At the proper time the plaintiff in error asked the court to instruct the jury as follows:

"The plaintiff was employed by the defendant as a switchman in its railroad yards at Streator, and as such it became and was his duty to couple and uncouple the cars handled by the defendant there. By accepting such employment, he assumed its natural and usual risks and hazards, and, if you believe from the evidence in this case that the injury which the plaintiff received was due to the natural and usual hazards and risks of his employment there as a switchman, then the plaintiff cannot recover in this action, and your verdict should be for the defendant."

The court refused to give this instruction, and an exception was duly reserved, and this ruling has been properly assigned here. The evidence showed that the defendant in error was employed as a switchman in the yards of the plaintiff in error at Streator at and prior to his injury, and that it was his duty to couple and uncouple the cars handled by it in such yard. According to the usual course of business, well known to the defendant in error, and notorious, the plaintiff in error was in the habit of receiving many foreign cars daily for transportation over its lines. He well knew that it was the practice of the railroad company to cause all such cars to be inspected when offered, and if they were found to be defective they were returned to the connecting carrier from which they came. The plaintiff in error was therefore entitled to have the court instruct the jury in regard to the rights and responsibilities of the parties, if they believed that the injury was due to the natural and usual hazards and risks of the service. The cases in support of the doctrine that an employé assumes all the natural and usual risks and hazards of the service which he undertakes are so numerous, and the principle is so elementary, that we will not incumber the opinion with citations.

Some other questions have been presented by the assignment of errors, and argued by counsel; but as the case will have to be reversed for the errors above pointed out, and as the alleged errors may not occur upon another trial, we do not deem it necessary to express any opinion upon them. The judgment of the court below is reversed, at the costs of the defendant in error, and the case remanded to the court below, with instructions to grant a new trial.

UNION PAC. RY. CO. v. HARRIS.

(Circuit Court of Appeals, Eighth Circuit. October 8, 1894.)

No. 439.

1. APPEAL—OBJECTIONS NOT RAISED BELOW.
   The objection that an action, or any material issue therein raised by the pleadings, is cognizable at law, instead of in equity, or vice versa, is waived by a failure to interpose it in apt time in the court of original jurisdiction.

2. RELEASE—EVIDENCE OF FRAUDULENT PROCUREMENT.
   A finding in an action for personal injuries that a release was procured by fraud will not be disturbed on error, where it appears that plaintiff was unconscious for many hours after the accident, and, because of the severity of the pain, was kept under narcotics for two

weeks or more, and three days after the accident, while all others save his nurses were denied access to him, defendant's agents procured his signature to the release, which there was evidence tending to show he could not read and did not read, and which was not read to him, and was signed in reliance upon the representations that the accident was caused by another company, which was alone responsible, and that the release was only a receipt for the estimated amount of plaintiff's medical expenses and loss of time.

3. APPEAL—ESTOPPEL TO ALLEGE DEFECT IN EVIDENCE.
Where plaintiff offers and is ready to produce competent evidence to prove a material fact in issue, and the court rejects it on defendant's objection, defendant will not afterwards be permitted to allege that plaintiff failed to prove the facts alleged in the offer of evidence.

4. SAME—REVIEW OF EVIDENCE.
A bill of exceptions stating only that certain of plaintiff's witnesses "gave evidence tending to show" is unavailing for the purpose of showing that the evidence was not sufficient to warrant a verdict for plaintiff.

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

Willard Teller (Harper M. Orahood, E. B. Morgan, and John M. Thurston, on the brief), for plaintiff in error.

William B. Felker (William L. Dayton, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge. This action was brought in the circuit court of the United States for the district of Colorado by Robert E. Harris against the Union Pacific Railway Company, to recover for personal injuries received by him while he was a passenger on defendant's train. The plaintiff recovered judgment in the circuit court, and the defendant sued out this writ of error.

The complaint alleged, in substance, that the company ran one or more of its freight cars out on its side track, known as the "Silver Age Mill Siding," and negligently left the same in such a position that they obstructed the main track, or that they were left in an insecure and unsafe position on the side track, and negligently permitted to run upon the main track, so that, when the train upon which the plaintiff was a passenger came along, it ran into these freight cars, derailing and breaking to pieces the car in which the plaintiff was riding, and inflicting upon him serious and permanent injuries to his mind and body. In its original answer the defendant denies generally all negligence, but "admits that it had standing upon its side track, at about the place mentioned in said complaint, one or more freight cars, but denies that the said freight cars were left insecure or unsafe, or in such a position as to interfere with the passage of the train of cars upon which the plaintiff was riding." The proof is plenary that the accident was caused by the passenger train coming in collision with the freight cars on this siding, in the manner set out in the complaint. The defendant, in its answer, admits "that it had standing upon its side track" the freight cars in question, and rests its defense on the issue of negligence solely upon a denial of the charge that the freight cars

