employé, that, if plaintiff was injured by reason of neglect proved on his own part, he could not recover, *held* error, although a charge was given that to entitle him to recover it should appear that defendant's alleged negligence was the sole cause of the injury.—Louisville & N. R. Co. v. Ward (C. C. A.) 927.

MECHANICS' LIENS.

One selling materials to another who has merely contracted with the general manager of a corporation, personally, to furnish the same, for use by the corporation, has no lien.—Pacific Rolling-Mill Co. v. Hamilton (C. C.) 476.

MINES AND MINING.

Locator may abandon part of his claim by drawing new end line at a point where the vein passes through his side line.—Last Chance Min. Co. v. Tyler Min. Co. (C. C. A.) 557.

Date of location may be shown by evidence aliunde, when the patent is silent in regard thereto.—Last Chance Min. Co. v. Tyler Min. Co. (C. C. A.) 557.

Mortgages.

Of railroad company, see "Railroad Companies."

MUNICIPAL CORPORATIONS.

Cities authorized to provide for the erection of water works may do so by granting a franchise to a water company.—Andrews v. National Foundry & Pipe Works (C. C. A.) 782.

Liability for destruction of "property" by mobs (Rev. St. La. § 2453) does not include loss of life.—Gianfortone v. City of New Orleans (C. C.) 64.

City of New Orleans not liable for killing of prisoner by mob. Civ. Code, art. 2315.—Gianfortone v. City of New Orleans (C. C.) 64.

Recital in municipal bonds that the law has been complied with does not estop the municipality from asserting that the bonds were issued without authority of law.—Swan v. City of Arkansas City (C. C.) 478.

Bonds issued by a city (Comp. Laws Kan. 1885, c. 19, art. 1, § 5, and article 7, § 111) without any action therefor by the mayor and council are void.—Swan v. City of Arkansas City (C. C.) 478.

Mutual Benefit Insurance.

See "Insurance."

National Banks.

See "Banks and Banking."

NEGLIGENCE.

The inference of negligence from an explosion in a factory from an unexplained cause *held* rebutted by evidence showing that the business was not especially dangerous when prosecuted with reasonable care, and that reasonable care was exercised in conducting it.—Warn v. Davis Oil Co. (D. C.) 631.

NEW TRIAL.

A statutory new trial as of right, in an action for possession of real property (Code Civ. Proc. Colo. 1887, § 272), may be granted to the defeated party, although he has previously obtained a new trial for cause.—Iron Silver Min. Co. v. Campbell (C. C. A.) 932.

Opinion Evidence.

See "Evidence."

Parol Evidence.

See "Evidence."

PARTIES.

Persons in whose favor a trust is declared, in a power of attorney, as to part of the proceeds of the sale of lands and enforcement of judgments under the power, are necessary parties to a suit for an accounting by the attorney as to such proceeds.—Newman v. Schwerin (C. C. A.) 865.

PARTNERSHIP.

A partner *held* to have no interest in the invention of his copartner upon the termination of the partnership agreement.—Denning v. Bray (C. C. A.) 651.

PATENTS FOR INVENTIONS.

A decision of the patent office awarding a patent after a contest is not decisive as to the patentability of the invention.—Empire State Nail Co. v. American S. L. Button Co. (C. C.) 650.

A decree enjoining a patent, the validity of which is not raised by the pleadings, is not proof of its validity.—Empire State Nail Co. v. American S. L. Button Co. (C. C.) 650.

The cancellation of additional claims in a patent for an improvement in electric railways upon the ground of anticipation *held* not to estop the patentee from insisting upon his construction of the original claims in a case of anticipation.—Electric Ry. Co. of the United States v. Jamaica & B. R. Co. (C. C.) 655.

A caveat intended to cover the proposed improvement in electric railways *held* insufficient where the patentee, instead of using the rails as conductors and the wheels as collectors, as described in the caveat, made use of a third rail and an additional collector, and where such caveat did not describe either the generator or motor.—Electric Ry. Co. of the United States v. Jamaica & B. R. Co. (C. C.) 655.

Transfer of stock in a corporation organized for the development of a specific invention *held*, under the circumstances, not to constitute such a sale of the patent as would estop the grantee from questioning the validity of such patent.—Electric Ry. Co. of the United States v. Jamaica & B. R. Co. (C. C.) 655.

An inventor is not deprived of the fruit of his invention, simply because the physical laws upon which it operates, are not susceptible of satisfactory exposition.—Knickerbocker Co. v. Rogers (C. C.) 297.

Where a machine would naturally be known to more than a few observers, the fact that it is claimed to have been known to but few at a particular time throws doubt upon its existence at that time.—Knickerbocker Co. v. Rogers (C. C.) 297.

On issue of prior use, great weight should be given to the presumption created by the patent.—Miller v. Handley (C. C.) 100.

Grant of exclusive right to make, use, and sell in the United States for full term of patent is a virtual sale.—Union Switch & Signal Co. v. Johnson Railroad Signal Co. (C. C. A.) 940.

A stipulation whereby a party withdrew from an interference proceeding *held* to be an admission of priority of invention, sufficient, in a suit for infringement, to show prima facie that the successful party was the first inventor.—Shoemaker v. Merrow (C. C. A.) 945.

On a bill by an assignee of a patent against the assignors for infringement, a cross bill cannot be maintained for cancellation of the assignment, or other affirmative relief, on grounds which do not, by the terms of the assignment, authorize a forfeiture thereof, and which may be pleaded as defenses to the original bill, and may be considered on the accounting prayed therein.—E. C. Atkins & Co. v. Parke (C. C. A.) 953.

Previous decisions establishing the validity of a patent are sufficient ground for finding it valid in a suit in another circuit for infringement.—Edison Electric Light Co. v. Packard Electric Co. (C. C.) 1002.

Averments of title to a patent by assignment, in a bill for infringement, are sufficient proof thereof, where answer under oath is waived, and there is no denial by affidavit.—Edison Electric Light Co. v. Packard Electric Co. (C. C.) 1002.

