THE

FEDERAL REPORTER.

VOLUME 68.

CASES ARGUED AND DETERMINED

IN THE

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

PERMANENT EDITION.

JULY—SEPTEMBER, 1895.

ST. PAUL:
WEST PUBLISHING CO.
1895.

JUDGES

OF THE

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

FIRST CIRCUIT.

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

SECOND CIRCUIT.

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

THIRD CIRCUIT.

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

FOURTH CIRCUIT.

HON. MELVILLE W. FULLER, CIRCUIT JUSTICE.
HON. NATHAN GOFF, CIRCUIT JUDGE.
HON. CHARLES H. SIMONTON, CIRCUIT JUDGE.
HON. THOMAS J. MORRIS, DISTRICT JUDGE, MARYLAND.
HON. AUGUSTUS S. SEYMOUR, DISTRICT JUDGE, E. D. NORTH CAROLINA.
HON. ROBERT P. DICK, DISTRICT JUDGE, W. D. NORTH CAROLINA.
HON. WILLIAM H. BRAWLEY, DISTRICT JUDGE, E. AND W. D. SOUTH CAROLINA.
HON. ROBERT W. HUGHES, DISTRICT JUDGE, E. D. VIRGINIA.
HON. JOHN PAUL, DISTRICT JUDGE, W. D. VIRGINIA.
HON. JOHN J. JACKSON, DISTRICT JUDGE, WEST VIRGINIA.

FIFTH CIRCUIT.

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

SIXTH CIRCUIT.

HON. HENRY B. BROWN, CIRCUIT JUSTICE.
HON. HOWELL E. JACKSON, CIRCUIT JUSTICE.[1]
HON. WILLIAM H. TAFT, CIRCUIT JUDGE.
HON. HORACE H. LURTON, CIRCUIT JUDGE.
HON. JOHN WATSON BARR, DISTRICT JUDGE, KENTUCKY.
HON. HENRY H. SWAN, DISTRICT JUDGE, E. D. MICHIGAN.
HON. HENRY F. SEVERENS, DISTRICT JUDGE, W. D. MICHIGAN.
HON. AUGUSTUS J. RICKS, DISTRICT JUDGE, N. D. OHIO.
HON. GEORGE R. SAGE, DISTRICT JUDGE, S. D. OHIO.
HON. CHARLES D. CLARK, DISTRICT JUDGE, E. AND M. D. TENNESSEE.[2]
HON. D. M. KEY, DISTRICT JUDGE, E. AND M. D. TENNESSEE.[3]
HON. ELI S. HAMMOND, DISTRICT JUDGE, W. D. TENNESSEE.

SEVENTH CIRCUIT.

HON. JOHN M. HARLAN, CIRCUIT JUSTICE.
HON. WILLIAM A. WOODS, CIRCUIT JUDGE.
HON. JAMES G. JENKINS, CIRCUIT JUDGE.
HON. JOHN W. SHOWALTER, CIRCUIT JUDGE.[4]
HON. PETER S. GROSSCUP, DISTRICT JUDGE, N. D. ILLINOIS.
HON. WILLIAM J. ALLEN, DISTRICT JUDGE, S. D. ILLINOIS.
HON. JOHN H. BAKER, DISTRICT JUDGE, INDIANA.
HON. WILLIAM H. SEAMAN, DISTRICT JUDGE, E. D. WISCONSIN.
HON. ROMANZO BUNN, DISTRICT JUDGE, W. D. WISCONSIN.

EIGHTH CIRCUIT.

HON. DAVID J. BREWER, CIRCUIT JUSTICE.
HON. HENRY C. CALDWELL, CIRCUIT JUDGE.
HON. WALTER H. SANBORN, CIRCUIT JUDGE.
HON. AMOS M. THAYER, CIRCUIT JUDGE.
HON. JOHN A. WILLIAMS, DISTRICT JUDGE, E. D. ARKANSAS.
HON. ISAAC C. PARKER, DISTRICT JUDGE, W. D. ARKANSAS.
HON. MOSES HALLETT, DISTRICT JUDGE, COLORADO.
HON. OLIVER P. SHIRAS, DISTRICT JUDGE, N. D. IOWA.
HON. JOHN S. WOOLSON, DISTRICT JUDGE, S. D. IOWA.
HON. CASSIUS G. FOSTER, DISTRICT JUDGE, KANSAS.
HON. RENSSELAER R. NELSON, DISTRICT JUDGE, MINNESOTA.
HON. ELMER B. ADAMS, DISTRICT JUDGE, E. D. MISSOURI.[5]
HON. HENRY S. PRIEST, DISTRICT JUDGE, E. D. MISSOURI.[6]
HON. JOHN F. PHILIPS, DISTRICT JUDGE, W. D. MISSOURI.
HON. ELMER S. DUNDY, DISTRICT JUDGE, NEBRASKA.
HON. ALFRED D. THOMAS, DISTRICT JUDGE, NORTH DAKOTA.
HON. ALONZO J. EDGERTON, DISTRICT JUDGE, SOUTH DAKOTA.
HON. JOHN A. RINER, DISTRICT JUDGE, WYOMING.

[1] Deceased August 8, 1895.
[2] Commissioned, January 21, 1895.
[3] Resigned January 21, 1895.
[4] Commissioned March 1, 1895.
[5] Commissioned May 17, 1895.
[6] Resigned May 17, 1895.

NINTH CIRCUIT

HON. STEPHEN J. FIELD, CIRCUIT JUSTICE.
HON. JOSEPH McKENNA, CIRCUIT JUDGE.
HON. WILLIAM B. GILBERT, CIRCUIT JUDGE.
HON. ERSKINE M. ROSS, CIRCUIT JUDGE.
HON. WM. W. MORROW, DISTRICT JUDGE, N. D. CALIFORNIA.
HON. OLIN WELLBORN, DISTRICT JUDGE, S. D. CALIFORNIA.[1]
HON. HIRAM KNOWLES, DISTRICT JUDGE, MONTANA.
HON. CORNELIUS H. HANFORD, DISTRICT JUDGE, WASHINGTON.
HON. THOMAS P. HAWLEY, DISTRICT JUDGE, NEVADA.
HON. CHARLES B. BELLINGER, DISTRICT JUDGE, OREGON.
HON. JAMES H. BEATTY, DISTRICT JUDGE, IDAHO.
HON. WARREN TRUITT, DISTRICT JUDGE, ALASKA.

[1] Commissioned March 1, 1895.

CASES REPORTED.

†

CASES

ARGUED AND DETERMINED

IN THE

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

NOONAN v. DELAWARE, L. & W. R. CO.

(Circuit Court, S. D. New York. May 14, 1895.)

1. UNITED STATES COURTS—JURISDICTION—DEMURRER.
   A citizen of New Jersey sued a citizen of Pennsylvania in a federal court in New York. The defendant appeared generally, and demurred for want of jurisdiction. *Held*, that the objection that the action was brought in the wrong district was waived by the appearance, and was not raised by the demurrer.
2. PLEADING—ACTION ON STATE STATUTE.
   The action was founded on a statute of New Jersey, which was not pleaded. *Held* that, as the courts of the United States take judicial notice of the laws of the several states, the right could, nevertheless, be enforced by the federal court in New York.

This was an action by John Joseph Noonan, as administrator of James A. Noonan, against the Delaware, Lackawanna & Western Railroad Company, to recover damages for the death of his intestate. Defendant demurred to the complaint for want of jurisdiction, and also on the ground that the complaint did not state facts sufficient to constitute a cause of action.

A. G. Vanderpoel, for plaintiff.
Hammond Odell, for defendant.

WHEELER, District Judge. The plaintiff is a citizen of New Jersey, suing as administrator, appointed in New York, for the death of his intestate in New Jersey; and the defendant is a citizen of Pennsylvania, having its principal office in New York. The personal, and not the represented, citizenship governs as to the place of bringing suit; and, under the act of 1888, this suit could properly be brought only in the district of New Jersey or a district of Pennsylvania. But it is between citizens of different states, and it could properly be brought in the circuit court of the United States for some district. The right to have it brought in such district could be waived, and would be by a general appearance in it, if brought in some other district and making defense. Ex parte

Schollenberger, 96 U. S. 369; Bank v. Morgan, 132 U. S. 141, 10 Sup. Ct. 37. The appearance here was general, accompanied by a demand of service of all papers upon the attorney appearing. The irregularity as to place was thereby waived. The demurrer raises the general question of the jurisdiction of the court over the subject-matter of the suit, but not that of this irregularity. That no law of New Jersey is alleged giving such an action is set down as ground of demurrer; but that the courts of the United States take judicial notice of the laws of the several states which they are called upon to administer is well settled. This right of recovery can be enforced here. Dennick v. Railroad Co., 103 U. S. 11. The statute gives the action to the administrator for the benefit of the widow and next of kin, with damages with reference to the pecuniary injury resulting to them; and this complaint alleges damages to the next of kin, which seems to be sufficient. Demurrer overruled.

ST. PAUL, M. & M. RY. CO. et al. v. ST. PAUL & N. P. R. CO.

ST. PAUL & N. P. R. CO. v. ST. PAUL, M. & M. RY. CO. et al.

(Circuit Court of Appeals, Eighth Circuit. May 6, 1895.)

Nos. 455 and 456.

1. FEDERAL COURTS—JURISDICTION—FEDERAL QUESTION.
If it appears from the plaintiff's complaint that, in any aspect which the case may assume, the right of recovery may depend upon the construction of federal statutes, and if the right of recovery, so far as it turns upon the construction of such statutes, is not merely a colorable claim, but rests on a reasonable foundation, a federal question is involved which is adequate to confer jurisdiction, although the right of recovery is also predicated on other grounds, not involving federal questions, and although the case is ultimately decided upon grounds not involving the determination of any federal question.

2. SAME—CLAIM MERELY COLORABLE.
A case which, in fact, depends for its decision upon questions of local or general law, cannot be brought within the jurisdiction of the federal courts by a reference in the complaint to a federal statute, and by setting up a merely colorable claim thereunder, nor because it may be found necessary to consult some federal statute to ascertain the meaning of a contract or the scope and effect of a local law.

3. SAME—TITLE DERIVED FROM UNITED STATES.
The federal courts do not acquire jurisdiction of a controversy in respect to the title to lands because the title was derived originally from the United States unless the controversy involves the construction, meaning, or effect of the granting acts.

4. STATUTES—CONSTRUCTION—FORFEITURE OF LAND GRANT.
The state of Minnesota conferred upon the S. & P. Ry. Co. the interest of the state in a large quantity of land granted to the state by congress, in aid of the construction of a railroad, by certain acts which provided that the title to the lands should only be acquired as the road adjacent to the particular lands was completed. By subsequent proceedings, the S. & P. Co. was practically divided into two corporations, the second known as the F. D. Co. The F. D. Co. constructed a large part of the road, and the governor of the state, acting in his official capacity and upon the supposition that such lands had been duly earned by the F. D. Co., conveyed large quantities of land to it, including some land beyond the furthest point to which the road was built. The deeds were duly recorded at the

times when they were made, in 1866 and 1871, and the F. D. Co. sold and conveyed large amounts of the lands covered by them. The S. & P. Ry. Co. having failed to construct a part of the line, the legislature of Minnesota, on March 1, 1877, passed an act to provide for its completion, forfeiting the grants previously held by the S. & P. Co. appertaining to the uncompleted portion of the line, and authorizing any corporation organized to build a railroad in the state to acquire the right to complete the line, and, upon so doing, and complying with the act, to be invested with the rights, lands, and property appertaining to the portion of the road it should complete, and formerly held by or belonging to the S. & P. Ry. Co. This act contained provisions for reserving part of the lands by the state, to pay claims for labor and materials used in completing the road, and excluding any corporation which should take advantage of it from acquiring title to any land in the grant upon which any settlement had been made or pre-emption claim filed. It did not appear that, at the time of the passage of this act, the validity of the deeds executed by the governor in 1866 and 1871 had ever been questioned. The complainant corporation complied with the provisions of the act, and completed the road, including the part beyond the point at which the F. D. Co. stopped. *Held*, that it was not the intention of the legislature, by the act of 1877, to forfeit the lands conveyed by the deeds of the governor, or to declare such deeds void, and that the complainant corporation acquired no rights in the lands conveyed by such deeds to enable it to question the title of those who held under them.

Appeals from the Circuit Court of the United States for the District of Minnesota.

This was a bill which was filed by the St. Paul & Northern Pacific Railroad Company, hereafter termed the plaintiff company, against the St. Paul, Minneapolis & Manitoba Railway Company et al., to establish its title to a large body of land in the state of Minnesota, and to annul certain deeds which were executed by the governor of that state in the years 1866 and 1871, on the ground that they operated as a cloud on the plaintiff company's title. The plaintiff also prayed that the defendant company might be required to account for and to pay over to it all such sums as it had realized from sales made of any of the lands embraced in the aforesaid deeds. The lands in controversy are a part of the lands granted by the United States, on March 3, 1857, to the then territory of Minnesota, to aid in the construction of a main line of railroad from Stillwater, on the eastern boundary of the territory, via St. Paul and St. Anthony, to a point on the western boundary of the territory between the foot of Big Stone lake and the mouth of the Sioux Wood river, afterwards fixed at Breckenridge, with a branch from St. Anthony, via Anoka, St. Cloud, and Crow Wing, to St. Vincent, in the northwestern portion of the territory.

A general statement of the facts out of which the controversy arises is as follows: Both parties derive title to the lands in dispute under the aforesaid grant of March 3, 1857 (11 Stat. 195, c. 99). That act granted to the territory of Minnesota, in aid of building the aforesaid main and branch lines of railroad, "every alternate section of land, designated by odd numbers, for six sections in width on each side of each of said roads and branches," with the right to select land, in alternate sections or parts of sections, lying within 15 miles of said main and branch lines, to make up for any deficiency in the grant caused by sales of land or by the filing of pre-emption claims before the definite location of the road. The act further provided "that the lands hereby granted for and on account of said roads and branches, severally, shall be exclusively applied in the construction of that road for and on account of which such lands are hereby granted, and shall be disposed of only as the work progresses; * * * that the said lands hereby granted to the said territory or future state shall be subject to the future disposal of the legislature thereof for the purposes herein expressed and no other;" and that they should be disposed of "by said territory or future state only in the manner following, that is to say: that a quantity of land not exceeding one hundred and twenty sections for each of said roads and branches, and included within a continu-

ous length of twenty miles of each of said roads and branches, may be sold; and when the governor of said territory or future state shall certify to the secretary of the interior that any twenty continuous miles of any of said roads or branches is completed, then another quantity of land hereby granted, not to exceed one hundred and twenty sections for each of said roads and branches having twenty continuous miles completed as aforesaid, and included within a continuous length of twenty miles of each of such roads or branches, may be sold; and so from time to time until said roads and branches are completed. * * *" By an act of congress approved March 3, 1865 (13 Stat. 526, c. 105), the aforesaid grant was increased to 10 sections per mile, and the indemnity limits were extended to 20 miles from said lines of road. As to the mode of disposing of the land, the act of March 3, 1865, provided as follows: "When the governor of said state shall certify to the secretary of the interior that any section of ten consecutive miles of said road is completed in a good, substantial, and workmanlike manner, as a first-class railroad, and the said secretary shall be satisfied that said state has complied in good faith with this requirement, the said secretary of the interior shall issue to the said state patents for all the lands granted and selected as aforesaid, not exceeding ten sections per mile, situated opposite to and within a limit of twenty miles of the line of said section of road thus completed, extending along the whole length of said completed section of ten miles of road, and no further. And when the governor of said state shall certify to the secretary of the interior, and the secretary shall be satisfied that another section of said road, ten consecutive miles in extent, connecting with the preceding section or with some other first-class railroad, which may be at the time in successful operation, is completed as aforesaid, the said secretary of the interior shall issue to the said state patents for all the lands granted and situated opposite to and within the limit of twenty miles of the line of said completed section of road or roads, and extending the length of said section, and no further, not exceeding ten sections of land per mile for all that part of said road thus completed under the provisions of this act and the act to which this is an amendment, and so, from time to time, until said roads and branches are completed. And when the governor of said state shall so certify, and the secretary of the interior shall be satisfied that the whole of any one of said roads and branches is completed in a good, substantial, and workmanlike manner, as a first-class railroad, the said secretary of the interior shall issue to the said state patents to all the remaining lands granted for and on account of said completed road and branches in this act, situated within the said limits of twenty miles from the line thereof, throughout the entire length of said road and branches. * * *" An act of congress approved July 13, 1866 (14 Stat. 97, c. 183), relative to the aforesaid grant, provided "that all the lands heretofore granted to the territory and state of Minnesota to aid in the construction of railroads, shall be certified to said state by the secretary of the interior, from time to time, whenever any of said roads shall be definitely located, and shall be disposed of by said state in the manner and upon the conditions provided in the particular act granting the same, as modified by the provisions of this act; * * * that the lands granted by any act of congress to the state of Minnesota, to aid in the construction of railroads in said state, specifically, lying in place, on any division of ten miles of road, shall not be disposed of until the road shall be completed through and coterminous with the same; provided, however, that this provision shall not extend to any lands authorized to be taken to make up deficiencies."

Turning to state legislation with reference to the aforesaid grant, and to other acts done which affect the questions at issue, the following may be mentioned as the most material: The grant made by the act of March 3, 1857, supra, was conferred by the territorial legislature on the Minnesota & Pacific Railroad Company, which had been incorporated to construct the main and branch lines of railroad aforesaid, but, that company having failed to discharge its obligations, the grant became revested in the state of Minnesota on June 23, 1860, by proper proceedings taken that are not challenged. The state thereafter, on March 10, 1862, incorporated the St. Paul & Pacific Railroad Company to construct said uncompleted lines of road, and, for the purpose of aiding it in so doing, conferred upon it "all the interest of the state,

present and prospective, in and to any and all the lands granted by congress to the territory of Minnesota," by the act of March 3, 1857, for the purpose of aiding in the construction of said lines of road, "together with all and singular the rights, privileges and immunities conferred and intended to be conferred by said act of congress." The act last aforesaid, creating the St. Paul & Pacific Railroad Company, and conferring upon it the rights and privileges aforesaid, contained the following provision as to the conveyance of said lands by the state: "Whenever said company shall actually complete that portion of the road between St. Paul and St. Anthony, so that regular trains of cars are running thereon, and not before, the governor shall certify the same to the secretary of the interior, and thereupon the title to one hundred and twenty sections of land shall vest in said company. And when twenty continuous miles of said road shall be completed, and regular trains running thereon, the title to a further quantity of one hundred and twenty sections of land shall vest in said company. And whenever said company shall actually complete twenty continuous miles of said road from Minneapolis westwardly, so as to admit of the running of regular trains of cars on the same, the governor shall certify the same to the secretary of the interior, and thereupon a further quantity of one hundred and twenty sections of said lands shall vest in said company; and so on, as often as any further twenty continuous miles of said road shall be completed so as to admit of the regular running of trains of cars thereon, the governor shall in like manner certify the same to the secretary of the interior, and a further quantity of one hundred and twenty sections of said land shall vest in said company; and it shall be the duty of the governor, whenever said road shall be completed between St. Paul and St. Anthony, in his official capacity, and on behalf of the state, to convey to said company one hundred and twenty sections of land; and whenever any further twenty continuous miles of said road or its branches shall be completed and in operation, the governor shall in like manner convey a further quantity of one hundred and twenty sections of land and so on as often as any further twenty continuous miles of said road or its branches shall be completed, shall in like manner convey to said company a further quantity of one hundred and twenty sections of land, until there shall be conveyed to said company all the lands to which they shall be entitled, according to the terms and provisions aforesaid. * * *" Sp. Laws Minn. 1862, c. 20. Prior to the passage of the last-mentioned act of March 10, 1862, the United States had certified to the state of Minnesota about 370,394 acres of land which pertained to the branch line aforesaid from St. Anthony, via St. Cloud and Crow Wing, to St. Vincent. On February 6, 1864, one E. B. Litchfield entered into an agreement with the St. Paul & Pacific Railroad Company to construct the main line of its road from St. Anthony to Breckenridge, and its branch line from St. Paul to Watab in Benton county, Minn., a place 80 miles northwest from St. Paul, and, in consideration therefor, the St. Paul & Pacific Railroad Company by said agreement sold, assigned, and transferred to Litchfield all of its "rights, benefits, privileges, property, franchises, and interests * * * under the laws of the territory or state of Minnesota" belonging to that porton of the branch line from St. Paul to Watab, "together with the lands granted by congress to the territory of Minnesota for the purpose of aiding in the construction of said eighty miles of road." It also sold and transferred to Litchfield, by the same agreement, all of its rights, franchises, etc., belonging to the main line from St. Anthony to Breckenridge, together with the land granted by congress for the purpose of aiding in the construction of that part of the main line. The agreement with Litchfield was subsequently fully ratified and confirmed by the state of Minnesota by legislative enactment, and Litchfield and his associates became consolidated into a corporation under the name of the First Division of the St. Paul & Pacific Railroad Company. Sp. Laws Minn. 1866, c. 1. The latter company will be hereafter termed the First Division Company. In this manner the St. Paul & Pacific Railroad Company became segregated into two corporations.

One day before the grant of March 3, 1857, was enlarged, as heretofore stated, that is to say, on March 2, 1865, the legislature of Minnesota passed an act which contained the following provision, to wit:

"Sec. 2. Any and all additional grants of land made prior to the passage of this act, or which may hereafter be made by the congress of the United States,

to the state of Minnesota for the purpose of aiding in the construction of the lines of railroad or any portion of them authorized to be constructed by the St. Paul and Pacific Railroad Company, shall inure to the benefit of said company, and said lands and the present and future interest of the state in or to them, are hereby granted and assigned unto the said company upon the same terms and conditions as the lands heretofore granted for the same purpose, together with the conditions contained in said act of congress donating the same. And the title of all lands heretofore, or hereafter granted by the congress of the United States, to the state of Minnesota for the purposes aforesaid, shall vest in said company at the time, and upon the terms prescribed by said act or acts of congress making the grant, and it shall be the duty of the governor, on behalf of the state, to convey to said company the lands so granted according to the terms and provisions contained in the act or acts aforesaid." Sp. Laws Minn. 1865, c. 6.

The so-called branch line from St. Paul to Watab was completed in sections, as follows: Ten miles of the road, from St. Paul to St. Anthony, were completed on or about July 2, 1862, prior to the organization of the First Division Company; by February 20, 1865, a further section of 10 miles, from St. Anthony in the direction of Watab, was completed; before March 3, 1865, when the grant was enlarged, an additional section of 20 miles was completed, making 40 miles of completed road counting from St. Paul, or 30 miles counting from St. Anthony; prior to September 18, 1866, a further section of 30 miles was completed to St. Cloud; some time in the fall of 1867, the branch line was extended by the First Division Company from St. Cloud to Sauk Rapids, the latter point being 76 $^{3}/_{10}$ miles distant from St. Paul, and about four miles from Watab; the First Division Company never constructed the remaining 4 miles necessary to reach Watab. The governor of the state of Minnesota made several conveyances to the First Division Company of lands pertaining to the branch-line land grant, on the assumption that the lands had been duly earned by the First Division Company under the legislative acts aforesaid, by the construction of the branch line to the extent last above indicated. Only three of the deeds so made are challenged in the present suit. The first of said three deeds was executed on August 22, 1866. It purported to convey 76,422.07 acres of land, about 11,540 acres whereof were situated north of Watab. The deed contained a recital that the governor had, on August 21, 1866, certified to the completion of a second section of 20 miles of the branch line, and that the First Division Company had become entitled to a deed for an additional 120 sections of land to aid in the construction of a third section of 20 miles of the branch line, which were thereby conveyed. The second deed was executed on September 20, 1866, and purported to convey 76,624.86 acres of land, about 58,721 acres whereof were north of Watab. This deed contained a recital that the governor had certified to the completion of a third section of 20 miles of the branch line, and that the grantee had become entitled to a conveyance of an additional 120 sections of land to aid in the construction of the fourth and last section of 20 miles of the branch line. The third deed was not executed until July 26, 1871. It purported to convey 77,008.86 acres of land, about 47,741 acres whereof were north of Watab. It contained a recital, in substance, that the land conveyed was land to which the First Division Company had become entitled under the various statutes heretofore mentioned, in consequence of the increase of the original grant from 6 to 10 sections per mile. The plaintiff company contended that, upon a true construction of the aforesaid federal and state statutes, the three deeds last above mentioned were executed without authority of law, and were utterly void as to the lands conveyed lying north of Watab. By an act of congress approved March 3, 1871 (16 Stat. 588, c. 144), the St. Paul & Pacific Railroad Company was authorized to change the course of the branch line beyond St. Cloud, by constructing it on a more direct route from St. Cloud to St. Vincent, without passing through Crow Wing, but this change of route was authorized on condition that it built a road about due north from St. Cloud, via Crow Wing, to Brainerd, Minn., to connect at that point with the Northern Pacific Railroad. The same act gave the same proportional grant of lands along the new route from St. Cloud to St. Vincent, on condition that the St. Paul & Pacific Railroad Company relinquished the old grant along the line as originally projected, from Crow Wing to St. Vincent.

The plaintiff company lays claim to all the lands north of the Watab terminal, about 118,000 acres, that were conveyed by the governor to the First Division Company by the three deeds aforesaid, on the following grounds, that is to say: The St. Paul & Pacific Railroad Company having failed to construct the line of road from St. Cloud to Brainerd, and from St. Cloud to St. Vincent on the new route, as authorized by the act of March 3, 1871, supra, the legislature of Minnesota, on March 1, 1877, passed an act entitled "An act to provide for the completion of the lines of railroad commonly known as the St. Paul and the Pacific Extension Lines."

The first section of that act was as follows: "Be it enacted etc., * * * That the rights, privileges, franchises, grants of land, and property heretofore held by the St. Paul and Pacific Railroad Company, appertaining to the uncompleted portions of that line of railroad extending from Watab to Brainerd, are hereby declared forfeited to the state, without merger or extinguishment, but are hereby preserved, continued and conferred upon the terms and conditions as in this act provided."

The second, third, and fourth sections of the act authorized persons holding bonds secured by mortgage on said extension lines to organize a "bond company" to complete the same, but such corporation was not organized, and these sections never became operative.

The fifth section of the act contained the following provision: "In case such a corporation as that herein designated the 'bond company,' shall not be duly and sufficiently organized for the purposes of this act, on or before May 1, 1877, * * * then, and in that case, any company or corporation now organized, or that may hereafter organize, having authority from this state to build, maintain and operate a line of railroad within or through the state, may succeed to and acquire the right to complete, own, maintain and operate the uncompleted portions of said line of railroad mentioned in the first section of this act, by filing with the governor a written notice of its desire and intention, under and subject to the provisions of this act, to complete, equip, maintain and operate the then uncompleted portions of said line of railroad. * * * Work shall be commenced thereon within thirty days after the filing of such notice, or as soon thereafter as the state of weather shall permit, and prosecuted to completion within one year from the filing of such notice. * * * But upon default to commence work or to prosecute the same to completion within the time aforesaid, said company shall forfeit all right to complete, maintain or operate the part or portion of said line remaining uncompleted at the time of such default. * * *"

The seventh, ninth, and tenth sections of the act contained the following provisions:

"Sec. 7. * * * Any company acting under and pursuant to the provisions of this act, shall become entitled to, and invested with, all and singular the rights, privileges, immunities, franchises, lands, and property appertaining to the portion of road it shall complete, which were formerly held by, or which formerly belonged to, the St. Paul and Pacific Railroad Company, or which were formerly granted to the St. Paul and Pacific Railroad Company, and shall be entitled to the same whenever and as often as any continuous ten (10) miles of road are completed. * * *"

"Sec. 9. One half of all the land up to two hundred thousand acres in quantity, which shall be first acquired on account of the construction of the present uncompleted line of railroad from Watab to Brainerd, * * * shall be reserved and retained by the state, to be used by it for the payment of the claims incurred for work and material furnished in the construction of said lines of railroad. * * *"

A board was also created by this section to audit and allow such claims and to sell the reserved lands for the purpose of paying the same after they had been allowed.

"Sec. 10. The St. Paul and Pacific Railroad Company, or any company or corporation taking the benefits of this act, shall not in any manner, directly or indirectly, acquire or become seized of any right, title, interest, claim or demand in or to any piece or parcel of land lying and being within the granted or indemnity limits of said branch lines of road, to which legal and full title has not been perfected in said St. Paul and Pacific Railroad Company, or their successors or assigns, upon which any person or persons have in good

faith settled and made or acquired valuable improvements thereon, on or before the passage of this act, or upon any of said lands upon which has been filed any valid pre-emption or homestead filing or entry, not to exceed one hundred and sixty acres to any one actual settler; and the governor of this state shall deed and relinquish to the United States all pieces or parcels of said lands so settled upon by any and all actual settlers as aforesaid, to the end that all such actual settlers may acquire title to the land upon which they actually reside, from the United States, as homesteads or otherwise, and upon the acceptance of the provisions of this act by said company, it shall be deemed by the governor of this state as a relinquishment by said company of all such lands so occupied by such actual settlers; and in deeding to the United States such lands, the governor shall receive as prima facie evidence of actual settlement on said lands, the testimony and evidence, or copies thereof, heretofore, or which may be hereafter taken in cases before the local United States land offices, and decided in favor of such settlers."

Sp. Laws Minn. 1877, p. 257, c. 201.

It is conceded that the Western Pacific Railroad Company, now known as the St. Paul & Northern Pacific Railroad Company (the plaintiff company), complied with the provisions of the foregoing act of March 1, 1877; that it completed the road from Watab to Brainerd about November 1, 1877, and thereby became entitled to all the property, lands, and franchises that were intended to be conferred by said act.

The defendant company, the St. Paul, Minneapolis & Manitoba Railway Company, deraigned title to the lands in controversy by foreclosure sales made under the following described mortgages: First, by a sale under a mortgage executed June 2, 1862, by the St. Paul & Pacific Railroad Company for the purpose of securing bonds, which mortgage covered the so-termed branch line from St. Paul to Watab, and purported to convey all the right, title, and interest the said company then had or might become entitled to of, in, or to the lands granted to the territory of Minnesota by the act of March 3, 1857, "for the purpose of aiding * * * in the construction of a railroad from St. Paul, via St. Anthony, Anoka and St. Cloud, to Watab on the Mississippi river, being three thousand eight hundred and forty acres of land for each mile, amounting in the aggregate to three hundred and seven thousand, two hundred acres, be the same more or less, and situated in the present state of Minnesota adjoining and adjacent to the line of the railroad" of the St. Paul & Pacific Railroad Company, "hereinbefore described." Second, by a sale under a mortgage executed by the First Division Company October 1, 1885, to secure certain bonds, which mortgage purported to convey all the right, title, and interest which the First Division Company then had or might become entitled to of, in, or to all of those sections of land granted to the territory and state of Minnesota by the acts of March 3, 1857, and March 3, 1865, to aid in the construction of the railroad lines mentioned in said acts, and which lands were subsequently granted by the state to aid in the construction of the branch line from St. Paul, via St. Anthony, Anoka, and St. Cloud, to Watab. The land so conveyed was further described in said mortgage as consisting of 10 sections per mile, amounting in the aggregate to 512,000 acres, and as being "situate in the present state of Minnesota adjoining and adjacent to the line of railroad" of said First Division Company, "as hereinbefore described." Third, by a sale under another mortgage, executed April 1, 1871, by the St. Paul & Pacific Railroad Company, covering the new or altered line, and land grant pertaining thereto, from St. Cloud to St. Vincent, which had been authorized by the act of March 3, 1871, supra; also covering the line required to be built by that act from St. Cloud, via Crow Wing, to Brainerd. The St. Paul & Pacific Railroad Company was made a party to each of the suits whereby the aforesaid mortgages were foreclosed. By virtue of sales made under the decrees of foreclosure in said suits, the defendant company claims to have succeeded to all the right, title, and interest of the First Division Company in and to the lands now in controversy which the latter company acquired through the legislation aforesaid, and by the agreement between Litchfield and the St. Paul & Pacific Railroad Company, heretofore mentioned. On March 7, 1881, the state of Minnesota, by legislative enactment, "fully ratified and confirmed" the several purchases so made as aforesaid by the defendant company of the lines of road heretofore described,

and the rights and franchises pertaining thereto. Sp. Laws Minn. 1881, c. 412. The original bill of complaint in the present action was filed on August 18, 1886. An amended complaint was filed five years thereafter, to wit, on August 31, 1891. The original bill prayed that the defendant company might be decreed to hold the lands in controversy, that is, the lands north of Watab, as a trustee for the plaintiff company, and that it be required to convey the same to the plaintiff by a good and sufficient deed; also, that it be required to account for the proceeds of all the lands in controversy that it had sold. The amended bill prayed for a cancellation of the aforesaid deeds executed by the governor of the state of Minnesota, as clouds upon the complainant's title, and that the defendant company might be compelled to account for the proceeds of such of said lands embraced in said deeds as it had sold and conveyed to third parties. The circuit court found and decided that the deeds executed by the governor of the state of Minnesota on August 22, 1866, September 20, 1866, and July 26, 1871, hereinbefore mentioned, were null and void so far as they conveyed lands north of Watab, and that they operated as a cloud upon the plaintiff company's title. 57 Fed. 272. It accordingly decreed that said deeds be canceled so far as they operated to cloud the plaintiff company's title, and that the defendant company pay to the plaintiff $270,844.05, the same being the amount found to have been received by the defendant company on account of lands sold. Both parties have perfected an appeal to this court, and both appeals are before us on the same record.

M. D. Grover and George B. Young (T. R. Benton, on the brief), for St. Paul, M. & M. Ry. Co.

Fred M. Dudley and James McNaught, for St. Paul & N. P. R. Co.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

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

The first question presented for consideration is one of jurisdiction, and, as both parties to the suit are corporations created by and existing under the laws of the state of Minnesota, the decision of the jurisdictional question turns upon the inquiry whether the case is one arising under the laws of the United States. Since the recent decisions in Tennessee v. Union & Planters' Bank, 152 U. S. 454, 14 Sup. Ct. 654; Chappell v. Waterworth, 155 U. S. 102, 15 Sup. Ct. 34; and Postal Telegraph Cable Co. v. Alabama, 155 U. S. 482, 15 Sup. Ct. 194,—it must be regarded as settled that the circuit court of the United States cannot entertain jurisdiction of a case as one arising under the constitution, laws, or treaties of the United States, whether such suit is commenced therein originally, or is brought there by removal, unless the plaintiff's complaint or declaration shows that it is a case arising under the federal constitution or national laws or treaties. And even under the judiciary act of March 3, 1875 (18 Stat. 470, c. 137), the same rule, it seems, was applicable to suits originally brought in the circuit court; that is to say, under that act the right to entertain a case brought therein originally, on the ground that it involved a federal question, depended upon the inquiry whether the plaintiff's statement of his cause of action showed the existence of a federal question. Tennessee v. Union Planters' Bank, supra; Metcalf v. Watertown, 128 U. S. 586, 589, 9 Sup. Ct. 173. The necessary result of this doctrine is that, when a complaint filed in the circuit court of the United States discloses a controversy arising under federal laws, the jurisdiction of the court will not be

defeated by any defense or plea that the defendant may see fit to make. If the plaintiff's right to sue in the national courts is to be tested solely by his complaint or declaration, and is not aided by any plea interposed by the defendant, no matter how clearly the latter may show that the construction or application of federal laws is involved, then it follows that, if jurisdiction is fairly disclosed by the plaintiff's statement of his own cause of action, it cannot be defeated by an answer or plea so conceived and drawn as to avoid the consideration of any federal question or questions. In other words, as was said, in substance, in Osborn v. Bank, 9 Wheat. 738, 824, the right of the plaintiff to sue does not depend upon the defense which the defendant may choose to set up, because the right to sue exists, if at all, before any defense is made, and must be judged exclusively as of the date of the filing of the complaint, on the state of facts therein disclosed. If, on the face of the complaint or declaration, the case is one which the court has the power to hear and determine, because of the existence of a federal question, it has the right to decide every issue that may subsequently be raised, and whether the decision of the case ultimately turns on a question of federal, local, or general law is a matter that in no wise affects the jurisdiction of the court. Mayor v. Cooper, 6 Wall. 247; Railroad Co. v. Mississippi, 102 U. S. 135, 141; Tennessee v. Davis, 100 U. S. 257, 264; Omaha Horse Railway Co. v. Cable Tramway Co., 32 Fed. 727.

In the light of these principles, we proceed to inquire whether any question of a federal character is presented by the bill of complaint which it may become necessary to decide in disposing of the issues involved in the present controversy. In the consideration of this question we do not deem it essential to state in detail all of the allegations of the amended bill, on which the case appears to have been tried and decided. It will suffice to say in this behalf that the amended complaint set forth by appropriate allegations all of the legislation, both state and national, affecting the land grant in question, and all of the facts and circumstances pertaining thereto, which we have already recited at length in the foregoing statement. In addition to such averments, the amended bill also alleged, in substance, that the lands now in controversy, being those situated north of Watab, were conveyed by the governor of the state of Minnesota to the First Division Company before the line of road along which they specifically lay in place was completed through and coterminous therewith; that the road abreast of which the disputed lands lie was constructed by the plaintiff company, and not by the First Division Company; that no part of said lands ever belonged or pertained to that part of the branch line which was constructed by the First Division Company, and that, in executing the deeds for the lands in controversy to the First Division Company, the governor of the state acted "wrongfully and without authority of law," and that the deeds so executed were "contrary to law, and void." The bill further averred that the plaintiff company was the owner of, and that it laid claim to, all the lands in dispute; that the defendant company had no interest therein or right thereto; and it contained a prayer that the plaintiff company be decreed to be the

owner of said lands, and that the deeds executed by the governor be adjudged to be null and void, and that the same be canceled as a cloud upon its title. In all of its essential features, therefore, the case made by the amended complaint was a suit to remove a cloud and to quiet title. It does not follow, however, that the case at bar is one of federal cognizance because it contains a reference to numerous acts of congress, and lengthy extracts therefrom. A case which in fact depends for its decision upon questions of local or general law cannot be brought within the jurisdiction of a federal tribunal as one arising under the constitution and laws of the United States merely by a reference in the complaint or declaration to some federal statute or statutes, and by setting up a claim thereunder which is merely colorable, and obviously without any reasonable foundation. If such a practice was tolerated, the result would be that the jurisdiction of the federal courts would be unduly enlarged, and made to comprehend a class of cases which were never intended to be tried therein. New Orleans v. New Orleans Water Works, 142 U. S. 79, 12 Sup. Ct. 142; Hamblin v. Land Co., 147 U. S. 532, 13 Sup. Ct. 353; St. Louis, etc., Ry. Co. v. State of Missouri, 15 Sup. Ct. 443.

At this point it accordingly becomes necessary to examine the various grounds upon which the plaintiff company predicates its right to recover. It is obvious that it derives its right to sue solely from the act passed by the legislature of the state of Minnesota on March 1, 1877, the material provisions of which act have been embodied in the foregoing statement. In the absence of that enactment, the plaintiff company would have no standing in any court, state or federal, to challenge the defendant's title to the lands in controversy, whether the deeds conveying the same are valid or invalid, void or voidable. The first question, then, that is encountered in the case is whether, by the act last aforesaid, the legislature of the state in fact intended to transfer the lands north of Watab, which had theretofore been deeded by the governor of the state to the First Division Company, to such other railroad company as might construct the uncompleted line of road from Watab to Brainerd, and whether, if it did so intend, the language of the act was adequate to vest in such company as elected to complete the road a legal title to such lands north of Watab and within the limits of the grant as the state then had power to convey. With respect to this question, a controversy arises between the two companies. It is the primary issue in the case. And it must be conceded, we think, that this controversy between the parties raises a question of local law which is in no wise dependent for its decision upon the construction of any federal statute. But if this primary question is decided in the affirmative, as the plaintiff contends that it ought to be, such decision is not decisive of the plaintiff's right to recover. It is merely one step in the direction of a recovery, and, for that reason, it cannot be said that the plaintiff's cause of action is founded solely on a state law, and that it grows out of the act of March 1, 1877. To entitle the plaintiff to a decree, it must further show that the deeds executed by the governor covering lands

north of Watab were invalid; that the title of the state to said lands was not divested by the execution of said deeds, and that on March 1, 1877, the legislature of the state still had power to convey said lands by legislative enactment to such company as might elect to construct the uncompleted line from Watab to Brainerd. It is apparent, we think, that the plaintiff endeavors to establish the foregoing proposition that the deeds were in fact void, and that the lands in controversy remained subject to the disposal of the state of Minnesota, because of the invalidity of the prior conveyances, on two grounds. In the first place, it insists that the Litchfield agreement of date February 6, 1864, which was subsequently approved and confirmed by the state, operated as a division of the land grant pertaining to the branch line, so that neither Litchfield nor his successor in interest, the First Division Company, could thereafter acquire any right or title whatsoever to any lands pertaining to said grant lying north of Watab, whether they were located within the place or indemnity limits. This, without doubt, is the ground on which the plaintiff chiefly relies for the purpose of establishing the proposition that the governor acted wholly without authority in executing deeds in favor of the First Division Company for the lands now in controversy. But, in addition to such contention, plaintiff also insists, and the allegations of the bill seem to be sufficiently full and specific to furnish a foundation for such contention, that the deeds in question were also unauthorized and void by virtue of limitations and conditions found in the several acts of congress by which the lands in controversy were granted to the territory and state of Minnesota, in trust, to aid in the construction of a branch line of road from St. Anthony, via Anoka, St. Cloud, and Crow Wing, to St. Vincent. In support of this position, it is contended, in substance, that the state held the legal title to all the lands embraced in the grant in trust, and that it could only convey the same on the conditions prescribed in the several acts of congress which created the trust; that, upon a true construction of the grant, the state had no power to convey lands lying within place limits, in advance of construction, after the first 120 sections had been sold; that it had no power to convey lands to any railway company unless the tracts so conveyed were "included within a continuous length of twenty miles of road"; that the granting act of March 3, 1857, set apart and appropriated to the construction of each consecutive section of 20 miles of road the place lands lying abreast of or coterminous with each section, and that the granting act of March 3, 1865, in like manner set apart and appropriated to the construction of each consecutive section of 10 miles of road enough place and indemnity lands coterminous therewith to make altogether 100 sections of land for each 10 miles of road. It is insisted that the deeds now in controversy are invalid, without reference to state legislation, because they were executed by the governor of the state in violation of each of the foregoing provisions claimed to have been contained in said acts of congress.

The ground first stated, on which the plaintiff company bases its claim that the deeds executed by the governor were invalid, does

not involve the consideration or decision of any federal question. In construing the Litchfield agreement, and in determining what lands the St. Paul & Pacific Railroad Company intended by that contract to transfer to Litchfield and his associates, it might be found expedient, or even necessary, to consult the act of congress of March 3, 1857, which is referred to therein, and with reference to which the contract appears to have been executed. But, after all, the point at issue upon this branch of the case is the true construction of that agreement, and that is clearly a question of general and local law, inasmuch as the right asserted by the plaintiff depends upon that agreement, and the local statute by which it was adopted and confirmed. A case does not become one of federal cognizance because it may be found necessary, in construing a private contract or a local law from which the rights of the respective parties are derived, to consult some federal statute with a view of ascertaining the meaning of the contract or the scope and effect of the local law. In such cases the cause of action or the defense, as the case may be, is not founded on a law of the United States in any such sense as to bring the suit within the jurisdiction of the federal courts. Miller's Ex'rs v. Swann, 150 U. S. 132, 14 Sup. Ct. 52. It is equally clear, however, that in so far as the plaintiff company challenges the validity of the deeds on the second ground above stated, because they were executed in violation of the provisions of the several granting acts heretofore mentioned, the case at bar does involve certain federal questions which it might be found necessary to decide, and on the decision of which the right of the plaintiff to recover would depend. If the plaintiff company fails to maintain its position that the Litchfield agreement, as confirmed by state legislation, operated to divide the grant and to withdraw the lands north of Watab from the reach of the First Division Company, or that the deeds in question were executed in violation of other state laws, then it seems obvious that the court would find itself compelled to consider the federal questions above suggested,—whether the deeds were rightfully executed under federal laws, and operated to divest the state of its title to all or any of the lands therein described which lie north of Watab. It is proper to observe in this connection that we are not concerned at present with the merits of the several propositions heretofore stated on which the plaintiff bases its claim that the deeds executed by the governor were void, and conveyed no title to the lands situated north of Watab. Whether the construction that is placed on the granting acts by the plaintiff company with a view of impeaching the conveyances is sound or unsound, we need not stop at this point to inquire, because the jurisdiction of the circuit court does not depend on that inquiry. If it appears, in any aspect which the case may assume, that the right of recovery may depend upon a construction of those acts, and if the right to recover so far as it turns on the construction of federal statutes is not merely a colorable claim, but rests upon a reasonable foundation, then a federal question is involved which is adequate to confer jurisdiction. We entertain no doubt that certain provisions contained in the several acts of congress relative to the disposal of the lands by the

state and territory of Minnesota are of such a nature as to afford a reasonable ground for the contention that the lands in controversy were not conveyed by the governor of the state in conformity therewith, and that the deeds were for that reason voidable, if not void. We think that the plaintiff company may fairly invoke a construction of those statutes, and that the allegations of the bill are sufficient for that purpose. Nor is it at all material, so far as the question of jurisdiction is concerned, that the court may not be compelled to construe the acts of congress in the respects stated, or in any other, for, as we have already shown, its jurisdiction does not depend upon the nature of the question that is ultimately decisive of the plaintiff's right to recover. If a case is commenced originally in the circuit court, and, by a fair construction of the complaint, it appears that the plaintiff predicates his right to relief on the meaning or effect of a law of the United States, and the claim is made in good faith, so that there is a real instead of a merely colorable controversy, then jurisdiction over the case exists, even though it may appear that the right to the same relief is asserted on another ground, that does not involve the consideration of a federal question. In concluding the discussion on this branch of the case, it is proper to add that we do not concur in the view that the case is one of federal cognizance merely because the title to the lands in controversy is derived from the United States. The bill shows very conclusively that both parties claim under the state of Minnesota, that the title to the state is not challenged, but is conceded to be well founded under the granting acts. The questions at issue all grow out of the manner in which the state dealt with the lands after it acquired the same from the general government. Nor is the case one in which the parties are asserting rights derived respectively from conflicting land grants. Under these circumstances it must be conceded, we think, in accordance with the decision in Romie v. Casanova, 91 U. S. 379, that a federal question is not involved in the case merely because the United States is the ultimate source of title. The jurisdiction of the court must be upheld, however, on the ground heretofore stated.