were left on the side track in an insecure or unsafe position, or in such a position as to interfere with the passenger train. The answer contains no allegation or suggestion that any other company had any control over this side track or these freight cars, or that any other company was in any manner responsible for the negligence which resulted in the collision. Upon this state of the pleadings and proofs, it was not error for the lower court to tell the jury there was no room for controversy over the question of the defendant's negligence. The remark of the learned judge who tried the case at circuit, that "the act of negligence of the servants of the mining company is to be ascribed to the defendant," must be read in connection with that portion of the charge which precedes and follows it; and, when so read, it means that, if the defendant committed the management and control of its cars on its side track to the servants of the mining company, their negligence was to be ascribed to the defendant. Further consideration of this issue is unnecessary, as we understand the learned counsel for the plaintiff in error, upon the argument, to concede that defendant's negligence was sufficiently established.

The defendant filed a supplemental answer, in which it pleaded in bar of the action a release executed by the plaintiff four or five days after the accident, by the terms of which he acknowledged the receipt of $250 in full settlement of the injuries he received and the property he lost by the accident, "and in full of all claims and demands of whatsoever character." To this defense the plaintiff replied—First, that at the time he executed the release he was not mentally capable of making a contract; and, second, that the release was obtained from him by fraud; that the defendant's agents represented to him that the defendant was not liable to the plaintiff for the injuries he had sustained, because, as they asserted, the accident was caused by the negligence of another company, that had charge of the side track and freight cars, and which was alone responsible for the injury sustained by the plaintiff; that the defendant's agents further represented to the plaintiff that the paper he was asked to sign was only a receipt for the amount of what it was estimated the medical services rendered him would cost, and for the expenses of sickness and loss of time for two weeks, and for nothing else; and that he signed the paper relying on the truth of these representations, being unable to read it himself, and no one reading it to him.

The chief contention of the plaintiff in error is that the issues arising on the replication to the defendant's supplemental answer should not have been submitted to the jury. It is said the plaintiff cannot in this action avoid the release for fraud, or show that he was mentally incapable of entering into a valid contract at the time he executed it; that the release can only be avoided upon these grounds by a suit in equity. This question was not raised in the lower court. The defendant did not demur to the plaintiff's replication upon the ground that a court of law could not try the issues it presented. These issues were tried to the jury without objection, and it is now too late to object for the first time in the appellate

court to that mode of trial. The objection that an action should have been brought at law instead of in equity, or vice versa, is waived by a failure to interpose it at the proper time in the court of original jurisdiction. Hollins v. Iron Co., 150 U. S. 371, 14 Sup. Ct. 127, Insley v. U. S., 150 U. S. 512, 14 Sup. Ct. 158; Preteca v. Land-Grant Co., 50 Fed. 674, 1 C. C. A. 607, 4 U. S. App. 326; Tyler v. Savage, 143 U. S. 79, 12 Sup. Ct. 340; Reynes v. Dumont, 130 U. S. 354, 395, 9 Sup. Ct. 486. If a party, when sued at law, conceives that the action, or any material issue in it, is of equitable cognizance, he must interpose the objection at the threshold of the case, and will not be heard to make it for the first time in the appellate court. The general principle is now well established that an appellate court will not entertain an objection to the form of the action, when the objection was not interposed in apt time in the trial court. It will be presumed that the parties assented to the theory that the remedy adopted was the proper one, and they will be held to that theory on appeal. Moreover, it is a general rule that questions not presented to the trial court will be deemed waived. Elliott, App. Proc. §§ 658, 679, 690, and citations; Brown v. Lawler, 21 Minn. 327; Brown v. Nagel, Id. 415; Weaver v. Kintzley, 58 Iowa, 191, 12 N. W. 262; Town of Mentz v. Cook, 108 N. Y. 504, 15 N. E. 541; Buffalo Stone & Cement Co. v. Delaware, L. & W. R. Co. (N. Y. App.) 29 N. E. 121; Sexton v. Pike, 13 Ark. 193; Creely v. Brick Co., 103 Mass. 514. In what is here said, we are not to be understood as intimating that, if the defendant had interposed a timely objection to the jurisdiction of the lower court to try the issues presented by the replication, the objection would have been of any avail. We express no opinion upon that question.