Novelty.

The Wall, Jones, and Bishop patent, No. 445,342, for a process of fumigating trees, is void for want of novelty and invention.—Wall v. Leck (C. C.) 291.

Improvements in sewing machines materially increasing sales, although comparatively simple, *held* to involve invention.—Miller v. Handley (C. C.) 100.

British design patent No. 20,670, for carriage lamp in form of tulip, *held* valid.—Britton v. White Manuf'g Co. (C. C.) 93.

The Miller patent, No. 419,863, for a "revolving hook machine," being an improvement in sewing machines, *held* to show novelty and invention, and not to have been anticipated.—Miller v. Handley (C. C.) 100.

No. 340,135, for improvement in lawn-tennis shoes, consisting of outer sole of rubber with projections, *held* void for want of novelty.—Marshall v. Packard (C. C. A.) 211.

Patent No. 452,553 for improvements in excelsior machine, is void for want of novelty and invention.—Johnson v. Olsen (C. C.) 829.

No. 396,407, for terra cotta wire conduit pipe, *held* void for want of novelty.—Browning v. Colorado Telephone Co. (C. C. A.) 845.

Terra cotta wire conduit pipes, divided by partitions, similar to hollow blocks previously used as building material, and made by the same process as ordinary sewer pipe, is not patentable as a new article of manufacture.—Browning v. Colorado Telephone Co. (C. C. A.) 845.

Evidence of want of novelty, to deprive an inventor of the fruit of his genius, must be so definite and cogent as to produce strong belief.—Knickerbocker Co. v. Rogers (C. C.) 297.

Novelty is not negatived by prior structures in another art, which were not designed or used, prior to the new invention, to do its work, though afterwards so modified in form and proportions, in the light of that invention, as to perform its function.—Knickerbocker Co. v. Rogers (C. C.) 297.

Invention.

Discovery of simple device for remedying serious defect of long standing constitutes invention.—McKay & Copeland Lasting Machine Co. v. Dizer (C. C. A.) 102; Same v. Claflin, Id.

The Cutcheon patent No. 384,893, for an automatic machine for beating out the soles of boots and shoes, covers a patentable invention.—Tripp Giant Leveler Co. v. Rogers (C. C.) 289; Same v. Weeks, Id.; Same v. Noyes, Id.; Same v. Portsmouth Shoe Co., Id.; Same v. Bresnahan, Id.

There is no invention in altering the slots of the guide clip of a stapling machine to permit driving staples both crosswise and lengthwise, or staples with projecting eyes.—Philadelphia Novelty Manuf'g Co. v. Weeks (C. C. A.) 405.

No. 274,941, for improvements in stapling machines over No. 226,402, is void for want of invention.—Philadelphia Novelty Manuf'g Co. v. Weeks (C. C. A.) 405.

No. 175,821, for an eye-glass holder, *held* void for want of invention.—Merritt v. Middleton (C. C. A.) 680.

An improvement in electric railways *held* not to constitute invention where, in view of the prior state of the art, it merely involved the selection of a generator producing a sufficient current to operate the railway.—Electric Ry. Co. of the United States v. Jamaica & B. R. Co. (C. C.) 655.

The Krick patent No. 408,416, for a floral design, consisting of a foundation having holes in it, combined with picks for holding the flowers in position, *held* not to show patentable invention. 59 Fed. 364, reversed.—Krick v. Jansen (C. C. A.) 847.

There is no invention in changing wooden bearings of excelsior machines so that the grain will run with line of motion instead of at right angles to it.—Johnson v. Olsen (C. C.) 829.

Adaptation of lugs to prevent lateral movement of sliding plate in excelsior machine involves no invention.—Johnson v. Olsen (C. C.) 829.

No. 405,821, for improvements in bed bottoms, *held* void, as to claim 2, for want of invention.—Bonnell v. Stoll (C. C. A.) 767.

Substitution of single hinge wire, joining sections of folding wire bed bottom, for two or more hinge wires, previously used, is not patentable.—Bonnell v. Stoll (C. C. A.) 767.

Anticipation.

Patents Nos. 359,687 and 359,688, for municipal signal apparatus, are not void for anticipation.—Gamewell Fire-Alarm Tel. Co. v. Municipal Signal Co. (C. C. A.) 948.

Evidence of experimental use, merely, of a device, the model of which is not produced, and which was not known to a subsequent inventor, is insufficient to show anticipation of his patent. —Gamewell Fire-Alarm Tel. Co. v. Municipal Signal Co. (C. C. A.) 948.

Letters patent No. 223,898, for the Edison electric lamp, *held* not proved to have been anticipated by Henry Goebel.—Electric Manuf'g Co. v. Edison Electric Light Co. (C. C. A.) 834.

Drawings admissible to show anticipation without written description.—Britton v. White Manuf'g Co. (C. C.) 93.

Drawing exhibited in mere trade circular not necessarily a publication.—Britton v. White Manuf'g Co. (C. C.) 93.

A number of a trade magazine bound up with others, prima facie a publication.—Britton v. White Manuf'g Co. (C. C.) 93.

Construction of claims.

No. 357,874, for a water-heating device for stoves, construed and limited to the construction claimed.—Stirrat v. Excelsior Manuf'g Co. (C. C. A.) 980.

No. 190,816, for improvement in couplings for cultivators, construed, and its first claim *held* not for a combination, but limited to the particular forms of construction described. — Brown Manuf'g Co. v. Deere (C. C. A.) 972; Same v. David Bradley Manuf'g Co., Id.

Rejection and amendment of claim does not necessarily exclude liberal interpretation and application of doctrine of equivalents, when the invention is a broad one.—Reece Button-Hole Mach. Co. v. Globe Button-Hole Mach. Co. (C. C. A.) 958.