The next question in order is whether the legislature of the state of Minnesota intended to declare by the act of March 1, 1877, that the particular lands in dispute were thereby forfeited to the state and conferred on such company as might thereafter complete the line from Watab to Brainerd, notwithstanding the previous conveyance thereof by the governor to the First Division Company. The decision of this question turns wholly upon the intention of the legislature, to be ascertained by all of the surrounding facts and circumstances, and the maxim must be applied that, no matter how general may be the language of a statute, that which was not within the intention of the lawmaker is not within the law. It is a notable fact, in its bearing upon the question now under consideration, that two of the deeds, the validity of which is denied, were executed and filed for record in the proper registry office of the state of Minnesota more than 10 years prior to the act of March 1, 1877, and that the other deed was executed and filed nearly 6 years prior thereto, to

wit, on July 26, 1871. In the meantime, that is to say from August, 1866, to March, 1877, the grantee in said deeds, the First Division Company, had sold and conveyed over 25,000 acres of the lands thus deeded to it, which were situated north of Watab, to various purchasers, who had settled upon some of the lands, and had very likely made valuable improvements thereon. It is not shown by the record that any one had ever questioned the validity of said conveyances prior to March 1, 1877, although, according to the present contention of the plaintiff company, the equitable title to much of the land embraced in the deeds, during all of said period, was vested in the St. Paul & Pacific Railroad Company, which was then a going concern, and most likely active in the defense of its interests. The plaintiff company likewise failed to challenge the several deeds for eight years after it had taken advantage of the provisions of the act of March 1, 1877, and had completed the line of road from Watab to Brainerd, and had thereby become entitled, according to its present contention, to demand a conveyance from the state of the lands now in dispute. Moreover, it suffered a period of five years more to elapse before it took the position which it now seeks to maintain, that the deeds in question were absolutely void when executed, and did not even operate to divest the state of the legal title. In view of these facts, it admits of no doubt, we think, that when the act of March 1, 1877, was adopted, the opinion prevailed generally among all persons who were aware of the existence of the deeds that they had been executed in substantial conformity with existing laws, and were valid conveyances. This belief that the deeds operated to convey a good title was probably strengthened by the fact disclosed by the testimony that, in executing the same, the governor of the state had acted under and pursuant to the advice of the attorney general.

It has been suggested that when the act of March 1, 1877, was adopted, the legislature was ignorant of the fact that any lands north of Watab had been conveyed to the First Division Company. This suggestion, even if it was well founded, would not determine the intention of the legislature with respect to the lands in controversy, neither would it be decisive of the construction which the act of March 1, 1877, ought to receive. The act shows very clearly that the legislature intended, by the sale of a part of the forfeited lands, to secure the payment of all claims that existed against the St. Paul & Pacific Railroad Company growing out of work theretofore done or materials furnished by individuals towards the construction of the line north of Watab, and that it also intended to protect all persons who had made settlements upon, or filed claims against, any of the lands lying within the limits of the grant between Watab and Brainerd. The tenth section of the act, as will be seen, excluded from the grant made by the state to such company as might complete the line from Watab to Brainerd all lands that had been settled upon in good faith, or against which valid homestead or pre-emption claims had been filed on or before the passage of the act. It is not too much to say that the act bears the strongest internal evidence of an in-

tention on the part of the legislature not to disturb existing rights or titles of any sort, but to protect settlers and all other persons who had colorable claims to the land, or any part of it. The general purpose seems to have been to vest in such company as might complete the line from Watab to Brainerd the right, on completion, to demand conveyances from the state of such lands within the limits of the grant as were clearly subject to its disposal because of the existence of no outstanding claims. We can scarcely conceive it to be possible that the legislature would have been any less solicitous to protect individuals who had purchased land from the First Division Company in reliance on the title conveyed by the deeds executed by the governor, than it was to protect persons who had made settlements on the land, possibly after the definite location of the line and after the withdrawal of the lands from sale. On the assumption, therefore, that the legislature was ignorant of the existence of the deeds, yet without a more definite expression of such a purpose, the act ought not to receive a construction that will bring within its purview lands that had already been conveyed by the governor to the First Division Company, in the belief that it had earned the same and was justly entitled thereto. We are persuaded, however, that it is not probable that the legislature passed the act of March 1, 1877, in ignorance of the fact that the deeds in question had been executed. The long period that had then elapsed since they were executed, the publicity that had been given to the same by filing them in the proper office and by certifying lists of the tracts of land thereby conveyed to the several counties where they were situated, the quantity of land that had actually been sold, and the discussions and investigations which usually precede the passage of such legislative enactments as the act of March 1, 1877, render it highly improbable, we think, that the legislature could have been ignorant that such conveyances had been executed and delivered, and that a portion of the land had been sold. It is most reasonable to presume that the legislature was well acquainted with the fact that certain lands north of Watab had been conveyed to the First Division Company, and that it shared in the common belief then entertained by all persons who were aware of the existence of the deeds, that they had been executed in accordance with law, and that the lands thereby conveyed would not be affected by the provisions of the act, because they were no longer subject to legislative control. From the standpoint occupied by the legislature, believing as it did, no doubt, that the previous conveyances were valid, it was both a reasonable and natural view that the language of the act granting the "lands * * * appertaining to the portion of the road it shall complete * * * formerly held by * * * the St. Paul and Pacific Railroad Company" could only be held applicable to lands then subject to its disposal, that is to say, to lands not theretofore earned or conveyed. Moreover, the execution of the deeds by the governor was an act done by him in an official capacity, and future legislatures, as well as his successors in office, were bound to take notice of what had already been done by the

executive department of the government in discharge of duties devolved upon it by law.

There is another consideration to be briefly noticed which strongly supports the foregoing conclusions. The legal title to all the lands in controversy, at the date of their conveyance by the governor, was undoubtedly vested in the state of Minnesota. The state had been authorized by the general government to dispose of the lands in aid of the construction of a certain line of railroad. It was obviously contemplated by congress that the state would pass laws designating a beneficiary of the grant, and prescribing the manner in which the lands should either be sold by the state, or the title thereof be transferred to such company or companies as might be formed to construct the proposed road. Such laws were, in fact, passed both by the territory and the state, and the local legislation on that subject, as might have been anticipated, became elaborate and complex. The execution of these laws was committed to the governor of the state. He was empowered to execute deeds, from time to time as the work of construction progressed, for all of the lands lying within the limits of the grant, and in the discharge of that duty it became necessary for the governor to consider and decide whether the conditions had been fulfilled which entitled the beneficiary company or companies to demand conveyances from the state. After the St. Paul & Pacific Railroad Company had become segregated into two corporations by the Litchfield agreement, and by the act of the legislature approving and confirming the agreement, it undoubtedly became the duty of the governor to decide, in the first instance, how much of the granted lands passed by that agreement to the First Division Company, and whether it could lawfully lay claim to any lands, either within the place or indemnity limits, that were situated north of Watab, and, if so, to what extent it could rightfully lay claim thereto. The record discloses that some of these questions which were thus committed to the decision of the governor, in the course of time, and particularly in view of the Litchfield agreement, became complex and difficult of solution. Inasmuch, then, as the legal title to the lands in controversy was vested in the state, and the governor had been given power to execute conveyances therefor, and to determine, as between different companies, which was entitled to them, and whether the conditions warranting a conveyance of the same had been fulfilled, the conclusion follows that the deeds in controversy were not void, but at most were only voidable. According to well-established principles, an erroneous decision by the chief magistrate of a question intrusted to him to decide cannot be said to have had the effect of rendering a deed executed by him in conformity with such decision absolutely null and void. The numberless titles in the state of Minnesota, and perhaps in other states as well, which rest upon deeds executed by its chief executive officer under similar circumstances, and the very common practice of relying implicitly upon titles emanating from the state, admonish us to be cautious in sanctioning the doctrine that a mistake made in

the construction of a law is sufficient to render a deed utterly void, although the power to convey the particular tract of land to some one is undoubtedly vested in the officer. In the case of U. S. v. Winona & St. P. R. Co., 67 Fed. 948, which has been under advisement, and has been considered by this court in connection with the case at bar, we have stated succinctly under what circumstances a patent for lands will be esteemed void, and when it will be held to be merely voidable. It is sufficient to say at present that, within the rules announced in that case, if the governor of the state of Minnesota acted under a mistaken view of the law in executing the several deeds now in question to the First Division Company, such conveyances were at most only voidable, and so the circuit court appears to have held.

It results from this view—that if the deeds are invalid they are at most only voidable—that we should be forced to conclude that the act of March 1, 1877, was not intended to declare a forfeiture of the lands theretofore conveyed by the governor, even if we believed it to be probable that the legislature acted under the impression that those conveyances had been erroneously executed. We would not feel authorized to infer merely from the general language of the statute, and in the absence of any allusion to said deeds or to titles acquired thereunder, that the legislature intended to declare, without judicial proceedings of any sort, that the lands theretofore conveyed by the governor were thereby forfeited to the state and granted to another company. The question now under discussion being merely as to the intent of the legislature, it is not necessary to decide whether it was competent for the state, by legislative enactment, to forfeit lands which had been erroneously conveyed by the governor, and were held by the grantee under a voidable deed, or whether the exercise of that power pertains solely to the judiciary, as was held in Fletcher v. Peck, 6 Cranch, 87. For present purposes, it will suffice to say that it ought not to be presumed that the legislature intended to exercise the authority in question without unmistakable evidence of such a purpose, and that we find nothing in the act of March 1, 1877, or in the circumstances which induced the passage of that measure, which satisfies us that such was the legislative intent. It follows, from the construction which we have felt compelled to place on the act of March 1, 1877, that the plaintiff company did not, by the provisions of that act, acquire any such title to or interest in the lands in controversy as will enable it to maintain the suit at bar.

The decree of the circuit court is accordingly reversed, and the cause is remanded to that court, with directions to dismiss the bill of complaint at the complainant's cost.

PITTSBURGH, C. & ST. L. R. CO. et al. v. KEOKUK & H. BRIDGE CO.

(Circuit Court of Appeals, Seventh Circuit. January 14, 1895.)

EQUITY—JURISDICTION.

The I. C. R. Co. and three other railroad companies made a contract with a bridge company by which such railroad companies were granted the right in perpetuity to a certain bridge and agreed to pay monthly tolls, and, if such tolls fell below a certain sum, each agreed to pay one-fourth of the deficiency. The I. C. R. Co. executed the contract at the request of the P. and Pa. R. Cos., which agreed to assume all the liabilities of such contract, the same as if it had been specifically named, and made a part of a certain article of a prior lease by the I. C. R. Co. of its road to the P. and Pa. R. Cos., by which the lessee agreed to assume and carry out certain existing contracts for transportation over roads of other companies, and the Pa. R. Co. guarantied performance by the P. R. Co. By such contract the companies named agreed to keep books of account, which should exhibit the number of passengers and the number of tons of freight transported monthly over such bridge, which books should be at all times subject to the inspection of the bridge company. *Held*, that a court of equity has jurisdiction of a bill by the bridge company against the P. and Pa. R. Cos. to assert liability to complainant under defendants' agreement with the I. C. R. Co., and for an accounting with respect to alleged deficiency in earnings under such contract.

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

J. T. Brooks and George Hoadley, for appellants.

Lyman Trumbull and Perry Trumbull, for appellee.

Before JENKINS, Circuit Judge, and BUNN and SEAMAN, District Judges.

JENKINS, Circuit Judge. The affirmative answer by the supreme court to the question we submitted to them (155 U. S. 156, 15 Sup. Ct. 42) establishes the liability of the appellants. The only question remaining to be considered arises upon the objection taken by the answer that the controversy between the parties is within the cognizance of the courts of common law only, and not of the courts of equity; and that, therefore, a court of equity is without jurisdiction to entertain the suit. The principal contract was between the bridge company and the Columbus, Chicago & Indiana Central Railway Company (for brevity called the Indiana Central Company) and three other railway companies, by which the Bridge Company granted to the four railway companies in perpetuity the right to use its bridge over the Mississippi river upon payment of certain specified tolls. The Indiana Central Company's line of railroad did not reach within 200 miles of the Mississippi river, but the railroads of the several railway companies parties to the contract, with the railroads of the Pittsburgh Company and the Pennsylvania Company, appellants, and with the bridge of the appellee company, formed a continuous line of transportation from Philadelphia to Des Moines, Iowa. By the bridge contract the three railway companies which immediately connected with the bridge at the river agreed to keep books of account which should exhibit the number of passengers and the number of tons of freight trans-

ported monthly over the bridge, which book should be at all times subject to the inspection of the Bridge Company. It was further provided by the contract that if the aggregate net earnings for the whole freight transported by all railroad companies over the bridge should in any one year exceed $150,000, the surplus should be divided, one-half to the Bridge Company and one-half to the railway companies parties to the contract, to be divided among them in proportion to their respective tonnage over the bridge. If the net earnings for freight should fall below $80,000 in any one year, the railway companies should pay to the Bridge Company, each for itself and not for the other, one-fourth part of such deficiency. By an amendment to the contract it was provided that the net earnings of the bridge should be applied first to the payment of the interest on $1,000,000 of mortgage bonds of the Bridge Company, and then to the payment of a dividend not exceeding 8 per cent. in any one year upon $1,000,000 of capital stock, and that any net resources in excess of the sums necessary to pay such interest and dividends should belong to the railroad companies, parties to this contract, to be divided among them as provided in the contract. The contract in question was executed by the Indiana Central Company after the lease of its line to the Pittsburgh Company. The Pennsylvania Company was a party to that lease, guarantying to the Indiana Central Company the performance by the Pittsburgh Company of the obligations assumed. The execution of the bridge contract by the Indiana Central Company was at the request of the Pittsburgh and Pennsylvania Companies, who agreed to assume all the liabilities and obligations, and be entitled to all the benefits of the bridge contract, the same as if it had been specifically named and made part of the ninth article in the lease from the Indiana Central Railroad Company to the Pittsburgh and Pennsylvania Companies, dated January 22, 1869. The bill is filed directly against the Pittsburgh and Pennsylvania Companies to assert liability to the Bridge Company under their agreement with the Indiana Central Company, and for an accounting with respect to alleged deficiency in earnings under the contract.

The judiciary act of 1789 provided that "suits in equity shall not be sustained in either of the courts of the United States in a case where a plain, adequate and complete remedy may be had at law." 1 Stat. 82; Rev. St. § 723. This provision has been held to be merely declaratory, making no alteration whatever in the rules of equity upon the subject of legal remedy. Boyce's Ex'rs v. Grundy, 3 Pet. 210, 215; Wehrman v. Conklin, 155 U. S. 314, 15 Sup. Ct. 129. The adequate remedy at law which is the test of equitable jurisdiction in the federal courts is that which existed at the adoption of the judiciary act. Thus it was said by Judge Story in Pratt v. Northam, 5 Mason, 95, 105, Fed. Cas. No. 11,376:

"It has been often decided by the supreme court that the equity jurisdiction of the courts of the United States is not limited or restrained by the local remedies in the different states; that it is the same in all the states, and is the same which is exercised in the land of our ancestors, from whose jurisprudence our own is derived."

The same learned judge, in Gordon v. Hobart, 2 Sumn. 401, 403, Fed. Cas. No. 5,609, declared that state regulation respecting suits is wholly inapplicable to the general equity jurisdiction of the courts of the United States, which can in no manner be limited or controlled by state regulation. So, also, Judge Curtis, in Cropper v. Coburn, 2 Curt. 465, 472, Fed. Cas. No. 3,416, declares:

"When the judiciary act speaks of a plain, adequate, and complete remedy at law, it refers to the common law, not to the statutes of the states. Robinson v. Campbell, 3 Wheat. 212; Bodley v. Taylor, 5 Cranch, 191; U. S. v. Howland, 4 Wheat. 109; Boyle v. Zacharie, 6 Pet. 648. The equity jurisdiction of the courts of the United States is the same in all the states."

Mr. Justice Woods, while circuit judge, declared (Kimball v. Mobile Co., 3 Woods, 555, 565, Fed. Cas. No. 7,774):

"No law of Alabama providing another forum or another method of procedure could deprive the complainants of their right under the constitution and laws of the United States, or circumscribe the jurisdiction of the equity courts of the United States. Bennett v. Butterworth, 11 How. 669; Thompson v. Railroad Co., 6 Wall. 134; Case of Broderick's Will, 21 Wall. 503; Noyes v. Willard, 1 Woods, 187, Fed. Cas. No. 10,374; Benjamin v. Cavaroc, 2 Woods, 168, Fed. Cas. No. 1,300."

In Payne v. Hook, 7 Wall. 425, it was insisted that a federal court of chancery sitting in Missouri would not enforce demands against an administrator or executor when the court of the state invested with general chancery powers could not enforce similar demands, and that the complainant should be remanded for redress to the local court of probate. The court, however, overruled the objection, declaring at page 430:

"We have repeatedly held 'that the jurisdiction of the courts of the United States over controversies between citizens of different states cannot be impaired by the laws of the states which prescribe the mode of redress in other courts, or which regulate the distribution of their judicial power.' If local remedies are sometimes modified to suit the changes in the laws of the states and the practice of their courts, it is not so with equity. The equity jurisdiction conferred on the federal courts is the same that the high court of chancery in England possesses, is subject to no other limitation or restraint by state legislation, and is uniform throughout the different states of the Union."

In McConihay v. Wright, 121 U. S. 205, 7 Sup. Ct. 940, the equity jurisdiction of the federal court was challenged because a remedy at law was afforded by the statute of West Virginia. But the court overruled the plea, asserting:

"Admitting this to be so, it nevertheless cannot have the effect to oust the jurisdiction in equity of the courts of the United States as previously established. That jurisdiction, as has often been decided, is vested as a part of the judicial power of the United States in its courts by the constitution and acts of congress in execution thereof. Without the assent of congress, that jurisdiction cannot be impaired or diminished by the statutes of the several states regulating the practice of their own courts. Bills quia timet, such as the present, belong to the ancient jurisdiction in equity, and no change in state legislation giving in like cases a remedy by action at law, can, of itself, curtail the jurisdiction in equity of the courts of the United States. The adequate remedy at law, which is the test of equitable jurisdiction in these courts, is that which existed when the judiciary act of 1789 was adopted, unless subsequently changed by act of congress."

We think it beyond question that the subject of the action is within the cognizance of equity as recognized at the time of the adoption of the judiciary act. The case is likened by the learned counsel for the appellants to that of the grantee of mortgaged premises who has assumed the mortgage debt. If it be so, it is settled that, in the absence of state legislation or decision, the remedy of the mortgagor against the grantee is in equity. In Insurance Co. v. Hanford, 143 U. S. 187, 190, 12 Sup. Ct. 437, the court says:

"By the settled rule of this court the grantee is not directly liable to the mortgagee at law or in equity, and the only remedy of the mortgagee against the grantee is by bill in equity in the right of the mortgagor and grantor, by virtue of the right in equity of a creditor to avail himself of any security which his debtor holds from a third person for the payment of the debt."

It is true that the court in the course of the opinion observed that "the question whether the remedy of the mortgagee against the grantee is at law and in his own right, or in equity and in the right of the mortgagor only, is—as was adjudged in Willard v. Wood [infra], above cited—to be determined by the law of the place where the suit is brought." But that was not said as controlling the form of action in the federal court. The lex fori was there ascertained and asserted to determine the contract relation existing between the grantee and the mortgagee as affecting a subsequent agreement of the mortgagor with the grantee without the assent of the grantor. The case does not assume to decide that the remedy at law afforded by the law of the state would preclude a resort to a remedy in equity in the federal court if such remedy was appropriate. Nor does the case of Willard v. Wood, 135 U. S. 309, 10 Sup. Ct. 831, therein referred to, in any way conflict with the established doctrine of the federal courts. In that case the administrator of the assignee of the mortgage brought an action at law in the District of Columbia against the executrix of a purchaser of the equity of redemption to recover the mortgage debt remaining unsatisfied after foreclosure and sale of the mortgaged premises. The mortgaged premises were situated in, and the debt contracted in, the state of New York. It was insisted that, as by the law of that state the suit could be maintained either at law or in equity, the plaintiff had his election of remedy in the District of Columbia, where the suit was brought. The court held that the form of the remedy, whether at law or in equity, was governed by the lex fori,—the law of the District of Columbia,—and could only be in equity. The case is far from asserting that local law can control the form of remedy in the federal courts. It may well be that, if the law of a state in which the federal court is located and where suit is brought permits an action at law where the remedy was formerly in equity only, the federal court will entertain jurisdiction at law of such a suit upon the ground that the remedy so afforded is concurrent; but we fail in search of authority to the effect that such remedy excludes the ancient jurisdiction of equity. It was said by Lord Eldon in Eyre v. Everett, 2 Russ. 381:

"This court will not allow itself to be ousted of any part of its original jurisdiction because a court of law happens to fall in love with the same or a similar jurisdiction."

It becomes, therefore, unnecessary to review the several decisions of the supreme court of Illinois to which we are referred, and which it is asserted would uphold an action at law to assert the liability of the appellants upon the contract in question; because, if they so declare, the remedy at law, so afforded, would, we think, be at most concurrent, and not in exclusion of the undoubted jurisdiction in equity. We are of opinion that the judgment should be affirmed.

DENVER & R. G. R. CO. v. WALKER et al.

(Circuit Court of Appeals, Eighth Circuit. May 20, 1895.)

No. 578.

APPEALABLE ORDER—ORDER DISSOLVING INJUNCTION.

An order made by a district judge, in vacation, before the act of February 18, 1895, amending section 7 of the act of March 3, 1891 (26 Stat. 826, c. 517), went into effect, which dissolves a temporary restraining order made on an intervening petition, is not appealable.

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

This was an intervening petition by the Denver & Rio Grande Railroad Company in a suit in which the respondents, Aldace F. Walker, John J. McCook, and Joseph C. Wilson, had been appointed receivers of the Colorado Midland Railroad Company. A temporary restraining order was made, on the motion of the intervener, to prevent the receivers from laying a track. The district judge of the district of Colorado made an order, in vacation, dissolving the injunction. The intervener appealed. The receivers move to dismiss the appeal.

Edward O. Wolcott, Joel F. Vaile, and Henry F. May, for appellant.

Charles E. Gast filed brief in support of the motion to dismiss the appeal.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. The motion to dismiss the appeal in this case appears to be well founded. The appeal was taken from an order made at chambers dissolving a temporary restraining order theretofore granted against Aldace F. Walker, John J. McCook, and Joseph C. Wilson, receivers of the Colorado Midland Railroad Company. On an intervening complaint filed by the Denver & Rio Grande Railroad Company in the suit in which the receivers had been appointed, the circuit court for the district of Colorado granted a temporary restraining order to prevent the receivers from laying a track across the track of the Denver & Rio Grande Railroad Company. It also issued, in connection therewith, a rule to show cause why an injunction pendente lite should not be granted. On the return made by the receivers to the rule to show cause, and on the hearing of certain testimony, the Honorable Moses Hallett, district judge for the district of Colorado, dissolved the temporary restrain-

ing order aforesaid. Treating the order appealed from as an interlocutory order, it is not within the purview of section 7 of the act of March 3, 1891 (26 Stat. 826, c. 517), which only allows an appeal from interlocutory orders of the circuit and district courts "granting or continuing" an injunction. The order dissolving the injunction, from which the appeal was taken, was made at chambers, and in vacation, on October 3, 1894, before the act of February 18, 1895, amending section 7 of the act of March 3, 1891, was adopted. The last-mentioned amendatory act permits an appeal from interlocutory orders of the district and circuit courts "granting, continuing, dissolving or refusing to dissolve an injunction," but that act can have no retroactive effect. The appeal cannot be sustained on the ground that the order appealed from is not an interlocutory order, but a final order. The order in question did not dismiss the intervening complaint on which the preliminary restraining order and rule to show cause was obtained, but leaves that complaint still pending and undetermined, for such further relief thereon, if any, as the court, on final hearing of the same, may see fit to award. Moreover, the order dissolving the injunction, from which the appeal is taken, was not made by the circuit court, but by the district judge for the district of Colorado, in vacation. For both of these reasons, it is not a final order or decree from which an appeal will lie. Thomas v. Wooldridge, 23 Wall. 283, 288; Moses v. Mayor, 15 Wall. 387, 390; Verden v. Coleman, 18 How. 86; McCollum v. Eager, 2 How. 61. The motion to dismiss the appeal is therefore sustained.

PENINSULAR IRON CO. et al. v. EELLS et al.

(Circuit Court of Appeals, Eighth Circuit. May 6, 1895.)

No. 406.

1 LIEN—ADVANCES FOR PURCHASE OF RAILROAD.

In 1875, complainants, who owned bonds of a railroad which was about to be sold under foreclosure, entered into an agreement with other bondholders and lienholders by which one S. was appointed their agent to buy the road; complainants and their associates to furnish the amount of the price, in bonds, liens, and cash. S. accordingly bid in the road, and the amount of cash to be paid was fixed by the court. Shortly before the day for its payment, S. made a contract with complainants, reciting that they desired to borrow the amount of cash required from them, and agreeing that he would convey the road to the K. Ry. Co., a corporation to be organized, and would cause that company to mortgage the property to one E. to secure $600,000 in notes, an amount of which equal to the cash furnished by complainants should be held by E. as security for the repayment of such cash. Complainants furnished the cash required, which was but a small part of that called for in the purchase, the balance being furnished by S. and his associates. S. bought the road. The K. Ry. Co. was organized, and S. conveyed the road to it, upon an agreement that it should issue the $600,000 notes and secure them by a mortgage to E., and should issue $2,700,000 bonds, also secured by a mortgage to E., which should be first used to pay off the notes; that the notes and bonds should be deposited with E., as trustee, and disposed of as S. should direct, and the proceeds be used by S. in the completion of the road. The K. Ry. Co. made the notes, and secured them by mortgage, and it appointed S. its

financial agent, and ratified all that he had done. Soon after, by direction of S., the notes, none of which had ever been used, and the mortgage securing them, were canceled, and the bonds and mortgage for $2,700,000 were made. S. having difficulty in raising the money to complete the road by the use of the bonds, and having expended a large amount of money in building it, and differences having arisen between the parties interested, as to their interests, S. brought a suit in an Iowa state court, to which complainants and all others interested in the property were parties, and appeared and litigated the questions arising, in which suit all the facts relating to the property and the dealings of the parties with it were set out, and in which the court made a decree settling and adjusting the rights of all the parties, and adjudging, among other things, that the complainants and others in like situation should receive their proper proportions, which were ascertained and fixed, of the stock of the K. Ry. Co., in return for their contributions to its purchase. Complainants received such stock, and no appeal was taken from the decree. Subsequently, in order to get money to complete the road, S., pursuant to a resolution of the board of directors of the K. Ry. Co., offered to the stockholders, including complainants, an opportunity to buy an amount of the bonds of the company proportioned to their stock, at 50 per cent. of their par value, which was estimated to be sufficient to pay the debts of the company and finish the road. Complainants declined, and S. and his associates purchased all the bonds, but at a higher price, and the debts were paid, and the road finished. Afterwards, the C. Ry. Co. purchased the bonds from S. and his associates, for value, relying on the validity of the mortgage securing them. The K. Ry. Co. defaulted in payment of interest on the bonds, and the road was foreclosed and sold. Complainants, before the confirmation of the sale, brought this suit against the K. Ry. Co., S., the C. Ry. Co., and others interested in the property, to enjoin the confirmation and have themselves declared entitled to a lien, superior to the mortgage, on the road, for the share contributed by them to the purchase price on the original sale. They had previously brought another suit for the same purpose before the foreclosure, but after the sale of the bonds to the C. Ry. Co., which had been dismissed for want of jurisdiction. *Held*, that complainants acquired no lien on the road by virtue of their contract with S. for the issue of notes by the K. Ry. Co., and the holding of them as security, or by virtue of the subsequent dealings of S. or E. or others with the property.

2. SAME—RES ADJUDICATA.
Held, further, that the decree of the Iowa court was res adjudicata as to any such lien, as well as all rights of complainants as against S. or his associates, or their privies.

3. JUDGMENTS—COLLATERAL ATTACK—FRAUD.
Held, further, that in a collateral proceeding between the same parties the decree of the Iowa court would not be a less complete bar, if shown to have been procured by fraud or imposition.

4. RES JUDICATA.
A judgment is conclusive upon the controversies determined thereby between the parties and their privies, and cannot be impeached for fraud otherwise than by a direct proceeding brought to set it aside on that ground.

5. TRUSTEE UNDER MORTGAGE—DUTIES.
Until the bonds are sold or pledged, the trustee in a mortgage, made to secure them, is the agent of the maker of the bonds and mortgage only, and is bound to follow his directions.

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

This was a suit by the Peninsular Iron Company and Abel Whitney, as trustee for himself and Walter S. Sears, Channing Whitney, William S. Wilcox, Porter L. Sword, the estate of Henry Hart, deceased, the estate of Charles Rynd, deceased, and for the Illinois

Manufacturing Company; Joseph S. Hart, administrator, and Jane S. Hart, administratrix, of the estate of Henry Hart; Adelia S. Angel; Joseph R. Bennett; S. Edson Graves; Henry S. Wilcox; George A. Wilcox; and Abel Whitney, against Dan. P. Eells; the St. Louis, Keokuk & Northwestern Railway Company; Andros B. Stone; the Chicago, Burlington & Quincy Railroad Company, and William Baldwin and C. F. Perkins, intervener, impleaded with Leander M. Hubby, Samuel M. Carpenter, and Charles Wasson, survivors of themselves and William F. Smith, copartners by the name of the Fulton Foundry Company; and the Bank of Skaneateles,—to set aside a decree of foreclosure, and establish and foreclose a lien on the road of the St. Louis, Keokuk & Northwestern Railway Company. The circuit court dismissed the bill. Complainants appeal. Affirmed.

For decision on a question of jurisdiction in a previous suit between the same parties, see 121 U. S. 631, 7 Sup. Ct. 1010.

Andrew Howell, H. Scott Howell, and William C. Howell, for appellants.

Jas. H. Anderson, Palmer Trimble, H. H. Trimble, and G. Edmunds, for appellees.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. This is an appeal from a decree dismissing a bill brought in September, 1887, by the appellants, the Peninsular Iron Company, a corporation, and others, to set aside the decree of foreclosure of a mortgage for $2,700,000 on the St. Louis, Keokuk & Northwestern Railway Company, rendered in the circuit court for the Southern district of Iowa on July 7, 1887, and to establish and foreclose a superior lien to that of the $2,700,000 mortgage upon the property of this railroad company. The facts out of which this controversy arises are substantially these:

On January 27, 1875, in the circuit court for the Eastern district of Missouri, a decree of foreclosure of two mortgages on the Mississippi Valley & Western Railway Company was rendered, which directed the sale of the property of that corporation to be made by a master on April 14, 1875. This railway company had constructed a railroad from Keokuk, Iowa, to Hannibal, Mo., and had expended a large amount of money towards its extension from Hannibal to Louisiana, a distance of 26 miles. This extension was, after the master's sale, completed by the Keokuk Company, which was formed by the purchasers, and the railroad was extended from Louisiana to Clarksville, 10 miles, and afterwards from thence to St. Peters, a distance of 43 miles, so that it ultimately became about 134 miles in length. On March 27, 1875, certain of the lienholders and bondholders of the Mississippi Valley Railway Company appointed one A. B. Stone their agent and trustee to purchase the property of the company at the foreclosure sale, and to hold or dispose of it as a majority in interest of those who made this appointment, and joined in the purchase through him, should direct. Those who joined in this purchase agreed with each other and with their agent, Stone,

that they would deliver to him all the bonds and liens upon this railway property that they held, and that each of them would pay to him in cash, to be used in the purchase of the property, such a proportion of the cash required to complete the purchase as his bonds and liens bore to the aggregate amount of the bonds and liens received by Stone under the agreement. Under this agreement the appellants joined in the purchase, and furnished in bonds, at the value awarded to them by the court, and in cash, about 4 per cent. of the purchase price paid. They furnished $24,391.61, and the price paid by Stone was $606,830.28. The appellants were creditors of the Adrian Car & Manufacturing Company, of Adrian, Mich., and received the bonds they furnished to make this purchase from that company to secure debts it owed to them. Their bonds were part of 125 bonds that had been previously pledged by the railway company to the car company to secure a debt due from the former to the latter. At the time of this contract to purchase this railway property, these 125 bonds were held by parties in and about Adrian who joined in the purchase, and together furnished about 11 per cent. of the purchase price. These Adrian parties acted together throughout these transactions, and were actively represented by the appellant William S. Wilcox, and by W. H. Angel, husband of the appellant Adelia S. Angel. Pursuant to the agreement of March 27, 1875, Stone purchased the property on April 14, 1875, and the court required him to pay $296,463.08 of the purchase price in cash on or before June 17, 1875. On June 8, 1875, Stone signed, and delivered to the Adrian parties, a contract in which he recited that he had purchased the property of the railroad company at the foreclosure sale; that a majority in interest of the purchasers had directed him to convey it to the St. Louis, Keokuk & Northwestern Railway Company, a corporation to be formed by those interested in the purchase; that these Adrian parties were interested in the purchase, and were required to furnish before June 17, 1875, their ratable proportion of the cash required to complete it, which was estimated to be $30,844.12; that they desired to borrow the same, and that to enable them to do so he agreed to convey the property to the Keokuk Company, to cause that company to mortgage the property to Dan. P. Eells, as trustee, to secure notes to the amount of $600,000, to deposit those notes with Eells, and to have Eells hold such an amount of those notes as would equal the amount of cash which the Adrian parties should pay to him before June 17, 1875, as collateral security for the repayment of the money so paid by them to complete the purchase of the property. The Adrian parties furnished $30,844.12, and Stone and others interested in the purchase furnished $265,619.86, in money, to complete the purchase, and with this money, and the bonds and liens of the purchasers, Stone completed it, and obtained a conveyance of the property to himself. Immediately thereupon the Keokuk Company was organized by those interested in this purchase. Stone then sold and conveyed the property to that company on these, among other, terms: That the company should issue $600,000 of notes payable in two years, and should secure them by a mortgage; that it should

issue bonds to the amount of $2,700,000, payable in 30 years, and secure them by a mortgage; that the bonds should be used first to pay off and satisfy the mortgage for $600,000; that all these notes, bonds, and mortgages should be placed in the hands of Dan. P. Eells, trustee; that the notes and bonds should be sold and disposed of as Stone should direct; and that Stone should use the proceeds thereof in the construction of the railroad, until it was completed, and when the road was completed all the bonds and stocks should belong to him, but that until that time the bonds and notes should not be issued any faster than at the rate of $20,000 per mile of completed and equipped railroad. Pursuant to this contract, Stone conveyed the property to the Keokuk Company. On June 22, 1875, the Keokuk Company made and delivered to Eells, as trustee, notes amounting to $600,000, payable in two years, and secured them by a mortgage on the property. On August 10, 1875, the Keokuk Company appointed Stone its financial agent to sell and dispose of its bonds and notes, and ratified his prior contracts for their sale and disposition. The notes secured by the mortgage for $600,000 were never sold or used, and on November 10, 1875, by direction of Stone, they were canceled, and Eells delivered them back to the company, and released the mortgage which secured them. On the same day the company executed and delivered to Eells, as trustee, the 30-year bonds, amounting to $2,700,000, and a mortgage to secure them. Stone was unable to sell the bonds, and he proceeded to equip and operate the railroad, and to extend it towards St. Louis, on the credit of the bonds, which he pledged for materials and money to accomplish this purpose. In 1877 the road had been equipped and extended from Hannibal to Clarksville, a distance of 36 miles, through his exertions, at an expense of about $700,000, and $1,800,000 of the bonds had been pledged for this purpose.

Differences had arisen between the parties interested in the original purchase, as to their respective interests, and thereupon Stone brought a suit in the district court of Lee county, in the state of Iowa, against all the parties interested in the original purchase, including the appellants in this suit, and against all the parties to whom the Keokuk Company had become indebted, to determine the respective interests of these parties in the property, and to obtain his discharge as their trustee. In his petition he pleaded all the facts to which we have referred, except his agreement with the Adrian parties, of June 8, 1875, that such an amount of the notes secured by the mortgage for $600,000 as would equal the money they furnished towards the purchase should be held by Eells as collateral security for the repayment of the money to them. He expressly stated in his petition, however, that the notes and mortgage for $600,000 had been made; that they had not been used, and that the notes had been canceled; and that the mortgage had been discharged. He set forth in detail the amount of cash and the amount of bonds and liens which each of the purchasers had furnished to him to make the purchase, and the amount of expense incurred by him for the Keokuk Company in equipping and extending the railroad. He pleaded that, of the $2,700,000 of bonds, bonds to the

amount of $1,800,000 had been pledged for the payment of expenses of construction and equipment incurred since the purchase, and that the entire assets of the Keokuk Company stood pledged for this indebtedness, for the moneys paid into court by him upon the purchase, and for his charges for services and expenses, and that they must all be paid before the bonds and stocks could be divided between the owners. He prayed, among other things, that "the respective interests of each and all the parties in the property of the St. Louis, Keokuk & Northwestern Railway Company, and the other property purchased by your petitioner, as herein stated, be ascertained and determined by the court; that the moneys paid, as hereinbefore stated, upon said purchase, be refunded to the purchasers, or be so prorated as that each shall bear and pay his or its ratable portion thereof, and that the moneys expended and debts incurred in the construction, improvement, and repair of said road and for rolling stock, be paid: * * * and, finally, that this court direct the distribution of the assets of said St. Louis, Keokuk & Northwestern Railway Company remaining after all equities are adjusted between the parties to this suit, among the respective parties, according to their respective interests therein, and that your petitioner be discharged from further liability on account of his said trust."

On August 24, 1877, the appellant Wilcox verified an answer made by the assignees, of the Adrian Car Company in that suit, which admitted the truth of all the allegations of this petition that are material to the issues now under consideration, and claimed a preference in the payment of $22,830.66 due from the old Mississippi Valley Railway Company to the car company. One of the defendants in that suit brought a suit against Stone in the state of New York, and obtained an injunction which prohibited him from proceeding with the suit in Lee county, Iowa. Thereupon, on June 9, 1878, the assignees of the car company, one of whom was the appellant Wilcox, filed a cross bill in the court in Lee county, in which they set forth the amounts, in cash, bonds, and liens, paid by each of the original purchasers; alleged that each of them was entitled to share in the property of the Keokuk Company in the same proportion that the value of their securities and cash furnished bore to the whole purchase price; that their attorneys had charged them $5,000 for services in maintaining their lien against the old Mississippi Valley Railway Company, and that their fees should be paid out of the assets of the Keokuk Company before division; and prayed that the court "decree a division among the several claimants of the bonds, stocks, assets, and property of the railroad company in the hands of said railroad company [the Keokuk Company], or in the hands of Daniel P. Eells, trustee, as they severally may be found entitled; that they may be found to be the owners of the undivided one-ninth of all said property; and that the other claimants may be decreed their respective interests, so that the title and ownership of said property between the said parties may be found and settled by said decree." All the appellants in this case received and accepted service of a notice of the filing of this cross bill, and be-

came parties to the suit in the court in Lee county, and subject to the jurisdiction of that court, before that suit went to trial. At the trial of that suit, Wilcox and Angel were present and testified. Some of the Adrian parties at that trial defeated a claim made by Stone for several thousand dollars which he had expended, and which he asked to have refunded to him, and obtained the allowance of a claim for several thousand dollars upon a lien the assignees of the car company held, which was opposed by Stone. On September 9, 1878, the court in Lee county rendered a decree in that suit which determined that the Keokuk Company was liable to Stone for $514,177.45, and to others for $171,402.71, on account of the extension of the railroad to Clarksville, and its equipment; that all the bonds applicable to the 90 miles of railroad then constructed, to wit, $1,800,000 in amount, of the $2,700,000 secured by the mortgage, were pledged to secure these liabilities; and that each of the appellants, and all others who joined in the purchase under the master's sale of April 14, 1875, were the owners of such a proportion of the property of the Keokuk Company, subject to these liabilities and pledges, as the value of the bonds and liens and the cash each furnished to make the purchase bore to the entire purchase price. The fractional portion of this property to which each of these appellants was entitled was fixed in the decree, and the capital stock of the Keokuk Company was divided between the appellants and the other parties to that suit in accordance with the terms of this decree. The appellants received their respective shares of this stock, and no appeal has ever been taken from that decree, nor has it ever been modified.

After the decree was rendered, Stone was still unable to sell the bonds, and the road to Clarksville was unable to earn much more than its operating expenses; and thereupon, as the agent of the railroad company, he proceeded to extend it to St. Peters, so that it might have a connection with St. Louis. In January, 1879, it was estimated that money to the amount of 50 per cent. of the face of the bonds would pay the debts of the company, and complete the road to St. Peters. For this purpose, pursuant to a resolution of the board of directors of the railroad company, Stone offered to each of the appellants and to each of the other stockholders of the company, at 50 per cent. of their face value, such a proportion of the bonds of the company as their stock respectively bore to the entire capital stock of the company, on condition that, if any of them failed to purchase within 30 days, their shares of these bonds would be offered to other stockholders at the same rate, and, if not at the time bought, they would be sold at not less than that rate to any purchasers that could be found. The appellants declined to purchase any of the bonds, and Stone and others of the stockholders did purchase all of them but about 125, which the company had previously disposed of in the settlement of a claim of one Fallon. They paid for these bonds an amount sufficient to pay the debts of the company and to complete the road to St. Peters, and this amount was more than 50 per cent. of the face value of the bonds. On December 14, 1880, the appellee Perkins made a contract to purchase

from Stone and his associates, for the appellee the Chicago, Burlington & Quincy Railroad Company, a corporation, these bonds to the amount, in face value, of $2,585,000; and he subsequently bought of others, for the same company, bonds of the Keokuk Company to the amount of $114,000. Before he paid for any of these bonds he employed an attorney at law to examine their validity, and the security for them furnished by the mortgage. This attorney made an examination of the records of the Keokuk Company, and of the proceedings in the suit in the district court of Lee county, and reported to him that the bonds were authorized and valid, and were secured by a first mortgage of $2,700,000 on the property of the company. After receiving this report, Perkins paid for the bonds. There is a dispute in the testimony regarding the notice he had of the claims of the appellants. Default was made in the payment of the interest on these bonds, and on July 7, 1887, a decree of foreclosure of the mortgage securing them was rendered at the suit of the trustee, Eells, in the circuit court for the Southern district of Iowa, which declared that mortgage to be a first lien on the property of the Keokuk Company, and directed the sale thereof to pay the debts secured by the mortgage. The appellants filed their bill in this case in September 1887. They had in 1881 brought a like suit, in which their bill was dismissed on the merits in the circuit court; and in the supreme court of the United States the decree of the circuit court was reversed, and their suit was dismissed, for want of jurisdiction. 121 U. S. 631, 7 Sup. Ct. 1010. In the bill in the case now before us they alleged that they had a lien on the property of the Keokuk Company superior to that of the $2,700,000 mortgage, and they sought an injunction to restrain the confirmation of the sale under the decree of foreclosure of July 7, 1887. Instead of contesting the application for an injunction, the appellee Perkins filed a bond in this suit, conditioned that he would pay the amount for which the courts should finally decree that the appellants had a superior lien to that held by the owners of the bonds secured by the $2,700,000 mortgage, and no injunction was issued.

The history of these railroad companies and their obligations has been long and tedious, but its review was necessary to a proper appreciation of the character of this suit. It is an application to a court of equity by a part of the purchasers of the property of the old Mississippi Valley & Western Railway Company at the master's sale in 1875, who furnished about 4 per cent. of the purchase price; who have never furnished a dollar to improve the property thus purchased; who, under the decree of the district court of Lee county, received the same proportionate share of the property purchased and improved that their copurchasers in like situation received; who were offered in 1879, and who refused to buy, the bonds of the purchasing company that extended the railroad, at a price less than their copurchasers were obliged to pay for them in order to defray the necessary expenses of completing and equipping the railroad,—to obtain a decree that they have a lien for the share of the purchase price they furnished in 1875, on the finished railroad, which was completed and equipped, at an expense exceeding $1,300,000, after

their purchase, and on the faith and pledge of the $2,700,000 mortgage made by the new company, and that this lien of theirs is superior to that of the bonds secured by this mortgage in the hands of subsequent purchasers. On the face of it, the case does not appeal to the conscience of a chancellor with compelling force. It has the appearance of an attempt to reap the fruits of the labor of others, who bore the heat and burden of the day while the applicants rested supinely in the shade. The only parties in interest before this court in this case are the appellants and the appellees Perkins and the Burlington Railroad Company. The only question is whether or not the appellants were entitled to a lien on the property of the Keokuk Company superior to that of the bonds held by the appellees, and secured by the mortgage for $2,700,000. In the history of this case which we have given above, we have stated only the undisputed facts. If the case was to be determined upon these facts alone, there could be but one answer to this question. The appellants could not maintain their lien (1) because their contract of June 8, 1875, was the personal contract of Stone to the effect that Eells, the trustee, would hold an amount of the notes secured by the $600,000 mortgage equal to the amount of cash they paid towards the purchase in 1875, as collateral security for the repayment of that money, and that promise created no lien on any of the notes; (2) because Stone was their agent to secure these notes, and to place them with Eells as collateral security for this money, and if he failed to do so, and caused the notes to be canceled and the mortgage to be discharged, they must suffer the consequence of the acts of their agent, and not the purchasers of securities, who had a right to rely on those acts; and (3) because the decree of the district court in Lee county, Iowa, in 1878, completely settled the liens, rights, and interests of these appellants, as against Stone and his associates, in the purchase and construction of the railroad, and the question now presented is res adjudicata, and cannot be again litigated by the appellants, either with Stone and his associates, or their privies, the appellees.