A further contention of the plaintiff in error is that there was not sufficient evidence to warrant the court in submitting to the jury the issue as to whether the release was procured from the plaintiff by fraud. The injuries to the plaintiff were of the most serious character, and are permanent. He was unconscious for many hours after the accident, and when he recovered consciousness the pain from his injuries was so severe that he was compelled to take narcotics, which had their customary effect. While they deadened the sensibilities for the time being, they also deadened or dulled his senses. This treatment continued for two weeks or more. Three or four days after the accident, while this treatment was going on, and while his arms were suspended over a rope stretched across his bed in order to relieve the pressure upon his injured spine, and when he was tortured and racked with physical pain (when not under the influence of opiates), the defendant's agents found their way into his sickroom, from which his friends and all others, save his nurses, had been excluded, by order of his physician, on account of the serious character of his injuries, and procured his signature to the release. There is evidence tending to prove the averments of the replication, and to show that he did not and could not read the release, and that it was not read to him, and that he signed it relying upon the truth of the representations as to its contents made by the defendant's agents, which are set

out in the replication, and which need not be repeated. The issue as to whether the release was procured by fraud was therefore properly submitted to the jury, and, upon the evidence in the record, we cannot disturb their finding upon that issue.

It is next contended that there was not sufficient evidence to justify the court in submitting to the jury the issue as to the plaintiff's mental capacity to make a binding contract at the time he signed the release. The plaintiff in error is clearly estopped by the record from making this contention. After the defendant had introduced the release, and rested, the record shows that the following proceedings took place:

"The plaintiff was then recalled in rebuttal. Plaintiff's counsel then made the following offer: 'The plaintiff offers to prove by witnesses, Dr. Eskridge and Dr. Hughes, Dr. Kimball and Dr. Pershing, that for the space of ten to fifteen days the plaintiff had not recovered from his injuries, and that his mind was weakened, and that he was unable, from that source alone, to do any business; that in connection with the shock, with the administration of opiates in sufficient amount to cause unconsciousness, that, at the time when defendant claims this agreement was signed, his mind was not in a condition to fully understand or comprehend the terms and conditions of the agreement that was presented to him; and that, had it been read to him, or he had read it himself, he would not have been able to appreciate the force and effect of it.' (Objected to. Objection sustained by the court, and Mr. Felker excepted.) Mr. Felker: I offer to prove by Dr. Kimball that two weeks after the injury he called upon the plaintiff, to examine him in regard to the extent of his injuries, for the United States Accident Insurance Company; that he examined at that time the plaintiff, and found him to be in a mental condition unfit to do any business, or to comprehend and appreciate the force and effect of any business transaction that he might enter into. Mr. Teller: I want to enter my objections—First, on the ground that it would not be admissible anyhow, under any circumstances; and, second, it is specifically inadmissible on account of the state of the pleadings. The Court: I will sustain it. I do not go upon that ground. I think these physicians have testified as fully as they can as to his condition. I do not care to hear anything more from them."

The witnesses were in court, and ready to be called to the witness stand. The offered evidence was competent and material to the issue. It tended strongly to prove the plaintiff's case on the issue we are considering, and it was erroneously rejected by the court on the defendant's objection. The rule is well settled that when a plaintiff offers and is ready to produce competent evidence to prove a material fact in issue, and the court rejects it on the objection of the defendant, the defendant will not afterwards be permitted to allege that the plaintiff failed to prove the facts alleged in the offer of evidence. Big. Estop. (5th Ed.) 720; Thompson v. McKay, 41 Cal. 221; Jobbins v. Gray, 34 Ill. App. 208, 218, 219; Insurance Co. v. O'Connell, Id. 357, 362; Elliott, App. Proc. § 630. The defendant will not be allowed to thus take advantage of his own wrong, or the errors of the court induced on his own motion, and then compel the plaintiff to suffer the consequences. Such a proceeding would be the merest trifling with the court. Jobbins v. Gray, supra. If the rule were otherwise it would encourage and reward unfounded and groundless objections to the plaintiff's evidence, and tend to promote sharp practice and chicanery.

Upon the question of the sufficiency of the evidence to support

the verdict on the several issues in the case, we may further observe that the bill of exceptions does not show that it contains all the evidence. There is no statement in the bill to that effect. On the contrary, it affirmatively appears that it does not contain all the evidence. The plaintiff, in his testimony in chief, examined several witnesses, touching whose testimony the bill of exceptions states only that they "gave evidence tending to show," or "gave evidence tending to show substantially * * *." The opinion of counsel, who drafted, and of the judge, who signed, the bill of exceptions, as to what the testimony of the witness "tended to show," or "tended to show substantially," cannot be accepted by the appellate court as the equivalent of the testimony of the witness. Gulf, C. & S. F. Ry. Co. v. Washington, 4 U. S. App. 121, 131, 1 C. C. A. 286, 49 Fed. 349; Railway Co. v. Shelton, 57 Ark. 459, 21 S. W. 876. Such a mode of stating the evidence is proper enough when its only purpose is to show there was sufficient evidence upon which to predicate the instructions given or refused, but it is unavailing for the purpose of showing that the evidence was not sufficient to warrant the verdict of the jury.