Words descriptive of one kind of motion only *held* not to exclude the doctrine of equivalents, when the invention is a broad one.—Reece Button-Hole Mach. Co. v. Globe Button-Hole Mach. Co. (C. C. A.) 958.

For "an improvement in burglar-proof safes" cannot be construed to cover a locking device used in a jail cage.—Gerard v. Diebold Safe & Lock Co. (C. C. A.) 209.

Claims 1, 2, and 3 of patent No. 403,362, claims 1 and 2 of patent No. 403,363, claim 4 of patent No. 403,770, and claims 1 and 2 of patent No. 408,987, of Orville M. Morse, for improvements in dust collectors, are all valid.—Knickerbocker Co. v. Rogers (C. C.) 297.

Limitations imposed by the claims cannot be construed away because invention is of primary kind.—Groth v. International Postal Supply Co. (C. C. A.) 284.

No. 226,402, for a stapling machine, construed as limited by the prior state of the art, and *held* not infringed.—Philadelphia Novelty Manuf'g Co. v. Weeks (C. C. A.) 405.

No. 293,740, for an improvement in the art of filtering water, construed, with reference to the effect of the disclaimer of part of the specification, and *held* not so limited thereby as to exclude from its protection the use as coagulants of alum, and the salts of alumina.—New York Filter Co. v. O. H. Jewell Filter Co. (C. C.) 840.

The Koechlin patent No. 253,371, for manufacture of dye stuffs, construed and *held* to cover the process alone, and not the product. 60 Fed. 392, affirmed.—Durand v. Schulze (C. C. A.) 819.

A patent may cover both a process and its product, but, if the claim of the patentee is restricted to the process, the patent cannot be made to include the product by reference to other portions of the specifications. 60 Fed. 392, affirmed.—Durand v. Schulze (C. C. A.) 819.

Acquiescence in rejection of claims estops inventor to claim construction covering the rejected matter, when rejected claim is narrower, as well as when broader, than claim allowed.—Johnson v. Olsen (C. C.) 829.

The word "automatic" means self-acting, or the elimination of human agency or volition, which results in the saving of labor, and increased certainty and uniformity of operation.—Tripp Giant Leveler Co. v. Rogers (C. C.) 289; Same v. Weeks, Id.; Same v. Noyes, Id.; Same v. Portsmouth Shoe Co., Id.; Same v. Bresnahan, Id.

Separate claims allowed for design for coach lamps.—Britton v. White Manuf'g Co. (C. C.) 93.

Statements of counsel cannot restrict clear grant of patent.—Britton v. White Manuf'g Co. (C. C.) 93.

One withdrawing a claim for an element forming the subject of an interference is thereafter precluded from claiming such element under his patent.—Shoemaker v. Merrow (C. C. A.) 945.

Assignment and license.

A license containing no words of assignability is unassignable.—Walter A. Wood Harvester Co. v. Minneapolis-Esterly Harvester Co. (C. C.) 256.

Where a patent is owned by several persons, a licensee from one of them need pay no royalty to the others.—Pusey & Jones Co. v. Miller (C. C.) 401.

Under an assignment of a patent, giving the assignor the right to cancel it by notice if the assignee fail to make certain statements and payments, notice of cancellation at a time when no money is due is ineffectual.—E. C. Atkins & Co. v. Parke (C. C. A.) 953.

Grant by an agent, having authority to give nonexclusive licenses only, of an exclusive license, *held* good as nonexclusive license, on the ground of acquiescence and ratification.—Union Switch & Signal Co. v. Johnson Railroad Signal Co. (C. C. A.) 940.

Infringement.

Patent No. 428,508, for a crocheting machine, construed, and *held* not infringed.—Shoemaker v. Merrow (C. C. A.) 945.

No. 240,546, for button-hole machines, *held* valid and infringed.—Reece Button-Hole Mach. Co. v. Globe Button-Hole Mach. Co. (C. C. A.) 958.

Nos. 341,330 and 388,366, for mail-stamping apparatus, construed, and *held* not infringed.—Groth v. International Postal Supply Co. (C. C. A.) 284.

The Gerard patent, No. 246,748, for "an improvement in burglar-proof safes" construed, and *held* not infringed.—Gerard v. Diebold Safe & Lock Co. (C. C. A.) 209.

The Jaeger patent, No. 432,411, for an easel album supported upon rigid, immovable standards, with a longitudinal bar resting thereon, which is pivoted to the back of the book, is valid, but the claims must be narrowly construed, and are therefore not infringed by an album in which the standards are hinged at the base.—Holman v. Jones (C. C. A.) 105.

No. 197,607, for improvement in lasting machines, *held* valid and infringed.—McKay & Copeland Lasting Machine Co. v. Dizer (C. C. A.) 102; Same v. Claflin, Id.

Letters patent No. 269,224, for steam-heating pipes, *held* not infringed.—Osborne Steam-Engineering Co. v. Lamb (C. C.) 683.

No. 213,119, for a folding gate, construed and *held* not infringed.—Cornell v. Bataille (C. C. A.) 684.

A patent for a folding gate, upright pickets being the characteristic feature, *held* not infringed by a lazy tongs gate, with a single central upright support.—Cornell v. Bataille (C. C. A.) 684.

Patent No. 433,187, for a "safety cut off" for electrical apparatus, construed and *held* not infringed.—Shapleigh v. Chester Electric Light & Power Co. (C. C.) 828.

No. 466,940, for an improved curtain rod, construed and *held* to be infringed.—H. L. Judd & Co. v. Fowler (C. C. A.) 821.

Evidence of experienced designers is of little weight on question of infringement.—Britton v. White Manuf'g Co. (C. C.) 93.

Spring rockers *held* mechanical equivalent for pivot or hinge.—McKay & Copeland Lasting Machine Co. v. Dizer (C. C. A.) 102; Same v. Claflin, Id.

Injunction.

After the validity of a patent has been adjudicated, a preliminary injunction will issue for its subsequent infringement, in the absence of convincing proof of a new defense.—Electric Manuf'g Co. v. Edison Electric Light Co. (C. C. A.) 834.