The appellants seek to escape from this conclusion by allegations that are denied, and testimony that is contradicted. They claim that under the agreement of June 8, 1875, in which Stone promised them that Eells should hold a part of the $600,000 in notes as collateral security for the purchase money they supplied, under the terms of the sale by Stone to the Keokuk Company, which provided that the bonds and mortgage for $2,700,000 should be first used to pay and satisfy the $600,000 mortgage, and under the execution of the two mortgages, they acquired a first lien upon all the property of the Keokuk Company for the value of all the bonds, liens, and money they furnished to make the purchase, and that the holders of the bonds secured by the mortgage for $2,700,000 took their rights subject to this lien, because Eells discharged the $600,000 mortgage without payment and without authority, and because the mortgage for $2,700,000 was, by the terms of the sale to the Keokuk Company, to be first used to pay the $600,000 mortgage. Their witnesses testified that Stone and Edmunds, his attorney,

told them in June, 1875, that the mortgage for $600,000 was to be made to secure the purchasers for the bonds, liens, and money they advanced for the purchase, and that Stone did not give the agreement of June 8, 1875, to enable them to borrow the $30,844.12 in money which they were to furnish, but solely to secure them for its repayment. On the other hand, Stone and his attorney testified that the agreement was given to them solely to enable them to borrow this money, and that the $600,000 mortgage was made, not to secure the repayment of the purchase price, but to obtain money to extend the railroad. They are corroborated by the testimony of Eells that he never heard of the contract of June 8, 1875, until after the $600,000 mortgage was discharged, and that he understood that that mortgage was made, not to secure the purchasers for the purchase price, but to raise money for construction purposes. The written contract of June 8th recites that Wilcox and others desire to borrow the $30,844.12 cash they were to furnish, and that Stone makes the agreement to enable them to do so, and in it Stone promises that Eells will hold an equal amount of the notes to be secured by the $600,000 mortgage, not to secure the repayment of the value of the bonds, liens, and cash they were to furnish, but to secure the repayment of the cash only. If, as appellants' witnesses testify, the Adrian parties did not declare to Stone and his attorney that they desired to borrow this money; if all parties, including Eells, the trustee, knew that this $600,000 mortgage was to be, and that it was, issued to secure these purchasers for the value of all they furnished, including bonds, liens, and cash,—it is incredible that Stone should have made, and that these appellants should have accepted, an agreement which recites that they want to borrow the money they are to furnish, that the agreement is made to enable them to do so, and which promises them collateral security, from the $600,000 in notes, for the repayment of the money they furnished only, and, by the strongest implication, excludes them from any security under that mortgage for the value of the bonds and liens they supplied. On the issue as to the purpose for which the mortgage for $600,000 was made, the written evidence is equally decisive. The terms of the sale by Stone, the agent of the purchasers and the holder of the title, to the Keokuk Company, which the purchasers formed and owned, were in writing, and are before us. That contract provided that the two mortgages,—one for $600,000, and the other for $2,700,000,—and the notes and bonds they were to secure, should be made by the Keokuk Company; that the bonds secured by the latter mortgage should be used first to pay off and satisfy the former mortgage; that all these notes and bonds secured by both mortgages should be placed in the hands of Eells, as trustee, and should be sold and disposed of as Stone should direct; and that the proceeds thereof should be used in the construction of the incomplete railroad, until it was completed. The conclusion from these writings is irresistible that the mortgage for $600,000 was made for construction purposes, and not to secure the repayment of the purchase money, and that the agreement made by Stone on June 8, 1875, with the Adrian parties,

was a mere personal contract of his, made to enable them to borrow the money they were to furnish, and that it could have no effect upon the securities issued by the Keokuk Company, unless it was executed. The fact is undisputed that the Adrian parties never borrowed any of this money, and that they themselves furnished it. Stone never caused Eells to hold any of the $600,000 in notes as collateral security for the repayment of this money, and never notified Eells that he agreed to do so. The agreement of Stone accordingly created no lien upon any of the notes or bonds issued by the Keokuk Company, and if it was broken the remedy of the appellants was an action against Stone for the breach. It is an established fact in this case that none of the notes secured by the mortgage for $600,000 were used or sold for purposes of construction or equipment of the railroad, and that by direction of Stone, the financial agent of the company that made them, the notes were canceled, and the mortgage was discharged by Eells, the trustee. It is contended that this action was without authority. It may be conceded that, if the notes secured by this mortgage had been sold or pledged, the trustee would not have been authorized to discharge the mortgage without the consent of the holders of the notes. But, until they were pledged or sold, Eells, the trustee, held them as the agent of their maker alone, and he was authorized and bound to dispose of them as that maker directed. Before they were sold, pledged, or used in any way, the maker of the notes, through its financial agent, Stone, directed Eells to cancel the former and to discharge the latter. In our opinion, this not only gave him the power, but imposed upon him the duty, to do so. Moreover, as there never was any debt secured by the mortgage for $600,000 to pay or to satisfy, none of the bonds secured by the mortgage for $2,700,000 were required to be used first, or at all, for the purpose of satisfying any such debt, and there was no lien on the property of the Keokuk Company superior to that of the holders of these bonds.

A more conclusive answer to the claim of the appellants, if that were possible, is found in the decree of the district court of Lee county rendered in 1878. Stone brought that suit to settle all questions relating to the liens and interests of all parties interested under the original purchase, and of all who had furnished money or materials on pledges of the bonds of the Keokuk Company. All of the appellants in this suit were parties to that suit. The appellant Wilcox verified one of the answers to the bill, was one of the complainants in the cross bill, and with Angel, the other active representative of the appellants, attended and testified at the trial. Stone's petition contained an allegation that the mortgage for $600,000 had been made, that it had not been used, and that it had been discharged. It set forth all the debts of the Keokuk Company, and stated what bonds were pledged to secure them. It stated in detail the value of the liens and bonds and the amount of the money furnished by each of the purchasers to buy the property at the master's sale. It prayed that the interests of all the parties to the suit in the property of the company might be determined; that all of is assets might be distributed among them according to their re-

spective interests; and it presented to that court the very question now before us, by the allegation that the entire assets of the Keokuk Company stood pledged for its indebtedness for construction, and for the moneys paid into court by Stone upon the purchase, and that all these must be paid before the bonds and stock could be divided between the owners, and, by the prayer, that the moneys paid as hereinbefore stated upon said purchase be refunded to the purchasers, or be so prorated as that each should bear and pay its ratable proportion thereof. The court decided that question. It decided that the money should not be repaid, and that it should be prorated, and decreed to each purchaser stock of the railroad company, for the moneys, as well as for the bonds and liens, he furnished for the purchase. The answer and cross bill in that suit nowhere deny the allegation that the mortgage for $600,000 had never been used and had been discharged, nowhere aver that any of the Adrian parties have any lien upon the property superior to that of the bondholders, and nowhere mention the contract of June 8th, with Stone. The cross bill prays for a division of the bonds, stocks, assets, and property of the Keokuk Company in the hands of the railroad company, or of Eells, the trustee, among the parties to the suit, so that the ownership of said property may be found and settled by the decree. The court granted that prayer, determined the liens and interests of all the parties, and divided and distributed the bonds, stock, and assets of the corporation among the parties to that suit, by its final decree, rendered September 8, 1878. The share of the appellants in this property was determined by that decree to be a certain number of shares of the stock of the corporation, and they accepted that stock. They now ask that they may have and enforce a lien upon all the shares of all the other parties to that suit, for the bonds, liens, and moneys for which they received that stock. The answer is that it was adjudged by that decree that they had no such lien; that they were entitled to the stock which they received, and to that stock only. Appellants seek to escape from the legal effect of this adjudication by allegations and proof that the decree of the court in Lee county was procured by fraudulent representations made by Stone and his attorney to them as to the character of their lien, and as to the purpose and effect of the suit in Lee county. No fraud is alleged that deprived the appellants of ample notice of the existence of that suit, and of the time of its trial. A direct suit may undoubtedly be maintained, in a proper case, to set aside and annul a judgment of any court, and all proceedings under such judgment, for fraud in procuring them. Gaines v. Fuentes, 92 U. S. 10, 21; U. S. v. Norsch, 42 Fed. 417; 1 Black, Judgm. § 321, and cases cited. But until such a suit is brought, and until a decree of avoidance is rendered, the judgment of a state court which had jurisdiction of the subject-matter and of the parties is conclusive upon the merits of the controversies determined by that judgment between the parties and their privies, in every court in the United States, and cannot be collaterally impeached for fraud. Christmas v. Russell, 5 Wall. 290, 305; Maxwell v. Stewart, 22 Wall. 77, 81; Anderson v. Ander-

son, 8 Ohio, 108; Mason v. Messenger, 17 Iowa, 261, 272; Smith v. Smith, 22 Iowa, 516, 518; Railway Co. v. Hall, 37 Iowa, 620, 622. This is not a suit to set aside or avoid the decree of the court in Lee county, nor has any such suit been brought. The appellants do not pray here for an avoidance of that decree. The only plea they make with reference to it is that it is not a bar to this suit, because it was procured by the fraud they allege. They have mistaken the law. This is a suit between some of the parties to the suit in the district court of Lee county, and the assigns of other parties to that suit, to retry the very questions there adjudicated 16 years ago; and, so long as that decree stands, it is a complete bar to this proceeding, even if it was procured by the fraud and imposition which the appellants plead. The decree below must be affirmed, with costs, and it is so ordered.

FARMERS' LOAN & TRUST CO. v. NORTHERN PAC. R. CO. et al.

(Circuit Court, E. D. Wisconsin. June 17, 1895.)

RAILROAD COMPANIES—RECEIVERS—PREFERRED CLAIMS—DIVERSION OF FUNDS.

A judgment was recovered against a railroad company, which gave bond and appealed. Pending appeal, the road went into the hands of receivers appointed in an action by the trustee for bondholders to foreclose a mortgage executed prior to the recovery of the judgment. The judgment was affirmed, and the receivers petitioned for leave to pay it out of the funds accruing from the operation of the road since the receivership, on the ground that the owner of the judgment was about to sue the sureties on the appeal bond, who had become bound solely for the accommodation of the company, and that, by virtue of such bond, the assets of the road had been preserved and increased by the amount of the judgment. *Held*, that the claim of the sureties could not be thus given preference over the mortgage bonds, as the lien of the latter was superior to that of the judgment, and there had been no diversion of funds to the benefit of the bondholders so as to create an equity to a preference. Farmers' Loan & Trust Co. v. Kansas City, W. & N. W. R. Co., 53 Fed. 182, disapproved.

In Equity. Bill by the Farmers' Loan & Trust Company against the Northern Pacific Railroad Company and others to foreclose a mortgage, and for the appointment of receivers. The receivers petitioned for leave to pay a judgment rendered against the road prior to their appointment.

Sullivan & Cromwell and Miller, Noyes, Miller & Wahl, for receivers.

Turner, McClure & Rolston, for complainant.

Michael H. Cardozo, for Johnston Livingston.

JENKINS, Circuit Judge. In October, 1887, one O'Brien recovered a judgment against the Northern Pacific Railroad Company in the district court for the Fourth judicial district of the then territory (now state) of Washington, sitting in and for the county of Yakima, for the sum of $6,000, and costs. The company sued out a writ of error in the supreme court of the territory to review such judgment, and thereupon executed a supersedeas bond with sure-

ties. The judgment was on the 7th day of March, 1889, affirmed by the supreme court of the territory. Thereupon the defendant company caused a writ of error to be issued out of the supreme court of the United States to review the judgment of the supreme court of Washington Territory, and another supersedeas bond was thereupon given with certain other persons as sureties. This last writ of error was dismissed in November, 1894. Railroad Co. v. O'Brien, 155 U. S. 141, 15 Sup. Ct. 30. The receivers of the railroad company, who were appointed by this court in August, 1893, now petition the court, upon the facts above stated, and upon the further assertion of fact that the owner of the judgment is about to institute suit against the sureties upon the supersedeas bonds to recover the amount due upon the judgment, for authority to pay the judgment out of funds in their hands accruing from the operation of the road since the receivership. The receivers advise the court that the sureties became bound solely as matter of accommodation and convenience to the company, and without pecuniary advantage of any kind to themselves. They also assert that, by virtue of the supersedeas bonds, "the assets of the Northern Pacific Railroad Company which came into the hands of your petitioners as receivers have been preserved, and were increased by the amount of such judgment which would have been collected out of the assets of said company if said supersedeas bonds had not been given." The trust company, complainant, which is the trustee under all of the mortgages here sought to be foreclosed, answers to the petition that in view of the fact that, if the judgment had been paid before writ of error sued out and supersedeas bonds given, the assets of the company coming into the hands of the receivers would have been decreased in amount, and in view of the peculiar hardships of the case, it consents to the granting of the prayer of the petition. The representative of the second mortgage bondholders, who has been made a party to the suit, opposes the granting of the petition, and denies the right of the court by such order to diminish the fund from which their mortgage should be paid.

I had occasion in the case of Farmers' Loan & Trust Co. v. Green Bay, W. & St. P. Ry. Co., 45 Fed. 664, to discuss the principle which underlies the allowance of preferential claims in the case of railroad foreclosures, and found it to be bottomed upon the idea of diversion of funds in equity belonging to the general creditors in preference to bondholders. I there said:

"The gross income arising from the operation of a railway should be first applied to the payment of the expenses of operation, proper equipment, and needful improvements. If the income be diverted to the payment of bonded interest in disregard of the payment of such expenses, there should be restoration to original equitable right. Failing diversion, there can be no restoration. The amount of restoration is dependent upon the amount of diversion."

I also there said that in case of failure by the trustee to take possession upon default, as the road must be kept a going concern, equity would recognize as preferential the expense of operation after default and within a limited time prior to the receivership, because

the expense of operation was indispensable to the preservation of the property. The latter ground is founded sometimes upon an implied assent by the bondholders growing out of their failure to take possession; sometimes upon the ground of laches; sometimes upon the ground of estoppel. In view of the hardship which will result to the sureties if they should be compelled to pay the judgment in question, I have taken occasion to reconsider the subject of preferential claims. A careful review of the whole question leaves no doubt in my mind of the correctness of my former holding.

The rule was stated by Chief Justice Waite in Burnham v. Bowen, 111 U. S. 776, 4 Sup. Ct. 675, as follows:

"That, if current earnings are used for the benefit of mortgage creditors before current expenses are paid, the mortgage security is chargeable in equity with the restoration of the fund which has thus been improperly applied to their use."

In St. Louis, A. & T. H. R. Co. v. Cleveland, C., C. & I. Ry. Co., 125 U. S. 659, 674, 8 Sup. Ct. 1011, the court again declares the rule, and observes:

"There has been no departure from this rule in any of the cases cited. It has been adhered to and reaffirmed in them all."

In the case of Kneeland v. Trust Co., 136 U. S. 89, 97, 10 Sup. Ct. 950, the supreme court had occasion again to consider the subject, and observes as follows:

"The appointment of a receiver vests in the court no absolute control over the property and no general authority to displace vested contract liens. Because in a few specified and limited cases this court has declared that unsecured claims were entitled to priority over mortgage debts, an idea seems to have obtained that a court appointing a receiver acquires power to give such preference to any general and unsecured claims. It has been assumed that a court appointing a receiver could rightfully burden the mortgaged property for the payment of any unsecured indebtedness. Indeed, we are advised that some courts have made the appointment of a receiver conditional upon the payment of all unsecured indebtedness in preference to the mortgage liens sought to be enforced. Can anything be conceived which more thoroughly destroys the sacredness of contract obligations? One holding a mortgage debt upon a railroad has the same right to demand and expect of the court respect for his vested and contracted priority as the holder of a mortgage on a farm or lot. So, when the court appoints a receiver of railroad property, it has no right to make that receivership conditional on the payment of other than those few unsecured claims which, by the rulings of this court, have been declared to have an equitable priority. No one is bound to sell to a railroad company, or to work for it, and whoever has dealings with a company whose property is mortgaged must be assumed to have dealt with it on the faith of its personal responsibility, and not in expectation of subsequently displacing the priority of the mortgage liens. It is the exception, and not the rule, that such priority of liens can be displaced. We emphasize this fact of the sacredness of contract liens for the reason that there seems to be growing an idea that the chancellor, in the exercise of its equitable powers, has unlimited discretion in this matter of the displacement of vested liens."

See, also, Penn v. Calhoun, 121 U. S. 251, 7 Sup. Ct. 906.

The law is established upon the authority of the ultimate tribunal, notwithstanding the contrary opinion held by some subordinate courts, that general creditors of a railroad company cannot with respect to the income of the road after receivership be allowed pri-

ority to the mortgage where there has been no diversion of funds to the benefit of the mortgage interest, working injury to the general creditor, or where the mortgage bondholders have not unduly delayed the assertion of their rights after default, and have not lain by and permitted an indebtedness to accrue for the operating expenses of the road when possession should have been taken by the trustee, and with which expenses they should therefore be chargeable. A court of equity has not the prerogative to thus displace the lien of a mortgage, or to charge the general indebtedness upon the corpus of the estate in priority to the mortgage lien.

Within the rule thus declared, has any equity been shown which would authorize the granting of relief to these sureties? At the date of the judgment there were outstanding mortgages upon the entire or parts of the main line of railway securing bonds now outstanding to the enormous amount of $76,429,000. The sureties dealt with the company with knowledge of this fact, and were chargeable with knowledge of it. They voluntarily assumed the obligation, relying upon the company to protect and indemnify them. They required no security for their assumption of liability. Upon what ground, then, can it be claimed that they should now be allowed priority, not only over general creditors of the company, but that vested mortgage rights existing when they signed these bonds should be subordinated to the payment of the debt which they assumed? It is said that the assets which came into the hands of the receivers have been thereby preserved, and were increased by the amount of the judgment which would have been collected out of the assets of the company if the supersedeas bond had not been given. Does this furnish sufficient reason to postpone the lien of the mortgages to the payment of this debt? The judgment which was stayed was a lien subordinate to that of the mortgages, and could only have been enforced subject to them. It might possibly have been collected out of the current income of the road; but that fact, I think, could not avail to displace the priority of recorded liens without a showing that by reason of nonpayment, property not subject to the mortgages had come to the possession of the receivers, and had been appropriated to the benefit of the bondholders. Possibly, such property might be followed; but in such case could the sureties be preferred to the other general creditors? The argument would give priority to every general creditor of the road, and would render substantially worthless every mortgage lien. This railroad company is bankrupt, with an enormous bonded debt and an immense floating unsecured debt. There is here no claim of diversion of funds. The proposition, stripped of its verbiage, amounts simply to this: That general creditors of the railroad company are in law and in equity to be preferred to mortgage creditors. I am not aware of any decision going quite so far, although it must be confessed that the case of Farmers' Loan & Trust Co. v. Kansas City, W. & N. W. R. Co., 53 Fed. 182, is a dangerous approximation to such holding. I think that case to be in direct antagonism to the rulings of the supreme court, and I am not able to follow it. The argument that, in analogy to the

principle of the maritime law, a mortgage of a railroad should be subordinated to claims for repairs and supplies, is plausible, but, in my judgment, quite fallacious. It is made in misconception of the underlying principle of the admiralty that repairs and supplies are awarded priority when, and only when, they are furnished in a foreign port, solely upon the credit of the vessel, and when, and only when, they are absolutely necessary to enable the ship to finish her voyage, and thus to preserve the security of the mortgage. The principle is grounded upon necessity. The ship in the course of her voyage has arrived at a foreign port in distress, and is unable to pursue the voyage or return to her home port. The owner is presumed to be unknown, and to be without credit at the foreign port. Unless the master can obtain the needed repairs and supplies, and pledge the credit of the vessel therefor, the ship will rot at the wharf, and the mortgage security be put in jeopardy. Therefore it is that from the very necessity of the case the master is authorized to pledge the credit of the vessel for necessary repairs and supplies. If, however, the supplies be in fact furnished upon the credit of the owner, although necessary, the admiralty accords no maritime lien for them; and the burden is also rested upon the material man to show that the repairs or supplies furnished were necessary to the continuance of the voyage. There is manifestly no such condition of things in respect of a railway, and the analogy does not obtain.

Upon this subject the supreme court of Alabama in Meyer v. Johnston, 53 Ala. 237, 345, well observes:

"A ship far from home, in distress, and without recourse, must perish, and perhaps her crew with her, if a bottomry bond given then for repairs and supplies shall not have precedence of other liens upon the vessel. But the court does not consider a railroad on terra firma so beyond the reach of help from those who own it or are concerned in it as to justify the adoption in such case of the rule relating to a ship abroad and about to perish."

In Railroad Co. v. Cowdrey, 11 Wall. 459, 482, the supreme court has distinctly held that the principle giving priority to the last creditor for aiding to conserve the thing "has never been introduced into our laws except in maritime cases, which stand on a particular reason."

I cannot yield assent to a doctrine that would practically destroy the immense bonded interest in railway properties, and place mortgage securities at the mercy of reckless and hostile directors.

Mr. Justice Brewer well observes in Kneeland v. Trust Co., supra, that:

"No one is bound to sell to a railroad company or work for it, and whoever has dealings with a company whose property is mortgaged must be assumed to have dealt with it on the faith of its personal responsibility, and not in expectation of subsequently displacing the priority of the mortgage lien."

Nor, if I could here adopt to its fullest extent the principle of the maritime law, would it prove availing to the granting of this petition. The sureties neither stipulated for security nor have they paid the debt. They could acquire no possible right until payment, and if they had paid, under any theory of the maritime law, they

could only be subrogated to the rights of the judgment creditor. As I have stated, the lien of the judgment, so far as it affected the mortgaged property, was subordinate to the lien of the mortgage. There is no showing here that execution ever issued upon the judgment, or was levied upon property not subject to the mortgage, or that any property was released by the giving of the supersedeas bonds.

In a somewhat similar case in the admiralty the surety was adjudged to have no lien. Judge Dyer in that case well observed:

"When libelant incurred the obligation which ultimately he had to pay, he had it in his power to exact security that should amply protect him; and having omitted to do so, in the language of the court in the case cited on the argument, he can only be considered as now possessing the rights which arise against the person for whom he incurred the obligation for having paid money for him which he had voluntarily and without consideration undertaken to pay." The Robertson, 8 Biss. 180, Fed. Cas. No. 11,923.

The decree in this case was on appeal affirmed by Mr. Justice Harlan.

The precise question here involved was passed upon by Mr. Justice Brewer (then circuit judge) in the case of Blair v. Railroad Co., 23 Fed. 523, adversely to the claim of the surety. It is urged, however, that that case is in effect overruled by Trust Co. v. Morrison, 125 U. S. 607, 8 Sup. Ct. 1004. In the latter case the railroad company had mortgaged its lines to the Union Trust Company in 1871. Default in payment of interest occurred in 1873, and continued thereafter. The company was harassed by suits, and a judgment was rendered in November, 1872, in favor of one Holbrook, upon which, in October, 1874, an execution was issued, and the sheriff threatened to levy upon the rolling stock of the company. By the law of the state of Illinois, rolling stock is deemed personal property, and made liable to execution and sale in the same manner as the personal property of individuals. The company, believing the judgment to have been fraudulently obtained, filed a bill in equity to enjoin proceedings for its collection. An injunction was granted therein, upon condition of giving an injunctional bond, with surety, for the payment of the judgment if the injunction should be dissolved. Morrison, at the request of the company, executed such a bond as surety. The bill for the injunction was in February, 1877, dismissed; and in June, 1879, the decree of dismissal was upon appeal affirmed. Holbrook then prosecuted Morrison upon the injunctional bond, and on the 30th day of September, 1880, obtained judgment. In November, 1877, pending the appeal, the trust company filed a bill for the appointment of a receiver and the foreclosure of the mortgage. A receiver was appointed and, finding this appeal with other suits pending against the company, and being met with claims for protection by sureties on appeal bonds, asked the court for its advice and instruction in respect to such appeal bonds and to the protection of the sureties in the event of adverse decision. The court, on consideration, made a decree authorizing the receiver, in his discretion, to prosecute or defend the appeals, and "to protect such sureties as, in his judgment, ought

to be protected in equity and good conscience by means of the protection afforded to the property and assets of the company by means of the giving of such bonds." He was also authorized for the purposes of that decree to use any money coming into his hands as such receiver, over and above the expenses of operation and repairs. It further appeared that the receiver had used funds, under authority of the court, in the purchase of certain real estate which was not covered by the mortgage, and also in the purchase of personal property and rolling stock; and this property was subsequently to the sale, and by order of the court, conveyed by the receiver to the purchaser, although it was not covered by the mortgage. The sale was made "subject to the lien of any and all claims against the said railroad property and assets which are now before this court by intervening petitions, and which shall be upon final determination and adjudication decreed to be paid as liens paramount to the indebtedness secured by said mortgage or trust deed." The intervening petition of the surety was filed prior to that decree. The court in that case emphatically affirmed the general rule which I have sought to state, but found in that case special equities which authorized the allowance of the claim of the surety. There was an actual diversion of the income to the purchase of real and personal property, which, by subsequent order of the court, was conveyed to the purchaser, and which, under the decree of the court, should have been used to protect the surety. The trust company was also bound by the decree which authorized the receiver to protect the surety. That decree seems to have been passed either by the express assent of the trust company or without its objection. The trustee did not seek to obtain possession of the road until more than four years after default in payment of interest, remaining inactive when it should have known that large liabilities were being incurred by the company in the prosecution of its enterprise. The court declare the case to be a special one, and say that, "taking all the circumstances into consideration, we cannot say that equitable relief was unduly extended in allowing the intervener's claim." It would seem that the decision is placed largely upon the fact that the earnings of the road had been appropriated to the purchase of property not covered by the mortgage, and which, by supplemental decree, was conveyed to the purchaser at the sale. The case is peculiar in its facts, and is plainly distinguishable from the case here presented; the court taking occasion to say that it is not its intention to decide anything in the case in conflict with the general doctrine which it had theretofore asserted. The trust company, recognizing the equitable position of a surety without reward, assents to the granting of the petition here. The second mortgage bondholders object. With whatever of favor I may be inclined to consider the case of sureties, and however desirous to relieve them from their liabilities, I cannot see that the court would be justified in imposing the burden of their voluntarily assumed obligations upon the second mortgage bondholders, who were equally innocent, without their consent. The petition will be denied.

HATCH et al. v. FERGUSON et al.

(Circuit Court of Appeals, Ninth Circuit. May 6, 1895.)

No. 167.

1. APPOINTMENT OF GUARDIAN—BOND—WASHINGTON STATUTE.
   The statutes of Washington provide (2 Hill's Code, §§ 906, 1141, 1142) that a person appointed guardian of a minor must, before receiving letters of guardianship, execute a bond, with sureties. H., by his will, appointed one F. guardian of his minor children. The will made no provision for dispensing with the guardian's bond, but the probate court, by error or inadvertence, entered a decree reciting that F. was appointed, by the will, guardian of the minors, without bond, and approving such appointment. No bond was given by F. *Held*, that such decree of the probate court was void, and F. did not become guardian of the minors.
2. JUDGMENT—COLLATERAL ATTACK.
   A suit was brought for partition of land in which the minors had an interest, to which suit F. was made a party as guardian, and in which he alone represented the interests of the minors. A decree of sale was made, and the land sold, and the sale confirmed by the court. The minors subsequently brought a suit to set aside the sale. *Held*, that the decree in the partition suit was void, and both it and the decree of the probate court were open to collateral attack.
3. COMMUNITY PROPERTY—WASHINGTON STATUTE.
   H., in 1870, began living with a woman not his wife. In 1873, he located a land warrant, received for services as a soldier in the Mexican war, on land for which he received a patent on January 2, 1874. In 1876, H. was married to the woman with whom he had been living. *Held*, that such land was not community property under the statute of Washington (1 Hill's Code, § 1397) providing that property owned by a husband or wife, before marriage, or acquired afterwards by gift, bequest, devise, or descent, shall be separate property, and property otherwise acquired shall be community property.
4. MARRIAGE—EFFECT OF STATUTE LEGITIMATING CHILDREN.
   Held, further, that the statute of Washington (Code 1881, § 2388) providing that illegitimate children shall be made legitimate by the subsequent marriage of their parents did not have the effect of making the marriage of H. and his wife relate back to a period before the issue of the patent for the land, though their eldest child was born before the issue of such patent.
5. COMMUNITY PROPERTY—LAND WARRANT.
   Held, further, that the land patented to H. under a warrant for military service rendered long before the marriage, even if patented after the marriage, would not be after-acquired property within the statute, but was a gift, and so the separate property of H.
6. WILLS—CONSTRUCTION.
   The will of H. bequeathed $5 to his wife, and gave all his property, real and personal, after paying such legacy and his debts, to his children, reciting that such property was a half interest in the community property owned by him and his wife. *Held*, that such recital did not estop his devisees from disputing that the land in question was community property, nor amount to a devise of a half interest to his wife.

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

This was a suit by Dexter Hatch, Arthur Hatch, Cyrus Hatch, and Ezra Hatch, by their next friend, Josephine Hatch, against E. C. Ferguson, Henry Hewitt, Jr., the Everett Land Company, Judson La Moure, and Minnie E. La Moure to annul a judicial sale of certain land. The circuit court rendered a decree for the complainants. 57 Fed. 966. Defendants appealed. Affirmed.

For a prior opinion on a jurisdictional question, see 52 Fed. 833.

Brown & Brownell, for appellants.

A. D. Warner and Stratton, Lewis & Gilman, for appellees.

Before McKENNA and GILBERT, Circuit Judges, and HAWLEY, District Judge.

GILBERT, Circuit Judge. The complainants in this suit are the minor children of Ezra Hatch, deceased, and devisees of his last will and testament. They bring suit to set aside the judicial sale of their interest in the pre-emption claim of their testator and the decree of partition upon which the same was sold. Ezra Hatch died on the 8th day of July, 1890, leaving five children, to whom he devised all his estate, real and personal, appointing E. C. Ferguson the executor of his will and the guardian of his minor children. He left a pre-emption claim, to which he had acquired patent, and a homestead claim, upon which he and his wife and family had resided for four years. It was believed by the executor that the widow of Ezra Hatch was the owner of an undivided one-half of each claim. In September of the same year the widow made proof upon the homestead claim, and paid the commutation price therefor, but, before patent issued, she gave to E. C. Ferguson a power of attorney to sell all her interest in both claims. On the 21st day of October, 1890, under the power of attorney, Ferguson sold and conveyed to the defendant Hewitt all the right, title, and interest of Josephine Hatch in and to said lands. On the 7th day of April, 1891, Hewitt, having purchased the interest of Esther Hatch, the only one of the children of Ezra Hatch who was of age, commenced, in the superior court of the state of Washington for the county in which said land was situate, a suit against the appellees and E. C. Ferguson, their guardian, for the partition of the pre-emption claim; alleging in the complaint that the plaintiff was the owner of an undivided six-tenths interest therein, and that the appellees were the owners of an undivided four-tenths interest. It was found by the court in the partition suit that the title was as alleged in the complaint, and that the land could not be divided. A sale was accordingly ordered. Hewitt became the purchaser, and the sale was subsequently confirmed by the court. Hewitt thereafter conveyed 10 acres of the land to the defendant La Moure, and the remaining 150 acres to the defendant the Everett Land Company. The circuit court, upon final hearing, found the appellees to be entitled to the relief sued for, ruling that the partition decree and sale were void for the reason that Ferguson was not the guardian of the children, and that Josephine Hatch had no interest in said claim at the time of her conveyance to Hewitt, but that the whole of the claim belonged to the children of Ezra Hatch. These rulings of the circuit court are assigned as error.

By the terms of his will, Ezra Hatch appointed E. C. Ferguson executor, without bonds, and also appointed him the guardian of the persons and estate of the minor children until they should each become of age. It contained no provision by which the guardian's

bond should be dispensed with. Through some error or inadvertence, the probate court understood the will to require no bond of the guardian, and on the 22d day of July, 1890, an order was entered in that court in the "Records of Letters Testamentary and Administration" reciting that Ferguson was appointed guardian of the person and estates of the minor children of Ezra Hatch, without bonds, and concluding thus:

"The said appointment of said E. C. Ferguson by the testator Ezra Hatch is hereby approved, and the said E. C. Ferguson is hereby appointed guardian of the person and estates of Esther Hatch, Dexter Hatch, Arthur Hatch, Cyrus Hatch, and Ezra Hatch."

There is no evidence that letters of guardianship were actually issued to Ferguson. Section 1141 of the Code of Washington (2 Hill's Code) declares that all the provisions of the statutes relative to bonds given by executors and administrators shall apply to bonds taken of guardians. Section 1142 provides that every testamentary guardian "shall give bond in like manner and with like condition as hereinbefore required." Section 906 provides as follows:

"Every person to whom letters testamentary or of administration are directed to issue must before receiving them execute a bond to the state of Washington with two or more sufficient sureties to be approved by the judge."

Without pausing to consider whether, under the laws of Washington, a father may, by his last will and testament, appoint a guardian of children whose mother survives, or whether, by the provisions of those laws, the guardian's bond may in any case be dispensed with, it is sufficient to say of that portion of the judgment of the probate court which declares that by the terms of the will the guardian is not required to give a bond that it is void, whether it be regarded as a recital of fact or a judgment of the court construing the will. The will being absolutely silent upon the question whether or not it was the wish of the testator that the guardian should serve without bond, the probate court had no power or authority to make such finding or enter such judgment. If the authority could be conferred upon the court to make such a finding, it could only be by the words of the testator expressed in his last will and testament. He having failed to confer that authority, there was no other source from which it could come. The probate court, while it is a court of record, with general jurisdiction, acts nevertheless, in the matter of appointing guardians, under a specific grant of power, and exercises a special jurisdiction defined by statute. If the facts do not exist which authorize the action of the court, its action so far is a nullity. Lewis v. Allred, 57 Ala. 628; Seamster v. Blackstock, 83 Va. 232, 2 S. E. 36; Risley v. Bank, 83 N. Y. 318; Windsor v. McVeigh, 93 U. S. 282; U. S. v. Walker, 109 U. S. 258, 3 Sup. Ct. 277, and cases there cited. Said the court in Windsor v. McVeigh:

"The doctrine invoked by counsel, that when a court has once acquired jurisdiction it has a right to decide every question which arises in the case, and its judgment, however erroneous, cannot be collaterally assailed, is undoubtedly correct as a general proposition, but is subject to many qualifications in its application. It is only correct when the court proceeds, after

acquiring jurisdiction of the cause, according to established modes governing the class to which the case belongs, and does not transcend, in the extent or character of its judgment, the law which is applicable to it."

Ferguson gave no bond, but proceeded to act as the guardian of the estates of the minor children, and continued so to act until the commencement of the present suit, which was in February, 1892. In the suit which was brought by Hewitt against the minor heirs of Ezra Hatch and against E. C. Ferguson, their guardian, the latter appeared as the guardian, and as such represented the interests of the children. The questions arise whether he was such guardian, and whether the partition decree and sale are void on account of his failure to give a guardian's bond. The decisions of the courts concerning the proposition here involved are not in harmony. It has been held in Alabama, Kentucky, Georgia, and North Carolina that the filing of a bond is not essential to the validity of the appointment of a guardian when the same is collaterally attacked. In Cuyler v. Wayne, 64 Ga. 88, the court ruled that the granting of letters of guardianship by the ordinary, without taking bond, would not make the grant of the letters void as against a bona fide purchaser, who had no notice that a bond had not been given. The statute of that state provided that "every guardian before entering on the duties of his appointment shall take an oath * * * and shall also give bond with good and sufficient surety," etc. In Leatherwood v. Sullivan, 81 Ala. 458, 1 South. 718, the court expressed the opinion that the failure of the plaintiffs to give bond would not render the grant of administration to them absolutely void, but only voidable. Citing Ex parte Maxwell, 37 Ala. 362, and Cunningham v. Thomas, 59 Ala. 158. In Howerton v. Sexton, 104 N. C. 75, 10 S. E. 148, under a statute providing that "every guardian of the estate before letters of appointment are issued to him must give a bond payable to the state," the court held that a guardian who had been duly appointed, but had failed to qualify, could bind his ward by the receipt of money paid by an innocent purchaser as the proceeds of the ward's land, and proceeded to say:

"We are disposed to hold the appointment itself effectual, for it is made in proper form, and the defect lies in the omission to take the bond with surety of the defendant,—an omission not affecting its validity, but subjecting the clerk to the consequences of such neglect."

In Mobberly v. Johnson's Ex'r, 78 Ky. 273, a testator had left a will designating executors, and directing them to sell his real estate. The statute provided that "no guardian can act until he has been appointed by the proper county court and given covenant to the commonwealth with surety." The court said:

"But we consider it immaterial whether the surety is bound on the bond for the proceeds of the real estate sold by the administrator, or whether there was any bond at all. The order of appointment was made by a court having jurisdiction of the person and of the subject-matter, and its judgment cannot be thus collaterally attacked. The executor derives authority to convey from the will. The order of appointment and qualification is the evidence of his authority to act."

But the reverse of these views has been held in Wadsworth v. Connell, 104 Ill. 369; Stewart v. Bailey, 28 Mich. 251; Ryder v. Flanders,

30 Mich. 336; Pryor v. Downey, 50 Cal. 388; Guynn v. McCauley, 32 Ark. 97; McKeever v. Ball, 71 Ind. 398; and Wuesthoff v. Insurance Co., 107 N. Y. 580, 14 N. E. 811. In Wadsworth v. Connell, supra, in construing the law of that state (Laws 1872, § 9, p. 470) which required that a testamentary guardian "shall before he can act be commissioned by the county court of the proper county and give the bond prescribed in section 7 of this act," etc., the court said:

"The will in this case does not dispense with a bond, and none being given, and no commission being issued, appellant never became the guardian of the minors. It is but as if the county court should designate of record the appointment of a person as a guardian, and he were never to give bond or receive letters of guardianship. He could not, by such an order, become a legal guardian, because the statute has made a bond indispensable."

In Wuesthoff v. Insurance Co., supra, the court had occasion to construe the statute of New Jersey, which provided as follows:

"Every guardian appointed by last will or testament, which shall be legally proved and recorded, shall before he exercises any authority over the minor or his estate, appear before the orphan's court and declare his acceptance of the guardianship, which shall be recorded, and shall give bond with such sureties and in such sum as the said court may approve of and order, for the faithful execution of his office, unless it is otherwise directed by the testator's will." Revision, p. 762, § 48.

The court said:

"The distinction which, in the construction of statutes, is sometimes made between directory and mandatory provisions, proceeds upon the supposed intention of the legislature and a discrimination between the essential and the immaterial or nonessential provisions of the statute, or where the statute relates to the powers and duties of officers, between those parts which are intended as a mere direction to the officer in the execution of his duties and those which relate to and concern his substantial authority. The exercise by courts of a power to disregard a particular provision of a statute on the ground that it is directory merely is a delicate one, and should be applied with great caution. The intention of the legislature is the cardinal consideration in the construction of statutes, and whether a particular provision is mandatory or directory is to be determined from the language used, and the purpose in view. Construing the various sections of the New Jersey statute together, it is plain, we think, that the first section quoted [Revision, p. 464, § 1] was intended to define the general powers of a testamentary guardian, and that section 48 [Id. p. 762] was intended to prohibit and suspend the exercise by a testamentary guardian of the functions of his office until he should signify his acceptance of the office and execute the bond required. Obviously, the object of the legislature in requiring the guardian to give security was the protection of the ward. The legislature was dealing with the interests of a class especially entitled to the protection of the law. It was a wise safeguard to require that a guardian, before intermeddling with the estate of the ward, should give security for its faithful administration, unless the parent dispensed with this precaution. This section is to be construed as if written with the prior section, and, so read, it makes the giving of security a necessary qualification and a prerequisite to the exercise of any authority over the estate of the ward."

Considering the language of the Washington statute, and the purpose which was intended to be subserved by the provision requiring a bond of the guardian before he should assume the duties of his office, we think it the better doctrine to hold that the statute is mandatory, and that the execution of a bond is made the necessary prerequisite to the appointment of a guardian. It was evidently contemplated that in the creation of guardianships two steps, equally

indispensable, should be taken: First, the appointment; second, the giving of the requisite security by the guardian so nominated,—and that the appointment without the bond, and the bond without the appointment, would be equally impotent to create the official relationship of guardian and ward. It is not the policy of the statute to extend to the purchaser at a guardian's sale the protection which in many instances is accorded to the innocent purchaser. The protection of the minor is deemed of the first importance. It is intended that the purchaser of the minor's property shall be placed upon inquiry to ascertain that the antecedent steps have been taken in accordance with the law. It is within the power of all to know whether the person who assumes to act as guardian is in fact clothed with the powers of that office. An inspection of the record in this case would have shown that Ferguson could not lawfully represent the Hatch heirs without first giving a bond, and that he had wholly failed to comply with the law in that regard. Notwithstanding the judgment of the probate court appointing the guardian, and the judgment of the superior court decreeing and confirming the sale, his acts are void, and may be so declared in any court having jurisdiction of the subject-matter and the parties to the suit. To hold that such defects may be taken advantage of only in direct proceedings is to afford but little protection to the ward whose property is being administered. The circumstances which attend and induce the sale continue in most instances until the ward reaches his majority and the guardian is discharged. Until that time it is obvious that the ward has rarely the opportunity to reclaim his property or protect his rights. The evils which it is the policy of the statute to obviate are real, and their existence is aptly illustrated in the case before the court, since it appears from the record that Ferguson, who acted as guardian, but who failed to give the bond required by law, has appropriated to his own use all of the children's money which he received as the proceeds of the sale of their land, and has wholly failed to account therefor.

Our attention is directed to cases in which it has been held that the failure of a guardian to execute the additional bond which in some states is required by statute upon a guardian's sale of real estate will not avoid the sale when collaterally assailed. But those decisions may be said to rest upon principles distinguishable from those involved in the present case. The failure to give a bond, which is by statute made necessary to the creation of the office of guardian, may be considered a jurisdictional defect, which would prevent the nominated guardian from assuming the duties of his office, and the probate court from acquiring, through such guardianship, the control of the ward's estate. The omission of a duly qualified guardian to give the additional bond may be regarded as an irregularity or defect in administering property lawfully under the control of the court and the guardian, and, as such, it would not necessarily avoid the proceedings.

In the decree of partition it was assumed by the court that the pre-emption claim had been the community property of Ezra and Josephine Hatch, and the court adjudged Hewitt, the plaintiff

therein, to be the owner of an undivided six-tenths interest in the land, he having purchased an undivided one-half interest from Josephine, and the one-fifth interest of Esther Hatch as devisee of her father's will. The remaining four-tenths were found to be the property of the four minor children. The further questions arise whether the land was community property, and whether Josephine had any interest therein. It appears that, in 1870, Ezra Hatch began living with Josephine, and, with her, occupied this land. On October 9, 1876, they were married. They continued to reside on the land until Ezra's death, in November, 1886. Ezra Hatch had been a soldier in the Mexican war, and was the owner of a Mexican land warrant, which had been issued to him by the United States for services rendered in that war. On the 7th day of May, 1873, he located the warrant on the land in controversy, and on the 2d day of January, 1874, in pursuance of such entry, he received his patent. The laws of Washington (section 1397, 1 Hill's Code) provide that the property owned by the husband before marriage, and that acquired by him afterwards by gift, bequest, devise, or descent, shall be his separate property; and section 1398 makes a like provision in regard to the separate property of the wife. Section 1399 provides as follows:

"Property not acquired or owned as prescribed in the next two preceding sections, acquired after marriage by either husband or wife, or both, is community property."

Under these provisions of the statute, the land in question was clearly the separate property of Ezra Hatch. The patent itself recites that the warrant was a grant or gift to him for services performed for the government in the Mexican war. Those services were rendered long prior to the marriage. The entry upon the land was made, and the patent was issued, some years before the marriage. It is not shown that the joint efforts of the husband and wife ever in any degree added to the value of the land. It is urged by the appellants that since the eldest daughter of Ezra and Josephine was born before 1873, and the law of Washington (section 2388 of the Code of 1881) provides that illegitimate children shall become legitimate by virtue of the subsequent marriage of their parents with each other, the marriage of Josephine and Ezra in 1876 relates back to 1870, when they began to live together as husband and wife, or, at least, to the date of the birth of the oldest child, thus rendered legitimate. We are unable to give this construction to the statute. The effect and scope of section 2388 is limited to the precise matter therein referred to,—the legitimation of the children. It would be an unwarranted extension of its scope to say that it was intended to affect the property relations of husband and wife, or to create a rule in regard to community property other than that defined in the statutes heretofore quoted. But, even if the marriage of Josephine and Ezra had taken place before 1873, land which was acquired under a land warrant issued at that date for services rendered by the grantee long prior to the marriage would not be after-acquired property so as to come within the definition of community property as expressed in the statute. The warrant was a gift, and, as such, was the separate prop-

erty of the donee, as was likewise the land which was purchased by means thereof.