The remaining assignments of error relate to the rulings of the court in admitting evidence. A separate statement and consideration of these exceptions is not necessary, as none of them is of any general importance. They have all been considered carefully, and we are satisfied none of them has any merit. The judgment of the circuit court is affirmed.

SIOUX NAT. BANK v. CUDAHY PACKING CO.

(Circuit Court, N. D. Iowa, W. D. October 11, 1894.)

1. NEGOTIABLE INSTRUMENTS—DRAFTS.
   Where a trust company, by agreement with a packing company, pays the tickets issued by the packing company in payment of purchases at a branch establishment, and the packing company daily issues to the trust company vouchers for such payments, which provide that, when approved and signed, they shall become drafts on the packing company, payable through certain banks, such vouchers, approved and signed, are not negotiable, though assignable under Code Iowa, § 2084.
2. MONEY PAID AND ADVANCED.
   A trust company, located at a place where a packing company had a branch, agreed with the packing company to pay its tickets issued for purchases by the branch. Under the agreement there was issued daily to the trust company a voucher for such payments, which provided that, when approved and signed, it should be a draft on the packing company, payable through certain banks. The packing company had a deposit with the trust company, but by their agreement this was not to be a payment of the tickets, being subject only to the draft of the home office of the packing company. The trust company, being insolvent, and not having money to pay the tickets, arranged with plaintiff to pay them, and assigned the packing company's voucher to plaintiff to induce it to make the payment. *Held* that, though the voucher was not negotiable, plaintiff could recover for money paid and advanced for the benefit of the packing company.

Action by the Sioux National Bank against the Cudahy Packing Company on a voucher.

This action was tried to the court, a jury being waived, and the facts developed in the evidence were as follows:

The Cudahy Packing Company had established a branch establishment at Sioux City, Iowa. For the purpose of providing for the payment of stock purchased and packed at Sioux City, the packing company made an arrangement with the Union Loan & Trust Company of Sioux City to pay the tickets issued by the packing company to the persons from whom stock was bought, and, to cover the advances thus made, each day a voucher or draft in the form hereinafter set forth was executed and delivered to the Union Loan & Trust Company, by whom it was forwarded to Chicago for collection. As it would require two or three days to obtain returns from these so-called drafts, it was further agreed that the packing company should keep on deposit with the trust company a sum about equal to the daily advances made to cover the stock tickets; but it was further agreed that this deposit could not be drawn upon by the officers of the packing company residing at Sioux City, but only by the officers at the Chicago office. These arrangements were carried out until about April 24, 1893, when the Union Loan & Trust Company, being in failing circumstances, was unable to take up the tickets issued by the packing company, and thereupon it applied to the Sioux National Bank to advance the amounts needed to cover the outstanding tickets, which the bank agreed to do, and thereupon the voucher or draft held by the trust company was indorsed and transferred to the bank, the same being in the form following:

Exhibit A.

Live-Stock Voucher.

Sioux City, Iowa, Apl. 22, 1893.

The Cudahy Packing Co.,
Sioux City, No. 413.

Debtor to the Union Loan & Trust Co.
Treasurer's No. ——.

For purchase of live stock this day as follows: 836-190-370-800-226-314-7.12 518	13,509.52	
Protested for nonpayment April 25th —93. James J. Barboux, Notary Public.		13,509.52

When approved, dated, and signed, this voucher becomes a draft on the Cudahy Packing Co., of South Omaha, Neb., payable through the Union Stock Yards National Bank, of South Omaha, or the Bankers' National Bank, of Chicago. For 13,509.52

Noted —— " —— (So. Omaha.)	I have compared the record of above purchases, and hereby certify to the correctness of above number, average price, and weight. W. J. Wallace, Buyer.	I have compared the record of above purchases with buyer's report, & checked extensions, and hereby certify to the correctness of above. Chas. E. Morris, Cashier.
Approved for payment. Maurice J. Barrow, Superintendent.	Paid —— Entered cash —— —— Asst. Treasurer.	Sioux City, Iowa, Apl. 24, 1893. Received of the Cudahy Packing Co. thirteen thousand five hundred nine & 52—100 dollars for deposit to your credit in live-stock acct. E. R. Smith, Sec'y.
Registered Apl. 24th, 1893. Chas. E. Morris (Sioux City.)	Registered 18— (South Omaha.)	