Appeal from interlocutory injunction dismissed where patent expired pending appeal.—Gamewell Fire-Alarm Tel. Co. v. Municipal Signal Co. (C. C. A.) 208.

Officers, agents, and stockholders of a corporation, sued for infringement of a patent while acting for the corporation, may be restrained therefrom, although the corporation is not a party, and not within the jurisdiction.—Edison Electric Light Co. v. Packard Electric Co. (C. C.) 1002.

Court will not examine merits on appeal from interlocutory injunction.—Gamewell Fire-Alarm Tel. Co. v. Municipal Signal Co. (C. C. A.) 208.

PATENTS ENUMERATED.

ENGLISH.

1,386. Electro-magnetic apparatus, 660, 662
1,582. Horse rakes, 979
1,788. Eyeglass holders, 681
2,015. Lawn tennis shoes, 212
2,667. Lawn tennis shoes, 212
2,674. Lawn tennis shoes, 212
3,133. Lawn tennis shoes, 212
8,644. Electro-magnetic apparatus, 661
20,670. Carriage lamp, 94

GERMAN.

6,480. Metal preserving cans, 294

UNITED STATES.

Original.

6,957. Folding gates, 686
47,521. Lawn tennis shoes, 212
58,867. Eyeglass holders, 681, 682
60,678. Folding gates, 686
67,143. Folding gates, 686
115,800. Water-heating device for stoves, 981, 982
136,314. Revolving hook machine, 102
138,527. Folding gates, 688
172,676. Revolving hook machine, 102
172,852. Folding gates, 686
175,821. Eyeglass holders, 680
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191,984. Folding gates, 687
192,663. Window shade roller, 826
197,607. Lasting machines, 103
208,137. Twine binders, 257
212,320. Steam-heating pipes, 683
212,420. Twine binders, 257
213,119. Folding gates, 684
218,277. Stapling machines, 406
221,246. "Electric railroad signal apparatus," 941
223,898. Electric lamp, 834
226,402. Stapling machines, 405
227,334. Water-heating device for stoves, 981, 982
232,535. Can-heading machine, 293
238,351. Can-heading machine, 293
240,546. Buttonhole machines, 959, 960, 971
240,622. "Electric railroad signal apparatus," 942
241,246. "Electric railroad signal apparatus," 942
246,748. "Burglar-proof safes," 210
248,269. Furniture nails, 650
253,371. Dye stuffs, 819
255,712. Twine binders, 257
257,837. Twine binders, 257
258,098. Water-heating device for stoves, 981, 982, 984
266,949. Twine binders, 257
269,224. Steam-heating pipes, 683
273,542. Filtration of water, 841
274,941. Stapling machines, 405

277,009. Water-heating device for stoves. 982, 984
281,296. Revolving hook machine, 102
293,740. Filtration of water, 840
297,136. Curtain rod, 826
340,135. Lawn tennis shoes, 211
341,380. Mail-stamping apparatus, 284–288
357,874. Water-heating device for stoves, 980
358,123. Water-heating device for stoves, 981
358,956. Folding gates, 685
359,687. Municipal signaling apparatus, 948, 949
359,688. Municipal signaling apparatus, 948, 949
370,614. Furniture nails, 650
384,893. Beating-out machines, 289
388,346. Mail-stamping apparatus, 288
388,366. Mail-stamping apparatus, 284, 286, 288
396,407. Terra-cotta wire conduit pipe, 846
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403,363. Dust collectors, 297, 299
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405,821. Bed bottoms, 767
407,188. Electric railways, 655, 656
408,416. Floral design, 847, 848
408,987. Dust collectors, 297, 299
419,863. Revolving hook machine, 100, 102
428,508. Crocheting machine, 945, 946
432,411. Easel albums, 105
433,187. "Safety cut-off," 829
445,342. Process of fumigating plants, 291
452,553. Excelsior machines, 829, 830
466,940. Curtain rod, 821, 824
468,987. Curtain rod, 824

Personal Injuries.

See "Master and Servant;" "Negligence;" "Railroad Companies;" "Shipping."

PLEADING.

See, also, "Equity."

Defense that suit was pending in a state court for reformation of policy sued on *held* not admissible in action at law in a federal court.—Wilcox & Gibbs Guano Co. v. Phoenix Ins. Co. of Brooklyn (C. C.) 199.

Defense of release of surety by change in contract is admissible under general issue and without notice. Pa. Proc. Act May 25, 1887.—Mundy v. Stevens (C. C. A.) 77.

POST OFFICE.

An obscene letter constitutes nonmailable matter (25 Stat. 496), although no obscene matter appears on the envelope.—United States v. Nathan (D. C.) 936.

Dunning postal card *held* nonmailable matter. 25 Stat. 496.—United States v. Simmons (D. C.) 640.

Private letter in a sealed envelope is nonmailable (Rev. St. § 3893), if of an indecent character.—United States v. Ling (D. C.) 1001.

Where an indictment for the mailing of obscene matter charges that defendant "knowingly deposited in the post office an obscene letter," the word "knowingly" qualifies the whole act charged, and it is not necessary to allege that he knew the letter to be obscene. U. S. v. Clark, 37 Fed. 106, followed.—United States v. Nathan (D. C.) 936.

POWERS.

It seems that where a contract, good by parol, is put in writing, for convenience of proof, the fact that it purports to be made under a power of attorney, but is executed in the attorney's name, does not render it void.—Union Switch & Signal Co. v. Johnson Railroad Signal Co. (C. C. A.) 940.

A power of attorney appointing an agent "for working and developing the business of said patents," and to negotiate the sale thereof "upon terms to be agreed upon," gives no authority to grant an exclusive license, but authorizes the making of nonexclusive licenses to manufacture and sell.—Union Switch & Signal Co. v. Johnson Railroad Signal Co. (C. C. A.) 940.