It is further contended that the expressions found in Ezra Hatch's will concerning this property make it community property, and estop his devisees from now contending that it was not. The language of the will is:

"I give and bequeath to my daughter Esther Hatch, and to my sons Dexter Hatch, Arthur Hatch, Cyrus Hatch, and Ezra Hatch, all my estate, real and personal, of every name and nature whatsoever, owned by me at the time of my death, after paying all my just debts and the admitting this, my last will, to probate, and the sum of five dollars, hereinafter bequeathed to my wife, Josephine Hatch, said estate being a one-half interest in the community property now owned by me and my said wife."

It may be conceded that Ezra Hatch believed both his pre-emption claim and his homestead claim to be the community property of himself and his wife, and it is possible that, had he known the nature of his estate in the two claims, he might have made a different testamentary disposition thereof. But the specific devise of all his interest and estate to his children cannot be controlled or diverted by the expression of his belief that the estate so devised was the one-half interest in community property. This opinion was not an admission against his interest so as to estop him or his devisees from thereafter asserting the truth. He may have assumed that he owned an undivided one-half of the pre-emption claim and an undivided half of the homestead claim. If so, he was in error as to both claims, for the pre-emption claim was his separate property, and all of the homestead claim was subsequently patented to Josephine, so that the children took no interest therein under the will. The result was that the land was substantially divided between the widow and the children. Nor can it be said that third persons, acting upon the faith of such a representation in the will, are misled. There was no specific statement in the will that the pre-emption claim was community property. A purchaser of said land at a partition sale was necessarily put upon inquiry to ascertain the nature of the estate which the testator possessed, and the facts concerning the same. An examination of the patent would have shown that the land was a gift from the United States. Neither do we find any warrant for holding, as contended by the appellants, that the provision of the will just quoted is in law a devise upon the part of Ezra Hatch to his wife, giving to her a one-half interest in the land. There is nothing in the will to indicate a purpose upon his part to devise to her any portion of his interest in real estate. He bequeathed to her the sum of $5, evidently with the intention that, as to her, he should not be deemed to have died intestate. The reference to the community property tends only to prove that he entertained the erroneous belief that both claims were community property, and that Josephine owned the undivided one-half of each, whereas, in fact, the children took under the will all of the pre-emption claim, and the widow took under the homestead law all of the homestead claim.

We find no error in the decree appealed from, and the same is affirmed, with the costs to the appellees.

GARRETT et al. v. BOEING et al.

(Circuit Court of Appeals, Sixth Circuit. May 13, 1895.)

No. 197.

JUDGMENT—COLLATERAL ATTACK—PROBATE COURT.

When a petition for administration has been presented to a parish court in Louisiana, containing a representation of all facts necessary to confer jurisdiction to grant administration to the public administrator and decree the sale of property to pay debts, and such court, having power to inquire into the facts, and in the regular exercise of its jurisdiction, has made a decree granting administration and directing a sale, such decree cannot be questioned collaterally, either on the ground that the succession was not vacant, but had been assumed by the heirs by a tacit acceptance, or that the decedent died in another parish, or that there were no debts, or that no notice of the proceedings was given to the parties interested.

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

This was a suit by Martin Alonzo Garrett and others against Marie M. Boeing and others to impress a trust upon the legal title to certain lands and for an accounting. The circuit court sustained a demurrer to the bill. Complainants appeal. Affirmed.

This case was argued and submitted with Hodge v. Palms (No. 232) 68 Fed. 61; McCants v. Land Co. (No. 233) Id. 66; Morancy v. Palms (No. 234) Id. 64; and Fletcher v. McArthur (No. 235) Id. 65,—cases in many respects of a similar character.

By the act of cession from France to the United States of the territory of Louisiana, in 1803, it was stipulated that the United States should give protection to the property rights of the citizens of the territory. For the purpose of carrying out this stipulation, congress passed an act providing for the appointment of a board of commissioners to ascertain what land claims covered by the treaty were just and valid. It happened that more claims were allowed and certified than there were lands to which they were applicable. The present suit involves one of such claims as remained unsatisfied, and dates in its origin as early as 1789. The suit was brought by a bill in equity filed in the Northern division of the circuit court of the United States for the Western district of Michigan. The complainants, by the averments of their bill, set forth in substance the following state of facts: That in the year 1810 one Joshua Garrett was the owner of an inchoate land claim in the former parish of Opelousas, in the state of Louisiana, comprised within the present parish of St. Landry, for 1,361 acres of land, which claim was entered by the commissioners for the Western district of Louisiana in their report of April 6, 1815, and, with other claims embraced in said report, was confirmed by an act of congress approved April 29, 1816. That said Joshua Garrett died possessed of that claim about the year 1812, in the parish of St. Mary's, in Louisiana, his domicile being in that parish, and leaving as his heirs at law two sons and one daughter; and that at the time of his death said Joshua Garrett owned a considerable amount of real estate and personal property situated in the said parish of St. Mary's. That there is no record in that parish of the settlement of his estate, but that by the law of Louisiana the heirs of the decedent were immediately upon his death seised and possessed of all his estate, subject only to their right to renounce the succession or the right of creditors to require an administration. That such renunciation is not presumed, but must be made by a formal act before a notary. Their acceptance, however, may be evidenced by any act of the heirs indicating their intention to exercise ownership over the ancestor's property; and that, after the acceptance by the heirs of the succession of their ancestor, no administrator can lawfully be appointed to administer thereon. That, immediately after the death of the said Joshua Garrett, his heirs took possession of all his real estate and of his other effects capable of being reduced to possession, and thereafter used, controlled, and disposed of the same as owners thereof. The

bill then proposed to deraign title to the land claim from the heirs of the said Joshua Garrett to the complainants in this suit, and goes on to state that for reasons not involving fault on the part of the said Joshua Garrett, or of the persons claiming under him, the said land claim remained unlocated and unsatisfied, and without provision for its satisfaction, until the passage by congress of the act approved June 2, 1858, entitled "An act to provide for the location of certain confirmed private land claims in the state of Missouri and for other purposes," by which act it was provided, in section 3: "That in all cases of confirmation by this act, or where any private land claim has been confirmed by congress, and the same, in whole or in part, has not been located or satisfied, either for want of a specific location prior to such confirmation, or for any reason whatsoever, other than a discovery of fraud in such claim subsequent to such confirmation it shall be the duty of the surveyor general of the district in which such claim was situated, upon satisfactory proof that such claim has been confirmed, and that the same, in whole or in part, remains unsatisfied, to issue to the claimant or his legal representatives, a certificate of location for a quantity of land equal to that so confirmed and unsatisfied; which certificate may be located upon any of the public lands of the United States subject to sale at private entry at a price not exceeding $1.25 per acre: provided, that such location shall conform to legal divisions and subdivisions." And in section 4: "That the register of the proper land office, upon the location of such certificate, shall issue to the person entitled thereto, a certificate of entry upon which, if it shall appear to the satisfaction of the commissioner of the general land office that such certificate has been fairly obtained, according to the true intent and meaning of this act, a patent shall issue as in other cases;" and that no limit of time was fixed for the presentation of claims under said act for such certificates of location. That during the lapse of time between the origin of said inchoate claim, its confirmation, and the provision for its satisfaction in the act of congress above quoted, many of those interested therein had died, and their heirs or legal representatives with respect to said land claim, many of whom were minors, as well as the survivors among those originally interested, had become widely scattered, and had, by reason of said delay, lost all hope of satisfaction for their said claims, and that neither the complainants nor any of those interested in said land claim, who were alive June 2, 1858, knew of the existence of said claim or of the passage of the act of 1858, or of their rights under the said act, until within 18 months last past; and that neither the surveyor general for the district of Louisiana in office from June 2, 1858, to February 6, 1861, nor his next successor, appointed August 16, 1869, nor any of his successors, ever took any steps to apprise the said legal representatives of their said rights, it being the practice to issue certificates of location, under said act, only upon application therefor; and that neither these complainants, nor any of the persons from whom they derive title to their interests in said land claim, ever applied for or received any certificate of location under said act of 1858, or other thing in satisfaction of said claim or any part thereof. That in the year 1872 one Daniel J. Wedge induced the public administrator of the parish of La Fayette, in the state of Louisiana, to file his petition in the parish court of that parish, by Wedge, his attorney, alleging that the estate of Joshua Garrett was vacant; that it consisted of the confirmed but unsatisfied land claim above referred to, and that it was less than $500 in value; and praying to be appointed administrator thereof, and for an inventory and sale of the same, under the laws of Louisiana regulating the administration of vacant estates of less than $500 in value; and that such proceedings were had that on the 1st day of August, 1872, the judge of the parish court, in pursuance of said petition, issued an order appointing the said public administrator to be administrator of said estate, and directing an inventory and sale of the property which might be found to belong thereto, to pay debts. That the inventory was returned August 2, 1872, and the property sold on the 29th day of that month in accordance with the order, at which sale Wedge purchased the said land claim for the sum of forty dollars, which was wholly consumed in the payment of the costs and expenses of administration, no other debts being shown to exist. That no notice was given of the application for the appointment of the administrator or of the sale of said property, nor of the order appointing the administrator and directing the

sale. The proceedings thus stated fully appear from a copy thereof which was annexed to the bill. Various provisions of the laws of Louisiana in reference to the administration of successions are set forth in the bill, the material parts of which are stated in the opinion. It is further stated in the bill that Wedge, claiming to be the legal representative of Joshua Garrett by virtue of the above-mentioned proceedings, applied to the surveyor general of the United States for the district of Louisiana for certificates of location in satisfaction of the said land claim under the said act of June 2, 1858, and that the said surveyor general prepared such certificates of location on the 2d day of June, 1879. The following is the form of one of such certificates of location and of an indorsement thereon by the surveyor general:

"No. 366A. Act of June 2nd, 1858. Acres, 80.

"Surveyor General's Office.

"New Orleans, La., June 2, 1879.

"I hereby certify that by the act of congress approved April 29, 1816, entitled 'An act for the confirmation of certain claims to land in the Western district of the state of Louisiana and in the territory of Missouri,' the claim of Joshua Garrett, entered as No. 44, class B, in the report dated April 6th, 1815, of the commissioners for the Western district, state of Louisiana, is confirmed to Joshua Garrett for 1,361 12/100 acres of land, of which there remains unsatisfied the quantity of 1,361 12/100 acres, which quantity the said claimant is entitled to locate, pursuant to the provisions of the third section of act of congress approved June 2, 1858, entitled 'An act to provide for the location of certain confirmed private land claims in the state of Missouri, and for other purposes.' Now, therefore, be it known that, on surrender of this certificate to the register of any land office of the United States, the said Joshua Garrett, or his personal representative, shall be entitled to locate, in part satisfaction of said claim, the quantity of 80 acres 'upon any of the public lands of the United States subject to sale at private entry, at a price not exceeding one dollar and twenty-five cents per acre, provided that such location shall conform to legal divisions and subdivisions.'

"O. H. Brewster,

"Surveyor General, District of Louisiana."

The indorsement:

"Surveyor General's Office.

"New Orleans, La., June 2d, 1879.

"It is hereby certified that, in pursuance of evidence on file and of record in this office, D. J. Wedge is the legal representative of Joshua Garrett, the deceased confirmee, and as such is authorized to locate the within certificate.

"O. H. Brewster,

"Surveyor General of Louisiana."

Upon the certificates being forwarded by the surveyor general to the commissioner of the general land office, he authenticated the same as follows:

"General Land Office.

"Washington, D. C., June 14, '79.

"The foregoing certificate or script, having been lawfully issued by the surveyor general of Louisiana, is receivable, according to its terms, at any land office in the United States for the location, subject to entry at private sale and to which no adverse right exists.

J. M. Armstrong,

"Acting Commissioner."

That the evidence referred to in said indorsement consists solely in the record of said succession proceedings. Thereupon the said certificates were delivered to Wedge. That one Wilhelm Boeing, on July 17, 1880, offered the said certificates of location at the United States land office at Marquette, Mich., for location upon the lands involved in this suit, and the said certificates were received by the register of the said land office in payment for said lands. That patents were issued by the United States on the 30th day of December, 1881, conveying the said lands to said Boeing, which patents recited the provisions of the act of congress of June 2, 1858, and set forth that they were issued in conformity with said act, in full satisfaction of the unlocated and unsatisfied claim of Joshua Garrett, and stated that the locator

was the assignee of the legal representative of the said Garrett. The bill then shows conveyances of part of said lands to some of the defendants in the case, and the inheritance of other parts thereof by the other defendants, upon the death of said Wilhelm Boeing, on January 10, 1890. That the defendants, claiming title to the lands under said locator, now hold possession, or have at some other time entered upon and held possession, of some part of the lands hereinbefore described, and that each of them, in person or by their agents, has removed, or authorized to be removed, the timber or other valuable products from the lands of which they now have possession, or have sold and have received large sums of money from the sale thereof, and from the rents and profits arising from said lands. That the value of the timber or other products so cut and removed largely exceeds the sum of $2,500. That all the aforesaid transactions, from the beginning of the succession proceedings in the parish court of La Fayette parish to the cutting and disposal of the timber and the reception of the rents and profits from the lands, were carried on without the knowledge of the complainants, or any person from whom they claim title. That complainants were wholly ignorant of the same, and of their rights in the premises, until the fall of the year 1889, when some of them, learning that certificates of location had been issued in satisfaction of said claim, made investigations respecting the claim and their rights thereunder. That the persons through whom they derive their title were widely scattered, and their residences unknown to complainants. Whereupon the facts were ascertained, the residences of the several complainants discovered, and their co-operation secured, and thereupon they filed their bill of complaint. They allege that the pretended succession proceedings in said parish of La Fayette and the sale therein made of the said land claim of Joshua Garrett are void, of no effect, and vested no title in said Wedge, for the following reasons: (1) Because said claim was not assets of the estate of the said Joshua Garrett, but the property of his descendants, whose estate the complainants now have; (2) because the parish court of the said parish of La Fayette was without jurisdiction to appoint an administrator upon the estate of the said Joshua Garrett; (3) because the said pretended appointment and sale were not preceded by the orders and publications required by law; and (4) because said Daniel J. Wedge could not lawfully purchase at said pretended sale. And they further charge that the said Wedge, by virtue of the said proceedings, became a constructive trustee for the legal representatives of said Joshua Garrett in respect to said claim, and that the several respective and successive assignees, down to and including the defendants, had notice of the said trust, and are chargeable by reason thereof. They pray that they may be adjudged to be the true legal representatives of the said Joshua Garrett. That the several defendants may be adjudged to hold the lands now respectively held by them in trust for the complainants, and to convey the said lands. That the several defendants may be restrained and enjoined from selling or making any claim of title to said lands, and from entering thereon and from in any manner intermeddling therewith. That an account may be taken of the timber and other products removed from said lands, and of the value thereof, and of the amounts received from rents and profits, and that the defendants may be decreed to pay the complainants such value and amounts, with interest. The specific character of the proceedings in the parish court of La Fayette parish, as shown by the exhibits attached to the bill, is more fully stated in the opinion of the court. To this bill the defendants demurred, and assigned as special grounds for their demurrer, among others, the reasons discussed in the opinion. The bill was amended during its pendency in the court below, but those amendments did not make any change in the statement of the facts material to be stated in the view which the court takes of the case upon this appeal. The circuit court sustained the demurrer, and ordered the bill to be dismissed, upon the ground, as appears from the memorandum of its opinion sent up with the record, that, although the bill avers that Joshua Garrett died in St. Mary's parish, and that was the parish of his domicile, while the proceedings were in the parish of La Fayette, yet that said parish court of La Fayette parish found that said Garrett died in La Fayette parish, and upon the further ground that the claim of the complainants is a stale claim, and barred by laches. From the decree dismissing the bill the complainants appeal.

Barbour & Rexford and Robert B. Lines, for appellants.

Jas. T. Keena (Don M. Dickinson and Henry M. Duffield, of counsel), for appellees.

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

Having stated the case as above, SEVERENS, District Judge, delivered the opinion of the court.

The complainants seek to maintain their suit upon the theory of a constructive trust cast upon the legal title, which they admit to be in the defendants, by the fact that Wedge obtained the land claim of their ancestor, Joshua Garrett, by means of a fraud upon those who had inherited the claim from him, which trust, it is alleged, attached to the lands upon the issuance of the patent by reason of the fact that the successive assignees from Wedge, to and including the defendants, took the claim or the products of it with notice of the trust. The soundness of this deduction is controverted by the defendants.

We shall not stop in this case to examine the sufficiency of the grounds, in the abstract, upon which this proposition is based, but, for the purposes of our decision, will assume that, if the allegations of law and fact upon which it rests are made out, the consequences claimed would follow. The complainants deny the validity of the proceedings in the parish court of La Fayette parish in the matter of Garrett's succession. The substance of the argument made in support of the attack made upon the proceedings of the parish court of Louisiana consists in these propositions: First, that the court was without jurisdiction, because the succession of Garrett was not vacant; second, that it had not jurisdiction, because, as they allege, Garrett did not die in, nor was he, at the time of his death, domiciled in, that parish; third, that there was no jurisdiction, because there were no debts against the succession; and, fourth, because, if in other respects the court had jurisdiction, it was not lawfully exercised as against the heirs of Garrett, for the want of notice to them of the contemplated proceedings.

We will answer these propositions in their order as thus stated.

1. It is insisted that the acceptance which the bill alleges the heirs of Garrett made of his succession upon his death displaced all authority of the parish court to appoint an administrator, or in any manner deal with the property of the succession. The provisions of the law of Louisiana upon which this result is claimed to ensue, as well from the first as from the second of the propositions above stated, are found principally in the following articles of the Revised Civil Code of that state of 1870:

"Art. 871. (867.) Succession is the transmission of the rights and obligations of the deceased to the heirs.

"Art. 872. (868.) Succession signifies also the estates, rights and charges which a person leaves after his death, whether the property exceeds the charges or the charges exceed the property, or whether he has only left charges without any property.

"Art. 873. (869.) The succession not only includes the rights and obligations of the deceased, as they exist at the time of his death, but all that has ac-

crued thereto since the opening of the succession as also the new charges to which it becomes subject.

"Art. 874. (870.) Finally, succession signifies also that right by which the heir can take possession of the estate of the deceased, such as it may be."

"Art. 934. (928.) The succession, either testamentary or legal, or irregular, becomes open by death or by presumption of death caused by long absence, in the cases established by law."

"Art. 940. (934.) A succession is acquired by the legal heir, who is called by law to the inheritance, immediately after the death of the deceased person to whom he succeeds.

"Art. 941. (935.) The right mentioned in the preceding article is acquired by the heir by the operation of the law alone, before he has taken any step to put himself in possession, or has expressed any will to accept it."

"Art. 946. (940.) Though the succession be acquired by the heir from the moment of the death of the deceased, his right is in suspense, until he decides whether he accepts or rejects it.

"Art. 947. (941.) The heir, who accepts, is considered as having succeeded to the deceased from the moment of his death, not only for the part of the succession belonging to him in his own right, but for the parts accruing to him by the renunciation of his co-heirs in the succession of the deceased."

"Art. 987. (981.) The effect of the acceptance goes back to the day of the opening of the succession."

But the rights secured by these provisions are subject to the general power of the probate court having jurisdiction over the succession. As we shall hereafter see, whether those powers are rightly exercised in the particular case is a question to be determined in that case by challenge in that court or in some other to which an appeal may lie.

By article 988 of the Revised Civil Code, it is declared that the acceptance by the heir may be either "express or tacit." "It is express when the heir assumes the quality of heir in an unqualified manner, in some authentic or private instrument, or in some judicial proceeding. It is tacit, when some act is done by the heir, which necessarily supposes his intention to accept, and which he would have no right to do but in his quality of heir." Assuming, what probably could not be conceded, that the effect of an express acceptance would preclude the exercise of jurisdiction by the parish court over the succession, it is to be observed that the bill in this case does not allege any formal or express acceptance by the heirs, but alleges what under the Code would amount to a tacit acceptance; that is to say, one to be implied from acts in pais. It was a question of fact whether such acceptance had taken place or not. The power to inquire into the facts and determine whether the succession had been accepted was vested in the parish court. It would be absolutely necessary that the authority to judicially determine such a question should be vested in some court, and, by the system established in every state in the Union, Louisiana among them, such authority is devolved upon the probate court, by whatever name called in the respective states. The failure to vest authority over such questions would leave them open to uncertainty, and to contest at the instance of anybody and upon any occasion where it might be for his interest to bring on a dispute about the fact. The petition presented to the parish judge contained a representation of every fact necessary to confer jurisdiction. It was so held in Simmons v. Saul, 138 U. S. 439, 11 Sup. Ct. 369, where the peti-

tion in the proceedings brought collaterally under the consideration of the court was in the same language as the petition now being considered. An examination of the constitution, statutes, and judicial decisions of Louisiana shows that full and exclusive jurisdiction of the opening and settling of successions within the state is conferred upon the parish courts, and that the powers vested in those courts are substantially coextensive with those generally exercised by the probate courts in other states. The parish judge is the judge of the probate court, and the court is one of general jurisdiction of all matters relating to the estates of deceased persons. It is alleged in the bill that the land claim in question was part of the succession of Garrett.

The petition of the public administrator of the parish represented that Garrett "departed this life in said parish many years since, leaving some property, consisting of an old deferred land claim against the United States, No. 44, of date 1789." "That said property should be inventoried, appraised, and sold according to law, and that petitioner is entitled to the administration of the said estate, being less than $500 in value." The petitioner thereupon prayed that he might be ordered to take charge of the estate, that an inventory might be made, the property sold according to law to pay debts, that an attorney might be appointed to represent the absent heirs of said estate, if any there were, and that a commission issue to the sheriff to sell the property. On this petition the parish court ordered that after 10 days' notice, if there was no opposition thereto, the public administrator take charge of and administer the estate, that the property be inventoried and appraised, that W. C. Crow be appointed to represent the absent heirs, that in due time the property be sold for the purpose of paying debts and settling the estate, and that a commission issue to the sheriff to sell it. Crow filed an acceptance of the appointment of attorney for absent heirs, and waived citation and service. The property, consisting of the said land claim, was appraised by the legally appointed appraisers at $40, and was sold by the sheriff at public auction to Wedge for the same sum. We cannot doubt that, for the purpose of testing the jurisdiction of that court, the fact that the succession was vacant was conclusively established by the determination of the order appointing an administrator. This subject will be further discussed in dealing with the next, to which it is closely allied.

2. The next objection to the validity of the proceedings is that the parish court of La Fayette parish had no authority to appoint an administrator, because, as it is alleged, Garrett died in St. Mary's parish, and not in La Fayette. But the petition, as we have seen, stated that he died in La Fayette parish. That, too, was a question of fact. It might depend on disputed testimony. By whom and when should such a question be determined? Manifestly, by that parish court of Louisiana to whom regular application for administration should first be made. Suppose that court, upon an allegation that the deceased died in that parish, so finds upon inquiry into the facts, and proceeds to administer the estate. Would

it be competent to reopen the question by an application to the parish court of an adjoining or other parish, and try it over again, upon an allegation that the question of the decedent's domicile was not rightly decided in the parish proceedings? And may that question again be decided by another judge upon the evidence that shall now be adduced? If that can be done, the second judgment is no more conclusive than the first. The question could be tried over again in every parish in the state, with the possibility of as many different conclusions.

The laws of Louisiana, by certain peculiar additional safeguards, lessen the danger of occasional hardship resulting from the lack of notice by providing, as they do by articles 607 and 611 of the Code of Practice, that, in addition to the right of appeal, an action of nullity may be brought in the same court within a prescribed time against the judgment, where it has been obtained by fraud or ill practices by the party procuring it; and by providing for the appointment by the court of an attorney to represent the absent heirs (Rev. Civ. Code, arts. 1210,1211), and by awarding him fees for his services (Id. art. 1219), and thereby making him responsible to any party suffering by his want of diligence.

We think the law is settled in Louisiana, as well as elsewhere, that a collateral attack on a judicial determination of this character cannot be permitted. The supreme court of Louisiana, in its decisions relating to the character of the local probate jurisdiction and the conclusiveness of the judgments thereof when indirectly brought in question, very clearly and positively affirms the rule above stated, and which is maintained in the cases hereinafter cited from the reports of the supreme court of the United States. The cases are very numerous, and we cite only a few of the more recent: Sizemore v. Wedge, 20 La. Ann. 124; Woods v. Lee, 21 La. Ann. 505; Duson v. Dupre, 32 La. Ann. 896; Webb v. Keller, 39 La. Ann. 58, 1 South. 423; Linman v. Riggins, 40 La. Ann. 761, 5 South. 49; Gale v. O'Connor, 43 La. Ann. 717, 9 South. 557; Grevemberg v. Bradford, 44 La. Ann. 400, 10 South. 786; Succession of Theze, 44 La. Ann. 47, 10 South. 412.

It is not necessary to canvass all these cases. It will be sufficient to refer to two of recent date, which state the result of the previous decision, so far as they apply to the present case. In Duson v. Dupre, 32 La. Ann. 896, an action was brought by the curator of a succession, and the attorney for the absent heirs thereof, to recover land belonging to it. The plaintiffs derived their authority from the parish court of St. Landry. The defendants alleged that their appointment was a nullity, because the decedent whose succession they were appointed to represent was not a resident of St. Landry, but resided in the parish of Orleans. They also alleged another reason for the invalidity of the appointment, a reason which is relied upon here, namely, that the decedent left heirs in Louisiana, and so the estate was not vacant. We say it was the same reason, because there the law raised the presumption that the heirs had accepted the succession, while here the bill alleges that they did so. The district court held these defenses to be good. But the supreme court

reversed the judgment, holding neither of them to be good, saying that:

"The parish court of St. Landry had probate jurisdiction, and was exclusively competent to grant and issue letters of administration in all successions properly opened in that court. Defendants contend that this succession was not properly opened in that court, for the reasons urged in their exceptions. This denial presents a question of fact; that the deceased was not a resident of this parish; and that, having left heirs who were residents of this state, his succession was not vacant so as to necessitate or justify the appointment of a curator. * * * These questions can be looked into and adjudicated upon only in a direct action before the same court, or before the tribunal now vested with original probate jurisdiction in the parish of St. Landry. No principle of our jurisprudence is more firmly established than the following: 'Letters of administration make full proof of the party's capacity until they be revoked. They must have their effect, and the regularity of the proceedings on which they issued cannot be examined collaterally.' This rule was laid down in the early days of our jurisprudence, and has been sanctioned, confirmed, and consecrated by an unbroken line of decisions of this court down to the present day."

This case is cited and quoted in Simmons v. Saul as an important one in the exposition of Louisiana law upon the subject in hand, and the statement of the doctrine therein contained was approved as correct. In the recent case of Grevemberg v. Bradford, 44 La. Ann. 400, 10 South. 786, the supreme court had before it a case in many respects like the present. It was a petitory action by the heirs of one who had held a like confirmed land claim in Louisiana to recover lands which had been located by one who derived his title to the claim through almost exactly similar proceedings to those which took place in Garrett's succession. Some of the facts differed, and so the case cannot be said to be exactly analogous, but in deciding it the court referred to Duson v. Dupre, supra, quoted the language thereof as above, and said:

"That decision is but the reannouncement of what is the settled jurisprudence of this court. * * * Evidently, had Duson, curator, made a sale of the property of the Le Blanc succession in the parish of St. Landry, and the heirs had contested the validity of the title conferred on the purchaser, who, like the present defendant, was a stranger to the succession, this court, acting on the authorities therein cited, would unquestionably have denied their action, and affirmed the validity of the sale."

The case supposed in this extract from the opinion of the court presents exactly the case now before us. As was said in Simmons v. Saul, there are many cases in the Louisiana Reports where objections of the nature here taken were successfully maintained. But quite generally those were cases where the proceeding was either upon appeal or directly by a practice permitted by express statute, for the purpose of annulling or correcting the former judgment. No case has been referred to by counsel, nor have we been able to find any where it has ever been held that the jurisdiction can be questioned in such circumstances as these, and in a proceeding wholly independent and collateral.

We are bound to give the proceedings in the parish court the same credit as they would have in the state from which the record comes. The proceedings, the validity of which is here disputed, however open to question in the original jurisdiction to correction or annulment, were not subject to impeachment or collateral attack there, nor are

they here, it being shown that Garrett was a resident of and died in Louisiana, that the parish court had jurisdiction by law over the subject of successions, that a petition alleging the existence of the facts requisite to bring the particular succession within its jurisdiction was presented to the parish court, and administration was thereupon ordered and a sale of part of the succession sold in pursuance of its order. The suggestion of fraud in the procurement of the order of the court is of no avail. Such a charge can only be successful in the home jurisdiction. Christmas v. Russell, 5 Wall. 290; Hanley v. Donoghue, 116 U. S. 1, 6 Sup. Ct. 242; Simmons v. Saul, 138 U. S. 439, 11 Sup. Ct. 369. And we are required to give the same effect to the proceedings as if no such imputation were made upon them.

It is often said in the Louisiana cases that one relying upon the orders and decrees of the parish courts is bound to look to the jurisdiction. Some of these cases are cited in complainants' brief. But the rule they state is only the one which lies at the foundation of all judicial proceedings, and, in applying it, those courts have always recognized the parish courts as courts of general jurisdiction in respect of the subjects committed in their charge. Upon the statement of the above rule, the question constantly remains, what are the matters relating to the jurisdiction, without the existence of which the court is without power to proceed? Doubtless the person whose estate is to be administered must have deceased. There must be a succession—that is, an estate—subject to the laws of the state, and susceptible of administration in the courts appointed for that purpose, and the property to be administered must be of that succession. And the succession must not have been already judicially administered. In the latter case it is no longer in the succession, but has passed finally into new ownership. Probably there are other things of like general character, the existence of which might defeat the jurisdiction, but they are not subordinate matters of the kind here relied upon, each one of which has first or last been held to be not intrinsically essential, but subject to be ascertained by the judgment of the court in which the suit is brought. When thus ascertained, their status is thereby fixed, and the power of the court may be exercised upon them as having that status in fact. As to such matters, that which is stated in the petition, and accepted and acted upon by the court as true, becomes an indisputable part of the record.

3. Jurisdiction in the parish court is also denied because, as is alleged, there were no debts. It may be that that would have been a good reason why an administrator should not have been appointed, but it was not indispensable to the validity of the appointment. In the petition there was no direct averment that there were debts to pay, though it is implied in the prayer that the property might be sold to pay debts. Although, as a matter of pleading, such a defective allegation would not be technically sufficient, yet the subject was brought to the attention of the court, and its order followed the prayer. We do not, however, think it necessary to vindicate the order of appointment on this ground. It is not absolutely necessary

to an administration that there should be debts to be satisfied, and the estate is equally a succession whether there be charges upon it or not.

4. The contention that the appointment was made without any notice to the parties interested, either personal or by publication, is answered by the decision in Simmons v. Saul, where precisely the same objection was taken. The court in that case, after referring to article 1190 of the Code, which provides for the settlement of small estates in a summary manner, and which the court thought authorized the appointment of an administrator without notice, went on to say that, jurisdiction having attached by the presentation of a petition containing the necessary representations, the failure to give the notice, although required by law, or any other informality or defect in the subsequent proceedings, would not oust the jurisdiction, nor render the proceedings collaterally assailable; citing Grignon's Lessee v. Astor, 2 How. 319; McNitt v. Turner, 16 Wall. 366; Thompson v. Tolmie, 2 Pet. 157; Mohr v. Manierre, 101 U. S. 417; Comstock v. Crawford, 3 Wall. 396; Florentine v. Barton, 2 Wall. 210; Thaw v. Ritchie, 136 U. S. 519, 10 Sup. Ct. 1037.

For these reasons we think the decree of the circuit court is right, and it is therefore affirmed.

HODGE et al. v. PALMS et a.

(Circuit Court of Appeals, Sixth Circuit. May 13, 1895.)

No. 232.

1. PROBATE COURTS—DECREE—PROPERTY AFFECTED.
   One V., a citizen of Louisiana, was the owner, prior to 1835, of a land claim, confirmed to him by act of congress pursuant to the provisions of the treaty of cession of Louisiana, and to the report of the commissioners appointed to carry out such provisions. In 1835, V. conveyed such claim to the predecessors of the complainants. By the act of congress of June 2, 1858, provision was made for issuing certificates to the owners of such claims, upon which locations of land might be made, no limitation of time for applying for such certificates being imposed. In 1872 proceedings were taken in a parish court in Louisiana to obtain administration upon the estate of V., and to sell the land claim as a part of his succession, and, under such proceedings, the claim was sold to the predecessors of defendants, who obtained the certificates provided by the act of 1858, and, soon after, located the same on the land in controversy. Upwards of 20 years later the complainants, who had until then been ignorant of the proceedings in the matter of V.'s estate, filed this bill to have defendants declared to hold the legal title of the land as trustees for them. *Held*, that the proceedings in the parish court in 1872 could have no effect upon the claim which had been sold in 1835 by V. himself.
2. LACHES—STALE CLAIM.
   Held, further, that as complainants had no reason to watch proceedings relating to the estate of V., or to suspect that their rights would be affected by any such proceedings, it could not be held that they were barred by laches from asserting their claim, nor that such claim was stale.

Appeal from the Circuit Court of the United States for the Eastern district of Michigan.

This was a suit by John L. Hodge and Andrew H. Sands against Francis S. Palms and others, trustees of the estate of Francis

Palms, deceased, and others, to impress a trust upon the legal title to certain lands, and for an accounting. The circuit court sustained a demurrer to the bill. Complainants appeal. Reversed.

Robert B. Lines and Dwight C. Rexford, for appellants.
H. M. Duffield and J. T. Keena, for appellees.

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

SEVERENS, District Judge. This is a suit in equity instituted by a bill filed in the United States circuit court for the Eastern district of Michigan. The case stated in the bill resembles that of Garrett v. Boeing (No. 197) 68 Fed. 51, in all essential particulars except one. The equitable title which the complainants assert is founded upon a deferred private land claim against the United States, of date 1789, for 2,708 acres of land, which land claim originally belonged to one Antonio Vaca. Similar proceedings to those in the Garrett Case were had in the year 1872 in the parish court of Catahoula parish, in Louisiana, at the instance of Daniel J. Wedge, in which the petition was in form substantially the same as in the Garrett Case, and was followed by like proceedings, resulting in a sale of the said land claim to one W. H. Hawford. The surveyor general of Louisiana issued to Hawford a certificate of location, which was on the 19th day of November following certified by the commissioner of the general land office as receivable according to its terms at any land office in the United States for the location of land subject to entry and private sale. This surveyor general's certificate, thus approved, was located at the United States land office at Marquette, in the state of Michigan, upon the lands described in the bill. The lands thus located were afterwards patented by the United States to persons whose titles, respectively, the defendants now have, and under which they deraign title and are in possession. The complainants, according to the allegations of the bill, have themselves acquired the rights of Antonio Vaca, the original owner of the claim, and they say, in paragraph 3 of their bill, "that the rights of the said Antonio Vaca in respect to said land claim were by him aliened, sold, and conveyed by deed duly recorded November 7, 1835, in the parish of Carroll, state of Louisiana, in which parish the said land claim was then embraced, to one Andrew H. Adams." And it is from the said Andrew H. Adams that they trace their title. In other respects the material facts are as above stated, and the grounds upon which the bill is rested are the same as in the case above referred to. The defendants demurred to the bill. The demurrer was sustained by the court below, and the bill dismissed, and thereupon the complainants brought the case here on appeal.

The complainants contend that the probate court of Catahoula parish had no jurisdiction or authority over this land claim as constituting a part of Vaca's succession, and we think this contention must be sustained. If the statement contained in paragraph 3 of the bill is true, and the demurrer admits it to be so, this land

claim had been sold and conveyed by Antonio Vaca during his life, and the deed conveying the same had been on record for 37 years before Vaca's succession was opened by the proceedings in the Catahoula parish court, upon the foundation of which the defendants' title rests. It follows, therefore, that this land claim was not embraced in Vaca's succession, and was not subject to administration as part thereof. It seems too clear for argument or discussion that the probate court has no authority to divest and dispose of the title to property which the decedent has in his lifetime duly conveyed to other persons. Walker v. Daly, 80 Wis. 222, 49 N. W. 812; Grevemberg v. Bradford, 44 La. Ann. 400, 421, 10 South. 786. The persons who held the land claim at the time when the probate proceedings in question were instituted were not parties to those proceedings and had no notice of them. It is only upon the idea that the proceedings in the probate court are proceedings in rem that personal notice is not deemed essential to the validity of the proceedings. The res is the property of the succession in a case like this, and the jurisdiction attaches to the substance of that as it existed at the death of the decedent. This view of that subject makes it necessary, in determining the case, to consider other questions which we did not find it necessary to pass upon in the Garrett Case.

The defendants object to the theory upon which the complainants seek to hold them as constructive trustees. There certainly seems some incongruity (and this incongruity was commented upon in the case of Grevemberg v. Bradford, 44 La. Ann. 400, 10 South. 786) in averring in one part of their bill that the probate proceedings were utterly void, and therefore conveyed no right or title whatever to the scrip upon which the lands were located, and then insisting in another part that in what they did Wedge, as promoter of the proceedings, and Hawford, as purchaser of the claim at the probate sale, and his successors, down to the time of the location of the land, should be held and treated as trustees for the real owners of the land. That is not exactly the ground upon which the complainants' case ought properly to be rested. It was by the use of the evidence of the void probate proceedings as color of title to the land claim that the scrip, which upon its face represented the substance of the thing owned by the complainants, was obtained from the surveyor general and the land department. This scrip was effective in the location and procurement of the legal title of the land by a patent from the United States, whereby the defendants have become possessed of property which the United States intended to confer upon the rightful owners of the land claim, and upon this foundation we think the bill may be rightfully sustained. Meader v. Norton, 11 Wall. 442; Johnson v. Towsley, 13 Wall. 72, 87; Widdicombe v. Childers, 124 U. S. 400, 8 Sup. Ct. 517, and the cases cited at page 404, 124 U. S., and page 517, 8 Sup. Ct.

It is further insisted by the defendants that complainants' claim is stale, and that their laches has been such as ought justly to debar them from prosecuting the suit. To our minds, this is the

most difficult branch of the controversies involved in these litigations; but upon the facts stated in the bill we are inclined to hold that this defense is not maintainable. The complainants were the owners of this claim. They, and those from whom they derived title, were the owners of this claim by purchase from the original owner. There was no reason why they should watch the proceedings in the parish courts of Louisiana to see what might be done with respect to the succession of Antonio Vaca; and nothing that was done by the defendants, and those through whom they claim title, so far as we can find, was anything of which the complainants were required to take notice, and of which they would be likely to have any notice in fact. So far as they knew, no entry upon their rights was impending or threatened, and we are unable to see that the defendants have any right to say that the complainants should have moved earlier to prevent that which the complainants had not the least reason to suspect. The complainants apparently owed no duty to the defendants, who, without their knowledge or subsequent discovery, had secretly invested themselves with the complainants' title under color of a false assumption of right. "Such defenses (laches and the statute of limitations) cannot prevail where the relief sought is grounded on a charge of secret fraud, and it appears that the suit was commenced within a reasonable time after the evidence of the fraud was discovered." Meader v. Norton, 11 Wall. 442, 458. And this rule was applied by the supreme court of Wisconsin in the case of Walker v. Daly, 80 Wis. 222, 49 N. W. 812, to almost precisely such a case as this.

Again, the defendants insist that the complainants ought not to maintain their bill because the defendants have invested their time, money, and skill in the location of the lands and in securing the products thereof, which land and products the complainants now seek to recover from them, in the doing of which the defendants have acted in good faith. But no such question arises upon the pleadings as they now stand, and it would be premature for us to express an opinion upon questions which may be involved in issues possible to be hereafter raised. For the same reason it is not expedient to now decide what may be the scope and measure of the ultimate relief to be awarded the complainants if they shall successfully maintain their suit. For the reasons above stated, we think the decree of the court below should be reversed, and the case remanded, with directions to give leave to the defendants to answer the bill.

MORANCY et al. v. PALMS et al.

(Circuit Court of Appeals, Sixth Circuit. May 13, 1895.)

No. 234.

PROBATE COURT—DECREE—PROPERTY AFFECTED.

Upon facts similar to those in Hodge v. Palms, 68 Fed. 61, a decree of a probate court, granting administration of the estate of a decedent, cannot affect property conveyed by such decedent in his lifetime.

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

This was a suit by Honori P. Morancy and others against Francis Palms and others to impress a trust upon the legal title to certain lands and for an accounting. The circuit court sustained a demurrer to the bill. Complainants appeal. Reversed.

Robert B. Lines and Dwight C. Rexford, for appellants.

H. M. Duffield and J. T. Keena, for appellees.

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

SEVERENS, District Judge. This is a suit in equity precisely like that of Hodge v. Palms (No. 232; just decided) 68 Fed. 61, in all material particulars. A Spanish land claim of 1790, which is the foundation of this controversy, was sold and conveyed by the original owner, one Miguel Llano, during his life. It was therefore no part of his succession which the parish court undertook to administer. The court below sustained the demurrer of the defendants, and dismissed the bill. For the reasons stated in Hodge v. Palms, we think the decree should be reversed, and the cause remanded, with directions to permit the defendants to answer the bill. It is so ordered.

FLETCHER et al. v. McARTHUR et al.

(Circuit Court of Appeals, Sixth Circuit. May 13, 1895.)

No. 235.

PROBATE COURT—JURISDICTION—COLLATERAL ATTACK.

Where a probate court in Louisiana has assumed to grant administration upon the estate of one who, at the time of his death, was in fact a resident of Mississippi, and whose estate has been judicially administered there, such action of the court is wholly unauthorized by law, and its decree can be impeached collaterally.

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

This was a suit by Jane Virginia Fletcher and others against William McArthur and others to impress a trust upon the legal title to certain lands and for an accounting. The circuit court sustained a demurrer to the bill. Complainants appeal. Reversed.

Robert B. Lines and Dwight C. Rexford, for appellants.

H. M. Duffield and J. T. Keena, for appellees.

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

SEVERENS, District Judge. This is the last of the cases Garrett v. Boeing (No. 197) 68 Fed. 51; Hodge v. Palms (No. 232) Id. 61; McCants v. Peninsular Land Co. (No. 233) Id. 66; Morancy v. Palms (No. 234) Id. 64; and Fletcher v. McArthur (No. 235), to be disposed of. It is like the others in all essential particulars save

one. Both parties derive their respective rights from a land claim once owned by John Fletcher, Sr. The complainants found their right upon a devise thereof by Fletcher. The defendants claim under a probate sale of the same land claim made by the order of the parish court of La Fayette parish, La. The difference between this and the other above-mentioned cases is this: According to the statements of the bill, John Fletcher, Sr., was not resident in Louisiana at the date of his death, but was domiciled in Adams county, Miss. He died in 1862, and left a will, whereby he devised all his property to his two children, Jane Virginia Fletcher, one of the complainants, and John Fletcher, Jr., from the latter of whom the other complainants take by descent. This will was duly probated in the probate court for Adams county in the same year. It seems clear that the administration of Fletcher's succession in the La Fayette parish court, in 1870, was wholly unauthorized by law, and could have no effect upon the title asserted by the complainants for two reasons: First, because the decedent was domiciled in Mississippi at the time of his death, and the situs of his claim was there; and, second, because his estate, including this claim, had already been judicially administered in the state of his domicile by a court of competent jurisdiction. This is in accord with the principles recognized by this court as sound in the case of Garrett v. Boeing (No. 197), where the subject was discussed. It is unnecessary to repeat what was there said. Upon the other questions, which were also involved in Hodge v. Palms (No. 232) and Morancy v. Palms (No. 234), relating to the standing of the complainants upon the footing of a constructive trust and to affirmative defenses as well as the scope of the relief to which the complainants may be entitled, if they maintain their suit, we do not, for the reasons expressed in those cases, now express an opinion. The decree of the circuit court sustaining the demurrer and dismissing the bill will be reversed, with directions to permit the defendants to answer the bill.

McCANTS et al. v. PENINSULAR LAND CO. et al.

(Circuit Court of Appeals, Sixth Circuit. May 13, 1895.)

No. 233.

JUDGMENT—COLLATERAL ATTACK—PLEADING.

One M., a citizen of Louisiana, died, leaving a will by which he disposed of other property, but not of an inchoate land claim arising under the treaty of cession of Louisiana and the acts of congress pursuant thereto. Such claim was afterwards sold in proceedings instituted in a Louisiana parish court to administer the same as a part of his estate. *Held*, in a suit seeking to impeach, collaterally, such proceedings in the parish court, that an allegation that the succession of M. was duly opened and fully administered in the proper court in 1865 (before the proceedings sought to be impeached), and was accepted by his heirs and owners of all the assets of said estate capable of being reduced to possession, was insufficient to show that the land claim was not properly administered in the proceedings questioned.

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

This was a suit by David A. McCants and others against the Peninsular Land Company and others to impress a trust upon the legal title to certain lands and for an accounting. The circuit court sustained a demurrer to the bill. Complainants appeal. Affirmed.

Robert B. Lines and Dwight C. Rexford, for appellants.