The Sioux National Bank paid all checks drawn on it by the Union Loan & Trust Company for an aggregate amount in excess of the sum of $13,509.52, there being included therein checks to the amount of $11,513.62 to cover tickets

issued by the packing company. When the trust company closed its doors, it had on deposit, of money belonging to the packing company, a sum of about $14,000; but, under the arrangement with that company, this deposit was not to be drawn on to meet the daily advances for stock purchased at Sioux City. The packing company refused to pay the voucher or draft assigned to the Sioux National Bank, and thereupon the bank brought suit to enforce payment; claiming that the instrument was in effect a negotiable draft, and that the bank was entitled to collect the whole amount thereof. The packing company, in its answer, denied that the instrument was negotiable, either under the law merchant or under the statute of Iowa, and set up a counterclaim for the sum due it from the Union Loan & Trust Company.

Joy, Call & Joy, for plaintiff.
Lewis, Holmes & Beardsley, for defendant.

SHIRAS, District Judge. I hold, under the facts of this case, that the draft described and set forth in the petition is not a negotiable instrument under either the rules of the commercial law or the provisions of the statute of Iowa. The fifteenth finding of facts shows that the voucher or draft sued upon was the only one that had been transferred to any third party; and it is clear that it was not the purpose of the defendant company, in issuing these vouchers, that they should be sold or transferred to banks or other parties as a means of raising money on its behalf. I further hold that the voucher or draft is one assignable under the provisions of section 2084 of the Code of Iowa.

The findings of fact show the situation to be as follows: By contract between the Union Loan & Trust Company and the Cudahy Packing Company, the former company agreed to pay the tickets issued by the latter company at Sioux City, Iowa, in payment of stock purchased at that place. Vouchers were issued to cover daily transactions, and were the means by which the Union Loan & Trust Company procured from the Cudahy Packing Company the money used in the daily transactions. The deposit account known as the "Current Account" was not to be used in payment of tickets. Under this arrangement it was the duty of the Union Loan & Trust Company to pay the tickets issued by the defendant company, and upon payment it was entitled to the proper draft or voucher therefor. On the 24th of April, 1893, the Union Loan & Trust Company was insolvent, and had not the money to pay the tickets issued by the Cudahy Packing Company. If it had taken no steps to provide for the payment of these tickets, the result would have been that the Cudahy Company would have had to pay the same, and it would then have been a creditor of the Union Loan & Trust Company for the amount of the current or deposit account. The Union Loan & Trust Company, however, arranged with the plaintiff bank to pay the tickets issued by the defendant company, and for the money to be thus advanced it assigned the voucher or draft sued on, as security. The money advanced by the bank to pay the tickets issued by the Cudahy Company was paid for its benefit; was in fact received by it, in that, if these tickets had not thus been provided for, the defendant company would have been compelled to pay them. Taking into consideration the fact that the Union Loan & Trust

Company was the agency employed by the defendant company to make payment of the tickets issued by it at Sioux City; that the loan and trust company, through its insolvency, became unable to pay the tickets issued by the defendant company; that in order to provide for the payment thereof the trust company arranged with the plaintiff bank to pay these tickets; that the bank in fact paid the tickets, and thereby relieved the defendant company from the payment thereof; that the draft or voucher issued by the defendant was assigned to the bank in order to induce it to advance the money needed to pay the tickets,—it seems to me this condition of affairs will sustain an action for money paid and advanced for the benefit of defendant, under the ruling of the supreme court in White v. Bank, 102 U. S. 658. To enable plaintiff to recover, upon this view of the case, the petition should be amended so as to include a count of the nature indicated, and leave is granted to plaintiff to amend in that particular. Assuming that such amendment will be made, I then hold that plaintiff is entitled to recover the sums of money by it actually advanced and used in the payment of tickets issued by the defendant company, which, as I understand the finding of fact, amount in the aggregate to the sum of $11,513.62, for which sum, with interest at 6 per cent. from April 24, 1893, plaintiff will be entitled to judgment.

WERCKMEISTER v. SPRINGER LITHOGRAPHING CO.

(Circuit Court, S. D. New York. October 4, 1894.)