PRACTICE IN CIVIL CASES.

See, also, "Appeal;" "Courts;" "Judgment;" "Removal of Causes;" "Trial;" "Witness."

Production of records and accounts of sales compelled in an action to recover royalties.—Kirkpatrick v. Pope Manuf'g Co. (C. C.) 46.

Federal courts have power to grant inspection of books and papers before trial, with permission to make copies. Rev. St. § 724.—Exchange Nat. Bank of Atchison v. Washita Cattle Co. (C. C.) 190.

Stipulation to waive jury and submit to court's decision *held* a waiver of objections to form of action.—Fisher v. Knight (C. C. A.) 491.

Principal and Agent.

See "Master and Servant."

PRINCIPAL AND SURETY.

Pleading release of surety, see "Pleading."

The burden of showing surety's consent to alteration in contract is on plaintiff when set out by him.—Mundy v. Stevens (C. C. A.) 77.

Change in contract in amount of payments to be made, *held* to release surety.—Mundy v. Stevens (C. C. A.) 77.

Where one surety consents to a material alteration, and the other does not, the one is bound, and the other is not.—Mundy v. Stevens (C. C. A.) 77.

A surety who, as attorney for one of the principals, executes the contract altering the original, is presumed to consent to the alteration.—Mundy v. Stevens (C. C. A.) 77.

Probable Cause.

See "Malicious Prosecution."

Process.

See "Writs."

Publication.

See "Writs."

PUBLIC LANDS.

Power in alcalde of Chihuahua to make land grant not presumed from its execution when subsequent to colonization law of May 25, 1825.—Owen v. Presidio Mining Co. (C. C. A.) 6.

Execution of the alleged Ronquillo Mexican land grant, and confirmation thereof, *held* not sufficiently proven.—Owen v. Presidio Mining Co. (C. C. A.) 6.

Railroad company *held* not entitled (Act Cong. March 3, 1875) to a right of way over lands in possession of a qualified pre-emptor, who has made final proof, tendered purchase money, and demanded receipt.—Spokane Falls & N. Ry. Co. v. Ziegler (C. C. A.) 392.

A homestead claimant, whose settlement was made years after certification of the lands to the state under a grant by congress, and whose application for entry and final proofs were rejected because of such certification, cannot maintain a suit to cancel or obtain the benefit of such certification.—Deweese v. Reinhard (C. C. A.) 777.

Railroad grants.

The Northern Pacific grant could never attach to lands withheld from settlement for another purpose, at the date of the grant, though thrown open afterwards.—Northern Pac. R. Co. v. Maclay (C. C. A.) 554.

A land-grant railroad company is not a tenant in common with the United States of unsurveyed lands lying within the grant.—Northern Pac. R. Co. v. Hussey (C. C. A.) 231.

A land-grant railroad company may enjoin trespassers from cutting timber from land lying within the grant.—Northern Pac. R. Co. v. Hussey (C. C. A.) 231.

Mere filing of pre-emptioner's declaratory statement, without settlement, did not except lands from the Union Pacific Railroad grant.—United States v. Union Pac. Ry. Co. (C. C.) 143.

RAILROAD COMPANIES.

See, also, "Carriers;" "Master and Servant."

Payment of claims for supplies furnished prior to appointment of receiver *held* erroneous upon foreclosure of mortgage.—Cutting v. Tavares, O. & A. R. Co. (C. C. A.) 150.

Where purchaser of a railroad, at foreclosure sale, had paid his bid in full, *held* court could not compel payment of a judgment rendered against the receiver after the sale has been confirmed.—Chicago & O. R. R. Co. v. McCammon (C. C. A.) 772.

Refusal to allow purchaser credit for taxes *held* not error on foreclosure where date of assessment did not appear.—Cutting v. Tavares, O. & A. R. Co. (C. C. A.) 150.

Judgment against corporation for personal injuries *held* to have priority over mortgage, although action not brought within 60 days of the registration of the mortgage. Code Proc. N. C. §§ 685, 1255.—Finance Co. of Pennsylvania v. Charleston, C. & C. R. Co. (C. C.) 369; Ex parte Hudson, Id.

A clause in a railroad mortgage requiring the trustee to foreclose after six months' default in interest on request of the bondholders does not prevent the trustee from beginning foreclosure suit immediately on such default.—Farmers' Loan & Trust Co. v. Chicago & N. P. R. Co. (C. C.) 543.

Trustee of railroad mortgage *held* entitled to foreclose and procure receiver upon default, although restricted, under clause in mortgage, from taking possession until interest was six months overdue.—Mercantile Trust Co. v. Chicago, P. & St. L. Ry. Co. (C. C.) 372.

Municipal aid.

Allegation in petition that "an election was duly held" to determine whether subscription should be made *held* sufficient in action on county bonds.—Breckinridge County v. McCracken (C. C. A.) 191.

Reservation in bonds as to time of payment need not be alleged in action where there was no such reservation in the act which authorized the subscription.—Breckinridge County v. McCracken (C. C. A.) 191.

County bonds issued upon subscription of magisterial precinct *held* valid. Act Ky. Feb. 24, 1888.—Breckinridge County v. McCracken (C. C. A.) 191.

President not required to give bond where railroad completed before county bonds were delivered.—Breckinridge County v. McCracken (C. C. A.) 191.

Accidents at crossings.

The contributory negligence of a person injured, upon failure of the engine driver to observe the statutory precautions, will not (Railroad Co. v. Burke, 6 Cold. 51) bar a recovery, but the jury must consider such contributory negligence in mitigation of damages.—Western & A. R. Co. v. Roberson (C. C. A.) 592.

The designation of a railroad crossing by a sign in plain view of passing trains is sufficient under the statute (Code Tenn. Mill. & V. §§ 1298–1300) to make a railroad responsible for an accident at such crossing, where the engine driver failed to blow the whistle and ring the bell.—Western & A. R. Co. v. Roberson (C. C. A.) 592.