H. M. Duffield and J. T. Keena, for appellees.

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

SEVERENS, District Judge. This case also is like those of Garrett v. Boeing (No. 197) 68 Fed. 51; Hodge v. Palms (No. 232) Id. 61; Morancy v. Palms (No. 234) Id. 64; and Fletcher v. McArthur (No. 235) Id. 65,—and is the case of a suit in equity brought by certain persons claiming to be the representatives of one David McCants, an original owner of a deferred Louisiana land claim, against persons who derive their title under patents from the United States to land located under a certificate of the surveyor general of Louisiana, approved by the commissioner of the general land office, issued by the former officer to one who represented himself to be the purchaser of the claim at a probate sale of it as of the succession of the original owner. The defendants demurred. The demurrer was sustained, and the bill dismissed. The facts are in all material respects the same as in the Garrett Case (No. 197) Id., the only difference worthy of attention being that in this the original owner, McCants, left a will whereby he devised his other property, but as to this land claim died intestate. The bill states "that the succession of the said David McCants was duly opened and fully administered in the proper court of the said parish of East Feliciana in the year 1865, and was in said year accepted by his said heirs and owners of all the assets of said estate capable of being reduced to possession,"—an exceedingly vague allegation, which we have some difficulty in construing. There is no allegation that there was any order of the court disposing of anything, and, as this claim was not one capable of being reduced to possession, the inference is that it was not administered at all, but was an unnoticed waif. That being so, it was competent for the parish court to administer it in an independent proceeding. Whether it would have been a more regular way to have opened the first proceedings, and dealt with it in that, we do not undertake to say. There was a choice of ways. This brings the case within the scope of the same principles as those upon which the Garrett Case was decided, and leads to an affirmance of the decree. The decree of the court below is accordingly affirmed.

GAY MANUF'G CO. v. CAMP.

(Circuit Court of Appeals, Fourth Circuit. May 31, 1895.)

No. 106.

EQUITY PRACTICE—MASTER'S REPORT—EXCEPTIONS.

No exception to a master's report, based upon matters of fact, should be heard by the court, unless such matters have been brought to the mas-

ter's attention and exception taken before him. Manufacturing Co. v. Camp, 13 C. C. A. 137, 65 Fed. 794, reaffirmed.

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

This was a petition for a rehearing of the appeal from the order made upon the petition of William N. Camp and others for the payment to them of certain moneys by the receivers of the Gay Manufacturing Company. See 13 C. C. A. 137, 65 Fed. 794.

Archibald H. Taylor, for appellant.

Robert R. Prentis, for appellee.

Before FULLER, Circuit Justice, and GOFF and SIMONTON, Circuit Judges.

SIMONTON, Circuit Judge. We have carefully considered the petition praying a reargument in this case. We see no reason for granting its prayer. At the hearing in this court, counsel for appellant presented a full and exhaustive argument covering all the points of the case. The court came to its conclusion thereon. The gravamen of the objection to the opinion of the court is the suggestion made as to the practice of confining the exceptions to a master's report to the exceptions taken before him. This suggestion is made on the authority of the decisions of the supreme court and of justices of that court on circuit. The rule is prescribed in 2 Daniell, Ch. Prac. 1314; and the decisions quoted,—McMicken v. Perrin, 18 How. 507; Gaines v. New Orleans, 1 Woods, 104, Fed. Cas. No. 5,177; to which may be added Cowdrey v. Railroad Co., 1 Woods, 331, Fed. Cas. No. 3,293; Topliff v. Topliff, 145 U. S., at page 173, 12 Sup. Ct. 825,—all made after the adoption of rule 83, which it is insisted changed the rule in Daniell. The case of Hatch v. Railroad Co., 9 Fed. 856, incorrectly quoted in the petition as 7 Fed., was examined and considered by the court. "A master is appointed by the court to assist it in various proceedings incidental to the progress of a cause before it, and he is usually employed to take and state accounts, to take and report testimony, to perform such duties as require computation of interest, the value of annuities, the amount of damages in particular cases, and similar services." Kimberly v. Arms, 129 U. S. 523, 9 Sup. Ct. 355. In other words, he finds all the facts bearing upon the matters referred to him, and reports them to the court, to aid it in coming to its conclusions upon the case made. To make this aid effectual, all the matters referred should be reported on. If, in the progress of the references, the parties neglect or omit to bring before the master all the facts bearing upon the matters referred, and necessary to a correct conclusion by the court, they are in default. And by this default the court is deprived of the aid sought in ordering the reference. If the master omit or neglect to report all the facts produced before him bearing upon the matters referred, he is in default. The parties are put to a disadvantage, and the report should be recommitted, unless the parties supply the omission by stipulation. It is true that in some of the circuit courts a loose practice has grown up, and

exceptions to a master's report are entertained, dealing with facts to which his attention was never called. This practice does not commend itself. It frequently operates a surprise, and it shuts the door to any explanation. It gives room for the display of skill and strategy on the part of ingenious counsel. It may secure success at the expense of right. When there exists a rule of practice, inculcated and approved by recognized authority, it should be followed. To prevent misapprehension, it is best to state that we do not require the conclusions of the master on matters of law to be first excepted to before him. This is unnecessary. 2 Daniell, Ch. Prac. 1314. But we do require that matters of fact upon which exceptions to his report are made be brought to his attention, in order that he might report them. In the case at bar the master was directed "to inquire as to the facts stated in the petition, and to report to the court what amount of money, if any, is due to the said W. N. Camp by reason of the facts stated in the petition, together with any other matter specially deemed pertinent by the master, or required by any of the parties to be so stated. We find in his report the amount claimed by the petitioner, and we find also certain items introduced by respondent as a set-off to his claim, passed on by the master. We cannot discover that the sum claimed as liquidated damages was ever called to his attention, or that he was ever requested to report on it. This court, however, did not dismiss the appellant for not observing this rule, but it followed the course adopted by Justice Bradley in the cases quoted from Woods, and, contenting itself with calling attention to the proper practice, went on, and decided the case as if the objection had been made in the proper time and in the proper place. The court, as constituted, which rendered the decree complained of, have been consulted by the court to whom the petition was addressed. No one of the judges concurring in the judgment desires a rehearing. The motion is denied.

LATTA et al. v. GRANGER.

(Circuit Court of Appeals, Eighth Circuit. May 6, 1895.)

No. 446.

1. APPEAL—DECISION AND MANDATE—DUTY OF COURT BELOW—ACCOUNTING OF RENTS AND PROFITS—CONFLICTING EVIDENCE.

   One H. leased from plaintiff a lot in the Hot Springs reservation, Ark., but was subsequently ousted by the United States under claim of superior title. He then leased the lot from the United States, and afterwards purchased it according to an award made by the commissioners appointed to adjust conflicting land claims in the reservation. Act March 3, 1877 (19 Stat. 377). Afterwards, plaintiff obtained a decree against H.'s grantees, declaring that they held the title in trust for him, and requiring conveyance thereof. On appeal, the supreme court confirmed plaintiff's title, but reversed the decree because the account of rents and profits had not been properly stated, saying, in substance, that rents and profits should not be allowed prior to the commencement of the suit, and that no increased rent should be allowed on account of improvements. *Held*, that this decree merely directed the circuit court to ascertain the fair rental value, and plaintiff was not entitled to have the rents measured by the terms of the original lease from him to H.

2. SAME—REVIEW—CONFLICTING EVIDENCE—PRESUMPTIONS.
Findings of fact by the trial court upon conflicting evidence are presumptively correct, and will not be reversed when not unreasonable in themselves or not clearly in conflict with the preponderance of the evidence.

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

The material facts out of which this suit arises are as follows: On June 26, 1875, the appellant's testator, William H. Gaines, being in possession of lot sixteen (16) in block sixty-eight (68) of the city of Hot Springs, Ark., under a claim of ownership, leased the lot for one year, with the right of renewal from year to year, to Perry Huff. Huff occupied the lot under said lease until June 1, 1876, when the United States took possession of the lot as property belonging to the United States, ousted the then occupants, and subsequently leased the lot to Huff through the agency of a receiver appointed by the court of claims. On March 17, 1880, Huff sold all his right, title, and interest in the lot to Vina Granger, the present appellee, and to Eva M. James, the latter persons well knowing that all of Huff's interest in the lot was derived from the aforesaid leases from Gaines and from the United States. Subsequently the commissioners appointed pursuant to the act of March 3, 1877 (19 Stat. 377, c. 108), to adjust conflicting claims to land situated within the Hot Springs reservation, awarded to Perry Huff the right to purchase the lot now in controversy, and the latter purchased the same, and received a patent therefor from the United States. After the decision in Rector v. Gibbon, 111 U. S. 276, 4 Sup. Ct. 605, to wit, on May 23, 1884, this action was begun by the present appellants against Perry Huff, Eva M. James, and Vina Granger to compel them to transfer the legal title so as aforesaid acquired from the United States to the appellants, upon the ground that the legal title acquired by them from the government was held in trust for the appellants. A decree as prayed for was rendered by the circuit court against the appellee, Vina Granger, in April, 1887, the suit having been theretofore discontinued as against Huff and James. From said decree an appeal was prosecuted to the supreme court of the United States by the appellee. By the decision of the supreme court on such appeal the present appellants' right to the lot in controversy was established and confirmed, but the decree in their favor was reversed, because the account as to rents and profits had not been properly stated, and because the allowances in that behalf made were deemed inequitable. The decision of the supreme court is reported under the title of Goode v. Gaines, 145 U. S. 141, 154, 12 Sup. Ct. 839. The second trial of the case resulted in a decree against the appellants for $2,316.23, that being the sum which the master found had been paid by the appellee, Vina Granger, for taxes and for improvements made on the lot, and in obtaining a title to the land from the United States, over and above the sum justly chargeable to her on account of rents and profits. From the last-mentioned decree the appellants have prosecuted an appeal to this court.

U. M. Rose (W. E. Hemingway and G. B. Rose, on the brief), for appellants.

John McClure, for appellee.

Before SANBORN and THAYER, Circuit Judges.

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

The present appeal presents but two questions for our consideration. The first is whether the master should have computed the rents of the property in controversy at the rate specified in the lease from Gaines to Huff of date June 26, 1875; and the second is whether the sum allowed by the master on account of rents was too small, even though the aforesaid lease does not govern in de-

termining the rental value of the property. The appellants maintain the affirmative of both of these propositions.

It will be observed by reading the opinion rendered in this case on the former appeal to the supreme court of the United States (vide Goode v. Gaines, 145 U. S. 141, 154, 12 Sup. Ct. 839), that the first decree was reversed because the allowance in favor of the present appellants on account of rents was deemed excessive and inequitable, in view of the peculiar relations of the parties to the suit, and the cause was remanded to the circuit court solely for the purpose of having the rent account restated. The lease executed by Gaines in favor of Huff was described in the bill of complaint, and the terms and conditions thereof, as well as the amount of rent therein reserved, could not have escaped judicial observation. Nevertheless, no direction was given to the circuit court to cause the rents on a second hearing to be computed at the rate reserved in the lease, nor was any intimation given to that effect. After pointing out the circumstances that had given rise to the litigation, and after alluding to the fact that the defendants had not acted knavishly or in bad faith, the supreme court said, in substance, that the defendants ought not to be charged with the rents prior to May 23, 1884, that being the date when the suit was instituted; that they should simply be charged with the rental value after that date, and that "no increased rents should be allowed on account of the improvements." If the court had intended that the rents should be computed at the rate fixed in the lease, and that the lease should control in estimating the rental value, it is obvious that the clause above quoted from the opinion would have been entirely unnecessary. We think, therefore, that the decision directed the circuit court, in effect, to ascertain the fair rental value of the lot without reference to the rent reserved in the original lease, and upon that theory the circuit court evidently acted.

It may be well to observe, in support of the view which appears to have been taken by the supreme court, that, inasmuch as the appellee, Vina Granger, bought the lot in controversy from Huff in the year 1880, after the latter had been ousted of possession under the lease, and had attorned to the United States, the true owner, it is by no means apparent that any such privity existed between her and the original lessor, Gaines, as would, in any event, render her amenable to the provisions of the lease and liable for the rent therein reserved. But, be this as it may, it was clearly the duty of the circuit court to follow the directions given by the supreme court in the opinion delivered on the first appeal, and, having done so, no error was committed of which the appellants can be heard to complain on the present appeal.

With respect to the second question above proposed, it is sufficient to say that the evidence contained in the record is not of such character as would warrant us in overruling the finding of the circuit court, and the finding of the master as well, with respect to the rental value of the property in controversy. In Warren v. Burt, 12 U. S. App. 591, 600, 7 C. C. A. 105, 58 Fed. 101, this court said that where the trial court has considered conflicting evidence, and made

its finding thereon, the finding must be taken as presumptively correct, and must be permitted to stand, 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. To the same effect are the decisions in Tilghman v. Procter, 125 U. S. 136, 8 Sup. Ct. 894; Kimberly v. Arms, 129 U. S. 512, 9 Sup. Ct. 355; Donnell v. Insurance Co., 2 Sumn. 371, Fed. Cas. No. 3,987; Richards v. Todd, 127 Mass. 172. In the present case, we cannot say that the circuit court obviously erred in assessing the rental value of the property. The question was one with respect to which different minds might well entertain different views, and the testimony with respect to the rental value was conflicting. The conclusion reached by the circuit court is not in itself unreasonable, and is not clearly in conflict with the preponderance of evidence. It must, therefore, be allowed to stand. The decree of the circuit court is hereby affirmed.

LATTA et al. v. NEUBERT. SAME v. COHN. SAME v. RUGG (two cases). SAME v. GARNETT. SAME v. SUMPTER et al.

(Circuit Court of Appeals, Eighth Circuit. May 6, 1895.)

Nos. 451, 457, 458, 459, 460, and 477.

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

U. M. Rose, W. E. Hemingway, and G. B. Rose, for appellants.
John McClure, for appellees.

Before SANBORN and THAYER, Circuit Judges.

THAYER, Circuit Judge. These cases were submitted by counsel under a stipulation that they should abide the decision in Latta v. Granger (which has just been decided) 68 Fed. 69. In accordance with the stipulation, the decrees rendered by the circuit court are affirmed.

MANHATTAN TRUST CO. v. SIOUX CITY & N. RY. CO. (TRUST CO. OF NORTH AMERICA, Intervener).

(Circuit Court, N. D. Iowa, W. D. June 1, 1895.)

1. RAILROAD MORTGAGES — AFTER-ACQUIRED PROPERTY — LANDLORD'S LIEN — IOWA STATUTE.

The S. Ry. Co. made a mortgage covering after-acquired property, which was recorded in W. county, Iowa, on January 31, 1890. On January 21, 1890, the railway company took a lease of certain lands for depot purposes within W. county. Most of the rolling stock acquired by the railway company was shown to have been delivered to it before being used on such depot grounds, and none was shown to have been used there before delivery to the railway company. *Held* that, as to all rolling stock acquired after the recording of the mortgage, the lien of the mortgage attached immediately upon its delivery to the company in W. county, or upon its coming within that county, and before any lien could attach in favor of the landlord under the Iowa statute (McClain's Code, § 3192), giving a landlord a lien for rent on any personal property of the tenant used on the premises, during the term.

2. LANDLORD'S LIEN—LIMITATION—IOWA STATUTE.
The statute provides (McClain's Code, § 3192) that the landlord's lien shall not in any case continue more than six months after the expiration of the term. The lease to the railway company was declared forfeited for nonpayment of rent, pursuant to a power reserved in it; and proceedings to enforce the lien were not commenced until nine months after such forfeiture. *Held* that, if any lien existed, it had expired.

3. SAME.
Whether rolling stock, used on a railway line, can be deemed personal property used upon depot grounds leased to the railway company, within the meaning of the statute (McClain's Iowa Code, § 3192), giving the landlord a lien on such property, quaere.

This was a suit by the Manhattan Trust Company against the Sioux City & Northern Railway Company for the foreclosure of a mortgage. The Trust Company of North America intervened, claiming priority for a lien asserted against the rolling stock of the railway company.

Strong & Cadwalader, for complainant.
Joy, Call & Joy, for intervener.

SHIRAS, District Judge. This case is now before the court upon an intervening petition, filed by the Trust Company of North America, and the question thereby presented is whether the lien of the Manhattan Trust Company, under the mortgage executed to it as trustee, is superior to the landlord's lien asserted under a lease of the terminal property in Sioux City, executed by the Sioux City Terminal Railroad & Warehouse Company to the Sioux City & Northern Railway Company, it being claimed that the landlord's lien is the first and paramount lien upon the rolling stock of the railway company used upon the leased premises. The question arises upon the following facts: On December 27, 1889, the stockholders of the railway company authorized the execution of a mortgage to the Manhattan Trust Company, as trustee, to secure bonds to be issued at the rate of $20,000 per mile of the contemplated road, and to cover all the property of the road then held or after acquired. The mortgage was executed, bearing date January 1, 1890; was acknowledged by the railway company January 22, and by the trust company January 27, 1890; and it was recorded in Woodbury county, Iowa, wherein Sioux City is situated, on January 31, 1890. The terms of the mortgage are comprehensive enough to include the property in dispute, and cover after-acquired property, authority therefor being found in the provisions of section 1966, McClain's Code Iowa, which enacts that mortgages or deeds of trust executed by railway companies "may, by their terms, include and cover, not only the property of the corporation making them at the time of their date, but property real and personal which may thereafter be acquired, and shall be as valid and effectual for that purpose, as if the property were in possession at the time of the execution thereof." The lien of this mortage, therefore, as between the mortgagor and mortgagee, attached to the rolling stock as soon as the same was acquired by the railway company. Thus it is said by the supreme court in Railroad Co. v. Cowdrey, 11 Wall. 459–481:

"Had there been but one deed of trust, and had that been given before a shovel had been put into the ground towards constructing the railroad, yet if it assumed to convey and mortgage the railroad which the company was authorized by law to build, together with its superstructure, appurtenances, fixtures, and rolling stock, these several items of property, as they came into existence, would become instantly attached to and covered by the deed, and would have fed the estoppel created thereby. No other rational or equitable rule can be adopted for such cases. To hold otherwise would render it necessary for a railroad company to borrow money in small parcels as sections of the road were completed, and trust deeds could safely be given thereon."

Pennock v. Coe, 23 How. 117; Jones, Mortg. § 153.

Thus it is made clear that the mortgage or trust deed executed to the Manhattan Trust Company became a lien as between the parties thereto, from the date of delivery, upon the property then owned by the railway company, and this lien attached to the after-acquired property as soon as the same passed into the possession of the grantor in the mortgage. The lien claimed on behalf of the Trust Company of North America is based upon a lease executed by the Sioux City Terminal Railroad & Warehouse Company to the Sioux City & Northern Railway Company of the certain premises in Sioux City, Iowa, which were used by the railway company for depot purposes. This lease bears date December 14, 1889, and was acknowledged by both parties thereto on January 21, 1890. It provided for the payment of a rental of $90,000 per year, payable quarterly, and it is claimed that, under the provisions of section 3192 of McClain's Code of Iowa, a landlord's lien exists upon the rolling stock of the railway company which was used on the leased premises, and that such lien is prior to that created by the mortgage. The section in question reads as follows:

"A landlord shall have a lien for his rent upon all crops grown upon the demised premises, and upon any other personal property of the tenant which has been used on the premises during the term, and not exempt from execution for the period of one year after a year's rent or the rent of a shorter period claimed falls due; but such lien shall not in any case continue more than six months after the expiration of the term."

Under the provisions of this section of the statute, it is the use of the personal property of the tenant upon the leased premises that creates the lien, and if the property, when such use begins, is then subject to another lien, as of a mortgage duly recorded, the latter is not displaced by, or subordinated to, the lien of the landlord. Jarchow v. Pickens, 51 Iowa, 381, 1 N. W. 598; Perry v. Waggoner, 68 Iowa, 403, 27 N. W. 292.

The stipulation of facts filed in this case shows that the larger part of the rolling stock in question passed into the possession of the Sioux City & Northern Railway Company before the same was used upon the leased premises, known as the "Terminal Grounds." The cars and engines were purchased at different places in other states, but in no case is it shown that the delivery thereof was made to the railroad company after the cars had been used on the terminal grounds. Delivery by the manufacturers of the cars and engines to other railway companies, such as the Chicago & Northwestern Railway Company or the Chicago, Milwaukee & St. Paul, was, in effect, a delivery to the Sioux City &

Northern Company; and the lien of the mortgage recorded in Woodbury county, Iowa, under the provisions of sections 1966 and 1967 of McClain's Code, would attach to the rolling stock as soon as it passed within the limits of Woodbury county, and it could not possibly be used on the terminal grounds until after the mortgage lien had attached thereto. It is therefore entirely clear that, as to those portions of the rolling stock that were purchased by and delivered to the railway company after the date of the recording of the mortgage, to wit, January 31, 1890, the lien of the mortgage is prior and superior to any lien arising from the use of the property upon the leased premises. It is claimed, however, that some of the rolling stock was in fact used on the leased premises after the date of the lease, and before January 31, 1890, when the mortgage was recorded, and that the landlord's lien is therefore the prior lien on such portion of the rolling stock as was thus used. Section 3192 of McClain's Code declares that the landlord shall have a lien "for the period of one year after a year's rent or the rent of a shorter period claimed falls due; but such lien shall not in any case continue more than six months after the expiration of the term."

In the lease from the terminal to the railway company it is expressly provided that, if default is made for a period of 30 days in the payment of the rent reserved or any part thereof, the lessor might forfeit the lease, and re-enter upon possession of the leased premises; and it is shown that on the 23d day of December, 1893, the terminal company declared a forfeiture of the lease, under the power reserved in the lease, for the failure to pay the rent accruing upon September 14, 1893. Having, by its own action, thus ended the lease, the terminal company had six months' time from that date within which to bring an action for the enforcement of the lien claimed. A failure to bring an action within the period named terminates the lien. Nickelson v. Negley, 71 Iowa, 546, 32 N. W. 487.

It is not shown that any proceeding, other than the intervention in this case, was brought for the enforcement of the lien now claimed; and as the petition in intervention in this suit was not filed until in September, 1894, more than six months had elapsed after the expiration of the term before suit was brought, and it therefore follows that, even if a lien did exist upon a part of the rolling stock for the rental due up to the time the lease was terminated, the lien has ceased to exist for the reason stated.

It has been very strongly urged in argument by counsel for complainant that the rolling stock, used upon a railway line, cannot be deemed to be "personal property," within the meaning of those words as used in the section of the statute creating a landlord's lien, and especially so in view of the provisions of section 1967 of McClain's Code, and that rolling stock used upon the line of railway cannot be said to be used within the limits of a terminal depot, so as to fasten and continue a landlord's lien thereon. It has not seemed necessary to decide this question, and I do not indicate any opinion thereon; but assuming, for the purposes of the case, that a

landlord's lien may be made applicable to such property, I hold that, under the facts now before the court, the lien of the mortgage to complainant is prior and superior to the lien, if any, which may have existed in favor of the terminal company, under the lease executed by it to the railway company.

HOTCHKISS & UPSON CO. v. UNION NAT. BANK.

(Circuit Court of Appeals, Sixth Circuit. May 20, 1895.)

No. 229.

1. CORPORATIONS—TRANSFERS OF STOCK—NOTICE—CONNECTICUT STATUTE.
   The statutes of Connecticut provide (Gen. St. § 1924) that no pledge of stock of a corporation organized under the laws of that state shall be effectual except as against the pledgor or his executors or administrators, unless it is consummated by an actual transfer of the stock, or a copy of the power of attorney to transfer is filed with the officers of the corporation. *Held*, that the purpose of this statute is to protect persons dealing upon the faith of the apparent ownership of the stock in ignorance of the pledge, and accordingly actual notice thereof is equivalent to a transfer on the books, or the filing of the power of attorney.
2. SAME.
   H. and U. were respectively president and treasurer of the H. & U. Co., of which they also owned the greater part of the stock. H. borrowed money from a bank upon pledge of his stock in the H. & U. Co. as collateral. H. embezzled the funds of the company. U., while visiting the bank, before H.'s embezzlement commenced, for the purpose of obtaining discount of notes indorsed by the H. & U. Co., was informed by the cashier of the advances to H., and his pledge of the stock as collateral. *Held*, that the H. & U. Co. had actual notice of the pledge of H.'s stock.
3. SAME—LIEN ON STOCK—DEBT INCURRED BY EMBEZZLEMENT.
   Whether the provision of the Connecticut statutes (Gen. St. § 1923), giving to corporations a lien upon their stock for all debts due them by the stockholders, applies, as against a pledgee of the stock by unrecorded transfer, to a debt incurred by the stockholder's embezzlement of the funds of the corporation,—quaere.

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

This is a suit in equity, brought by the appellee, the Union National Bank, of Cleveland, Ohio, against the appellant, the Hotchkiss & Upson Company, a corporation organized under the laws of Connecticut. The object of the bill is to enforce a lien upon 260 shares of stock of the defendant below, acquired by it in pledge upon certain transactions with Charles A. Hotchkiss, president of that company. Those transactions were as follows: On November 13, 1885, Hotchkiss borrowed of the complainant $5,000, for which he gave his note of that date. On December 12, 1885, he borrowed $10,000 more, for which he likewise gave his note. On March 16, 1886, he took up these two notes, and gave a new note of that date for the sum of $15,000, that being the amount of both the former notes. This last-mentioned note was renewed from time to time until July 28, 1887, when the note for $15,000 now held by the bank was executed, and was made payable four months after its date. This is one of the obligations constituting the basis of the complainant's ground for relief. On April 16, 1887, the said Hotchkiss made another loan of the bank, this loan being of $6,000, for which he gave to the bank his note of that date. This note was renewed August 19, 1887, by a note for the same sum, made payable in four months. This is the other part of the indebtedness for which the complainant asserts a lien. Upon the making of the original note for

$15,000, Hotchkiss assigned in pledge to the bank for the security thereof two certificates of stock, representing 140 shares of the Hotchkiss & Upson Company, and delivered them to the bank. On making the $6,000 note of April 16, 1887, he likewise assigned in pledge 120 shares of the stock of the same company as security for the payment of that note. Both these assignments of stock consisted of a delivery thereof with a blank power of attorney for the transfer of the stock upon the books of the company, executed by Hotchkiss. Neither of the notes so taken upon the last renewals had been paid, either in whole or in part. The stock has never been transferred upon the books of the company to the bank, and no copy of the power of attorney was ever filed in the office of the company.

The defense is that during the years 1887 and 1888 Hotchkiss became indebted to the Hotchkiss & Upson Company in the sum of $50,000 by reason of his having embezzled the funds of the company of which he had charge as an officer, he being the president thereof. This embezzlement commenced in the early part of 1887, and was continued from time to time through that and the succeeding year. And it is contended that by force of the general laws of Connecticut relating to corporations a lien was given to the company upon the stock standing upon its books in the name of Hotchkiss for the amount of the indebtedness created by his embezzlements, and that this lien is paramount to that of the bank, for the reason that there was no transfer of the stock by Hotchkiss to the bank upon the books of the company, and no copy of the power of attorney, was filed in the office of the company as required by the law of Connecticut in order to make the assignment good as against the company. The provision of the statutes of Connecticut giving the company such lien is found in section 1923 of the General Statutes of that state (Revision of 1887), which reads as follows: "When not otherwise provided in its charter, the stock of every corporation shall be personal property, and be transferred only on its books in such form as the directors shall prescribe; and such corporation shall at all times have a lien upon all the stock owned by any person therein for all debts due to it from him." And section 1924 declares how such stock may be pledged, and the manner in which such pledge may be made effectual, as follows: "Shares of stock in any corporation, organized in this state under the laws of this state or of the United States, may be pledged, by executing and delivering a power of attorney for its transfer, with the certificate of stock therein mentioned, to any party to whom the pledge is made; but no such pledge, unless consummated by an actual transfer of the stock to the name of such party, shall be effectual to hold such stock against any person but the pledger and his executors and administrators, until a copy of said power of attorney shall be filed with the cashier, treasurer or secretary of said corporation." As stated before, the provisions of section 1924 were not complied with; but the complainant in the court below introduced evidence from which, as it alleges, it is made to appear that Hotchkiss, the president, and A. S. Upson, its treasurer, were the owners of nearly all the stock, and were the principal managers of the business of the company; that the business was principally carried on at Cleveland; that the company had extensive dealings with the bank, and that Hotchkiss as president, necessarily, and Upson as treasurer, by distinct information, had notice of the loans by the bank to Hotchkiss, and of the above-mentioned pledges of his stock, prior to the date of the beginning of the embezzlements by Hotchkiss, and that the company was affected by such notice; and it is claimed by the bank that such actual notice is equivalent to the statutory notice required by the laws of Connecticut. The court below found upon the evidence that on April 16, 1887, when Hotchkiss pledged the 120 shares of stock as security for the $6,000 note, he had already embezzled from and was indebted to his company in a sum of more than $14,000, and the complainant's claim upon the shares of stock assigned as security for that sum was rejected; but, it appearing that the pledge of the 140 shares to secure the $15,000 note was made before the commencement of the indebtedness to the company by Hotchkiss, it was held by the court, upon the further finding that the company had notice of the pledging of these shares before the embezzlements commenced, that the bank's lien was superior to that of the appellant. Accordingly a decree was passed denying the lien upon the 120 shares of stock pledged in payment of the $6,000 note, and sustaining

the lien of the bank upon the 140 shares pledged in payment of the $15,000 note. From this decree the Hotchkiss & Upson Company have appealed.

J. E. Ingersoll, for appellant.

Squire, Sanders & Dempsey, for appellee.

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

Having stated the case as above, SEVERENS, District Judge, delivered the opinion of the court.

The appellant contends, in the first place, that there was neither any transfer of the shares of the company upon its books upon the occasion of their being pledged by Hotchkiss to the bank in payment of his loan for $15,000, which is admitted; nor any written notice filed in any proper office of the company of the assignment of the stock, nor any copy of the power of attorney for its transfer, which is also admitted; and that actual notice of such assignment was ineffectual to bind the company. This last contention presents the question to be decided, and it seems to turn upon the construction and effect to be given to the laws of the state of Connecticut. The appellee insists that, while the pledgee of shares of stock in this Connecticut corporation was bound to take notice of the provisions of the charter by which it was organized, yet that, if that stock was transferred in some other state than Connecticut, the transferrer would not be bound by implied notice of the general laws of Connecticut relating to corporations. It is unnecessary, in the view which we take upon another branch of the case, to express an opinion as to whether this contention can be sustained or not. For, assuming that the bank was bound to take notice, not only of the charter, but the general laws of Connecticut affecting the Hotchkiss & Upson Company, we think it was competent for the bank to show that the Connecticut corporation had the notice of the pledge of its stock to the bank for the payment of the $15,000 note, which it was the purpose of section 1924 of the laws of that state, above quoted, to secure. It is a widely prevalent doctrine, applying to a variety of statutes enacted for the purpose of protecting parties dealing bona fide with property upon the assumption of its ownership by the persons dealing with them, against prior liens and conveyances, that, notwithstanding the generality of the language of such statutes declaring that such former liens and conveyances should be held void, if not registered in conformity with the provisions of the statute, as against subsequent purchasers, yet, seeing that the whole object of such provisions was to guard the subsequent purchaser against transfers of which he had no notice, if the object of the statute had been subserved by actual knowledge of the fact, the prior transferee would be protected. And there is no reason why this should not be so. Such laws are not designed to accomplish so unjust a result as that a person having knowledge of another man's equities may defeat them by an act of his own, taken with such knowledge. Converting those statutes to such purpose would be quite contrary to the spirit of their enactment. That such is the general doctrine upon this subject cannot, we think, be disputed. The cases are

too numerous to justify a review of them here. Many of the principal decisions are collected in 1 Jones, Mortg. (5th Ed.) § 538, and the result of them stated; and it is there said:

"The doctrine is the same under statutes which declare without qualification that an unacknowledged or unrecorded deed shall be void as against purchasers, or as against all persons who are not parties to the conveyance."

The rule is the same in respect to personal property. No distinction in the application of the doctrine can be based upon a distinction between the two classes of property. Jones, Chat. Mortg. (4th Ed.) § 308. It rests upon a broad and fundamental equity. It must be conceded that there are occasionally to be found cases which seem to lead to a different conclusion, but the general current and weight of authority is as above indicated. No doubt there are exceptions to this rule where the statute goes further than to provide for the mere giving of notice, and expressly declares that the instrument shall only become valid upon its registration. In such case the condition is made essential to its validity. The decisions of the supreme court of the state of Connecticut show beyond doubt that the rule which prevails in that state upon this subject is the same as the rule which prevails generally in the courts of the several states and of the United States, and it may be regarded as the settled rule of Connecticut that statutes of a kindred character, and having the same purpose as that here under consideration, are to be construed, not as rendering prior transactions void as between the parties themselves or others who had equivalent notice of such transactions, and who, therefore, were in no predicament requiring protection, but as provisions whose whole scope and intended effect was the protection of parties who had an equity arising upon the fact of their having altered their situation, in reliance upon the apparent condition of things. Wheaton v. Dyer, 15 Conn. 307; Blatchley v. Osborn, 33 Conn. 226; Hamilton v. Nutt, 34 Conn. 501. These cases indicate the law of the state, and the rule by which the construction of its statutes should be governed, and are controlling. Bank v. Francklyn, 120 U. S. 747, 7 Sup. Ct. 757; Hammond v. Hastings, 134 U. S. 404, 10 Sup. Ct. 727; Bishop v. Globe Co., 135 Mass. 132. The cases of Platt v. Axle Co., 41 Conn. 255, and First Nat. Bank v. Hartford Life & Annuity Ins. Co., 45 Conn. 22, do not declare any contrary rule as applicable to the provisions of the statute here in question. On the other hand, it is clear from the discussion of the question by the court in the last-cited case that they adopt as the test of decision the principle upon which that court had acted in previous cases turning upon the construction and effect of statutes designed to accomplish in respect of other species of property the same kind of protection against secret incumbrances and conveyances; for the court, in distinctly announcing the rule of their decision, say:

"The equitable interest of the bank [the pledgee] stands postponed to the publicly recorded lien of the insurance company [that is, the lien declared by the statute] by the principle which postpones an imperfect to a completed attachment, or a secret, unrecorded mortgage of land to one which, although later in time, is recorded by a grantee who has no notice of the first."

In neither of the two cases last cited was there any notice to the corporation of the pledge of the shares of its stock, and all that was said by the court in either case has reference to such a condition of things; and the expressions of the court are in harmony with and much like those of the courts generally when discussing the consequences of a failure of the first grantee or mortgagee to record his conveyance where subsequent purchasers in good faith had parted with their property in reliance upon the apparent ability of the grantor to convey or pledge. As to such cases, all that is said in these two Connecticut cases may be fully conceded, but the rule of their decision furnishes quite completely the distinction which shows that the present case is not within the purpose of the statute, and not affected by it, if the claim of the bank that the Hotchkiss & Upson Company had actual notice of the pledge of its stock before the incurring of any liability by Hotchkiss to it is sustained by the proof. It would seem to admit of much doubt whether a debt or liability incurred by positive malfeasance of an officer of the corporation was a debt within the meaning of the statute. The natural inference to be gathered from the language of the statute and the nature of the subject would seem to be that the debts referred to were such as would arise upon an actual contract, for it would be in such cases that the question whether any reliance had been placed by the corporation or any other person upon the state of the records and files in the office of the corporation would arise.

If we are right in supposing that the statute was enacted simply for the purpose of giving notice, it would seem to follow that it had no reference to a case like this, where the liability arises only upon an implied assumpsit founded on a tort. But, passing this question, we proceed to the other branch of the case, and consider the question whether the Hotchkiss & Upson Company had actual knowledge of the pledge of the shares to secure the $15,000 note. That Hotchkiss, the president of the company, had notice, necessarily follows from his having been a participant in the transaction of borrowing the money and pledging the stock. He appears from the evidence to have had, jointly with Upson, the management of the business affairs of his corporation. Whether the knowledge that he had was notice to his company, in view of the fact that in committing the act of embezzlement he was acting in hostility to the interests of the company, may be doubted; yet no such question arises in regard to the knowledge which Upson had of the condition of that stock, which knowledge was acquired prior to the incurring by Hotchkiss of his liability to the company. It appears from the evidence that upon an occasion when Upson, who was the treasurer of the company, was at the bank in October, 1886, for the purpose of discounting notes indorsed by the Hotchkiss & Upson Company, in a conversation between him and Mr. Bourne, the cashier of the bank, the subject of Hotchkiss' dealings with the bank and his pledge of this stock was distinctly brought forward and canvassed with much interest by both of the participants in that interview; and Mr. Bourne testifies that he at that time showed Upson the

book "showing the amount we had loaned Mr. Hotchkiss, and I stated to him the collateral which we held for the loan of $15,000. He took a memorandum of some of the items which I had called his attention to, and thanked me for doing so. Said he would look the matter up, and report to me. He did report to me in a few days, and said that, while some of the notes were not regular Hotchkiss & Upson Company business, the transactions were kept properly upon the books, and that the matter was all right, or would be fixed all right." This indicates also that Upson had knowledge that Hotchkiss had dealings with the bank on his private account, which were mixed up with the company's business. And Upson himself testifies that at one interview, the date of which he could not state, he asked Mr. Bourne "if Hotchkiss had any other liabilities there, and he told me he had some personal loans secured by collateral." He does not essentially contradict Bourne, and his testimony as a whole seems rather to lend confirmation to Bourne's testimony than otherwise; and the testimony of Hotchkiss tends also to show that the fact that this pledge of stock had been made as collateral to the $15,000 note of Hotchkiss was a matter of conversation between Upson and Hotchkiss at the company's office. Upon the whole testimony in reference to the knowledge by Upson at the time when Hotchkiss' defalcation began of the fact that the stock had been pledged, we cannot entertain any doubt whatever, and we quite agree with the court below in holding that the company had notice in fact. Adopting the rule which the counsel for the appellant quotes from 17 Am. & Eng. Enc. Law, 140, tit. "Officers, Private Corporations," that "the notice, to be binding upon the corporation, must be notice to the agent acting within the scope of his agency, and must relate to the business, or, as most of the authorities have it, the very business, in which he is engaged, or is represented as being engaged, by authority of the corporation. It must be the knowledge of the agent coming to him while he is concerned for the corporation, and in the course of the very transaction which is the subject of the suit, or so near before it that the agent must be presumed to recollect it,"—we conclude that, notwithstanding that the principal business which was being transacted between Bourne and Upson, in October, 1886, was the business of the Hotchkiss & Upson Company with the bank, and that the consideration of Hotchkiss' business with the bank was only incidentally brought forward, yet that it was so connected with the business in hand, and about which their interview took place, that the information then gathered by Upson was such as he was likely to have remembered during the period which ensued, and while Hotchkiss was appropriating the funds of the company; and that his knowledge ought to be imputed to the company. We cannot help feeling conscious that there may be an incongruity in a discussion leading to the establishment of this proposition with what seems to us the obvious purpose of the Connecticut statute, for the reason that, as before stated, it seems doubtful to us whether the statute has any application to a liability incurred in the way

in which that of Hotchkiss was; but we have followed the main lines adopted by counsel in the argument, assuming that the statute applies not only to express obligations, but also to implied liabilities resulting from tort, and are unable, upon any view of the case, to reach a different conclusion from that reached in the court below, sustaining the lien of the bank. The result is that the decree of the court below should be affirmed.

MANHATTAN TRUST CO. v. SIOUX CITY CABLE RY. CO. (HUNGERFORD, Intervener).

(Circuit Court, N. D. Iowa, W. D. May 28, 1895.)

STREET RAILROADS—LIEN OF JUDGMENT FOR PERSONAL INJURIES—IOWA STATUTE.

The Iowa statute (McClain's Code, § 2008), making a judgment against any railway corporation, for injury to person or property, a lien superior to that of mortgages on its property, does not apply to street-railway corporations.

This was a suit by the Manhattan Trust Company against the Sioux City Cable Railway Company to foreclose a mortgage. C. A. Hungerford intervened, claiming priority over the mortgage for a judgment recovered by him.

Swan, Lawrence & Swan, for complainant.

T. F. Bevington and P. A. Sawyer, for intervener.

SHIRAS, District Judge. The question presented by the petition of the intervener is whether a judgment, rendered against a street-railway company for personal injuries, has priority over the lien of a mortgage upon the corporate property; or, in other words, are street railways to be included within the words "any railway corporation," as the same are used in section 2008, McClain's Code Iowa, which declares that "a judgment against any railway corporation for any injury to any person or property, shall be a lien within the county where recovered on the property of such corporation, and such lien shall be prior and superior to the lien of any mortgage or trust deed executed since the 4th day of July, A. D. 1862"? It cannot be questioned, on the one hand, that a company engaged in operating street cars upon lines of rails laid down along the streets of a town or city, for the transportation of passengers, is, in one sense, a railway corporation, nor, upon the other hand, that there is a marked and recognized distinction between street-railway lines and those engaged in the general passenger and freight traffic of the country. This distinction is well stated by Judge Caldwell, in Williams v. Railway Co., 41 Fed. 556, wherein it is said:

"The difference between street railroads and railroads for general traffic is well understood; the difference consists in their use, and not in their motive power. A railroad, the rails of which are laid to conform to the grade and surface of the street, and which is otherwise constructed so that the public is not excluded from the use of any part of the street as a public way; which runs at a moderate rate of speed compared to the speed of traffic railroads; which carries no freight, but only passengers, from one part of a thickly popu-

lated district to another, in a town or city, and its suburbs, and for that purpose runs its cars at short intervals, stopping at the street crossings to receive and discharge its passengers,—is a street railroad, whether the cars are propelled by animal or mechanical power. The propelling power of such a road may be animal, steam, electricity, cable, fireless engines, or compressed air, all of which motors have been, or are now, in use for the purpose of propelling street cars."

The fact that the form of power used for the propulsion of the cars is not now held to be the controlling factor in determining whether a given line of railway is to be deemed a street or general traffic line is emphasized by the act of the general assembly of the state of Iowa approved April 24, 1890, which enacts that:

"All cities and incorporated towns, including cities acting under special charters, shall have the power to authorize or forbid the construction of street railways within their limits, and may define the motive power by which the cars thereon shall be propelled, including animal, electricity, steam, or other power, whether now known or hereafter utilized."

Without further elaboration, it will be assumed that there is a marked distinction and difference between street-railway lines and corporations and general traffic lines and corporations, and, as it is not questioned that the Sioux City Cable Railway is a street railway, the point in dispute resolves itself into the question whether, in the legislation of the state, the terms, "railroad or railway lines, or corporations operating railroads or railways," should be held to include street railways, when the latter class is not specifically named. The section of the Code already cited, declaring that judgments against any railway corporation for injuries to persons or property shall be prior and superior to the lien of any mortgage or trust deed executed since the 4th day of July, 1862, forms part of chapter 5, tit. 10, McClain's Code Iowa, which includes the legislation in regard to railways. An examination of the 147 sections of this chapter shows that in none of them are street railways named, and at least 137 thereof show affirmatively, by the nature of the provisions thereof, that it was not the intent to include street railways therein, and it is therefore the fair inference that the entire chapter was intended to apply only to the other class of railways. Thus in this chapter it is enacted that every corporation operating a railway shall, at all highway crossings, construct cattle guards, and erect signboards; must connect its line by means of a Y with all intersecting lines, and receive and draw the cars of all connecting lines; must stop not less than 200 feet from any other line of railway intersected or crossed; and must give signals, by bell or whistle, beginning at least 60 rods from all highway crossings, of the approach of all trains. The application of these and similar provisions of this chapter would be practically a prohibition of the running of street cars. The chapter further provides for the assessment of railways by the state executive council; provides for the establishment of a board of railway commissioners, and declares its powers and duties; and it has never been claimed that these provisions extend to street railways. The contention that the provisions of chapter 5, tit. 10, of the Code, are not applicable to street railways, finds support in the fact that in other chapters of the Code, wherein the words "railways or

railroads" are used, we find coupled therewith the words "street railways," whenever the latter are intended to be included. Thus, in section 623, it is declared that cities and incorporated towns "shall also have the power to authorize or forbid the location and laying down of tracks for railways and street railways on all streets," etc.; and in construing this section in the case of Sears v. Railway Co., 65 Iowa, 742, 23 N. W. 150, the supreme court of Iowa said:

"In the grant of power, both railways and street railways are mentioned. There is, then, a statutory implication that they are not the same, but that there is a material difference between the two; and that a grant of the power to authorize one would not necessarily include the other. The limitation or qualification of such power, it will be observed, is thus expressed in the statute: 'But no railway track can thus be located and laid down' until the damages to the abutting owner is ascertained and compensated. As thus used in the statute, does 'railway track' mean or include 'street railway track' operated by horse power? We think not. 'Railway track,' as generally understood, means only a track on which steam is used as the motive power, and it will be presumed that the general assembly used such words in that sense, unless the context or subject-matter contemplated by the statute requires that a different meaning than that in ordinary use should be adopted."