1. COPYRIGHT—NOTICE—NAME OF PARTY.
   The name "Photographische Gesellschaft" (Photographic Company), being the trade-name created by the owner of a copyright, and extensively used by him for many years in his business, is a sufficient designation of the party by whom the copyright is taken out.
2. SAME—RESIDENCE.
   The residence of the party taking out a copyright, though a foreigner, need not be stated in the notice.
3. SAME—SALE OF PAINTING—RESERVING COPYRIGHT.
   A sale by an author of his painting, reserving the right of reproduction, does not destroy his right of copyright. The purchaser in such case is not a "proprietor," within the copyright law.
4. SAME—PUBLICATION—SALE OF REPLICA.
   The right of copyright of a painting is not destroyed by a sale of a replica, or original study or model, differing from the painting in size and style, especially where the right of reproduction is reserved on such sale.
5. SAME—CATALOGUE COPY.
   The printing in a salon catalogue, without notice of copyright, of a mere crayon sketch of a painting exhibited in the salon, not intended in any way to serve as a copy of the painting, is not a publication which will work a forfeiture of the right to copyright.
6. SAME—PUBLIC EXHIBIT.
   An exhibition of a painting in a public salon is not a publication working a forfeiture of the right of copyright unless the general public is permitted to make copies at pleasure, and such permission will not be assumed in the absence of direct evidence.

This was a suit by Emil Werckmeister against the Springer Lithographing Company for infringement of copyright.

Goepel & Raegener, for complainant.
Boothby & Warren, for defendant.

TOWNSEND, District Judge. This is a bill in equity for the infringement of a copyright. The complainant is a resident of Germany, and has been for many years engaged in the business, under the name of "Photographische Gesellschaft," of publishing copies of paintings after obtaining the rights of publication from the authors. The name "Photographische Gesellschaft" has existed since 1862, and complainant has been the sole proprietor of the business carried on under that name since 1872. It is implied in the testimony that others were associated with him before 1872, but there is no direct evidence on that point. It is not claimed that any other person or persons have done business under said name since 1872. Prior to May, 1892, Edouard Bisson, an artist, made a painting called "Floreal." The painting is an original, artistic representation of the half-length figure of a girl, with flowers falling on her head and lap. In May, 1892, he exhibited the painting in the salon at the Palais de l'Industrie, in the Champs-Elysees, in Paris. While there, he sold the painting, reserving all rights of reproduction. Afterwards, he verbally assigned the exclusive right of reproduction, publication, and copyright, of said painting to the complainant, and confirmed the same by written instrument on July 13, 1892. In June, 1892, he sold to another person the replica or original study or model, which was not in the same style or size as the finished painting, telling the purchaser that all rights of reproduction were reserved. The price paid by complainant for the rights purchased by him was 1,500 francs. Defendant is a lithographic company, and has infringed the copyright by making lithographs of the painting. The points made by defendant's counsel will be considered in their order.

The first objection urged is that the copyright notice, "Copyright, 1882, by Photographische Gesellschaft," is insufficient, because it does not contain the name of the person taking out the copyright. The statute (Act June 18, 1874, c. 301) provides as follows:

"That no person shall maintain an action for the infringement of his copyright unless he shall give notice thereof, * * * if a photograph, * * * by inscribing upon some visible portion thereof the word 'Copyright,' together with the year the copyright was entered, and the name of the party by whom it was taken out."

The earlier statutes, which provided for the use of the words "Entered according to act of congress," etc., did not contain the above limitation, "the name of the party by whom it was taken out." This clause seems to have been added for the purpose of preventing any ambiguity as to the character of the notice which should accompany the use of the word "Copyright." The object of the statute was to notify the public of the claim of copyright, and to enable it to ascertain the "party" by whom it was taken out. In this case the party was the Photographische Gesellschaft, or Photographic Company, said name being the trade-name created by complainant, and extensively used by him in his business for many

years. In Scribner v. Henry G. Allen Co., 49 Fed. 854, it appeared that Charles Scribner was at one time doing business under the name of Charles Scribner's Sons, and that during this period he bought the right to obtain a copyright upon a certain book, and did the various acts required to copyright said book, in the name of "Charles Scribner's Sons." Judge Shipman held the notice sufficient. He says:

"At common law, individuals are permitted to carry on business under any name or style which they may choose to adopt; and, if persons trade or carry on business under a name, style, or firm, whatever may be done by them under that name is as valid as if real names had been used."

The principle there stated is applicable to the present case. I think said notice is sufficient.

The residence of the party is not required to be stated, and, if any person in America desires to ascertain who claims the copyright of this painting, he will much more readily succeed if informed that the owner is Photographische Gesellschaft, than if he is informed that it is Emil Werckmeister. Lithographic Co. v. Sarony, 111 U. S. 53, 4 Sup. Ct. 279; Black v. Henry G. Allen Co., 42 Fed. 618; Carte v. Evans, 27 Fed. 861.