The fact that gates at a railroad crossing were not lowered will not make the question of contributory negligence one for the jury, where a pedestrian would not have been injured if he had looked and listened.—Blount v. Grand Trunk Ry. Co. (C. C. A.) 375.

Driving across a railroad without first bringing the horse to a full stop to listen for a train is contributory negligence.—Littaur v. Narragansett Pier R. Co. (C. C.) 591.

Statutory action for negligence (Code Tenn. Mill. & V. §§ 1298–1300) not barred by contributory negligence of person injured. — Byrne v. Kansas City, Ft. S. & M. R. Co. (C. C. A.) 605.

Train not required to come to full stop before crossing an ordinary horse-car line. Code Tenn. Mill. & V. § 1304.—Byrne v. Kansas City, Ft. S. & M. R. Co. (C. C. A.) 605.

RECEIVERS.

Appointment and powers, see "Banks and Banking."

Of railroad companies, see "Railroad Companies."

The court which appointed receivers for different companies has jurisdiction of a controversy between them as to possession of property leased by one company to an assignor to the other company.—Comer v. Felton (C. C. A.) 731.

Suit cannot, without leave of court, be brought against a receiver appointed by a federal court upon a cause of action accruing before the receiver was appointed, and upon which he has refused to sell.—Swope v. Villard (C. C.) 417.

Court has power, on intervening petition, to order receiver to discontinue a public nuisance. —Felton v. Ackerman (C. C. A.) 225.

Appointment and removal.

The appointment of an officer of a railroad company as receiver thereof is not improper where he is familiar with the condition and necessities of the railway, is a competent manager, and the disaster to the company was not promoted by reckless management on his part, and where the parties interested consent.—Farmers' Loan & Trust Co. v. Northern Pac. R. Co. (C. C.) 546.

Railroad company not responsible for failure to whistle and put down brakes when pedestrian stepped on track just before he was struck. Code Tenn. Mill. & V. § 1298, subsec. 4.—Byrne v. Kansas City, Ft. S. & M. R. Co. (C. C. A.) 605.

Appointed on bill to foreclose a railroad mortgage when alleged that taxes were in default, wages and operating expenses unpaid, and that trustees would not take action in behalf of complainant bondholder.—Putnam v. Jacksonville, L. & St. L. Ry. Co. (C. C.) 440.

Application for the appointment of a separate receiver denied in view of the special circumstances of the case.—Clap v. Interstate St. Ry. Co. (C. C.) 537.

On an application for removal of receivers on charges met by answer, a reference to take proofs is not granted as of course, but is discretionary.—Farmers' Loan & Trust Co. v. Northern Pac. R. Co. (C. C.) 546.

Rights, duties, and powers.

Property of a corporation in possession of a licensee at the time of the appointment of a receiver for the corporation passes to the receiver subject to the rights of the licensee.—Comer v. Felton (C. C. A.) 731.

Receiver may appeal from order, made on intervening petition, enjoining obstruction of highway.—Felton v. Ackerman (C. C. A.) 225.

Receiver has no right to obstruct a highway where same has not been properly vacated. Act Tenn. 1891, p. 1.—Felton v. Ackerman (C. C. A.) 225.

An agreement between a railroad company and its employes as to the terms on which they may be discharged is not binding on a receiver of the road.—In re Seattle, L. S. & E. Ry. Co. (C. C.) 541; Grievance Committee of Brotherhood of Railway Trainmen, Lodge No. 196, v. Brown, Id.

Judgment in an action brought against a receiver without leave of court, being null and void, is not available to him as res judicata.—Comer v. Felton (C. C. A.) 731.

Railroad company charged with discrimination cannot be made party to a suit against another company on petition of receiver.—Wood v. New York & N. E. R. Co. (C. C.) 236.

Records.

On appeal, see "Appeal."

RELEASE AND DISCHARGE.

In suit for personal injuries, release given cannot be attacked for fraud affecting only the consideration, but suit may be suspended to allow independent suit to rescind release.—Vandervelden v. Chicago & N. W. Ry. Co. (C. C.) 54.

REMOVAL OF CAUSES.

A corporation not party to the record, which refused to enter itself as a defendant to the action, *held* not entitled to removal.—Bertha Zinc & Mineral Co. v. Carico (C. C.) 132.

Removal not allowable after statutory time, even when inevitable accident prevents earlier application.—Daugherty v. Western Union Tel. Co. (C. C.) 138.

Action against private parties for wrongfully causing marshal to levy an execution is removable. Act Aug. 13, 1888, § 2.—Hurst v. Cobb (C. C.) 1; Cooke v. Same, Id.

A suit to compel the receiver of a national bank to pay a certain claim out of the bank assets is removable as being a suit arising under the laws of the United States.—Hot Springs Independent School Dist. No. 10, of Fall River County, v. First Nat. Bank (C. C.) 417.

Controversy in suit to enforce mechanic's lien *held* not separable (Supp. Rev. St. § 612) where statute (Laws S. D. 1893, c. 116) required all

lienholders to be made parties. — Sweeney v. Grand Island & W. C. R. Co. (C. C.) 3.

The question whether an insolvent national bank should pay a savings bank in full (Laws N. Y. 1882, c. 409, § 282) or pro rata (Rev. St. §§ 5236, 5242) is one to be determined by the United States courts.—Auburn Sav. Bank v. Hayes (C. C.) 911.

The objection that a petition for removal was filed too late, if not made by motion to remand, is waived, where the case is within the general jurisdiction of the circuit court, and cannot be made on appeal.—Newman v. Schwerin (C. C. A.) 865.

Time of removal not jurisdictional, and question cannot be first raised on appeal.- Knight v. International & G. N. Ry. Co. (C. C. A.) 87.

Rescission.

Of contracts, see "Equity."

Res Judicata.

See "Judgment."

Revenue.

See "Customs Duties."

Review.

On appeal, see "Appeal."

Risks of Employment.

See "Master and Servant."