The distinction in question is also recognized in section 2492, McClain's Code, wherein it is provided that inflammable oils shall not be burned in any lamp, vessel, or stationary fixture, "in any passenger, baggage, mail, or express car on any railroad * * * nor in any street railway car." There are a number of other sections in the Code which deal with the subject of street railways in express terms, and it is thus made clear that in the legislation of the state there is recognized to be a marked distinction between corporations engaged in the transportation of passengers and freight over lines of railway extending beyond the limits of cities and towns, which are not subject, except in minor matters, to any control by the city authorities, but are governed and controlled by the general laws of the state, and corporations created to construct and operate lines of railway in city and town streets, and which are largely, as to location, mode of operation, rates of fare, and the like, subject to the control of the city or town authorities. It cannot be denied that there is, in fact, a distinction between the two kinds of railways, and an examination of the statutes of the state shows that such a distinction is recognized in the legislation of the state, and that in general the term "railroad or railway" is used to designate the former class, and the words "street railway or railroad" the latter. From this it follows that, unless the context or subject-matter of a particular statute shows the contrary, the presumption is that the legislature did not intend to include street railways in the general term "railroad or railway." This is the rule given us in Sears v. Railway Co., 65 Iowa, 742, 23 N. W. 150, and is not inconsistent with the decision of the supreme court in City of Clinton v. Clinton & L. H. Ry. Co., 37 Iowa, 61, wherein it was, in effect, held that a corporation engaged in operating a horse railway through, between, and in the cities of Clinton and Lyons was not a street railway, and therefore came within the class designated in the general right of way act, then forming part of chapter 55, art. 3, Revision. In Freiday v. Transit Co. (Iowa) 60 N. W. 656, the

same rule is given, in effect, and thus we find that in the legislation of the state, and the judicial decisions based thereon, the words "railroad or railway" do not ordinarily include street railways.

So far the question has been considered as though all the provisions of chapter 5, tit. 10, McClain's Code, had been adopted at one time by the legislature, whereas, in fact, they were not, and therefore it can be properly urged that regard must be had to the act which first adopted into the legislation of the state the provisions of the section under consideration; for if it should appear from the terms of that act, as it passed the legislature, that it was intended to include street railways within its provisions, such legislative intent would not be changed or defeated because the section was subsequently codified as part of chapter 5, tit. 10. The act in question was passed by the ninth general assembly, being approved April 8, 1862, and contains 11 sections, the first of which provides that each railroad company shall, when completed, make report to the legislature stating the amount expended in constructing the road, and for the equipment thereof, stating the length of the road, the number of planes on it and their inclination, the greatest curvature, the average width of grade, and the number of ties to the mile. The second section provides that in the month of September each company shall fix its rates of fare for passengers, and for the transportation of timber, wood, coal, and merchandise, and shall post such established rates in its depots. Sections 3, 4, 5, and 6 provide for fencing the railroad, and declare the liability for stock killed at points where the right to fence the road exists. Sections 7 and 8 declare that every railroad company shall be liable for all damages sustained by any person, including employés, in consequence of the negligence of the parties operating the road, and that service may be had on any station or ticket agent; and section 9 provides that any judgment against any railroad company, for injury to person or property, shall be a lien within the county, and shall be prior and superior to the lien of any mortgage or trust deed executed after the date of the act. Section 10 makes it the duty of every land grant railroad to transport, in time of war, troops and munitions of war free of charge. Section 11 repeals all conflicting acts.

It is clearly apparent that, of these sections, at least nine have no application to street railways, and why, therefore, should it be held that the other two, to wit, sections 7 and 9, were intended to include street railways, when they are not named therein, and the same words, to wit, "railroad company," are used in these sections as are employed in the other nonapplying sections? Upon what theory can the court rightfully enlarge the meaning of the words "railroad company" as used in sections 7 and 9 over the plain construction applicable to these same words when used in the other sections of the statute? There is certainly nothing in the language of these sections, or in the context, that gives support to the contention that the legislature intended these sections to apply to a class of corporations not included in the other sections of the act. The argument that sustains the proposition that section 9 of the act of April 8, 1862, or its substitute, to wit, section 2008 of McClain's Code, in-

cludes street railways, would apply with equal force to section 7 of the act of 1862, or its substitute, to wit, section 2002 of McClain's Code, which declares the liability of every corporation operating a railway for all damages sustained by any person, including employés, in consequence of the negligence of the agents or servants of the company in the operation of the road; and yet it is clear that the legislature of the state did not so regard it, for the eighteenth general assembly, in the second section of chapter 32 of the act passed by it, expressly enacts that street-railway companies "shall also be liable for all damages sustained by any one, resulting from the carelessness of its officers, agents or servants, in the construction or operation of its railway," which enactment would not have been necessary if street railways were included in the previous legislation now codified as section 2002 of McClain's Code.

The conclusions reached are that, as there is in fact a marked distinction between railroads used in the furtherance of the general passenger and freight traffic of the state and those used for street purposes only, we should naturally expect to find in the legislation of the state provisions applicable to the one class which are not applicable to the other; that an examination of the statutes of the state shows that such difference is recognized therein; that chapter 5, tit. 10, McClain's Code, is intended to embrace the provisions applicable to companies engaged in the general passenger and freight traffic; that, as that is the general purpose of the chapter, the court is not justified in excepting out of it one or two sections, and holding that they include also street railways, when the latter are not specifically named therein, and there is nothing in the context of the chapter or in the text of the original act of 1862 which shows the legislative intent to include street railways therein; that the adoption of other sections of the statute, not included in said chapter 5, which authorize the construction and operation of street railways under the control of the city or town, with special provisions in regard to right of way, and liability for injuries caused to others, shows clearly that the legislature did not intend to include street railways within the provisions of chapter 5, tit. 10, and that the court cannot so include them, upon the argument that the proper protection of the people requires the application of the same rule to both classes of corporations, it being for the legislature to give force to this argument, if it deems it advisable so to do. I therefore hold that the claim of the intervener, while valid against the defendant company, is not superior or paramount to the mortgage lien held by the complainant in trust for the bondholders.

OOLAGAH COAL CO. v. McCALEB et al.

(Circuit Court of Appeals, Eighth Circuit. May 6, 1895.)

No. 551.

1. EQUITY—JURISDICTION—TRESPASS.

Complainant's bill alleged that it held several licenses from the Cherokee Nation to mine and sell coal on certain lands described, and for more

than a year had been mining and selling coal thereunder; that the defendants, under a license issued after complainant's, and, either under a mistake of fact or through fraud on defendants' part, had entered upon the lands, and were mining and shipping coal, and preventing complainant from so doing; that such acts tended to destroy the estate created by the licenses, and were inflicting irreparable injury upon complainant; and that some, if not all, of the defendants were insolvent. *Held*, that equity had jurisdiction to enjoin the defendants from mining coal on the lands, and from preventing the complainant from so doing.

2. SAME—MINING RIGHT—LICENSE.
Held, further, that equity had jurisdiction to determine the validity of defendants' claim of title, whether the same was founded in mistake or fraud.

Appeal from the United States Court in the Indian Territory.

This was a suit by the Oolagah Coal Company against A. F. McCaleb, Grant Roberts, C. A. Schmoy, and C. D. Evans to restrain the defendants from mining coal on certain lands. The circuit court sustained a demurrer to the bill. Complainant appeals. Reversed.

Thomas A. Sanson, Jr., and S. M. Porter (Oliver P. Ergenbright and Z. T. Walrond, on the brief), for appellant.

H. C. Dooley (J. H. Keith, on the brief), for appellees.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. The appellant, the Oolagah Coal Company (hereafter termed the "Coal Company"), filed a bill against the appellees, A. F. McCaleb, Grant Roberts, C. A. Schmoy, and C. D. Evans, in the United States court in the Indian Territory for the First judicial division and after due service of process the defendants appeared, and filed a general demurrer to the bill on the ground that "the said complaint does not state facts sufficient for a complaint." The demurrer was sustained, and a final decree was thereupon entered, dismissing the bill, whereupon the plaintiff prayed for an appeal, and the same was allowed. The only question, therefore, that arises upon the appeal, is whether the bill of complaint stated a case entitling the plaintiff to equitable relief. The bill averred, in substance and in legal effect, the following facts: That the coal company was a corporation duly created under the laws of the state of Kansas, and that the defendants were residents within the First judicial division of the Indian Territory; that the Cherokee Nation had theretofore lawfully issued five mineral licenses, pursuant to the laws of the Nation, to certain licensees therein named, which licenses conferred on said licensees the exclusive right to mine and sell coal on the various tracts of land described in said licenses; that the several licensees had duly assigned the licenses, in writing, and that by virtue of the several assignments, which were particularly described in the bill of complaint, the coal company had succeeded to all of the rights, privileges, and franchises of said licensees, including the exclusive right to mine and sell coal on the lands described in said licenses, and that for more than a year prior to the filing of the bill the plaintiff company had been actually en-

gaged in so mining and selling coal; that all of the licenses aforesaid were assigned by, and that the assignments thereof were obtained from, the licensees, by the plaintiff company, in accordance with the laws of the Nation. Copies of said laws, as well as copies of the several licenses and the assignments thereof, were made exhibits to the bill. The bill next averred that the defendants, well knowing the aforesaid facts, had unlawfully, by force and arms, entered upon a portion of the lands described in the aforesaid licenses, and were then unlawfully engaged in mining coal thereon and in shipping the same, and were preventing the plaintiff company from so doing, to its great and irreparable injury. The bill also averred that the acts aforesaid tended to destroy the estate created by the licenses in the coal lands in question; that the damage done by such wrongful acts could not be accurately ascertained, and was not susceptible of estimation in money; that some, if not all, of the defendants were insolvent; that at least $5,000 worth of coal had already been wrongfully mined and sold by the defendants; and that for the wrong and injury done and threatened the plaintiff company was without any adequate remedy at law. The bill further stated that a mineral license had been issued by the Cherokee Nation to A. F. McCaleb, one of the defendants, on September 13, 1892, which covered the lands in controversy between the parties, but that such license was issued subsequent to the licenses under which the plaintiff company claimed, and that it was either issued under a mistake of fact, or was obtained by said A. F. McCaleb through fraud, and was therefore illegal and void. In view of the premises the bill prayed for an injunction restraining the defendants from further mining coal on the lands in controversy, and from further obstructing the plaintiff company in so doing, and for general relief.

The chief ground on which the defendants below, who are the appellees here, seek to sustain the action of the trial court in sustaining the demurrer and in dismissing the bill, is that the plaintiff company had a plain, adequate, and complete remedy at law. This view, however, overlooks the important fact disclosed by the record that the injury complained of by the plaintiff company was not an ordinary trespass upon lands, of temporary duration, but was a continuous trespass, which threatened to destroy the character of the property as a mine, and to render the plaintiff's interest therein utterly valueless. It also overlooks the fact that the bill charged, in substance, that whatever colorable right the defendants had to mine coal on the lands in controversy was derived under a license that had either been issued by mistake, or had been obtained by one of the defendants through fraud. It is now well settled by many adjudications, beginning with the case of Mitchell v. Dors, 6 Ves. 147, that an injunction may be granted to restrain a trespasser from entering into a mine and removing the minerals therefrom. Trespasses of that kind, as well as those which consist in cutting down and removing timber, or in removing buildings or other improvements of a permanent character, standing upon lands, are readily enjoined, because, as has sometimes been said, such acts alter the character of the property, and also tend to destroy

it, and to occasion irreparable loss and damage. Courthope v. Mapplesden, 10 Ves. 290; Scully v. Rose, 61 Md. 408; Erhardt v. Boaro, 113 U. S. 537, 5 Sup. Ct. 565; Jerome v. Ross, 7 Johns. Ch. 315; Hammond v. Winchester, 82 Ala. 470, 2 South. 892; Snyder v. Hopkins, 31 Kan. 557, 3 Pac. 367; Iron Co. v. Reymert, 45 N. Y. 703; Beach, Inj. § 1155; High, Inj. (1st Ed.) § 469. It is also held that, even when the title to the property on which the trespass is committed is in dispute, a court of equity will at least award a temporary injunction against the commission of such acts as tend to permanently alter its character or destroy its value, until the title thereto is determined in an appropriate proceeding inaugurated for that purpose. Clayton v. Shoemaker, 67 Md. 216, 9 Atl. 635; Smith v. Jameson, 91 Mo. 13, 3 S. W. 212; Beach, Inj. § 1140, and cases there cited. We fail to see, therefore, that the plaintiff company was without right to equitable relief, even if it be true, as the defendants contend, that the bill discloses a controversy between the parties as to who has the superior right to mine coal on the lands in question, which can only be appropriately determined by a court of law. If such was the fact, it would nevertheless be competent for a court of equity to restrain the commission of such trespasses as are charged in the bill, which tend to render the property valueless for mining purposes, until the controversy existing between the parties is settled by the proper tribunal. We think, however, that in so far as the bill shows that the right to mine coal is in dispute, and that the defendants are acting under a claim or color of title, it also shows that that controversy is one which is within the jurisdiction of a court of equity. The allegation is that the license from the Cherokee Nation under which the defendants are acting was issued after the issuance of the licenses to the plaintiff's assignors, and that it was either issued under a mistake of fact, or was obtained through fraud. A court of equity is certainly competent to inquire and to decide whether the license in question is void on either of these grounds. From any point of view, we think that the bill stated a case entitling the plaintiff to some measure of equitable relief. It showed that the mines underneath the land were being rapidly exhausted by the alleged trespassers; that some, if not all, of the trespassers were insolvent; that the trespass was not temporary, but continuous; that the plaintiff company had an exclusive right to mine coal on the lands in question; and that, in so far as there was a dispute as to who had the better license, the question at issue was one of equitable cognizance. The trial court therefore erred in sustaining the demurrer and in dismissing the bill. Its decree is accordingly reversed, and the cause is remanded, with directions to overrule the demurrer to the bill of complaint, and to proceed with the trial and determination of the case in a manner not inconsistent with this opinion.

CENTRAL TRUST CO. v. RICHMOND, N., I. & B. R. CO. et al.

(Circuit Court of Appeals, Sixth Circuit. May 7, 1895.)

No. 240.

1. MECHANIC'S LIEN—WAIVER—INCONSISTENT SECURITY.
It seems that, while the right to a mechanic's lien may be waived by the acceptance of a contract to pay for the work in securities whose existence is inconsistent with the existence of a lien, such waiver is only conditional upon the actual performance of the contract, and if it is not performed the right to the lien continues.

2. SAME—KENTUCKY STATUTE—WHEN LIEN ARISES.
The Kentucky statute relative to mechanics' liens upon railroads (Barb. & C. Ky. St. 1894, §§ 2492–2495) provides (section 2492) that "all persons who perform labor or who furnish labor, materials or teams * * * by contract * * * with the owner * * * or by subcontract thereunder, shall have a lien * * * which * * * shall be prior and superior to all other liens theretofore or thereafter created." Section 2493: "The liens * * * shall in no case be for a greater amount in the aggregate than the contract price of the original contractor and, should the aggregate * * * exceed the price agreed upon, * * * there shall be a pro rata distribution. * * *" Section 2494: "No lien shall attach unless the person who performs the labor or furnishes the labor, material or teams shall, within 60 days after the last day of the last month in which any labor was performed or material furnished, file * * * a statement * * * setting forth the amount due," etc. *Held* that, under this statute, the lien originates with the beginning of the work or delivery of materials, and continues, as an incipient or inchoate lien, until perfected by filing the required notice, etc., or lost by failure to do so within the prescribed time.

3. SAME—NATURE OF SUBCONTRACTOR'S LIEN.
Held, further, that a subcontractor in the first degree is given by said statute a direct lien, independent of the lien of the principal contractor, or of a waiver or loss thereof.

4. SAME—TIME FOR FILING NOTICE.
Held, further, that the statute requires each particular contractor or subcontractor to file notice of his lien within 60 days from the end of the month in which he completes his own work, and not from the end of that in which the work of the last contractor or subcontractor engaged upon the undertaking is completed.

5. SAME—PAYMENT TO PRINCIPAL CONTRACTOR.
The R. Ry. Co. made a contract with the O. Contract Co. to build its road; payment to be made in stock and bonds deliverable from time to time, as the work progressed, upon monthly certificates of the engineer of the railway company, in proportion to the amount of work completed; the monthly estimates being subject to revision on the final settlement, at the completion of the work. This contract contained no provision for securing the railway company against liens of subcontractors, or permitting it to pay them directly. The contract company made subcontracts with various persons to do parts of the work, to be paid for in money. *Held*, that neither the contract with the principal contractor, nor payment to it in accordance with such contract, could affect the rights of the subcontractors to liens upon the property of the railway company.

6. SAME—APPLICATION OF PAYMENTS TO SUBCONTRACTOR.
The amount of the subcontracts made by the contract company exceeded the amount coming to it by the contract with the railway company. Payments were made from time to time by the contract company to the subcontractors, some receiving a larger proportion than others, and the payments in certain months being nearly equal to the amount due to the subcontractors, according to the engineer's estimates for such months. *Held*, that such payments were primarily applicable to that part of the subcontractors' claims which could not be secured by liens against the

owner's property, without regard to the proportion of lienable claims in the estimates for the particular months when the payments were made, and that the subcontractors were entitled to the full benefit of their liens until paid the whole amount due them, respectively.

7. SAME—ASCERTAINMENT OF PRO RATA SHARES.
Held, further, that, in ascertaining the amount of the pro rata shares of the contract price to which the several sub-contractors were entitled, such contract price should be apportioned according to the whole amount of their respective lienable claims, whether or not partly paid by the principal contractor, and whether or not actually perfected as liens.

8. SAME—VALUE OF PRICE PAID IN SECURITIES.
The bonds and stock called for by the contract with the O. Contract Co. were delivered to it, in accordance with such contract, and were sold by it, from time to time, some nearly at par value, others at very much less. *Held* that, for the purpose of determining the money value of the contract price to be paid to the O. Co., by which the liens of the subcontractors were limited, the market value of the stock and bonds at the times when they were actually delivered to the contract company should be ascertained.

9. SAME.
The contract company was able, by assigning to another railway company the stock, paid to it by the R. Ry. Co., to procure the indorsement of such other railway company on some of the bonds paid to it by the R. Ry. Co., thereby enhancing their value. The stock had no value, except in the voting power attached to it as an inducement to such an arrangement. *Held,* that the enhanced value of the bonds, thus secured, might properly be included as part of the money value of the price paid the contract company, though the R. Ry. Co. had nothing to do with the arrangement for the indorsement of its bonds.

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

This was a suit by the Central Trust Company against the Richmond, Nicholasville, Irvine & Beattyville Railroad Company and others for the foreclosure of a mortgage. Numerous parties intervened, claiming mechanics' liens on the road. Demurrers to some of such petitions were passed upon by the circuit court in a decision reported in 54 Fed. 723. The circuit court entered a final decree settling the priorities among the various claimants. The complainant appeals.

The questions for determination arise between creditors of the defendant railroad company, claiming mechanics' liens for the construction of its road, and the holders of its first mortgage bonds, issued shortly after construction was begun. The Richmond, Nicholasville, Irvine & Beattyville Railroad Company, hereafter designated and described as the "Railroad Company," was chartered by special act of the Kentucky legislature, and authorized to construct and operate a railroad from Versailles, in Woodford county, to Beattyville, in Lea county, Ky. The charter provided that the company might pay for the construction of its railroad with its own capital stock and bonds. On the 1st day of July, 1889, the railroad company executed its first mortgage to the Central Trust Company of New York, as trustee, which mortgage recited that it had executed, and made ready for delivery, 2,375 bonds, of the denomination of $1,000 each, bearing interest at the rate of 6 per cent. per annum, payable semiannually, evidenced by coupons attached, the principal being payable 30 years after date. It was also provided that upon default in the payment of interest for more than six months the principal sum mentioned in each of the said bonds should, at the option of the holders of a majority of the bonds, become due and payable. There was a default in the payment of interest for more than six months, whereupon, at the request of a majority of the holders of the bonds, the trust company declared the maturity of the prin-

cipal thereof; and this bill was thereupon filed December 2, 1891, in the circuit court of the United States for the district of Kentucky, for the purpose of obtaining a foreclosure thereof. Various persons and corporations, claiming to be creditors of the said railroad company, and claiming to be entitled to priority over the mortgage aforesaid, were made defendants thereto, and some of them have filed cross bills setting up their several claims. From the final decree of foreclosure, settling the priorities as between the various creditors, appeals have been prosecuted by the Central Trust Company, and by a large number of other creditors, claiming mechanics' liens.

On the 11th day of October, 1888, and prior to the execution of the mortgage aforesaid, the railroad company entered into a contract for the construction of its entire line of railway with the Ohio Valley Improvement & Contract Company. That company was a Kentucky corporation, authorized by its charter to construct railroads, and to receive in payment the stocks and bonds of such railroads. By the contract mentioned, the Ohio Valley Improvement & Contract Company, hereafter designated the "Contract Company," agreed to procure all necessary rights of way, to make all surveys, to furnish all the materials, and to build the entire line of said railroad, from Versailles to a point within one-half of a mile of Beattyville. It also undertook to pay to the railroad company, until the road was completed, such sums as might be necessary to pay the salaries of the railroad company's officers, not exceeding $10,000 per annum. It also agreed to assume and pay the debts of the railroad company, not exceeding $25,000, and to assume and pay the interest coupons on the mortgage bonds of the railroad company during the construction of the road, and two semiannual installments of interest thereafter maturing. In payment for all this the railroad company agreed to assign to the contract company bonds of five counties, amounting to $550,000, to be delivered to the contract company whenever the railroad company was entitled to receive the same from the counties for construction of the road in accordance with their several subscriptions. The counties had subscribed, in all, for $550,000 of stock of the railroad company, payable in bonds of the respective counties, in installments, depending upon the completion of the road to designated points. The railroad company further agreed to assign and deliver to the contract company, for each lineal mile of road, $25,000 of its own negotiable 6 per cent. coupon bonds, secured by a mortgage constituting a first lien upon the entire line of road and its equipments; also to assign to the contract company the subscriptions made by individuals to the capital stock of the railroad company; also to issue to the contract company, for each lineal mile of road, $25,000 of the paid-up capital stock of the company, after deducting the stock subscribed for by individuals and counties. It was provided in the contract that the aforesaid bonds and shares of stock should be issued in advance, and placed in the custody of the Louisville Trust Company, to be paid over to the contract company as the work progressed. The entire line of road thus contracted for was 97 miles in length. Of this, 62 miles was completed. Considerable proportion of the remainder was graded, but before completion the contract company became insolvent, and abandoned the work, whereupon this litigation began. Of the $550,000 in county bonds mentioned in the contract, only $200,000 were earned. The remainder were lost on account of the failure of the contract company to finish the road to designated points by the times stipulated in the various contracts with the counties. During the time of construction the railroad company delivered to the contract company the $200,000 of county bonds earned as aforesaid, and its first mortgage bonds to the amount of $2,375,000. It also delivered a corresponding amount of its railroad shares to said contract company. The contract company is one of the defendants to this litigation, but it has not appealed from the decree of the circuit court.

All these payments were made to the contract company on monthly estimates by the chief engineer of the railroad company, which estimates included the work done and materials furnished by the contract company, directly or through its various subcontractors; the contract providing for

payment by installments, on estimates thus made, as the work progressed. A large part of the work done and materials furnished was done or furnished directly by the contract company, but a still larger proportion was done or furnished through the medium of subcontractors employed by the principal contractor. These subcontractors were to be paid directly by the contract company in money, on monthly estimates furnished by the railroad company's chief engineer, who was to give vouchers for 90 per cent. of such estimates, to be paid in cash by the contract company. The railroad company seems to have fully complied with the terms of its own agreement, and to have made all payments, as the work progressed, which it was obligated to do. The capital of the contract company was insufficient to carry on and complete its undertaking. It was therefore driven to make ruinous sales of the securities it from time to time received under its contract, at prices affected by the fact that they were the securities of an unfinished railroad,—subordinate, by the express terms of the Kentucky statute giving a lien to contractors and subcontractors constructing a railroad, to the claims of all engaged in the work of construction. The railroad company took no steps to protect itself against the liens of subcontractors, and made no payments directly to them. It seems to have willingly met its obligations to the contract company, and to have trusted to its ability to relieve its road from any liens which might exist in favor of subcontractors. The contract company had an independent capital of about $500,000. It added to this the proceeds arising from the sale of the railroad company's securities, and applied all in the payment of its own obligations. Their resources proved insufficient. It was compelled to abandon its contract before completion, leaving several hundred thousand dollars of debts to subcontractors unpaid. The unpaid subcontractors were either made defendants to the foreclosure bill, or they have become parties by intervention, and have asserted liens, under the Kentucky lien law, as against the property of the railroad company. These claims, if successfully asserted, constitute liens prior to that of the bondholders. The property of the railroad is confessedly inadequate to meet both classes of liens. This state of facts has given rise to a much complicated and hotly-contested series of litigations, culminating in 12 distinct appeals from the decree of the circuit court. Many of the appeals present questions common to all the cases. These appeals were argued together. So many of the questions as are common to all the appeals, and as presented on the appeal of the Central Trust Company, will be disposed of in this opinion, leaving such questions as arise upon cross-appeals of mechanic's lien creditors to be disposed of in another opinion. The existence and priority of the several liens claimed in opposition to the bondholders depend upon a construction of the Kentucky lien act passed in 1888, entitled "An act to create a lien on canals, railroads, and other public improvements, in favor of persons furnishing labor or materials for the construction or improvement thereon"; being sections 2492–2495 of the Kentucky Statutes of 1894, revised by Barbour and Carroll. These sections are as follows:

"Section 1. That all persons who perform labor or who furnish labor, materials or teams for the construction or improvement in this commonwealth, by contract express or implied, with the owner or owners thereof, or by sub-contract thereunder, shall have a lien thereon and upon all the property and franchises of the owner or owners thereof for the full contract price of such labor, material and teams so furnished or performed, which said lien shall be prior and superior to all other liens theretofore or thereafter created thereon.

"Sec. 2. The liens provided for in the foregoing section shall in no case be for a greater amount in the aggregate than the contract price of the original contractor, and should the aggregate amount of liens exceed the price agreed upon between the original contractor and the owner or owners of the canal, railroad, turnpike or other improvement, then there shall be a pro rata distribution of the original contract price among said lienholders.

"Sec. 3. No lien provided for in this act shall attach unless the person who performs the labor or furnishes the labor, material or teams, shall within sixty days after the last day in the last month in which any labor was

performed, or materials or teams were furnished, file in the county clerk's office of each county in which the labor was performed or materials or teams were furnished, a statement in writing, verified by affidavit, setting forth the amount due therefor, and for which the lien is claimed, and the name of the canal, railroad or other public improvement upon which it is claimed. Said claim shall be filed and indorsed by the clerk of said court, giving the date of its filing. The clerk shall also make an abstract and entry thereof, as now provided by law in case of mechanic's liens, and in the same books used for that purpose, and shall make proper index thereof. For his services the clerk shall be paid one dollar by the party filing the claim, which may be recovered by the latter from the owner or owners of the canal, railroad or other improvements as costs.

"Sec. 4. Liens acquired under this act shall be enforced by proper proceedings in equity, to which other lien-holders shall be made parties; but such proceedings must be begun within one year from the filing of the claim in the county clerk's office, as required by the third section of this act."

A. E. Richards and J. B. Baskin, for Central Trust Co.
W. A. Sudduth and H. L. Stone, for Richmond Const. Co.
Earnest Macpherson, for John Mitchell & Co.
St. John Boyle, for Louisville Trust Co.
Matthew O'Doherty, for D. Shannahan & Co.
Humphrey & Davie, for D. Shannahan & Co. and J. W. Walker.
Pirtle & Trabue, for Dickason & Crawford.

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

LURTON, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

The first question presented upon the appeal of the Central Trust Company involves the existence of a mechanic's lien in favor of any of the subcontractors. The contention of the trust company is that the contract company agreed to accept for its work, bonds constituting a first lien upon the same property, and maturing 30 years from their date, and thereby waived any mechanic's lien in its favor, and that subcontractors are bound by the waiver, and cannot assert any lien in consequence. It may be admitted that lien laws do not, in general, create a lien in favor of one who accepts in full a different security at the time the contract or agreement is made, or who has entered into any other agreement which manifestly indicates a clear purpose and intention to waive the benefit of the statutory lien. A contract for a security which is inconsistent with the intention that a mechanic's lien should exist will be held, generally, as a waiver of the statutory lien; but it is well settled that though the owner obligate himself to give a security inconsistent with the intention that a mechanic's lien should exist, or where the contract is to pay in land, or other specific article of property, yet if the owner fail to fulfill the agreement for such mode of payment, or for different security, it will not be taken as an agreement to waive the mechanic's lien in case payment is not made in the manner provided for, or the security is not given according to the obligation of the owner. Grant v. Strong, 18 Wall. 623; Reiley v. Ward, 4 G. Greene, 22; McMurray v. Brown, 91 U. S. 257. "If the labor has been performed, or the materials furnished, no matter in what the owner agreed to pay, if he has not paid in any way, the laborer or mechanic

has a right to resort to the security provided by law, unless the rights of third parties intervene before he gives the required notice. Liens of the kind, except where the statute otherwise provides, arise by the operation of law, independent of the express terms of the contract, in case the stipulated labor is performed, or the promised materials are furnished; the principle being that the parties are supposed to contract on the basis that if the stipulated labor is performed, or the promised materials are furnished, the laborer or material man is entitled to the lien which the law affords, provided he gives the required notice within the specified time." McMurray v. Brown, 91 U. S. 266; Chicago & A. R. Co. v. Union Rolling-Mill Co., 109 U. S. 702, 721, 722, 3 Sup. Ct. 594; Van Stone v. Manufacturing Co., 142 U. S. 136, 12 Sup. Ct. 181. It may be admitted that the agreement of the contract company to accept, in payment for work and materials, the bonds of the company, secured by a first mortgage, and payable in 30 years, and the shares of the capital stock of the company, was an agreement to take a security, which, when actually accepted, would be inconsistent with the retention of a mechanic's lien. And it may be conceded that, to the extent that payment was made and accepted in bonds and shares, to that extent the debt for work and materials was satisfied, and the mechanic's lien waived. It is very clear, however, that under the Kentucky statute a lien is originated with the beginning of the work, or the delivery of the materials. The provision in the third section of the act that no lien "shall attach unless the person who performs the labor or furnishes the labor, materials, or teams, shall within sixty days after the last day of the last month in which any labor was performed, or materials or teams were furnished, furnish a statement in writing * * * and file the same with the clerk of the county court," is not in conflict with this view. This filing of the claim is necessary to the continuance and perfection of the lien. If this is not the meaning, and the lien has its inception when the work has been completed and the claim filed, then the contractor would have no protection against a bona fide purchaser who bought or fixed a lien before the statutory registration. The lien, under such statutes, has been uniformly held to begin with the delivery of materials, or the beginning of the work. It is not a lien originating in a contract for a lien, but arises out of the statute, independent of any agreement for a lien, and is based upon the equity of paying for work done or materials delivered. It is an incipient or inchoate lien until it is completed or perfected by compliance with the statute, and is lost utterly if those acts be not done, required for its completion, within the time and in the manner required by the statute. Thus, although the contract company had a contract for payment in such securities, which, when accepted, would be inconsistent with the retention of a statutory lien, yet it had an inchoate lien from the time it began work or the delivery of material, which inchoate lien was only waived when the owner complied with his agreement, and gave the security or made the payment contracted for. But, independently of the existence of an incipient or perfected lien in favor of the contract company, we are quite agreed that a subcontractor in the first degree is

given a direct lien under this statute. It is difficult, as observed by counsel, to add anything by way of argument which will make this contention any more obvious than is apparent from the plain language of the statute. The first section of the act gives the lien to "all persons who perform labor or furnish labor or materials * * * by contract express or implied with the owner * * * or by subcontract thereunder." The clear purpose of the Kentucky statute was to make the liens of the contractor and subcontractor independent direct liens, the latter limited only by the amount of the original contract price. The lien of the subcontractor does not spring out of the lien of the contractor; is not derived therefrom, or subordinate thereto. The aggregate of all the liens is not to exceed the contract price agreed to be paid by the owner, but this limitation concerns, not the fact of a lien, but the extent thereof. Being a direct lien, its existence does not depend upon the existence or nonexistence of a contractor's lien, and the waiver of a lien by a contractor will not affect the subcontractor's lien.

Opinions of other courts, construing other statutes, are of little importance, without a careful comparison of the statute in question with that construed. But upon this question, as to whether a subcontractor has a direct lien, the case of Green v. Williams, reported in 92 Tenn. 220, 21 S. W. 520, is in point, for the reason that the Tennessee statute gives a lien to the contractor, "and every person employed by the contractor to work on the building or to furnish materials." The Tennessee supreme court, in the case cited, said that the lien of a furnisher of materials, under that statute, was distinct, and independent of that of the original contractor, saying:

"The statute gives the lien to several classes of persons, and the lien of each depends upon the statute, and is not derived from the right, or dependent upon the existence or nonexistence of the lien, of any other. The contractor may, by contract or conduct, waive or estop himself. But his subcontractor may nevertheless bring himself within the protection of the statute, and independently assert a lien for his work or materials."

The language of the Kentucky act is that "all persons who perform labor or who furnish materials, by contract express or implied with the owner or owners thereof, or by sub-contract thereunder, shall have a lien thereon." As to who is meant by "sub-contractor thereunder," the learned district judge very aptly observed that:

"The words 'by sub-contract thereunder' could not be intended to make the lien of subcontractor a subrogated one, taking simply the place of the contractor, since, if such was the intention and meaning, the limitation of the liens to the original contract price would be without meaning, as, without this limitation, neither the original contractor, or those subrogated to his lien, could claim a lien for labor and material furnished under a contract, beyond the contract price of that contract. I have heretofore construed those words as limiting the person who could obtain a subcontractor's lien."

2. The contention that the lien claims registered in the county clerk's office before the final completion or abandonment of the work by the contractor or subcontractor last engaged upon the work were prematurely filed, and that, therefore, no lien has been perfected, is not based upon a reasonable construction of the statute. The act requires that a lienor "shall within sixty days after the last day of

the last month in which any labor was performed, or materials or teams were furnished, * * * furnish a statement in writing, verified by affidavit, setting forth the amount due therefor, and for which the lien is claimed: * * * Said claim shall be filed and indorsed by the clerk of the court, giving the date of its filing." By section 4 it is required that the lien thus asserted shall be enforced by a suit in equity, to which other lienors are parties, by proceedings begun within one year from the filing of the claim in the county clerk's office. In view of the limitation upon the aggregate amount of liens enforceable against an owner who has a contract for the whole work, and of the provision that if the liens exceed the contract price the original contract price shall be distributed pro rata among such lienors, it is evident that all lienors should be parties to any suit of the kind, where, by reason of the excess of liens over the contract price, a pro rata distribution must be made. Indeed, the statute expressly requires only what a court of equity, under such circumstances, would order. But this does not, in itself, conflict with the other provision, which seems to contemplate that the person doing or furnishing the labor, materials, or teams is required to file his claim within 60 days after he has completed his work or furnished his materials. The language, "due therefor, upon which the lien is claimed," refers to the statement of the labor that was performed or materials or teams that were furnished, which was the subject-matter of the statement to be filed in the county clerk's office of each county in which the labor was so performed or the materials so furnished. The word "therefor" cannot refer to the last labor that was performed, or the last materials that were furnished, by some other person. The construction placed upon the statute by the district judge, by which each claimant is required to file his claim within 60 days after the last day of the last month in which he performed any labor, or furnished any materials, meets with our approval. The inconvenience of having the final decree postponed until all lienors can be brought before the court who had subcontracts under the original contractor, is not so great as to leave purchasers and creditors indefinitely unadvised as to the existence of liens for work done and materials furnished until the last work had been done or the last materials furnished under a contract for the construction of an entire railroad. The object of filing the claim is to give notice, not only to the owner, but to others interested; and it seems very unreasonable to construe the statute so as to authorize the filing of such notice only after completion of the entire work, or a final abandonment of the contractor's obligation.

3. As we have before stated, the contract between the contract company and the railroad company obligated the latter to pay the former, as the work progressed, on monthly estimates embracing all work done or materials furnished under the contract. The railroad company did make payments accordingly, on estimates which embraced all work done and materials furnished, whether by the contract company directly, or through its subcontractors. The insistence of the appellant is that the subcontractors must be taken to have entered upon their several subcontracts with reference to the

obligation of the railroad company to pay on monthly estimates, as the work progressed, and therefore to be bound by all payments thus made under the contract. This might be so, if the subcontractors' lien was a derivative one, and subordinate to the lien of the principal contractor. When the railroad company made the contract for the construction of its entire road, it did so in the face of the fact that the contractor might sublet the work, and that, if it did so, each subcontractor would be entitled, under the law, to a lien which could only be discharged by the payment to such subcontractors of an equitable proportion of the original contract price. This statute was as much a part of the original contract as if it had been written therein. Under the plain and explicit provision of the statute, there was no way for the railroad company to protect itself against the liens of subcontractors but by so distributing the contract price between all who should contribute to the work of construction as that each incipient lienor should receive from it his pro rata of the contract price. An agreement to pay to the contractor this contract price in installments, as the work progressed, was an agreement inconsistent with self-protection. If an owner, in the face of such a statute, obligates himself to make payments in advance, or in installments, as the work progresses, he cannot complain if the effect of his own agreement is to leave him unprotected against the possible defaults of the contractor in paying subcontractors. We do not think that the effect of the statute is to suspend the owner's own contract, as to the time and mode of paying the original contractor. If he has made a foolish contract, it is nevertheless a valid one; and if he cannot get relief through an equitable injunction, in case subcontracts are made, but is forced to carry out his agreement, he has no one to blame for his own folly in making a contract prejudicial to his own interests, in case subcontractors are left unpaid. From this it must follow that payments made to the contract company, in excess of its pro rata proportion, for work and labor done or materials furnished by it, are no answer to the independent liens of subcontractors whose obligations have not been discharged by the contract company. Jones, Liens, §§ 1304, 1305. What the effect would be if the principal contractor had made payments to his subcontractors through orders made on the owner, it is unnecessary for us to say, for no such question arises in this case. Payments made by the owner direct to a subcontractor in discharge of the subcontractor's claim and lien would, of course, operate as intended by the parties, and reduce to that extent the liability of the property for mechanics' liens, provided such payments were not in excess of the pro rata part of the contract price due to such subcontractor. So, also, it may be conceded that if the subcontractor expressly or impliedly agreed that the contract price might be paid to the principal contractor, and undertook, expressly or impliedly, to look to the principal contractor alone, such conduct would operate as an estoppel, and prevent the enforcement of any lien by the subcontractor. This case is, however, free from all circumstances indicating any agreement, express or implied, that the contract price might be paid to the principal contractor, and that such payment should

operate as a discharge, pro tanto, of the subcontractor's lien. There is nothing to indicate that in any way the principal contractor received any part of the contract price as the agent of the subcontractors. The subcontractors were in the situation of a creditor having two securities. The principal contractor was primarily liable for the whole amount of their claims. In addition, they had a lien upon the owner's property for a proportionate part of each claim against the contractor. Payments made by the principal contractor to a subcontractor would primarily be payments in discharge of the personal obligation of the principal contractor, and therefore applicable to that part of the subcontractor's claim in excess of his lien against the owner. This was the rule of distribution and application of payment adopted by the district judge who heard this case in the circuit court. We have given additional consideration to the argument presented here by the Central Trust Company, that partial payments made from time to time by the principal contractor upon monthly estimates of work or materials done or furnished by the subcontractors should operate as an absolute discharge of so much of the claims of the subcontractors as was embraced within the estimate paid, in full or in part. This question arises upon evidence that monthly estimates were made by the railroad company's chief engineer of work done or materials furnished by subcontractors, and that the contractor, in very many instances, paid on such estimates 90 per cent. of the amount thus estimated. Upon these facts, counsel contend that the payments thus made by the contractor operated to absolutely discharge 90 per cent. of the entire work done and materials furnished during the given month. This overlooks the fact that the subcontractors' contracts were entire contracts. They were contracts to do so much work and furnish so much material for a given sum of money, and that these monthly payments as the work progressed were upon estimates subject to correction. The learned district judge was right in holding that payments made upon such estimates were, in the last analysis, but partial payments upon sums due or to become due upon the subcontractors' entire contracts, and that as a partial payment made by the contractor, who was personally obligated to pay the whole of the sum, it should be properly treated as a payment upon that proportion of the subcontractors' claims in excess of that secured by the lien. The same result will be brought about upon another theory, which is that, where the aggregate of the liens is for a sum in excess of the original contract price, each lienor is entitled, under the statute, to only a proportionate part of the contract price, and to a pro rata interest in the common security, and that he would be entitled, when he came to assert his claim against the common security, to obtain that pro rata upon the basis of his entire claim, and not upon the basis of the balance due after crediting his claim with payments made by the principal contractor on account of his personal liability. Bank v. Armstrong, 8 C. C. A. 155, 59 Fed. 379. Thus construed, it must follow that the distribution of the original contract price should be made upon the basis of the entire lienable claim of each subcontractor to the work of construction. If the railroad company pays out the contract price

before the work is completed or finally abandoned, then its liability to contractors or subcontractors left with unpaid claims will be ascertained by an appraisement of the entire original contract price among the several persons who did work or furnished materials on the basis of the cost of the work. To limit this distribution to those claims which were perfected by the statutory notice would be unjust to the owner, who had a right to distribute the contract price during the progress of the work. If, by premature distribution, one incipient lienor is paid more than his proportion, the owner will suffer the loss, and be remitted to his remedy against the original contractor. To require the contract price to be distributed alone among those who finally perfected their claims, and upon the basis of the amount of the claims shown by the completed liens, would do great injustice, and deprive the owner of the right to distribute the contract price among contributors to the work as it progressed. The fact that some of the subcontractors have been paid a larger per cent. of their claims by the principal contractor than others is an advantage of which they should not be deprived. If any part of their claims remains unpaid, they will be entitled to share in the common security ratably. That some of the subcontractors received some of the bonds paid by the railroad company to the principal contractor, and that others received the proceeds derived from sales of such bonds by the contractor, cannot affect the rule of distribution. The bonds were paid to the contract company as an absolute payment, and became the property of that company, to do with as it saw fit. The contract company was absolutely liable to each subcontractor for the full amount of the price agreed to be paid under the subcontracts. The aggregate sums thus due to subcontractors very much exceeded the original contract price. Payments made by the contract company were most often made from a common fund, arising in part from the capital of that company, and in part from proceeds of sales of bonds received from the railroad company; other payments were made on the check of the company against a fund traceable wholly to proceeds of sales of such bonds; and, in still other cases, partial payments were made in such bonds at an agreed cash valuation. But all these payments were made, without regard to the source from which the fund or property came, upon the direct, personal, pecuniary obligation of that company to its subcontractors, and in reduction of that acknowledged liability between debtor and creditor. The first effect of these payments was to reduce the personal and primary liability of the payor. The second and indirect effect was to relieve the property of the railroad company, in so far as such payments, on proper application, might discharge the independent liens of the subcontractors. If the subcontractor took pay in bonds at an agreed value, instead of money, it ought not to operate as a discharge of his lien to any greater extent than a like payment in money. If we are right in holding that a partial payment in money by the contract company, upon its own absolute obligation, would not operate to defeat or release the direct lien of the subcontractor to a ratable proportion of the common security for any balance left unpaid, then it must follow, in the absence of an agree-

ment to the contrary, that it is immaterial whether such payment was made in bonds or money, and immaterial to inquire as to the origin of the contract company's title. The decree declaring the liability of the railroad company proceeded upon the basis we have indicated, and meets our approval.

4. The next objection to the decree presented by the Central Trust Company is as to the method adopted for the ascertainment of the contract price agreed to be paid by the railroad company to the contract company. Appellants insist that it was the duty of the railroad company to withhold the payment of any part of the contract price until all the work contracted for by the principal contractor or by subcontractors had been finished, and all liens ascertained and perfected; that at that time only the contract price should have been ascertained, and distributed among all the persons entitled to share therein. This suggestion is based upon the peculiar facts of this case. The contract price was payable in bonds and shares of stock, and not in money. As between the principal contractor and the railroad company, the latter was obliged to pay this contract price only in bonds and stock. It was also obligated to make these payments on estimates, as the work progressed. This the railroad company did, and paid to the contract company, from time to time, as the work progressed, every dollar that it was obligated to pay. These bonds were converted into money by the contract company, as received, and the proceeds of such sales were the principal source from which the contract company made its partial payments to its subcontractors. The price of these bonds varied. Those first delivered are shown to have sold as high as 90 cents on the dollar, but from that time they declined in market value. Some were sold for 60 cents, some for 40 cents, some for 30 cents; and after a receiver was appointed in this case, and these mechanics' liens asserted, the market value of the bonds had declined to from 12 to 17 cents on the dollar. Now the contention of the trust company is that the money value of the price to be paid by the railroad company should have been ascertained when the work was finally completed or abandoned. This contention would operate to reduce the money value of its contract to a comparatively insignificant sum. The position is inequitable, unjust, and legally unsound. The railroad company had placed itself in a position where it was obligated to pay out these securities to the contract company from time to time. The statute, as we have before said, placed it under the obligation to see that the contract price was ratably distributed among all persons who contributed to the building of the railroad, or the furnishing of materials. If its own contract was inconsistent with its protection against the independent liens of subcontractors, undischarged by a proper application of the contract price by the contractor in discharge of subcontractors' claims, it did not operate to destroy the contract, or to suspend its liability thereunder. It is perhaps true that it might have resorted to a court of equity, and have brought the contractor and subcontractors before the court, and compelled a distribution of the contract price ratably among all the lienholders, or have obtained other equitable interference, by way of an injunction prohibit-

ing the contract company from subletting any of its work unless it should give a bond for the protection of the owner against subcontractors and their liens. If the railroad company chose not to avail itself of possible equitable assistance, it had the right to go ahead, and pay the contract price into the hands of the contractor, as it had agreed to do, and take the risk of liability to subcontractors whose claims should be left unpaid. Now, this is exactly what the railroad company did. If the contract price had been payable in money, instead of bonds and stocks, no such question as this would have been material, but inasmuch as the subcontractors' lien is an independent one, and inasmuch as their contracts with the principal contractor were for money, it follows that the subcontractors' liens operated as a security for the payment of the money; and it is no answer for the railroad company to say that it contracted to pay for the building of its road in land or bonds or shares, and therefore their lien is dischargeable by land or bonds or shares. That would be so if the subcontractors' liens were by way of subrogation. It would be so if the subcontractors were limited to the amount due by the owner to the contractor at the time their liens were acquired. But the lien of the subcontractor, being an independent, direct lien, is a lien for the security of the money due on his contract with the principal contractor. It therefore becomes essential that the money value of the contract price to be paid by the owner shall be ascertained. The subcontractor is bound by that contract price, for the statute provides that the aggregate amount of the liens shall not exceed the original contract price. The method adopted by the circuit court was to ascertain the market value of the bonds and shares at the time they were actually delivered by the railroad company to the contract company in pursuance of the contract between them. That method, we think, was the proper one, and did no injustice to any of the parties concerned.