Defendant next insists that complainant is neither the author, inventor, designer, or proprietor of the painting, nor the assign of any such person, within the meaning of the statute. The objection presents the novel question whether, under the statute, the artist could sell the painting to one person, and the right to obtain the copyright to another. It is claimed by the defendant that a copyright can only be obtained by the proprietor of the painting, and that, after the author had parted with the right of property in the painting, he could have no right of copyright remaining; that, until the copyright is actually taken out, the right of property in the painting and the right of copyright are inseparable; that, after the sale of the painting, the purchaser was the only person who had the right to copyright it, or to transfer any right of reproduction or copyright. This raises a question as to the meaning of the word "proprietor" in the statute. The intellectual conceptions of an author are his absolute property. He may hold them captive in his brain, or he may release them, and express them by outward signs. In the latter case the common law protects him against duplication or publication by any other parties without his consent; but, if he sets them free by unrestricted publication, he abandons his property in them to the public. The law undertakes to encourage the publication of works of this character by providing that upon certain conditions no one but the author, or one deriving the right from him, shall have the liberty of publishing or copying his works for a certain time. The copyright thus secured to an author by statute is an incorporeal right, not a corporeal thing. At the same time it is property capable of being assigned by the author at his pleasure. It cannot, like tangible property, be made the subject of seizure and sale on execution. The sale of this painting on execution, for instance, would not pass the title to the copyright, even if the copyright had been taken out before

such sale. Ager v. Murray, 105 U. S. 126; Stephens v. Cady, 14 How. 531. It will not be denied that either the author or any unconditional purchaser of the painting might have originally copyrighted the painting, and then sold it, either retaining the copyright or selling it to another purchaser. The statute manifestly does not intend to vest the right to a copyright in two persons. When there is a "proprietor" of a painting, within the meaning of the statute, the right of the author must cease. Did the purchaser in this case become the "proprietor," within the meaning of the statute? I think not. I think by "proprietor," in this statute, is intended the person who not only obtains the right to physical possession of the painting, but the common-law rights of publication or preventing publication which belong to the author. I do not think that these common-law rights absolutely and of necessity accompany the title to the canvas and coloring matter which constitute the painting. In Parton v. Prang, 3 Cliff. 537, Fed. Cas. No. 10,784, it is said that "the author or proprietor of a manuscript or picture possesses that right [to sell and transfer the same] as fully and to the same extent as the owner of any other personal property. The sales may be absolute or conditional, and they may be with or without qualifications, limitations, and restrictions." And this case throughout implies that there may be a transfer of the painting itself without the common-law rights of publishing or restricting publication. The opinion in Stephens v. Cady, 14 How. 529, strongly sustains this view. Drone, Copyr. 240. "No disposition—no transfer—of paper upon which the composition was written or impressed (though it gives the power to print and publish) can be construed a conveyance of the copy without the author's express consent to print or publish, much less against his will." Millar v. Taylor, 4 Burrows, 2396. "Copy," in above quotation, seems to signify the common-law rights of the author. The case of Yuengling v. Schile, 12 Fed. 97, implies throughout that the ownership of the painting itself does not necessarily carry with it the right to copyright. If, then, the purchaser of this painting, without the right of reproduction, did not become the owner of the right to copyright, the right was destroyed or remained in the author. According to the literal words of the statute, he still had this right. He was the author of the painting, and there was no proprietor or assign. He retained the common-law right to prevent publication, or he could give it to the public. He, and he only, could furnish the consideration—the publication—in return for which the public confers the right of copyright. Unless he could have a copyright, the right was destroyed, and the benefit the public might receive from a duplication of the painting was lost. Such a limitation of the right of copyright would tend to defeat the liberal purposes of the statute. The purchaser of a work of art is not ordinarily the one who cares to make or sell copies thereof. The purchaser of a drama may not care to engage in the publication of the manuscript, and yet, if the author may not dispose of his separate and distinctive rights to separate persons, both he and the public will be deprived of the benefit which arises from the exchange of his common-law rights for the

rights given by the statute. I can see no inconvenience and no violation of principle in allowing the author to sell his painting, and retain the right to copyright, any more than in allowing an inventor to sell his model, or to make his first machine for another person, and still retain the right to patent his invention.

Defendant claims, thirdly, that the sale of the replica was a publication by the author which destroyed the right to copyright. The sale of the replica was made subsequent to the oral transfer of the rights of reduplication which gave the right to a copyright. But, if it be necessary that these rights be assigned by writing (which was not done in this case until later), the replica was not a copy of the painting, but was made before the painting, for assistance to the author in producing the painting. It differed from the painting in size and style, and was itself an original painting, of which the author had the common-law right to prevent a reproduction. It was sold by him, reserving any right of reduplication, and such a sale was not a publication even of the replica, and certainly not of the painting.