SALE.

Under a contract for sale of kiln-dried phosphate rock, to be removed within a specified time after notice, *held*, that a tender of such rock to be kiln-dried before removal was not sufficient.—Empire State Phosphate Co. v. Heller (C. C. A.) 280.

SALVAGE.

Seamen rendering ordinarily skillful services to save the ship, in the master's absence, are not entitled to salvage.—The C. P. Minch (D. C.) 511.

Use in trade and commerce of the property saved is not essential to salvage.—Tebo v. City of New York (D. C.) 692; Same v. The Public Bath No. 13, Id.

A suit in personam may be sustained upon an implied request for salvage services.—Tebo v. City of New York (D. C.) 692; Same v. The Public Bath No. 13, Id.

Five thousand dollars *held* adequate for salvage and expenses in towing disabled steamship into port. — The Chinese Prince (D. C.) 697; Ocean Steamship Co. of Savannah, Ga., v. The Chinese Prince, Id.

$6,800 *held* fair compensation where a vessel and cargo worth $35,000 were rescued from fire on the wharf, and from burning oil on the water, by the exertions of 5 tugs worth $53,000.—Neal v. The Elena G. (D. C.) 519.

Eight hundred dollars *held* reasonable compensation for towing derelict to port.—Lowndes v. The Ernest M. Munn (D. C.) 694.

SCHOOLS AND SCHOOL DISTRICTS.

An act incorporating a school district is not invalid because it confers on a board elected by the people part of the functions ordinarily discharged by the township clerk, under a constitutional provision declaring him ex officio school inspector.—Board of Sup'rs of Presque Isle County v. Thompson (C. C. A.) 914.

An act incorporating a school district is not invalid because of the great extent of the district, in the absence of any constitutional restriction in that respect.—Board of Sup'rs of Presque Isle County v. Thompson (C. C. A.) 914.

The exercise, for many years, under an act for the incorporation of a school district, of all the franchises and privileges of such a corporation, constitutes the district a de facto corporation, under the law of Michigan.—Board of Sup'rs of Presque Isle County v. Thompson (C. C. A.) 914.

An act incorporating a school district is not repealed by subsequent acts organizing new townships out of part of the territory of the district, and afterwards restoring them, with provisions for detaching them on an apportionment of the debt of the original district; nor is the liability of such territory for the debt affected thereby.—Board of Sup'rs of Presque Isle County v. Thompson (C. C. A.) 914.

A provision in an act incorporating a school district, making all general laws relating to primary school districts applicable in the district, *held* to include provisions of such laws for collection of judgments.—Board of Sup'rs of Presque Isle County v. Thompson (C. C. A.) 914.

A provision in an act incorporating a school district for election of a "president, secretary, and treasurer," whose powers and duties should "severally be the same as those of the moderator, assessor, and directors," under general laws, *held* to impose on the secretary the power of such assessor to receive service of summons for the district.—Board of Sup'rs of Presque Isle County v. Thompson (C. C. A.) 914.

SEAMEN.

Expenditures of shipping commissioners, required to enable them to discharge their official duties and to maintain suitable premises therefor, are a proper charge against the United States.—United States v. Reed (C. C. A.) 414.

Separable Controversy.

See "Removal of Causes."

Servant.

See "Master and Servant."

Service of Process.

See "Writs."

SHIPPING.

See, also, "Admiralty;" "Collision;" "Maritime Liens;" "Seamen;" "Towage."
Shipping commissioners, see "Seamen."

Shipping goods from New York to Antwerp by one foreign vessel, and forwarding them thence to a California port by another, *held* no violation of Rev. St. § 4347.—United States v. Two Hundred and Fifty Kegs of Nails (C. C. A.) 410.

Where an abandoned vessel was brought by salvors into a distant port, and her master, in a suit for salvage, claims the vessel and cargo, and obtains delivery of the vessel which he repaired, but the cargo was claimed by the charterers and sold, the master, on giving proper stipulation, was entitled to the cargo, and the abandonment did not deprive the vessel of freight.—Cargo ex The Eliza Lines (C. C.) 308; Andreasen v. Two Hundred and Ninety-Five Thousand Feet of Lumber, Id.

Objections to the trim of a steamer, as loaded by charterers, not made at the time of loading, *held* not available to excuse her failure to make the speed guarantied in the charter.—Wessels v. The Ceres (D. C.) 701; Sydsvenska Angfartygs Aktiebolag v. Wessels, Id.

The weight stated in bills of lading, containing the clause "Weight unknown," *held* correct, on a claim of shortage on delivery of the goods in damaged bags, the difference between the weight stated and the total weight of goods delivered and sweepings collected being very small.—The Timor (D. C.) 633; Nordlinger v. Nelson, Id.

Corporation owner is not entitled to limit its liability for loss arising from defects of which its president was ignorant because of his own negligent examination.—The Republic (C. C. A.) 109; In re Myers Excursion & Nav. Co., Id.

The fall of a stevedore's employe into a hatchway, the position of which was known to him, and which was guarded by coamings, *held* the result of his own carelessness, even if the hatchway was unlighted.—Deming v. The Argonaut (D. C.) 517.

Leaving hatches open during intervals in unloading, the passageway and the hatches being reasonably lighted, is not negligence.—Deming v. The Argonaut (D. C.) 517.

A vessel is liable for injuries sustained by a grain inspector through the negligence of those in charge of the vessel.—Eustrom v. The City of Naples (D. C.) 1012.

Directions for determining general average of net freight under the circumstances of the case.—Cargo ex The Eliza Lines (C. C.) 308; Andreasen v. Two Hundred and Ninety-Five Thousand Feet of Lumber, Id.

Charter party.

A bill of lading which permits a ship to tow and assist vessels in all situations exempts such ship from liability for delay caused by towing a disabled vessel into port.—Morris Beef Co. v. The Wells City (C. C. A.) 857.