The insistence of the appellees below, and again presented by their several cross appeals, was, that the contract price was $50,000 per lineal mile, plus the various county aid bonds. This contention rests upon the assumption that for the construction of the railroad, and for the other expenditures to be made by the contract company, it agreed to pay $50,000 per lineal mile, in money, or, at its election, in its bonds and shares. This assumption is radically erroneous. The contract fixed no money value whatever. It provided that "in payment for this work thus to be done, and the expenditures to be made, the railroad company agrees to assign and deliver to the contract company the following named securities, to wit." This is followed by a detailed statement of the securities to be delivered in payment. By the third paragraph it was provided that payment should be made in monthly installments, as the work progressed. By the fourth paragraph the railroad company agreed to deposit these securities, as soon as practicable, with the Louisville Safety-Vault Company, as trustee under this agreement. The fifth paragraph provides the method of ascertaining, from time to time, the payments due to the contract company, by prescribing that the chief engineer should, from month to month, certify in writing "what proportion the work

done, and material furnished, bore to the total expenditures and cost of the railroad and equipments, when completed according to this contract, as same may be estimated by said engineer, and the amount payable on account thereof to said contract company, and thereupon the amount so certified shall become immediately payable by the railroad company to the contract company." The sixth paragraph, which gave to the company an option to pay in money, was in these words:

"Paragraph 6. As the several installments of money shall become due to the contract company under this agreement as above provided, it shall be the duty of the railroad company to pay the same in money, or to give to the trustee an order for a delivery to the contract company, or its order, of the securities deposited with it as above provided, equal in amount, at their par value, to the amount of such installment, as fixed by the certificate of the engineer. If the railroad company should pay any such installments in money, it may, upon depositing with the trustee the receipt of the contract company therefor, withdraw from the hands of the trustee an equal amount, at par, of the bonds and capital stock of the railroad company, such withdrawal to be in equal proportion of each. If payment be made in securities, instead of money, the contract company shall be entitled to receive pro rata payments in the stocks and bonds of the railroad company, after deducting the amounts paid in county bonds, as provided in clause first of paragraph II. of this contract."

It is difficult to draw an inference that the company was to pay at the rate of $50,000 per mile in the event it elected to pay in money, in place of securities. The estimates of the engineer were to be based on the proportion of the work done to the whole amount to be done. Thus, if the estimates showed that 10 per cent. of the whole work had been done and materials furnished, then 10 per cent. of the securities had been earned, and were deliverable. It is not within the bounds of reason that these securities were estimated at their par value, or that if, for any reason, the company had refused to deliver them, a money judgment equal to the par of the stocks and bonds would have been recoverable. But, however this may be, the railroad company did deliver these stocks and bonds as they were earned; and this, as we have already seen, it had a right to do. The legal proposition that where a promise is in the alternative, to pay in money or in property, the promisor has an election either to pay in money or the equivalent, and that, if he fail to pay in property on the day of payment, the right of election is gone, and the promisee entitled to payment in money, is not applicable, upon the facts of this case. To be applicable, there must be a promise to pay a definite sum of money, or its equivalent in property, and there must be a failure to pay according to the contract. Neither essential is found here. No contractual relation existed between the railroad company and the subcontractors. It was under no promise to pay them anything. It is true that they had a direct, statutory lien to secure them in the payment by the contractor of the sums due under their several subcontracts, and it is also true that they have been allowed money decrees against an owner who had a contract to pay only in property. But this is because the property has been paid over to the principal contractor, thus entitling them to a decree for a proportionate part of the value of the property. That value

was properly ascertained when the master reported its cash value when paid and delivered to the contract company. The amount to be paid in bonds and stocks for each lineal mile was manifestly not intended as the measure of a money price to be paid, or of a money indebtedness in case of a default in the delivery of the securities. The price to be paid for the work was fixed with reference to the speculative value of the securities in which it was to be paid, and it would be most gross injustice to hold that a price so payable furnished the measure of a money indebtedness. In Railroad Co. v. Kelley, 5 Ohio St. 180, the agreement was that 75 per cent. of the price of construction should be paid in money, and 25 per cent. in the stock of the company. The railroad company made default in delivery of the stock, and was held to have lost the right to pay in stock. But upon a full consideration of the contract the Ohio court held that the price was a stock price, and not a money price, and the price, as payable in stock, was not, in the contemplation of the parties, a money indebtedness, and that it would be a manifest injustice to give the contractors, in cash, what was measured by payment in speculative stock. The court thereupon held that the market value of the stock was the measure of recovery. The cases of Moore v. Railroad Co., 12 Barb. 156, and Parks v. Marshall, 10 Ind. 21, are to the same effect.

5. Appellants' tenth assignment of error is based upon the action of the court in overruling its twenty-ninth exception to the report of Special Master Du Relle. That exception was in these words:

"Because the master valued $652,000 of bonds issued by the Richmond, Nicholasville, Irvine & Beattyville Railroad Company, and afterwards indorsed by the Louisville, New Albany & Chicago Railway Company, at 90 cents on the dollar, being the amount at which they sold after such indorsement, instead of valuing the said bonds at the sum they were worth at the time they were received by the Ohio Valley Improvement & Contract Company without said indorsement."

The contract company entered into an agreement with the Louisville, New Albany & Chicago Railway Company, a corporation of Indiana, by which the latter, in consideration of the transfer to it of a controlling interest in the stock of the Richmond, Nicholasville, Irvine & Beattyville Railroad Company, agreed to indorse the bonds of the latter company, when delivered to the contract company. The latter company is not shown to have had anything to do with this arrangement, the consideration for the indorsement proceeding wholly from the contract company. Bonds to the amount of several hundred thousand dollars were accordingly indorsed and sold before any question was made as to the validity of the indorsement. The master, in ascertaining the value of the contract price to be paid for construction, attached no value to the stock of the railroad company, except in so far as that stock had been used to enhance the value of the bonds, as furnishing a consideration inducing the Indiana Railroad Company to indorse the bonds of the Kentucky Railroad Company. We are unable to see any injustice in this. While the stock had no definite market value in money, yet a controlling interest did have value sufficient to procure an indorsement on the bonds in

which the remainder of the price of construction was to be paid. If that indorsement enhanced the market value of those bonds, that enhancement furnished a reasonably fair measure of the value of the shares which were part of the contract price. Before all the bonds had been indorsed, and before most of them indorsed had been sold, the act of the Indiana Railroad Company in undertaking to indorse the bonds of another railroad corporation was, in a judicial proceeding instituted by the Indiana Company against the contract company and other holders of indorsed bonds, declared null and void as ultra vires. This decision operated to deprive the contract company of any benefit from such indorsement on unsold bonds, but it did not rob it of the benefit already realized through the enhanced value of such bonds as had been sold theretofore. To the extent of this benefit, it had been able to realize value from the shares of stock, and this enhanced value of the bonds actually sold was a fair measure of the value of that part of the price of construction paid in shares. Costs of appeal will be paid out of the fund arising from the sale of the railroad.

RICHMOND & I. CONST. CO. v. RICHMOND, N., I. & B. R. CO. et al.

(Circuit Court of Appeals, Sixth Circuit. May 7, 1895.)

Nos. 231, 236-239, 241-246.

1. CORPORATIONS—IDENTITY OF STOCKHOLDERS.
   The fact that the stockholders in two corporations are the same, or that one corporation exercises a control over the other, through ownership of its stock, or through the identity of the stockholders, such corporations being separately organized under distinct charters, does not make either the agent of the other, nor merge them into one, so as to make a contract of one corporation binding upon the other.

2. MECHANICS' LIENS—KENTUCKY STATUTE—EFFECT OF APPROVAL OF SUBCONTRACT BY OWNER.
   The R. Ry. Co. made a contract with the O. Contract Co. to build its road. Before the completion of the work, the contract company, through exhaustion of its resources, became unable to continue it and thereupon made a contract with the R. Construction Co. to complete the work. The railway company was informed of such contract, and its board of directors passed a resolution consenting thereto, and consenting, so far as it could lawfully do so, that the construction company should have a contractor's lien upon the railroad for all work done. *Held*, that such resolution did not make the construction company a principal contractor with the railway company, nor give rise to a principal contractor's lien under the Kentucky statute (Barb. & C. Ky. St. 1894, §§ 2492-2495), but, at most, created a lien by contract, which could not be superior to mortgages or liens arising by statute.

3. SAME—APPLICATION OF PAYMENT TO SUBCONTRACTOR.
   The contract between the contract company and the construction company for the completion of the railroad provided for the doing of a variety of things, some of which were, and some were not, proper subjects of liens against the property of the railway company; and such contract, together with a modification thereof subsequently agreed upon, provided that the construction company should be paid by the contract company the amount of money it expended in doing such things, and an equal amount of bonds of the railway company, which, at the time of the contract, were worth about 40 cents on the dollar. *Held*, that any hardness in the bargain between the principal and subcontractor not amount-

ing to fraud upon other lienors or the railway company was not a reason for applying to payments made by the principal to the subcontractor any different rule from that prevailing in other cases of such payments, and that the bond payments, applicable to the lienable part of the construction company's claim, the money payment not having been made, and, being only obtainable through a lien on the railroad, should be applied primarily to that part of such claim in excess of what could be obtained by lien. Central Trust Co. v. Richmond, N., I. & B. R. Co., 68 Fed. 90, followed.

4. SAME—LIENABLE CLAIMS.
Held, further, that the construction company was not entitled to claim a lien, under such Kentucky statute, for money expended either for purchase of rights of way for the railroad, or for payment of salaries of its officers, or for stationery and office expenses, or for a commission to a trust company for guarantying a contract for the purchase of rails, such guaranty being made necessary by the construction company's lack of funds and credit, or for legal expenses in purchasing and condemning rights of way, rights of way not being material and legal services not being labor, within the meaning of the lien act.

5. SAME—CONTRACT PRICE.
The original contract between the railway company and the contract company included an agreement by the latter to pay the interest on the bonds of the former during construction, and for a year after. *Held* that, in estimating the gross contract price for the building of the railroad, such interest was properly deducted from the whole amount to be paid.

6. SAME—INTEREST—LIENS OF DIFFERENT PRIORITIES.
Held, further, the amounts due from the contract company to its various subcontractors having been due at the completion of the work, except in the case of the construction company, whose payment was due at a fixed date after the completion of the work, that such subcontractors were entitled, as against the contract company, to interest from the completion of the work, and, in the case of the construction company, from such fixed date, and that such interest was also properly allowable as against mortgage bondholders whose lien was by statute made subsequent to the liens for labor and material furnished.

7. SAME—MATERIAL LOST BY NEGLIGENCE.
One W., a subcontractor under the contract company for the construction of a bridge, claimed a lien for material lost by the fall of a part of such bridge during construction. His contract provided that the material for the bridge, as delivered and paid for, should become the property of the contract company. It did not appear that the material had been paid for, but it did appear that the loss was due to W.'s own negligence. *Held*, that he was not entitled to a lien.

8. SAME—PLACE OF FILING LIEN.
The statute provided that the statement claiming a lien should be filed in each county in which the labor was performed. One D. filed a lien for services as engineer in J. county. It appeared that his work had been principally in J. county, but that he did a small amount of work in W. county. *Held*, that he should be allowed a lien for two-thirds of the amount of his claim.

9. SAME—MATERIAL NOT DELIVERED.
D. & C. prepared a quantity of railroad ties under a contract with the contract company. That company notified D. & C. that it would not accept the ties, and they were never delivered. *Held*, that D. & C. were not entitled to a lien.

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

These were appeals in the suit of Central Trust Co. v. Richmond, N., I. & B. R. Co., 68 Fed. 90, severally taken by the Richmond & Irvine Construction Co., L. F. Mann, J. E. Dougherty, G. W. Gourley,

W. B. Smith, D. Shannahan & Co., J. W. Walker and others, John Mitchell & Co., M. A. Sullivan, Dickason & Crawford, and John McLeod, from the decree of the circuit court settling the priorities among the various claimants of the fund arising from the sale of the railroad.

Each of the appellants named above has prosecuted a separate appeal. The general facts out of which the questions presented by them arise have been stated in the opinion filed upon the appeal of Central Trust Co. v. Richmond, N., I. & B. R. Co. (being No. 240 on this docket) 68 Fed. 90. These general facts need not be again stated. Many of the questions arising upon the separate assignments of error filed by the several appellants are fully covered by the opinion in the case above referred to. The court, in this opinion, will confine itself to such questions as were not necessarily involved in the former case.

A. E. Richards and J. B. Baskin, for Central Trust Co.
W. A. Sudduth and H. L. Stone, for Richmond Const. Co.
Earnest Macpherson, for John Mitchell & Co.
St. John Boyle, for Louisville Trust Co.
Matthew O'Doherty, for D. Shannahan & Co.
Humphrey & Davie, for D. Shannahan & Co. and J. W. Walker.
Pirtle & Trabue, for Dickason & Crawford.

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

LURTON, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

1. One of the principal questions presented by the appeal of the Richmond & Irvine Construction Company concerns the relation which it bears to the appellee the Richmond, Nicholasville, Irvine & Beattyville Railroad Company. Its contention is that it is properly to be considered as a contractor with the railroad company, and it assigns as error that the circuit court did not so hold, instead of construing it to be a subcontractor under the Ohio Valley Improvement & Contract Company. As will appear more fully by the opinion of the court heretofore filed in the case of Central Trust Co. v. Richmond, N., I. & B. R. Co., 68 Fed. 90, the Ohio Valley Improvement & Contract Company had contracted with the said railroad company to construct and equip the entire line of railroad of the said railroad company. The Ohio Valley Improvement & Contract Company, hereafter designated as the "Contract Company," after doing the larger part of the work and furnishing the greater part of the materials for that purpose, became financially embarrassed, and unable to complete its contract without assistance. It had agreed to construct and equip the said line of railroad for the bonds and stocks of the railroad company. Thus all the assets of the railroad company had either been paid or pledged to it, and when the latter became unable to go on with the work the railroad company was in no condition, financially, to complete the construction itself. In this situation of affairs the contract company entered into an agreement with the appellant the Richmond & Irvine Construction Company, hereafter designated the "Construction Company," that the latter should complete the work of construction between Richmond and Irvine, Ky., and furnish all necessary materials. It also agreed to purchase

and hold certain coupons detached from the bonds of the railroad company, which coupons the contract company, under its agreement with the railroad company, was under obligation to pay, and to purchase and hold certain subcontractors' lien claims due by the contract company. The agreement between the construction company and contract company provided that the former should have a "subcontractors' lien" on the property of the railroad company. The subscribed capital stock of the construction company was estimated to be $200,000. It contracted to do work and furnish materials of an estimated value of not more than $140,000, and to expend the balance of its subscribed capital stock in the purchase of the coupons and subcontractors' liens designated by the contract. The contract concluded in the following words:

"And said contract company agrees to pay the said construction company for said work, materials, and such claims as may be so purchased, the sum $400,000, to be paid as follows: In the new 5 per cent. first mortgage bonds of said railroad company the sum of $200,000 as soon as the bonds are printed and ready for delivery, and the sum of $200,000 in money due and payable at the expiration of thirty days after the track of said railroad is laid and completed as aforesaid from Richmond, Ky., to the Kentucky river, opposite Irvine, Ky.; but, should said sum not be paid at maturity, the same shall bear no interest until January 1, 1892."

It was signed only by the contract company and the construction company. The contention of appellants that this contract is to be construed as a contract of the railroad company, and its relation as that of an original contractor, is based upon two propositions:

First. It contends that under the evidence in this case the contract company was, in legal effect, the railroad company, and that engagements made by it were, in legal effect, engagements made by the railroad company. In support of this, appellant has endeavored to show that the stockholders in each corporation were the same, and that the contract company dominated and controlled the railroad company. The contract company was a legal corporation, wholly distinct and separate from the railroad company. The fact that the stockholders in each may have been the same persons does not operate to destroy the legal identity of either corporation. Neither does the fact that the one corporation exercised a controlling influence over the other through the ownership of its stock or through the identity of stockholders, operate to make either the agent of the other, or to merge the two corporations into one. There is no pretense of any fraudulent concealment of the interest of the one corporation in the other, or of the fact that the persons controlling the one corporation likewise controlled the other. The officers and agents of the construction company were fully aware of the relations which existed between the two companies. They also knew that the contract company was under obligation to build and equip the railroad for the railroad company. With this knowledge of the relations of each corporation to the other, it deliberately entered into a contract with the contract company to do work for and under the contract company, as a subcontractor. The facts of this case are very much the facts which appeared in the case of Trust Co. v. Bridges, 6 C. C. A. 539, 57 Fed. 753. In that case the court dis-

tinctly held, on substantially the same facts, that the corporations were to be treated as distinct entities, and that neither was to be treated as the agent of the other, when openly contracting for itself, and in its own corporate name.

Second. Appellant also rests its contention upon the legal effect of the action of the board of directors of the railroad company contained in certain resolutions found upon the minutes of the board, as follows:

"Whereas, the Richmond, Nicholasville, Irvine & Beattyville Railroad Company, hereinafter designated the 'Railroad Company,' is informed by the Ohio Valley Improvement & Contract Company, hereinafter designated the 'Improvement Company,' that it desires to make a subcontract with the Richmond & Irvine Construction Company, hereinafter designated the 'Construction Company,' substantially as follows, to wit: First. That said construction company will finish the work of construction necessary to be done upon the railroad of the railroad company from Versailles to Irvine, according to the construction contract of October 11, 1888, which, it is estimated, will require something less than $140,000. Second. That said construction company shall purchase and take up certain lien claims of subcontractors, now existing and unpaid, for work heretofore done and material furnished on the line of the railroad, the lien claims to be purchased, added to the cost of the work and materials, to aggregate $200,000. Third. That said improvement company will pay to said construction company, in money, the amount so paid out both in construction and in the purchase of subcontractor's lien claims, amounting in the aggregate to $200,000, and will pay to the said construction company, as an additional consideration, in 5 per cent. bonds of this company, an amount equal, at par value, to the amount of money to be so paid by the improvement company to the construction company. Now, be it resolved, that the Richmond, Nicholasville, Irvine & Beattyville Railroad Company does hereby consent to the subletting by said improvement company to said construction company upon substantially the terms above mentioned, and consents, so far as this company can lawfully do so, that said construction company shall have a contractor's lien upon the railroad for all work done and material furnished and claims purchased as above mentioned."

These resolutions do not operate to make the railroad company a principal contractor, within the meaning of the Kentucky lien act, being sections 2492–2495, St. Ky. 1894, by Barbour and Carroll, and which have been fully set out in the opinion of this court filed in the principal case. A contractor, within the meaning of that act, is one who does work or furnishes material for the owner, and upon a contract with the owner for the payment of the contract price. A subcontractor, within the meaning of that act, is one who contracts under and with the principal contractor. Now, nothing in these resolutions obligated the railroad company to pay the construction company for the work and materials which it was to do and furnish, and for the lien claims which it was to purchase and hold. The railroad company was obligated to the contract company to the extent of the contract price mentioned in the contract between them. The labor and materials which the construction company undertook to furnish are a part of the same labor and materials which the contract company had agreed to furnish, and for which the railroad company was bound to pay. There is nothing in these resolutions which indicates that the railroad company intended to personally assume liability to the construction company. The language that "it consents, so far as this company can lawfully do so, that said construction company

shall have a contractor's lien upon the railroad for work done and material furnished and claims purchased," implies simply a lien by contract. A contractor's lien, per se, is one that arises by operation of law, independently of the express terms of any contract. It springs out of the obligation to pay for the stipulated labor and the promised materials, when furnished, provided the contractor shall give the notice required by statute. McMurray v. Brown, 91 U. S. 266. This, at most, is an agreement for a lien by contract. No lien dependent upon a contract for a lien would be effectual as against mortgages, or the liens of contractors or subcontractors created by the lien statute. We agree with the holding of the circuit court that the relations which existed between the Richmond & Irvine Construction Company and the railroad company was not that of contractor and owner, but of subcontractor and owner.

2. The nineteenth assignment of error filed by the construction company presents a question concerning the application of a payment of part of the contract price in railroad bonds, made by the contract company to the construction company. The rule in regard to partial payments made by the contract company to its subcontractors, and the effect of such payments upon the lien of such subcontractors, is fully stated and explained in the opinion filed upon the questions involved by the appeal of the Central Trust Company, and need not be here repeated. That rule was applied to all payments made to subcontractors, except only the construction company. The learned district judge who heard this case in the circuit court deemed the contract between the contract company and the construction company so peculiar as to justify a departure from the general rule adopted with reference to partial payments made to other subcontractors by the contract company. The peculiarity of that contract consisted, not only in the great variety of things which the construction company undertook to do, but in the odd way in which the price was to be fixed which was to be paid for all its undertakings. The construction company was a corporation organized for the express purpose of helping the contract company out of its difficulties. It obligated itself to do all that the contract company had contracted to do, and had not done, on that part of the road between Richmond and Irvine, Ky. This involved the acquirement of rights of way, grading, track laying, bridge and depot building, the furnishing of all necessary materials, including steel rails, etc. The contract company had, as more fully appears in the principal opinion, obligated itself to pay the interest upon the bonds of the railroad company during construction, and for one year thereafter. It owed a great deal of money to subcontractors for work finished and materials furnished. Its obligation to pay matured coupons, and to pay subcontractors having liens, had to be provided for, and so the construction company undertook to buy and hold matured coupons not exceeding $12,000 in par value, and to purchase and hold for its benefit subcontractors' lien claims to be designated by the contract company. The total capital stock of the construction company was fixed at $200,000. Of this capital it undertook to use $140,000 in expenditures on the work of construction. The expendi-

tures upon this account, it was provided, should include "the actual cost and expenditures" on account of labor done, materials furnished, and rights of way acquired, "including the salaries of said construction company's officers and agents." The remainder of its capital, estimated at $40,000, was to be expended in the purchase of matured coupons and lien claims. Thus it was contemplated that the construction company should actually expend $200,000 for the benefit of the contract company in the completion of a considerable part of the work undertaken by that company for the railroad company. How was it to be compensated for this use of its capital? What price was the contract company to pay for all the undertakings included in this rather unusual contract? This is answered by the contract. The concluding covenant is in these words:

"And said contract company agrees to pay the said construction company for said work, materials, and such claims as may be so purchased, the sum of $400,000, to be paid as follows: In the new 5 per cent. first mortgage bonds of said railroad company, the sum of $200,000 as soon as the bonds are printed and ready for delivery, and the sum of $200,000 in money due and payable at the expiration of thirty days after the track of said railroad is laid and completed as aforesaid from Richmond, Ky., to the Kentucky river, opposite Irvine, Ky., but should said sum not be paid at maturity, the same shall bear no interest until January 1, 1892."

Subsequently a modification of the contract was agreed upon, as follows:

"The agreement attached hereto between the undersigned, bearing date January ——, 1891, was made with the expectation and understanding that the paid-up capital stock of the Richmond & Irvine Construction Company should equal the sum of $200,000 in money which was to be expended in the prosecution of the work of constructing the R., N., I. & B. R. R. and the purchase of the lien claims mentioned in said contract. Now, this writing witnesseth, that if the said paid-up capital stock should fall short of the said $200,000, then the Richmond & Irvine Construction Company shall only be paid under said contract an amount of bonds equal to said paid-up capital stock, and a like amount in money. In testimony whereof, we have hereunto subscribed our names this, the 7th day of February, 1891."

The capital expended did in fact fall short of that anticipated, and the bond payment made by the contract company was correspondingly reduced. This agreement comes at last to this: that in place of agreeing, in the first instance, upon a definite price to be paid for what the construction company agreed to do and expend, the parties to that contract agreed that the price to be paid should be the actual amount of the cash expenditures plus the value of an equal amount of securities, which, as shown by the master's report, were worth 40 per cent. of their value. This arrangement settled definitely the profit allowed the construction company upon its entire outlay, provided the whole of the price should be paid or collectible. The contract may have been a hard bargain, as between the contracting corporations, and this view, in part, may account for the exceptional rule enforced in regard to the application of the partial payment so as to reduce the amount of its lienable claim, as well as the amount of its pro rata enforceable against the property of the railroad company. On the other hand, it is to be remembered, in mitigation, that this profit was more apparent than real. The market value of the

bonds rapidly depreciated after their delivery, and, when these suits were instituted, had declined to perhaps 15 per cent. of their par value. There was no probability of the payment of the cash part of the contract price, except through the enforcement of the statutory lien. The cost, delay, and uncertain result of a suit enforcing such a lien, as well as the uncertain and speculative value of the payment in bonds, were proper matters to be taken into consideration in fixing the gross price to be paid for all the construction company undertook to do and expend. The contract was one which did not affect the legal liability of the railroad company, nor did it subject its property to any larger lien than was already fastened upon it. It had an indirect effect due to the fact that the railroad company had already paid the contract company more than its ratable share in the original contract price, and so it indirectly affected the holders of the mortgage bonds, and of subcontractors' lien claims. But this indirect effect would result from any unwise subcontract made by the principal contractor. In the absence of intentional fraud, such indirect consequences are not matters of which the parties affected can complain. What the court was called upon to do was to ascertain the contract price due from the principal contractor to each subcontractor, eliminate from that so much of the price as was for work or expenditures nonlienable under the statute, and then ascertain the pro rata of the original contract price properly earned by each subcontractor. The mere hardness of the bargain between the principal contractor and its subcontractors, not amounting to a fraud upon other lienors or the railroad company, should have no effect in determining the pro rata of each subcontractor in the original contract price. The first direction in the decree, for an apportionment of the bond payment ratably between so much of the claim of the construction company as was entitled to the benefit of the statutory lien and that which was nonlienable, seems to be justified by the terms of the contract, and is therefore affirmed. In substance, that agreement was, that for each one dollar of money expended, the contract company would pay one dollar in money and one dollar in bonds. The bond payment must be treated as having been made ratably upon the lienable and nonlienable expenditures. But so much of the decree as directed that that part of the bond payment applicable to its lienable claim should be again prorated between that part of its lienable claim as was in excess of, and so much of it as was within its pro rata share of, the original contract price, was erroneous. We see no reason for applying that payment in any other manner than was adopted with reference to other subcontractors' liens.

3. The same appellant assigns as error that the court disallowed interest on its pro rata, except from the date of decree. We think this was error. The agreement between the contract company and the construction company provided that the actual cost of work and labor and expenditures for material, etc., made by the construction company for the contract company should be "payable at the expiration of thirty days after the track of said railroad is laid and completed as aforesaid from Richmond, Ky., to the Kentucky river, opposite Irvine, Ky.; and, should said sum not be paid at maturity, the

same shall bear no interest until January 1, 1892." We think this is an express contract for payment upon the completion of the work, and an implied promise to pay interest from and after January 1, 1892. Redfield v. Iron Co., 110 U. S. 176, 3 Sup. Ct. 570. Under this contract this appellant should have been allowed interest, in accordance with the terms of the contract, after January 1, 1892.

4. The contract between the construction company and the contract company provided for the doing of many things, and the expenditures of money on many accounts, which the circuit court held were not lienable matters. All these expenditures made by the construction company, and which were excluded from the lienable claim of that company, were made matters of exception to the report of the special master, and the ruling of the court thereon has been assigned as error. We are of opinion that the court's ruling was correct, with respect to each and all of these matters thus excluded from the lienable claim. Money paid for purchase of rights of way is neither work nor material, within the meaning of the lien act. Neither is money expended in the payment of the salaries of the president of the construction company and its other general officers, although properly chargeable to the contract company, as between it and the construction company. Nor were the expenses of the construction company for stationery, and like office material, lienable claims. The construction company paid $2,346.29 to a trust company to secure its guaranty upon a contract made by the construction company for the purchase of steel rails. Appellant insists that this expenditure constitutes a part of the actual cost of the steel rails which it had contracted to furnish for the completion of the road. We think that that expenditure was one resulting alone from its own want of sufficient cash capital, or its own insufficient credit, and that no such expenditure was within the meaning or spirit of the contract between it and the contract company. If its own capital or credit had been sufficient, no such expense need have been incurred; and the contract makes no provision, directly or indirectly, for compensating the construction company for expenses directly due to its own insufficient capital or credit. The construction company paid out some $10,000 for legal expenses incurred in purchasing or condemning rights of way. The court held such expenditures were not lienable. There was no error in this, for two reasons: First, because the furnishing of rights of way is not the furnishing of "materials," within the lien act; second, legal service rendered by counsel is not "labor," within the meaning of the lien statute.

5. Each of the appellants has filed numerous assignments of error touching the improper exclusion of items of expenditure which it is now insisted should have been included in ascertaining the total original contract price entitled to the statutory lien, and to be prorated among all who contributed to the proper work of construction. It is sufficient to say that we have given careful attention to the various assignments and the evidence relating to them upon which this class of objections to the decree have been presented to this court, and we find that none of the assign-

ments of error to the manner in which the original contract price was ascertained are well taken. The deduction from the gross contract price of a sum regarded as necessary on the evidence for the completion of the railroad seems to us to be well supported by the weight of proof. Error has been assigned because of an alleged erroneous deduction from the gross contract price on account of the agreement of the contract company to pay the interest upon the bonds of the railroad company during construction, and two installments after completion, of the road. We are of opinion that the ruling of the circuit court upon this point was correct. It was very essential to the contract company that the interest upon the bonds should be provided for during construction, and for such a period thereafter as it was reasonable to presume that the earnings of the road would be insufficient to pay. As the prospective owner of the bonds to be issued, it was directly interested in the maintenance of the credit of the railroad company. And so much of the contract as obligated the contract company to maintain the credit of the railroad company seems to have been based upon this obvious proposition. This agreement was not, in our judgment, at all dependent upon the operation of the road as completed by the Louisville Southern Railroad Company. It was an absolute contract to pay accruing interest for the time indicated, and formed a considerable element in the determination of the contract price. The interest unpaid was properly deducted from the contract price, and all the assignments of error relating thereto are overruled.

6. The decree allowed none of the subcontractors interest except from the date of the final decree. This has been assigned as error. We have already passed upon this matter, so far as the construction company is interested. The disallowance of interest seems to have been based upon the assumption that there was no contract between the contract company and the subcontractors for the payment of interest, and that the allowance of interest upon such claims, in the absence of a local statute, was within the sound discretion of the court. The court seemed also to attach importance to the fact that the litigation which has resulted in delay was not vexatious, but necessary for the proper marshaling of liens. The question divides itself: First, is interest properly allowable as between the contract company and its subcontractors? Second, is there any reason which should move the conscience of a chancellor to disallow interest because of its indirect effect upon the rights of another class of creditors? In general terms, it may be stated that the contracts between the contract company and its subcontractors provided for payments of a proportionate part of the contract price on monthly estimates as the work progressed, and for payment of all balances due on the completion of the work. There seems never to have been any serious controversy as to these balances due to subcontractors, except in regard to a claim for so-called extra work and materials asserted by appellant Walker. Their claims were not paid because the contract company was unable to pay them, and not because it disputed its liability. As between the contract company and the subcontractors, there can be no serious contention but that interest

should be paid from and after the completion of the work and the filing of their lien notices as required by statute. That filing is the full equivalent of the rendition of a stated account. In the case of Young v. Godbe, 15 Wall. 565, the court said with regard to the allowance of interest upon an open account that:

"If the debt ought to be paid at a particular time, and is not, owing to the default of the debtor, the creditor is entitled to interest from that time, by way of compensation for the delay in payment. And if the account be stated, as the evidence went to show was the case here, interest begins to run at once."

This rule announced by the supreme court of the United States seems to be in entire accord with the latest utterances of the supreme court of the state of Kentucky. In the case of Henderson Cotton Manuf'g Co. v. Lowell Machine Shops, 86 Ky. 668, 7 S. W. 142, the court said, concerning the allowance of interest upon an account for machinery sold and payable at a definite time by agreement of the parties:

"The true ground upon which to put the allowance of interest is the fault of the party who is to pay the debt. If he has made default of payment, then, ex aequo et bono, he should reimburse the creditor for keeping him out of the use of his money. He should render an equivalent for the use of what is not his own. If there be a specified time for payment, and a failure to then pay, or a demand of payment of a liquidated claim, and default, then the debt should, as a matter of law, bear interest from the time of such failure. This is the current of authority, and it is supported by both right and reason."

Neither is there anything in the case of Redfield v. Iron Co., 110 U. S. 174, 3 Sup. Ct. 570, or Thomas v. Car Co., 149 U. S. 116, 13 Sup. Ct. 824, which conflicts with the doctrine as stated in Young v. Godbe and Henderson Cotton Manuf'g Co. v. Lowell Machine Shops, cited above. In Redfield v. Iron Co., Justice Matthews, in discussing this question, said, for the court:

"Interest is given on money demands as damages for delay in payment, being just compensation to the plaintiff for a default on the part of his debtor. Where it is reserved expressly in the contract, or is implied by the nature of the promise, it becomes part of the debt, and is recoverable as of right; but, when it is given as damages, it is often matter of discretion. In cases like the present, of recoveries for excessive duties paid under protest, it was held in Erskine v. Van Arsdale, 15 Wall. 75, that the jury might add interest, the plaintiff ordinarily being entitled to it from the time of the illegal exaction. But where interest is recoverable, not as part of the contract, but by way of damages, if the plaintiff has been guilty of laches in unreasonably delaying the prosecution of his claim, it may be properly withheld. Bann v. Dalzell, 3 Car. & P. 376; Newell v. Keith, 11 Vt. 214; Express Co. v. Milton, 11 Bush, 49."

In Thomas v. Car Co., heretofore cited, there seems to have been no definite time agreed upon as to payment, and interest was disallowed because, as the court said, the delay in payment "was occasioned by resisting demands made by the car company, which the result of the litigation shows were excessive, if not extortionate." The contract company was in default, and interest is properly allowable from the time it failed to pay according to its promise, by way of compensation for the delay in payment. Neither is there anything in the fact that the railroad company is insolvent, nor in the fact that the allowance of interest will diminish the fund to which

the bondholders may look for the payment of their bonds. The language relied upon in support of the decree disallowing interest, from the opinion in Thomas v. Car Co., that "as a general rule, after property of an insolvent passes into the hands of a receiver, or of an assignee in insolvency, interest is not allowable on the claims against the funds," was not a point upon which that case turned, and was doubtless intended to apply only to a case where the fund is insufficient to pay all, and the creditors are all of the same rank, as in the distribution of the assets of an insolvent bank, as in White v. Knox, 111 U. S. 784, 4 Sup. Ct. 686, and Bank v. Armstrong, 8 C. C. A. 155, 59 Fed. 372. This is not a case of the distribution of an insufficient fund among lienors of the same rank. The lien claims of the subcontractors are by the statute preferred over the mortgage, and the bondholders are entitled only to that which remains after senior liens are satisfied. If interest is properly due, as between creditor and debtor, the interest is just as much a part of the principal claim as the principal thereof. A like controversy arose in the case of Trust Co. v. Condon (decided by this court March 5, 1895, and not yet officially reported) 67 Fed. 84. ' There, as here, the contest was between subcontractors and mortgage creditors. The distinctions between the two cases is that, under the Tennessee statute construed in that case, the lien of the subcontractor was derived from, and subordinate to, the lien of the contractor, and his recovery against the property of the owner was limited to such sum as might be found due the principal contractor at the time the several subcontractors' liens accrued. The question in that case was as to the extent of the liability of the railroad property to the contractor. Judge Taft, who delivered the opinion of the court in that case, concerning these subcontractors' liens, said:

"They were liens superior to the bonds. They should bear interest, or, what is the same thing, the fund from which they are payable should bear interest until paid. The security and priority of the lien attach as well to interest as to principal. The aggregate of the subcontractors' claims exceeds by at least fifty per cent. the fund due Eager, even with interest, so that in the distribution no interest need be calculated on the claims after December 15, 1890, for the share applicable to each will not be varied by adding interest to all claims for the same period from December 15, 1890, to the date of the decree. But the limit in the aggregate of the liens fixed on the property must be increased by interest until satisfaction. This is not a case where the distribution is to be made pro rata between the lienholders and the bondholders, in which case, of course, interest is not to be calculated upon the claims after the time of the sequestration of the property for sale and distribution, so long as the claim cannot be paid in full. Bank v. Armstrong, 16 U. S. App. 465, 8 C. C. A. 155, 59 Fed. 372. In the distribution of the proceeds of a common security between liens of different priorities, we know of no principle by which interest can be stopped on the amount of the superior lien until its satisfaction. As between the bondholders and the lienholders, the lienholders are entitled to interest to the day of payment, and the decree should therefore include interest on the amount herein found due Eager from December 15, 1890, until it shall be entered."

One error assigned by appellant Walker and others needs to be especially noticed. J. W. Walker had a contract with the contract company for the erection of four bridges, for which he was to receive the sum of $146,200. One of these bridges was known as the

"Marble Creek Bridge," and its price was to be $37,000. During the erection of this bridge a large portion of it fell into a deep ravine, destroying or seriously damaging a large part of the material which had been placed in the incompleted structure. New material, of the value of $15,328.62, was furnished by Mr. Walker, and replaced in the bridge. The court declined to allow this claim, being of opinion that the loss should fall upon him, and not upon the contract company, nor upon the railroad company. The cause of the accident is unexplained. The employés of the bridge contractor were in the exclusive control of the work. The bridge fell, not from any violent storm, or by reason of any extraordinary natural cause. The clear inference is that it fell by reason of defective engineering; that it was insufficiently supported, or subjected by the bridge builders to some unnecessary strain. Appellant insists that he should be reimbursed for the new material: First. Because he alleges that the contract company agreed to reimburse him for the material destroyed by the falling of this bridge. We quite agree with the master and the district judge who tried this case, that appellant did not successfully sustain his contentions to an agreement to reimburse him for the new material necessitated by the falling of the bridge. Second. He insists that the title to the material damaged or destroyed was in the contract company, and that, therefore, it ought to sustain the loss. This contention is bottomed upon the fact that the agreement provided for the payment of the contract price in installments, as the material was delivered on the ground, less 10 per cent. of the value thereof. The contract concluded as follows:

"The balance of the contract price for each structure, including the ten per cent. reserved on the monthly estimates, is to become due and payable as each structure is completed and inspected and approved, according to both specifications attached hereto. As payments are made upon the material, the title to the same is to become vested pro rata in the party of the second part."

The proof fails to show that the material was in fact paid for as delivered, to any considerable extent. But we are of opinion, even if the material had been in part paid for, so that the title had vested in proportion to the payments in the contract company, that under the circumstances of this case the appellant ought not to be allowed to recover the value of this material, necessitated by an accident for which his own employés were manifestly responsible. The most he could claim, under any consideration, would be that each of the contracting parties should share the loss in the proportion that they held title to the material destroyed. The burden was certainly put upon appellant to establish the extent of his claim. This he has not done. But upon the ground first indicated, to wit, that the accident was the result of the negligence of the bridge contractor, and was not contributed to or brought about by any fault or neglect of the contract company whatever, the loss ought, therefore, to fall upon the party responsible for the accident.

The appeals of G. W. Gourley, W. B. Smith, C. F. & A. R. Burnan, J. W. Caperton, and John Bennett are from decrees disallowing

their claims as nonlienable under the statute. The appellants referred to rendered legal services in obtaining railroad rights of way under the contract of the construction company. We have already ruled that money expended in acquiring rights of way is not the subject of a lien under the statute. For the same reason, it must be held that legal or other services rendered to either the contractor or subcontractor in acquiring rights of way are not claims for "labor" done or furnished, within the meaning of the statute giving a "labor" lien. The decrees dismissing their intervening petitions must be affirmed.

J. E. Dougherty appeals because a claim for $454.10 for services as a civil engineer in the construction of the railroad was disallowed. The ground upon which it was disallowed was that his services were rendered within the counties of Jessamine and Woodford, and the claim filed in Jessamine county alone. The Kentucky act giving a lien for labor required that the verified statement claiming a lien should be filed in the county clerk's office of "each county in which the labor was performed." The only evidence concerning the locality in which Dougherty did his work is that during September, October, and November, 1890, "Dougherty's work was principally in Jessamine county, and his headquarters were in that county," and that "he did a small amount of work during that time in Woodford." The itemized statement of his account filed in Jessamine county was as follows:

Ohio Valley Improvement & Contract Co. to J. E. Dougherty, Dr.

1890. Address.....

For services and expenses as resident engineer, as follows:

Salary	for	month of	September	$100 00
"	"	"	October	100 00
"	"	"	November	100 00
"	"	"	December	125 00
"	"	"	August	13 20
"	"	"	September	11 90
"	"	"	October	40
"	"	"	November	2 10
"	"	"	December	1 50
				$454 10

It is clear that the greater part of his work during three months was done in Jessamine county, where his lien was filed. It will not be unjust if it be assumed that his salary of $300 during those months was two-thirds earned by his work in Jessamine, and that a proportionate part of his expenses for the same time attached to his work in Jessamine. The decree, as to his claim, will be so modified as to allow him $208.60, as the amount of his lien claim, upon which he will receive his pro rata as other lienors, with interest.

The claim of Dickason & Crawford was uncontested, except to the extent that it embraced railroad ties cut under a contract with the contract company, but never delivered to the railroad company, or on its premises. The contract company notified them that they would not accept the ties, and that they need not deliver them. The ties had been cut under and in accordance with a contract prior to such notice. There being no other market for them, they were

left to decay in the woods where cut. The claim of appellants is that these ties were gotten out for this work, and were worthless for any other purpose, and that they are entitled to a lien, without regard to the fact that they were not actually used in the work of construction. The case is a hard one, but it would be harder still to throw the loss upon the railroad company, which was in no default whatever. If the material had been refused without good cause by the railroad company or its agents or assignees, appellants would have some standing under such cases as Howes v. Wire-Works Co., 46 Minn. 44, 48 N. W. 448. So if they had been actually delivered on the premises of the railroad company, and not used, appellants would come within the principle of Burns v. Sewell, 48 Minn. 425, 51 N. W. 224, and Mechanics' Mill & Lumber Co. v. Denny Hotel Co. of Seattle (Wash.) 32 Pac. 1073. The fault was wholly that of the contract company. It breached its contract without reason, and refused to accept or pay for the material. It never did go into the structure, and was never so delivered that the railroad acquired the title, or appellants parted with it. Under such circumstances, we do not think appellants can be held as persons who have "furnished material," within the meaning of the lien act.

A considerable number of other errors have been assigned by one or other of the appellants. To notice each would extend this opinion to an undue length. They have all been examined, and none of them are regarded as pointing out any substantial error. The decrees appealed from will therefore be affirmed, except as herein expressly modified. Costs of appeal will be paid out of the fund arising from sale of the railroad.

BONSACK MACH. CO. v. S. F. HESS & CO.

(Circuit Court of Appeals, Fourth Circuit. May 28, 1895.)

No. 103.

1. FALSE REPRESENTATIONS.

H. & Co., in March, 1887, wrote to the B. Co., which owned the patent for a cigarette machine, asking for the terms of royalty for the use of such machine. In reply, the B. Co. wrote that it required a royalty of 30 cents per 1,000 cigarettes, or 33 cents if a device was printed on the cigarettes, with a guaranty of $200 per month, saying that these were their uniform terms. On April 23d, H. & Co. telegraphed the B. Co. to ship a machine, and wrote them, on the same day, saying they understood the B. Co. gave better terms to others than they offered H. & Co., and asking to have as good terms allowed them as any other house. On April 25th the B. Co. replied to this letter, saying that H. & Co.'s information as to different terms was not correct, that their terms were the same to all. On April 26th H. & Co. wrote the B. Co. not to ship the machine until further orders, as they heard it might be an infringement of other patents; but the machine was afterwards shipped, and received, and used by H. & Co. on the terms offered, without objection on any ground. In September, 1889, H. & Co. requested the B. Co. to send them a second machine, and to waive the $200 per month guaranty, and the extra royalty on printed cigarettes, stating that they understood the B. Co. had a right to make its own terms, but hoped this would be agreed to. The B. Co. agreed to waive the guaranty, but not the extra royalty. In March, 1890, H. & Co. and the B. Co. entered into a formal contract for the use by H. & Co. of the two machines, which provided that the royalty should be 30 cents per

1,000 cigarettes, either printed or unprinted. H. & Co. continued to use the machines and pay the royalty, and at no time made any objection on the ground that better terms were given to other parties. In August, 1890, the contracts were terminated, and the machines removed by the B. Co. In September, 1890, H. & Co. wrote the B. Co., inclosing a final payment of royalty, and claiming a right to demand from the B. Co. the difference between the royalties paid by them and lower rates allowed to others. In March, 1892, H. & Co. sued the B. Co. for this difference, alleging that, in making the contracts, they had relied on the representations of the B. Co. that the terms offered were the same as those given to all others, that such representations were false and fraudulent, and that contracts had at the time been made by the B. Co. with other parties, at lower rates. No evidence was offered to show that H. & Co. were ignorant of the existence of such contracts during their dealings with the B. Co., or that they made any inquiry, after their letter of April 23, 1889. It did appear that the B. Co. had made contracts at lower rates of royalty, in cash, but that in each such contract certain services by the licensee, in advertising the machines, were agreed upon as part payment of the royalty. *Held*, that H. & Co. had not established either that they relied upon or acted upon any false representations of the B. Co., assuming such representations to have been made, so as to entitle them to recover back the royalties paid.