Defendant next says that there was a publication of a copy of the painting in the salon catalogue, without a copyright notice, and before the taking out of a copyright. This was an illustration not taken from the painting, but from a very superficial crayon sketch printed in the catalogue of the salon where the painting was exhibited prior to the assignment to the complainant. It was not intended to be a copy of the painting. The purpose of the catalogue was merely to furnish to the holder of the catalogue information regarding the paintings, or to enable him to find the paintings desired, and perhaps to recall the paintings to the memory afterwards. It was not intended to serve in any way as a copy of the painting. No one would think of considering it as a work of art. Such a printing would at most be a qualified or limited publication, which would not work a forfeiture of the right of copyright. Such use of catalogue is under the implied qualification that the privilege shall not be extended beyond the purpose for which it was granted. In Falk v. Engraving Co., 4 C. C. A. 648, 54 Fed. 890, a publisher sent to retail dealers an exhibition card containing copies, in very reduced sizes, of photographs, from which the dealers were requested to make their orders. The card did not contain the copyright notice in the language prescribed by statute. Judge Shipman says:

"This card or sheet of miniature copies of photographs for the inspection of dealers is not one of the published editions of the photographs which it contained, within the meaning of this section. The statute refers to a published edition, which is an edition offered to the public for sale or circulation."

Defendant has not claimed that the exhibition of the painting in the salon at Paris was a publication, so that it is unnecessary to decide that point. It would seem that such an exhibition would not be a publication unless the general public was permitted to make copies at pleasure. In the absence of direct evidence, such permission will not be assumed. It would seem that such exhibition of the painting and use of the catalogue were under an implied quali-

fication that the use should not be extended beyond the purpose for which it was granted, and that such special use did not constitute publication. See Parton v. Prang, 3 Cliff. 549, Fed. Cas. No. 10,784; Abernethy v. Hutchinson, 1 Hall & T. 28; Drone, Copyr. 287; Bartlette v. Crittenden, 4 McLean, 300, Fed. Cas. No. 1,082; Kiernan v. Telegraph Co., 50 How. Pr. 201; Tompkins v. Halleck, 133 Mass. 32.

Lastly, defendant says that there is no direct evidence that their lithographs were copied from the painting. In the absence of any evidence whatever on the part of the defendant, the proof offered by the complainant is sufficient.

Let there be the usual decree for an injunction and an accounting.

In re BODEK.

(Circuit Court, E. D. Pennsylvania. October 11, 1894.)

1. ALIENS—NATURALIZATION PROCEEDINGS.
   An applicant for naturalization is a suitor who, by his petition, institutes a proceeding in a court of justice for the judicial determination of an asserted right, and such petition must allege the existence of all the facts, and the fulfillment of all the conditions upon which the statutes (Rev. St. §§ 2165, 2167) make the right dependent, and must be supported by legal proofs of the facts on which the petition rests.
2. SAME—EXAMINATION.
   The applicant's oath to support the constitution of the United States will not be accepted if, upon examination, it appear that he does not understand its significance, or is without such knowledge of the constitution as is essential to the rational assumption of an undertaking to support it; and the court will not admit the applicant to citizenship without being satisfied that he has at least some general comprehension of what the constitution is, and of the principles which it affirms.
3. SAME—MORAL CHARACTER—EVIDENCE.
   The requirements as to moral character and a disposition to good order must be shown by competent evidence.
4. SAME—DECLARATION OF INTENTION—MINORS.
   Where the oath declaring the previous intention in the case of an alien coming to this country before majority is made under Rev. St. § 2167, it must be supplemented by proof that the applicant has, for the designated period, actually intended to become a citizen.
5. SAME—TIME OF FILING PETITIONS—ADJUDICATION.
   Petitions for naturalizations must be filed at or before the time of their presentation, and judgments upon them, whether adverse or favorable to the petitioners, should be formally entered.

This was a petition by Wolf Bodek to be admitted to become a citizen of the United States.

DALLAS, Circuit Judge. In pursuance of its power to "establish an uniform rule of naturalization" (Const. art. 1, § 8), congress has prescribed the conditions on which an alien may become a citizen of the United States, and the manner in which, "and not otherwise," he may be admitted to citizenship. By section 2165 of the Revised Statutes the following requirements, among others, are imposed upon every applicant under that section: (1) He shall have made the declaration which is there set forth "two years, at least,