Charter party making charterer liable for delay caused by his default does not restrict his liability to delays caused by his negligence.—Sixteen Hundred Tons of Nitrate of Soda v. McLeod (C. C. A.) 849.

Charter party exempting charterer from liability for delay caused by political occurrences does not exempt him where the political occurrences prevent him from obtaining a cargo, not from loading one.—Sixteen Hundred Tons of Nitrate of Soda v. McLeod (C. C. A.) 849.

Under a guaranty in the charter of a steamer for the fruit trade of a certain speed "fruit or light laden," *held* that, with a cargo partly of fruit, she was "light laden" in respect of draft, if her draft did not exceed that of a full freight cargo; and that, in reckoning weight of cargo, the weight of so much ballast as would be needed for a fruit cargo should not be counted.—Wessels v. The Ceres (D. C.) 701; Sydsvenska Angfartygs Aktiebolag v. Wessels, Id.

A stipulation in a charter party for delivery of the vessel for charterer's use at a designated port, "about" a certain date, *held*, in view of the conditions of the trade in which she was to be employed, to give her only such additional time to reach that port as might be made necessary by accidents of navigation arising on the voyage after a seasonable start.—The Alert (D. C.) 504; Sanders v. Munson, Id.

A "lay-up clause" in a charter party *held* to assume the need of overhauling, and to preclude the owners from claiming that overhauling was unnecessary.—Wessels v. The Ceres (D. C.) 701; Sydsvenska Angfartygs Aktiebolag v. Wessels, Id.

Damage to cargo.

Limitation of time for presenting claims for damages to 30 days is unreasonably short, and stipulation in bill of lading is void.—The Queen of the Pacific (D. C.) 213; Bancroft-Whitney Co. v. Pacific Coast Steamship Co., Id.

Notice within prescribed period of damage to cargo by water *held* sufficient to cover subsequent notice after prescribed period of damage to cargo by oil.—The Thames (C. C. A.) 1014; Bernier v. Phipps, Id.

A stipulation in shipping receipts, limiting time for presenting claim for damages, does not apply to a suit in rem.—The Queen of the Pacific (D. C.) 213; Bancroft-Whitney Co. v. Pacific Coast Steamship Co., Id.

Ship *held* not seaworthy under the circumstances for the carriage of flour, and liable for the consequent damage thereto.—The Thames (C. C. A.) 1014; Bernier v. Phipps, Id.

Ship *held* not seaworthy under the circumstances for the carriage of such large quantities of flour and oil in juxtaposition, and liable for the consequent damage to the flour.—The Thames (C. C. A.) 1014; Bernier v. Phipps, Id.

Ship liable for damages to cargo stowed in an improper place, although stowed by the freighter's stevedore.—The Thames (C. C. A.) 1014; Bernier v. Phipps, Id.

Ship is liable on contract of affreightment for negligence, notwithstanding charterer is deemed special owner.—The Alert (C. C. A.) 113; Bergh v. Ceballos, Id.

Shipper may sue on contract of affreightment for negligent handling of goods.—The Queen of the Pacific (D. C.) 213; Bancroft-Whitney Co. v. Pacific Coast Steamship Co., Id.

On damage by rats to beans shipped in bags, causing shortage, consignees cannot refuse to accept loose beans collected and cleaned, and claim as for a conversion.—The Timor (D. C.) 633; Nordlinger v. Nelson, Id.

The damages for cattle, lost at sea through the negligence of the ship, includes in addition to the market value of the cattle at the place of shipment the freight paid in advance, and the pro rata premiums of insurance.—The Hugo (D. C.) 860; Brauer v. Compagnia De Navigacion La Flechs, Id.

Damage to goods by leakage of oil, forming part of the same cargo, in consequence of heavy weather, and not of improper stowage, being within the exception of perils of the seas in the bills of lading, the burden of proof is on the shippers, seeking to recover therefor, to show fault in the ship in not protecting the goods against such damage.—Crooks v. The Dunbritton (D. C.) 764; Knudson v. Same, Id.; Smail v. Same, Id.

Bottomry.

Where owners of a vessel failed to supply money for ordinary disbursements at her port of loading, and the master obtains, on bottomry, money covering ordinary port disbursements, to which the owners did not object, they cannot afterwards object for failure of the master to communicate with them in advance.—Cargo ex The Eliza Lines (C. C.) 308; Andreasen v. Two Hundred and Ninety-Five Thousand Feet of Lumber, Id.

Provisions of the law of the flag as to form of bottomry bonds are waived by the execution in a foreign port of a bottomry bond by the master and part owner without objection by the other owners.—Cargo ex The Eliza Lines (C. C.) 308; Andreasen v. Two Hundred and Ninety-Five Thousand Feet of Lumber, Id.

Where, after bottomry of a ship and freight, she became derelict, and was taken by salvors, and the cargo was sold, by order of the court, on application of the owners, and the vessel was repaired, the bottomry became a lien on the net salvage of vessel and freight, but was not entitled to the benefit of repairs.—Cargo ex The Eliza Lines (C. C.) 308; Andreasen v. Two Hundred and Ninety-Five Thousand Feet of Lumber, Id.

Where a master obtains a loan on an application, and signed a note promising payment, and containing a hypothecation of the ship and freight, and an assignment of enough of the freight to cover, and "rules for loans on freight," signed by the master, the lien was on bottomry of ship and freight.—Cargo ex The Eliza Lines (C. C.) 308; Andreasen v. Two Hundred and Ninety-Five Thousand Feet of Lumber, Id.

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Though, in an action for negligence, defendant's request to charge that plaintiff was guilty of contributory negligence was properly refused, yet where the exception to such charge brings up all the evidence on writ of error, and it appears on the face of the record that there was no evidence of negligence on defendant's part, judgment against him will be reversed, notwithstanding he failed to ask the trial court for a peremptory instruction upon the whole evidence. Toulmin, District Judge, dissenting.—Texas & P. Ry. Co. v. Patton (C. C. A.) 259.

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