2. SAME—CONTRACTS—INTERPRETATION.

Held, further, that the question of the equivalence of the terms allowed to other parties with those allowed to H. & Co. was a material one, and the B. Co. should have been allowed to introduce evidence to show that the terms allowed to such other parties were not more favorable.

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

This was an action of assumpsit, instituted by S. F. Hess & Co. to recover of the Bonsack Machine Company royalties alleged to have been in excess of the contract price paid by S. F. Hess & Co. to Bonsack Machine Company. The defendant pleaded nonassumpsit.

S. F. Hess & Co. leased one machine for the manufacture of cigarettes from the Bonsack Machine Company in the spring of 1887, and another one in the fall of 1889, besides having used still another machine for a while in the spring of 1888; the price or royalty for the use of the machines being first at 30 cents per 1,000 cigarettes made without any printing of trade-mark or other matter on them, and 33 cents per 1,000 cigarettes with such printing on them. The transactions between the parties constituting the subject-matter of this suit began on or about 22d of March, 1887, and continued until some time in September, 1890, during which time the cigarettes made by S. F. Hess & Co. on the machines, at the royalties aforesaid, amounted to about $17,654.09. During this period three contracts were made between the parties. By the first, which is evidenced only by the correspondence between the parties, one machine was to be furnished to S. F. Hess & Co. by the Bonsack Machine Company, at the royalties aforesaid, for no specified time, the arrangement being liable to be canceled by either party at will. By the second, which was made a little more than two years after the first, and which is likewise evidenced only by the correspondence then had between the parties, another of said machines was to be furnished to S. F. Hess & Co. by the Bonsack Machine Company at rather reduced royalties. By the third and last contract, which was reduced to

writing, and signed by the parties, respectively, dated the 7th day of March, 1890, the terms of the contract in pursuance of which the two machines had been furnished as aforesaid are recited, and the royalty for the use of the machine from and after the 1st day of March, 1890, is fixed at 30 cents per 1,000 cigarettes, regardless of whether printing was done or not on the wrapper of the cigarettes. The Bonsack cigarette machine had been in use several years before S. F. Hess & Co. began to use it. Its reputation had been established, and it had grown largely in favor, when, on March 22, 1887, Hess & Co. wrote to P. A. Krise, addressing him as president of the Bonsack Machine Company, as follows:

"If it please you, inform us by return mail all particulars about your cigarette machines, together with your terms and price for which you lease or sell them, giving the number made by one machine per day, and the power necessary.

"Yours, respectfully, S. F. Hess & Co. J.

"P. S. How soon could you furnish us one, provided we would want your machine?"

On the 26th of March, 1887, D. B. Strouse, president of the Bonsack Machine Company, replied as follows:

Letter from D. B. Strouse to Plaintiff, dated March 26, 1887.

"Salem, Va., 26 March, 1887.

"S. F. Hess & Co., Rochester—Gentlemen: In answer to your letter dated 22d March, and addressed to P. A. Krise, I have to say that our terms are uniform, and are as follows: We send the machine to the factory, and furnish a man to put it up and run it at our expense. The factory must put up the necessary driver, shafting, and belt, and furnish one or two hands to feed the machine. We require a royalty of 30 cents per 1,000 cigarettes, if not printed, and 33 cents if printed. The machine prints any desired device on each cigarette. The machine weighs 2,000 pounds, and requires less than ½-horse power to run it. It should be placed in a room having good light. The capacity of the machine is from 200 to 220 cigarettes per minute, and is thoroughly constructed and reliable. I suppose you know that the best work in America is that done by our machines. These machines are very expensive, and, owing to their exceedingly quick work, require a careful and experienced operator, and we therefore require a guaranty of $200 per month on each machine in case the royalty should not amount to that sum. The machine will easily yield us $600 per month on royalty, but, as they are often not run on full time, we agree to allow the manufacturers to run or not, as they see fit, so that we receive for no month less than $200. All payments are required to be made at the end of each month for the work packed during the month. We have several machines on hand ready to be set up at once. If the machine fails to give you entire satisfaction, we will remove it at our expense. I say this so that you may have no hesitation in making the order. Our machines are now in eight factories, and are giving much more satisfaction than hand-made work. Hoping to hear from you very soon, I am,

"Yours, very truly, D. B. Strouse."

Letter of Plaintiff to D. B. Strouse, dated April 4, 1887.

"S. F. Hess & Co.

"Rochester, N. Y., April 4, 1887.

"D. B. Strouse, Salem, Va.—Dear Sir: Please let us know the size fully necessary to run your cigarette machine, and whether a tight or loose pulley is necessary, and the speed necessary to run the same, and width of belt, etc.; and please let us know if there is much of a jar to the running of the machine, as we wish to place the machines on 5th floor. Should we decide to order, and should we order, how soon after receiving order would you be able to ship? Let us hear from you as soon as possible, and oblige,

"Yours, respectfully, S. F. Hess Co. J."

Letter of Plaintiff to D. B. Strouse, dated April 26, 1887.

"Rochester, N. Y., April 26, 1887.

"Mr. D. B. Strouse, Salem, Va.—Dear Sir: It has been intimated to us that your machine may be an infringement on other parties, which rather upset us, and telegraphed you this a. m. not to ship until further orders. While we know nothing personal about this matter, but to protect us against any suit for infringements, we thought perhaps you would furnish a good bond, and so telegraphed you. The length of cigarette we wish to make will be two inches and thirteen-sixteenths (2 13-16 in.), or rather 2¾ and a 1-16. Trusting that you can give us this protection, so that we can use your machine. Awaiting your earliest reply, we are yours,

"Very respectfully, S. F. Hess & Co. J."

Letter of Plaintiff to D. B. Strouse, dated April 23, 1887.

"S. F. Hess & Co.

"Rochester, N. Y., April 23, 1887.

"Mr. D. B. Strouse, Salem, Va.—Dear Sir: We telegraphed you this day to ship machine at once, provided you can furnish us same quality paper as the bobbin you sent us; also to ship us one case of the paper. Now, Mr. Strouse, we must have good paper, and wish to impress you with the fact, and hope you will not fail to get it for us to start with. Also send us first-class man to run machine, for you know we have two other machines in this city to compete with, and don't want to be outdone. Write us all the particulars about what is necessary to be done in advance of machine and man, so that when it arrives there will be as little delay as possible in getting started. Now, give us as good terms in contract as you can, and as good as you give any other house. We understand you give better terms than you offer us. If you are liberal with us, so that we are able to compete with our neighbor, we expect to use more of your machines. Since we have been corresponding with you, parties have made an effort to have us use other machines, but we prefer yours, but at same time want as liberal lease as you give others, and trust that you will do so. Awaiting your reply, we are

"Yours, very respectfully, S. F. Hess & Co."

Letter from D. B. Strouse to Plaintiff, dated April 25, 1887.

"Lynchburg, Va., 25 April, 1887.

"Mess. S. F. Hess & Co., Rochester—Gentlemen: This firm will ship you to-morrow 100 reels of paper, just such as the sample, except that the sample reel is glazed on the sides of the reel and this is not. I also cabled Abodie & Cie to ship you 100 reels, which will give you 200 reels of paper. A reel of paper will make 20,000 cigarettes. You can make your own calculations as to other orders. It is best to keep at least 90 days ahead. Your information as to our giving any manufacturers different terms from those I have given you is not correct. Our terms are the same to all. I wired you to-day as to printing cigarettes. If you want to print your cigarettes, we have to have a steel die cut to do the printing, hence I must have the words or device you wish to print, which should be as small as possible. I must also know the length of the cigarette you want to print. The die makes one revolution for each cigarette, and its circumference must correspond with the length of the cigarette. We prefer not to print, but never decline to do so. Will write you as to other details to-morrow.

"Yours, truly, D. B. Strouse."

"Rochester, N. Y., Sept. 9, 1889.

"D. B. Strouse, Salem, Va.—Dear Sir: Yours of the 2d to hand, and note your remarks in regard to machine, &c., and now write to say our future for an increase in trade is very promising, and we feel confident that we will soon have all we can do for 2nd machine, and will want the third soon; but you know we have had a struggle, and up to the present time we have not made a dollar on cigarettes, while you have been paid your royalty; and we now feel, in view of all the circumstances, that you ought to send us the second machine, and allow us to pay for what we pay per month at rate of 30 cents per M., and if we do not make enough to pay you for both, that you should not compel us to pay $200 per month; but of course at any time that

you do not feel that you can afford to leave the second machine in our factory you can order it away, unless we then conclude to pay you the royalty of $200 per month. Still we feel confident that we can make and sell easily enough to pay you the royalty, but of course we cannot positively say, as no one can tell what the future will be. We understand that you have a right to make your own terms, and we make the above suggestions. Trusting you will comply with our wishes so far as you can, and send us another machine at once, on the best terms possible, we are

"Yours, respectfully, S. F. Hess & Co."

Answer of Strouse.

"Salem, Va., Sept. 13, 1889.

"Messrs. S. F. Hess & Co., Rochester, N. Y.—Gentlemen: I have your letter of the 9th inst. I cannot understand why it was so long reaching me. I will send you another machine just as soon as I can, and will send it on the terms suggested in your letter, except that we will of course expect 33 cents per M. for printed work. We can modify the terms as to guaranty, but not as to royalty. We hope to ship your machine within ten days.

"Yours, truly, D. B. Strouse.

"I prefer that you say nothing of ordering or receiving another machine.

"D. B. S."

"Rochester, N. Y., Sept. 6, 1890.

"P. A. Krise, Treasurer, Lynchburg, Va.—Dear Sir: Inclosed we hand you statement of cigarettes made on the Bonsack machines during the month of July, and draft for $485.85, covering royalty on the same. We desire to inform you that we do not construe this payment to be a waiver on the part of S. F. Hess & Co. of any claim against your company for a breach of your agreement with us. We have paid you at the rate of 30 cents per M. for all cigarettes made on your machines, and we shall ask you to make us good between that amount and the lowest rate given by you to other manufacturers while we were using your machines.

"Yours, truly, S. F. Hess & Co.

"1619½ M., at 30, $485.85."

Contract of S. F. Hess with Bonsack Machine Co., dated March 7, 1890.

"Whereas, S. F. Hess & Co., of Rochester, New York, are using two Bonsack cigarette machines, which are owned and operated by the Bonsack Machine Company on a royalty of thirty cents per thousand cigarettes for cigarettes not printed, and thirty-three cents per thousand for cigarettes which are printed, which two said machines are subject to removal at any time at the will of either the said S. F. Hess & Company or of the Bonsack Machine Company: It is agreed: First. That the royalty to be paid by the said S. F. Hess & Co. to the Bonsack Machine Company from and after the first of March, 1890, shall be thirty cents per thousand (1,000) cigarettes, whether the same be printed or not. Second. That the said S. F. Hess & Co. shall have the right to continue to use the two said machines up to the thirty-first day of January, 1891, and shall deliver to the Bonsack Machine Company, or to its order or agent, the two said machines on the first day of February, 1891, without hindrance, delay, or default, on any account whatsoever, provided that the said S. F. Hess & Co. have the right to deliver the said machines to the Bonsack Machine Co. at any time prior to the first day of February, 1891, and provided also, since contingencies may possibly arise which may cause the Bonsack Machine Company to prefer to indefinitely continue its machines in the factory of the said S. F. Hess & Co., that the Bonsack Machine Company shall, in case the said S. F. Hess & Co. shall not have surrendered the said machines, give to the said S. F. Hess & Co. notice in writing of its intention to remove the said machines on the first day of February, 1891, which notice shall be given at least sixty days before the first day of February, 1891, and, upon such notice being given, the said machines shall be surrendered on the first day of February, 1891, without hindrance on any account whatsoever.

"Witness the following signatures this 7th day of March, 1890.

"S. F. Hess & Co.

"Bonsack Machine Co.

"By D. B. Strouse, Pres."

In their declaration in the court below Hess & Co. set out their case as follows:

"And the said plaintiff further avers the said contract was made and entered into by the said plaintiff upon this express agreement, understanding, and representation by the said defendant; and the said defendant, to wit, on or about the month and year aforesaid, in its correspondence and in its negotiations, and in its agreement concerning the use of said machines by the plaintiff, expressly promised and undertook that the said royalty of thirty cents and thirty-three cents per thousand for cigarettes of that character was and should be the fixed and uniform royalty then charged and thereafter to be charged by it for the use of such of its machines as were then in use by manufacturers of cigarettes, or which should thereafter be hired to or placed by said defendant with such manufacturers for use in making cigarettes, and that there was and should be no discrimination made against said plaintiff in the royalty so charged as aforesaid for the use of said machines. And the said plaintiff further avers that, relying upon the said representation, agreement, and assurance, and upon the said promise and undertaking of the said defendant that the said royalty so charged the defendant as aforesaid was the fixed and uniform charge to all manufacturers of cigarettes for the use of its said machines, and that there was and should be no discrimination made against the plaintiff in the royalty charged for such use, the said plaintiff did pay to the said defendant monthly during said period, to wit, from the —— day of April, 1887, to the —— day of September, 1890, an amount to the sum, to wit, of $17,654.09, royalties so agreed to be paid, and in all other respects faithfully complied with their said contract. And yet the said plaintiff avers that the said defendant, wholly disregarding its said agreement, representation, and assurance, and its said promises and undertaking, had, before the making of the said contract with the said plaintiff, secretly and fraudulently let and hired out its said machines to other manufacturers of cigarettes, rivals and competitors in the making and sale of cigarettes of said plaintiffs, among them W. Duke, Sons & Company, doing business in the city of Durham, in the state of North Carolina, and in the city of New York, on or about, to wit, the 11th day of June, 1885, and to the Lone Jack Cigarette Company, doing business in the city of Lynchburg, in the state of Virginia, on or about, to wit, September, 1885, not at the said royalty of thirty cents per thousand agreed, promised, and undertaken by it with the plaintiff to be its fixed and uniform royalty to all manufacturers using its machines, but to the said W. Duke, Sons & Company at a royalty of, to wit, twenty (20) cents per thousand cigarettes, and to the said Lone Jack Cigarette Company at a royalty of, to wit, fifteen cents per thousand cigarettes, which said contracts of hire and letting were craftily concealed from this plaintiff, although in full force between the parties thereto during the entire said period from the —— day of April, 1887, to the —— day of September, 1890, during which period the said plaintiff was using and paying said royalty on said machines as aforesaid. And the said plaintiff avers that it was altogether ignorant of said other contracts with said other manufacturers of cigarettes by said defendants until a long time after the 1st day of August, 1890, at or about which time said plaintiff ceased to use said machines. Wherefore the said plaintiff says that the said defendant, not regarding its said contract, promise, and undertaking, hath craftily broken the same, contriving and intending to deceive and defraud the plaintiff in the premises, and the said defendant hath not paid or returned to the said plaintiff the large sums so overpaid it monthly during the said period as aforesaid by the said plaintiff, amounting in whole to the sum of, to wit, $8,837.64, although requested so to do, but hath hitherto wholly refused and neglected, and still does so refuse and neglect. Therefore the said plaintiff says that, by reason of the premises, he is injured and hath sustained damage to the amount of $12,000."

The declaration complains of no contracts in conflict with the alleged stipulation of the Bonsack Company that none should have better terms than those granted to Hess & Co. other than one with

Duke & Sons, and another with the Lone Jack Company. These contracts were respectively as follows, so far as material:

The Duke Contract.

"This agreement, made this 11th day of June, 1885, between the Bonsack Machine Company and W. Duke, Sons & Co., witnesseth, that whereas, the manufacturers of cigarettes who use the Bonsack machines, except the Lone Jack factory, have so far declined to put the machines on their fine brands, for the reason that they fear that there may be a prejudice against machine-made work, which might injure the sales of their goods, and whereas W. Duke, Sons & Co. are willing to put the machines on their best brands, and to do all their plain work on the Bonsack machines: Now, therefore, it is agreed that the said W. Duke, Sons & Co. will at once put two machines on their finest brands, and as fast as practicable will relieve themselves of brands until they do all their plain work on the machines, and in consideration of this undertaking the Bonsack Machine Company agree to allow W. Duke, Sons & Co. from this day a drawback which will reduce their royalty to twenty-four cents per one thousand cigarettes, whether printed or not, and as soon as they shall make their entire plain work of all brands and qualities on the said machines their drawback shall be such as to reduce their royalty to twenty cents per 1,000 cigarettes. The amount paid on which such drawbacks are allowed is thirty cents for nonprinted work and thirty-three cents for printed work. And it is agreed that this arrangement is permanent, unless the said W. Duke, Sons & Company shall divulge the same, or unless they shall fail to put the machines on their fine work as above stated, in which event the Bonsack Machine Company may, at its pleasure, refuse thereafter to allow the said drawback."

The Lone Jack Contract.

"This agreement, made this 30th day of September, 1885, between the Bonsack Machine Company, of the first part, and the Lone Jack Cigarette Company, of the second part, witnesseth, that the said party of the second part shall use the machines of the said party of the first part for the manufacture of their cigarettes, paying therefor the sum of thirty cents per 1,000 for nonprinted work and thirty-three cents per 1,000 for printed work, payable at the end of each month. And it is agreed that the Lone Jack Company shall advertise their goods as made on the Bonsack machines, and by such advertisements bring into favorable notice the Bonsack cigarette machines, and that the Bonsack Machine Company shall contribute in monthly payments, payable at the end of each month, in cash, to the Lone Jack Cigarette Company, a sum of money equal to fifteen cents per 1,000 cigarettes made during the preceding month and not printed, and a sum equal to —— cents per 1,000 cigarettes on the printed work made during the preceding month by the Lone Jack Cigarette Company; such payments to be in full satisfaction and payment, upon the part of the Bonsack Machine Company, for the advertisements to be made by the Lone Jack Cigarette Company as aforesaid."

Neither of these contracts contained a clause imposing secrecy upon either party to it.

At the trial of the case the Bonsack Company offered to read two depositions, one of James B. Duke, a member of the firm of W. Duke, Sons & Co., and W. H. Butler, an officer of the Kinney Tobacco Company, which was a large manufacturer of cigarettes. The court refused to allow the two depositions to be read. The following are extracts from them, respectively. That of James B. Duke contained the following passages:

"Q. 11. You have said that Kinney Tobacco Company knew of the contract with W. Duke, Sons & Co. before Kinney Tobacco Co. contracted for the use of the Bonsack machines. Please state what rate of royalty the Kinney Tobacco Co. paid for the use of the Bonsack machines. A. 11. Thirty cents per thousand.

"Q. 12. In your judgment, what was the value to the Bonsack Machine Co. of the services rendered by W. Duke, Sons & Co., together with the money consideration paid by it, as compared with the price paid by Kinney Tobacco Co., the same being, as you say, a money consideration alone of thirty cents per thousand? A. 12. In view of the risk, W. Duke, Sons & Co.'s terms were not so favorable; in other words, I will say that the service rendered by W. Duke, Sons & Co., together with the money consideration, in my judgment, was worth more than the thirty cents per thousand cigarettes.

"Q. 13. What, if anything, was said to Mr. D. B. Strouse by you and Francis S. Kinney, Esquire, president of the Kinney Tobacco Co., at the time you were negotiating for Bonsack machines in 1888, relating to the terms of the contract the Bonsack Machine Co. had made with W. Duke, Sons & Co.? A. 13. We stated to Mr. Strouse that we considered that W. Duke, Sons & Co. were entitled to all they received. We regarded the services of W. Duke & Sons, as they were the first manufacturers who successfully brought the product of the machines to the favorable attention of the public, as being more than equivalent to the difference in the money considerations paid."

The deposition of W. H. Butler contained the following passages:

"Q. 7. What was the result of the corporation of W. Duke, Sons & Co. making its entire work on the Bonsack machines, so far as relates to the other manufacturers making use of the Bonsack machines? A. 7. It demonstrated that machine-made cigarettes might supplant hand-made cigarettes. The result was that the other large manufacturers largely adopted machines for making their work, and to-day ninety per cent. of the cigarettes made in this country are made on the Bonsack machines, I think.

"Q. 8. What was the probable value of the services rendered by the corporation W. Duke, Sons & Co. in placing the Bonsack machines prominently and favorably before the public, together with the money consideration paid by W. Duke, Sons & Co., as compared with the rate of royalty of thirty cents per thousand for nonprinted cigarettes and thirty-three cents per thousand for printed cigarettes? A. 8. I consider that the value to the Bonsack Machine Co. of the services rendered by the corporation W. Duke, Sons & Co., together with the money royalty paid by it, was more than equal to paying the Bonsack Machine Co. thirty cents per thousand for nonprinted and thirty-three cents per thousand for printed cigarettes."

The defendant's bill of exceptions states that it—

"Offered to introduce witnesses Edmund Schaefer and J. Stewart Walker to show by them that they were for many years associated as officers in the conduct of the business of the Lone Jack Cigarette Company, and were well acquainted with the contract relations between the Lone Jack Cigarette Company and Bonsack Machine Company, before and after the year 1885, touching the renting of the machines of the latter company; that the Lone Jack Cigarette Company paid for the renting of the said machines royalties of 30 cents per thousand cigarettes nonprinted, and 33 cents per thousand cigarettes printed, of which 15 cents was paid in money and balance in services,—that is to say, in consideration of said money reduction, the Lone Jack Cigarette Company agreed to advertise, and did advertise, their cigarettes as made on the Bonsack machines, and by its advertisements to bring said machines into favorable notice; that the said Lone Jack Cigarette Company agreed to render and did render services to the Bonsack Machine Company in furnishing opportunity to its operatives in its factory so as to make them skilled and prepared to be sent off for service in any factories where said machines were used, and allow the machines and tubes of the Bonsack Machine Company to be tested in its factory, the said Lone Jack Cigarette Company finding tobacco and paper for the purposes of all such tests; that this undertaking on the part of the Lone Jack Cigarette Company caused it many and serious interruptions and inconveniences, and resulted in large losses of tobacco and materials, so that this undertaking on the part of the Lone Jack Cigarette Company jeopardized its business so that they were losers in business, and finally had to wind up; and that the witnesses would testify positively that in their judgment the royalty paid to the Bonsack Machine Company in the shape of money and services as afore-

said exceeded in fair values the money paid by Hess & Co. of 30 cents for nonprinted and 33 cents per thousand for printed work."

The court below refused to allow the witnesses, Schaefer and Walker, to testify. No evidence was given on the trial by the plaintiff below, Hess & Co., to sustain the averment of the declaration that the plaintiff was ignorant, until after the 1st day of August, 1890, of contracts made by the Bonsack Company giving better terms than had been accorded the plaintiff. A good deal of evidence at the trial below related to an answer in equity, which the Bonsack Company had prepared, and left for a few weeks in the clerk's office, to a bill which had been exhibited against it by the Lone Jack Cigarette Company in the circuit court of Lynchburg, on May 1, 1890. The answer had never been filed or used in the suit, and was soon withdrawn from the clerk's office by the Bonsack Company. The suit itself never came to a trial. This answer was offered in evidence by Hess & Co. in the trial below of the present suit, and, against the objection of the Bonsack Company, was allowed by the court below to go to the jury. The chief object of Hess & Co. in using this alleged answer as evidence at the trial below was to show that the Bonsack Company had denied in that paper the claim they were making at the trial, that the services rendered by the Lone Jack Cigarette Company, and stipulated for by the contract, were of material value to the Bonsack Company. The answer alleged, among other things, that most of the stock of the Lone Jack Company had been taken and was held by parties who owned stock in the defendant company. It alleged, furthermore, that the main reason that defendant company agreed with the plaintiff company to reduce royalties was that the latter company had not succeeded. It claimed to have lost money. Its stockholders being principally officers and stockholders of the defendant company, who had embarked in the new enterprise of manufacturing cigarettes, induced and persuaded the defendant company to make a reduction in royalty, thus insuring its success, and at the same time preventing it from being said that any manufacturers who had taken hold of said machine had failed, or done other than succeed. The answer, except so far as this paragraph did so, did not deny that the object of the contract with the Lone Jack Company was to secure the services indicated by the contract itself, but rather that the Bonsack Company had not realized their expectations in that respect.

At the trial below, the Bonsack Company, by its attorneys, moved the court to give to the jury the following instructions:

Instructions Prayed for by Defendant.

"(1) The court instructs the jury that for the plaintiff to recover in this action they must believe from the evidence that by the contract between the parties to this suit it was agreed that no one using defendant's machines then had, or should thereafter have, machines for less royalty than that provided to be paid by the plaintiff, and they must further believe that other parties did then have, or were thereafter furnished, machines by the defendant at less royalty. And in considering the royalties paid by other parties the jury is instructed to take into account not only the money royalty that may have been paid by other parties, but other consideration, such as services, etc., as well, at a fair, honest, and equivalent value.

"(2) The court instructs the jury that the answer of the defendant in the

case of the Lone Jack Cigarette Company against the defendant must be considered by the jury in reference to that suit; and the defendant is not precluded by any statement made in that answer, but the amount of royalty paid to the defendant by the Lone Jack Cigarette Company, whether in money, services, or otherwise, depends upon all the proofs in this case relating to that matter.

"(3) The court instructs the jury that, while it may consider the answer of the Bonsack Machine Company in the suit brought against it by the Lone Jack Cigarette Company as tending to show the construction the Bonsack Machine Company at that time placed upon the contract which it had made with the Lone Jack Cigarette Company, yet the same may be overcome or explained by other testimony, and in determining the true construction of and real intent of the said contract they must consider all the testimony that has been introduced touching that subject as tending to explain or rebut the admissions in the answer of the Bonsack Machine Company, so far as the said admissions bear upon the issue in the case on trial.

"(4) The court instructs the jury that for the plaintiff to recover in this action it must appear to the jury by a preponderance of testimony that the defendant company has broken or failed to perform its part of the contract made between the plaintiff and defendant, and that the plaintiff has sustained damages by such breach of the contract, and the jury can find only so much of the amount demanded in the declaration as the plaintiff has shown it sustains as a loss by reason of such breach of the contract.

"(5) The court instructs the jury that, should they believe from the evidence that the language contained in the two letters, one of the 26th of March, 1887, and the other of the 25th of April, 1887, when viewed in the light of other correspondence of the parties, the subsequent written contract, and other evidence was not relied upon by the plaintiff, and was not intended by the parties to be incorporated into the contract, then they must find for the defendant; and in estimating the royalties, upon which they shall base their verdict, in case they find for the plaintiff, they must exclude all such royalties as accrued after and under the written contract, dated March 7, 1890.

"(6) The court instructs the jury, if they believe from the evidence that the clauses contained in the two letters of the 26th of March and the 25th of April, 1887, now relied on by the plaintiff in this suit, viewed in the light of other correspondence of the parties, of the plaintiff's written contract of March 7, 1890, and of other evidence, were not relied upon by the plaintiff when he leased the defendant's cigarette machines, or were not intended by the parties to be incorporated into the contract, then they must find for the defendant. And said clauses, and the provisions contained in them, not having been embraced in the said contract of March 7, 1890, there can be no recovery, in any event, on account of the royalties accruing after the date of said contract.

"(7) The court instructs the jury that the burden is on the plaintiff corporation to show that it paid to the defendant corporation the 30 and 33 cents per thousand, without knowledge of a lower rate or royalty being given by the defendant to others; and if they shall, from the evidence, believe that the plaintiff has failed to prove by a preponderance of evidence that said payments were made without knowledge of a lower royalty to others, then they must find for the defendant.

"(8) The court instructs the jury that if they believe from the evidence the defendant contracted it had not and would not furnish machines to others at a royalty or rate lower than 30 cents per 1,000 cigarettes nonprinted, and 33 cents per 1,000 cigarettes printed; that said defendant has violated said contract, and that said plaintiff has not proved it has sustained damage thereby, —then they shall find only nominal damages in favor of said plaintiff.

"(9) The court instructs the jury that under the pleadings in this cause, to enable the jury to find for the plaintiff, the burden of proof is on the plaintiff to show—First, that the contract set out in the declaration is the contract which was made between the parties; second, that the defendant has violated the said contract; third, that the plaintiff has been damaged by such violation of the contract; and, fourth, the amount of the damages which the plaintiff has sustained by reason of the violation of the said contract by the defendant.

"(10) The court instructs the jury that all prior negotiations and contracts between the plaintiff and defendant relating to the hiring or leasing of machines by defendant to plaintiff are merged in the contract between said parties of the 7th of March, 1890, and if they believe from the evidence that there has been no breach of said contract of the 7th of March, 1890, then they must find for defendant."

To the giving of said instructions, or any of them, the plaintiff, by its attorneys, objected, and the court sustained the objection, and refused to give the instructions, and each of them, in the form in which they were presented. And thereupon the plaintiff company, by its attorneys, moved the court to give to the jury the following five instructions:

Instructions Prayed for by Plaintiff.

"(1) The court instructs the jury that the correspondence between the plaintiff and defendant, which has been introduced in evidence and read to the jury, constitutes a contract between the parties. And upon the subject of royalty, or compensation to be paid by the plaintiff to the defendant for the use of the defendant's machines, said contract was that the rate of said royalty should be thirty cents per thousand for all cigarettes not printed and thirty-three cents per thousand for all printed cigarettes; and this rate of royalty, or compensation for the use of defendant's machine, to be paid by the plaintiff, was based upon the assurance given by the defendant to the plaintiff that such rate was in accordance with the terms of the defendant, which were uniform, and not different from those given to any other manufacturer, and that said terms were the same to all.

"(2) And if the jury believe from the evidence that the defendant company, before and at the time when the plaintiff was using its said machine, had contracted with, and did allow the use of the said machine by, other persons engaged in the manufacture of cigarettes upon terms different and more favorable than those required of the plaintiff, such conduct was a breach of said contract by the defendant company.

"(3) The court further instructs the jury that if they believe from the evidence that the contract between the plaintiff and the defendant company has been broken by the defendant company, the measure of the damages to which the plaintiff is entitled is the difference between the royalty paid by the plaintiff to the defendant company and the royalty paid by the Lone Jack Cigarette Company, or that paid by the Duke, Sons & Co. to the defendant, whichever royalty may be the smaller paid by either of said companies. And in estimating the royalty upon which they shall base their verdict in case they find for the plaintiff, they must exclude all such royalty as accrued after and under the written contract dated March 7th, 1890.

"(4) The court instructs the jury that the answer of the defendant company in the case of the Lone Jack Cigarette Company against the defendant company, which has been introduced in evidence, must be considered by the jury in reference to the bill as an answer to which it was prepared, and only so much of said answer must be considered as bears upon the issue now being tried, as defined by the rulings of the court.

"(5) The court further instructs the jury that when the plaintiff, in the letters to the defendant company, inquired the terms and price for which the defendant company leased its machines, and stated that plaintiff understood that the defendant company gave better terms than offered to the plaintiff, it was the legal duty of the defendant company to inform the plaintiff of the terms of any contract it may have had with other parties which were different and better than those offered to the plaintiff."

To the giving of these five instructions the defendant objected, which objection was overruled by the court, and the instructions given. The trial resulted in the following verdict:

"We, the jury, find for the plaintiff, and assess its damages at the sum of eight thousand two hundred and thirty-two dollars and twenty-nine cents,

with interest on $6,999.69, a part thereof, from the 8th day of January, 1892, until paid."

A. H. Burroughs and T. J. Kirkpatrick, for plaintiff in error.

W. W. Crump and R. H. G. Kean, for defendant in error.

Before SIMONTON, Circuit Judge, and HUGHES and SEYMOUR, District Judges.

HUGHES, District Judge (after stating the facts as above). The case will be considered principally on the merits. The suit below grew out of the use, by Hess & Co., of cigarette machines made exclusively by the Bonsack Company, at royalties per 1,000 cigarettes made by the machines, and rented to manufacturers. Hess & Co., after paying all royalties claimed by contract for several years, finally sued to recover back what they claimed to have been overpaid by them, under an alleged deception practiced upon them by the Bonsack Company throughout the dealings. The transactions between Hess & Co. and the Bonsack Company lasted from March, 1887, until September, 1890. The suit below was not brought until March, 1892. The charge of the plaintiff was that "a gross fraud was practiced on S. F. Hess & Co., as part of a deliberate and systematic course of cheating in the matter of royalties paid; the Bonsack Company having declared and promised the plaintiff, Hess Co., that their royalties were uniform and invariable, not different in any case, when the fact was that those charged the Lone Jack Company were at that very time, and had been for near two years, about one-half of what was so quoted as the 'same to all'; and that those charged the Dukes were about 10 and 13 cents less than what they represented as uniform and invariable, with a sliding scale, which gave the Dukes 25 per cent. less than any reduction to others." As early as the 23d April, 1887, Hess & Co. wrote that they had information of better terms being given to others than had been offered themselves by the letter of Strouse, written on the 26th March preceding. They were, therefore, on inquiry as to these terms as early as April, 1887, and remained so during all their dealing with the Bonsack Company. Whether inquiry was made or not, they ordered, a year afterwards, a second machine, without allusion to better terms to others in requesting and accepting it, when delivered. They wrote as late as September 9, 1889, to Strouse, asking for a third machine, requesting to be allowed to pay 30 cents per 1,000 cigarettes with release from the requirement to pay $200 per month absolutely, and declaring to Strouse that "he had the right to make his own terms." Thus Hess & Co., as long as 17 months after beginning to use the Bonsack machine, and after hearing of better terms to others, asked Strouse to change the terms alleged to be required of all in their own favor, and recognized Strouse's right to make his own terms. In doing so, they put the Bonsack Company off its guard, if it was really granting better terms to others, by giving assurance that no advantage would be taken of such departure from the usual terms by themselves. Strouse replied on the 13th September, granting the liberal terms requested; and Hess & Co. accepted these terms, which were such as they had assured Strouse he had the right to grant. The dealings

between the two concerns went on from that time on the new basis; Hess & Co. having been informed as long as 17 months before that better terms than 30 and 33 cents per 1,000, with $200 per month absolutely, had been given by Strouse to others, and themselves participating in the better terms which they had solicited and accepted in September, 1889. On the 7th March, 1890, all contracts that had arisen between the two concerns were merged, at the instance of Hess & Co., in the contract of that date, and Hess & Co. again accepted terms still better than those they had enjoyed since September, 1889. By this last contract they accepted a release from the payment of the three cents of extra money for cigarettes in printed covers, all previous concessions being continued in the consolidated agreement. This last contract remained in force until the close of all dealings in August, 1890. Here was not only knowledge that the Bonsack Company was not rigidly uniform in their terms to all who used their machines, but an express acknowledgment of its right to make its own terms with each manufacturer of cigarettes; they themselves being special beneficiaries of important modifications and better terms, solicited by themselves. A critical examination of the earlier correspondence between the two concerns will show that the contract for the first machine received by Hess & Co. was consummated before the matter of better terms to others became a subject of correspondence. The contract was completed in the letters of the 22d March, 26th March, and the telegram of 23d April, 1887. In none of these had the idea of better terms to others found expression. Nothing had been said before the telegram of Hess & Co. ordering the first machine had been sent and received, relating to better terms. In the letter of Hess & Co. dated on the 23d and received by Strouse on the 25th April, 1887, two days after the first machine had been ordered by them, they first make mention of the subject. They had ordered the machine after hearing that better terms were enjoyed by other manufacturers. Before receiving any assurance from Strouse that his terms were the same to all, and with the knowledge that this charge was current against Strouse, they ordered the first machine. It was in reply to the intimation in the letter of the 23d that Strouse said, on the 25th April: "Your information as to our giving manufacturers different terms from those I have given you is not correct. Our terms are the same to all." Strouse does not say that the information is not true or is false; but he says it is not "correct,"—it is not an accurate account of the matter. This declaration, positive as it is, and positively untrue as it is, so far as his using the phrase "different from" instead of "same to all" could make it so, could not have applied to the machine which had already been ordered. It could only apply to the two machines which were subsequently ordered. It is true that the order for the first machine, made on the 23d, was countermanded on the 26th, April, the evidence not showing whether or not it had then been sent. But the countermand was not because Hess & Co., as intimated by their counsel in their brief, were hesitating on the rumor of better terms to others, but because of what they call an "intimation" to them that the Bonsack machine might be an infringement on other patents.

The temporary countermand for such a reason could not affect the contract for the first machine, which had been completed by the telegram of the 23d April. Does the expression "same to all," used by Strouse on the 25th April, 1887, apply to the second and third machines subsequently ordered and received by Hess & Co.? The second one was furnished some time in the spring of 1888, a year after Hess & Co. had made their suggestion of better terms to others, and without any mention again of that subject by Hess & Co. The contract on which this machine was sent and received was not written, either in correspondence or special writing. Whether it contained an implied stipulation, arising out of Strouse's letter of April 25, 1887, that the terms respecting it should be as favorable as were granted to any other manufacturer, is a question open to debate. When this second machine was sent to Hess & Co., they had had the idea in their minds of better terms to others for a year, and they ordered and received it without objection on that score. The third machine sent to Hess & Co. was sent in response to their letter of September 9, 1889, and in compliance with Strouse's reply to it four days afterwards. It was sent and received under the contract embodied in those letters. The terms stipulated in the correspondence had been solicited and granted upon an express assurance from the receivers that the owner of the machine had a right to make the terms solicited and conceded. Hess & Co.'s letter of the 9th September in very words contained a concession that the Bonsack Company had a right to modify their terms at their own pleasure to particular manufacturers, and contained, by necessary implication an assurance that Hess & Co. would not object if it were or should be a fact that better terms than those stated in Strouse's original letter of March 26, 1887, were given to other manufacturers. Hess & Co. themselves received and became beneficiaries of better terms, and by accepting them, and by the assurance given in their letter, waived all objection on that score to better terms to others.

It may be concluded, therefore, we think, that this matter of better terms to others did not affect either the first machine received by Hess & Co. or the third one, and could only apply, if at all, to the second machine. Be this as it may, however, and assuming, for the sake of argument, that the Bonsack Company had, before the 23d of April, 1887, and afterwards, given better terms to other cigarette manufacturers than they gave to Hess & Co., in respect to either or all of the machines, the question arises whether or not the latter are in position to be entitled to recover as they claim in the suit below; for no principle of law can be more obvious than that a plaintiff must recover on the strength and merits of his own case, and, these being wanting, cannot recover exclusively on the weakness and demerits of the defendant's case. From what has been said, it is plain that the averment in their declaration that Hess & Co. were ignorant of other contracts giving better terms to others, until after August, 1890, was a necessary one. It is, in fact, the crucial question in this litigation. Hess & Co. contend that the Bonsack Company were estopped by Strouse's letters of March 26 and April 25, 1887,

from receiving from themselves any greater royalties on the work of the machines sent them than the lowest that were accepted from any other manufacturers. But they cannot claim a corresponding abatement from such royalties as they actually paid, unless they show that these latter were paid by them in ignorance of the fact that lesser royalties were accepted by the Bonsack Company from others. Such ignorance is a necessary ingredient of estoppel by conduct. Bigelow says (page 480) among other essentials of estoppel is the fact that the injured party must have been ignorant of the truth of the matter. We shall refer to another necessary ingredient in the sequel. The averment of this ignorance was therefore necessary in Hess & Co.'s declaration. Unlike a bill in chancery, the averments in which are sworn to as true by the complainant, a declaration at common law is merely the work of lawyers, the averments in which are strictly technical, and do not necessarily touch the conscience of the plaintiff. They are not taken to be true. They must be affirmatively proved by evidence,—evidence which, to be valid, must in general have the sanction of an oath, and be taken with opportunity for cross-examination. It was necessary, therefore, at the trial below, for the ignorance averred by the declaration to have been affirmatively proved. This could have been done by the testimony of the members of Hess & Co., or either of them, or by other competent evidence. But the averment was left unproved at the trial, no evidence whatever having been offered in support of it. Neither of the plaintiffs was put on the stand. It is an inference of law, therefore, that the ignorance averred by the declaration did not exist, and was not, for that reason, proved. In point of fact, such ignorance was quite improbable. During the entire period of their operating the Bonsack machines these plaintiffs had had in mind the idea—whether they believed it or not—that better terms were enjoyed by other manufacturers. They went on, nevertheless, using the machines, without objection on this score, for two years and a half, making no complaint to the Bonsack Company. It was not until after the machines were withdrawn from them, in August, 1890, that they complained of the existence of contracts with others granting better terms. All their payments of royalty throughout that long period had been made without protest, and it was not until September, 1890, that they disclosed to the Bonsack Company a knowledge of such contracts in making their last remittance. This disclosure was contained in their letter of September 6th, in which they say:

"We desire to inform you that we do not construe this payment to be a waiver on our part of any claim against your company for a breach of your agreement with us. We have paid you at the rate of 30 cents per thousand for all cigarettes made on your machines, and we shall ask you to make us good between that amount and the lowest rate given by you to other manufacturers while we were using your machines."

This letter, as before stated, was dated on the 6th September, 1890, and the averment in their declaration was that they were ignorant on this score "until long after the 1st of August, 1890." The fact that Hess & Co. did not bring their suit for reclamation

until March, 1892,—18 months after the letter containing the language quoted, and inclosing the last remittance,—suggests that their delay and hesitation in bringing suit were due to their conscious doubtfulness of their ability to prove this ignorance. The fact was that they had not labored under this ignorance. They did become cognizant during the period in which they were using Bonsack machines that the terms were not uniform, for they themselves, during that 2½ years, solicited and obtained several modifications in their own favor of the "uniform" terms. And how could they suppose, when these modifications were granted to themselves, that the Bonsack Company would immediately proceed, in consequence, to make similar modifications in the terms under which all other manufacturers using their machines were operating? Such a supposition would have been very strained. The fact that Hess & Co. solicited, obtained, and enjoyed better terms than those which Strouse had declared on the 26th March, 1887, to be "uniform," and on the 25th of April following to be the "same to all," shows that they were not ignorant of different terms having been accorded. The fact proves that they were cognizant of such terms during a large part of, if not throughout, the period of their use of the Bonsack machines. Being so, were they not giving the Bonsack Company reason to believe that they wittingly waived the alleged guaranty of uniform rates; and are not they themselves debarred by their own acceptance of different rates from claiming the drawbacks which they seek to recover by their suit? Moreover, when they declared that the Bonsack Company had a right to make its own terms, requested a change of the "uniform" terms in their own favor, and, this being granted, accepted and enjoyed better terms solicited by themselves, making no protest until after the business had come to an end, did they not impliedly guaranty the Bonsack Company that no reclamations would be demanded or expected by themselves? We think so, and that their waiver misled the Bonsack Company.

The correspondence shows that, in the course of the dealings between these two concerns, Hess & Co. frequently requested favors modifying the "uniform" terms stated in detail by Strouse in his letter of March 26, 1887. They requested leave to keep a machine idle, they solicited a release from the payment absolutely of $200 each month, they asked for an abatement of 3 cents per 1,000 on printed cigarettes, and they made other demands for modifications of the regular terms. These frequent requests were most of them granted, and Hess & Co. accepted the concessions, and profited by them. This course of proceeding shows that Hess & Co. did not construe the terms "uniform" and "the same to all" as inexorably fixed rules of the Bonsack Company, and did not treat Strouse's language as other than an approximate statement of the terms on which the company rented their machines. Hess & Co. themselves, for two years and a half, put a construction upon the language of Strouse which conceded to the Bonsack Company the liberty of partially modifying their terms to suit the changing exigencies of business and the varying circumstances of their customers. Public pol-

icy requires that such correspondence as transpired between the parties to this suit should be construed in the interests of active trade, and with more or less liberality in favor of a free course of business in dealings of this character. In the case at bar the evidence shows that Hess & Co. did not act upon the rigid letter of Strouse's language. They frequently departed from it.

It is an essential ingredient of estoppel by conduct that the party claiming the benefit of this rule of law must have acted upon the declarations made to him by the defendant. In the leading case of Cornish v. Abington, 4 Hurl. & N. 549, the presiding justice said:

"The rule of estoppel is that, if a party [say the Bonsack Company] uses language which, in the ordinary course of business, and the general sense in which words are understood, conveys a certain meaning, he cannot afterwards say he is not bound, if another [say Hess & Co.], so understanding it, has acted upon it."

The conduct of Hess & Co. throughout their dealings with the Bonsack Company shows that they neither understood the language of Strouse in the rigid sense, nor acted upon it, in soliciting and accepting the different terms of which they were the beneficiaries. We do not think that the Bonsack Company, in a suit by Hess & Co., can be held to a rigid construction of the language which it employed in its letters of the 26th March and 25th April, 1887; Hess & Co. having themselves construed those letters liberally, in frequently requesting better terms for themselves, and receiving advantage of better terms accorded themselves in their own dealings with the Bonsack Company.

Coming now to the particular specifications of breaches of contract relied upon by Hess & Co., we find that their declaration singles out only two instances of such violations, to wit, the contracts with Duke & Sons and with the Lone Jack Company. Both of these contracts stipulated that the price required of the Lone Jack Company and of Duke & Sons, respectively, should be 30 and 33 cents per 1,000, and they stipulated additionally that part of this price—half in one case and a third in the other—should be credited to certain services defined in the contracts which the other parties to them agreed to render, respectively, in part payment of the regular charge of 30 and 33 cents per 1,000. If these services were real, valuable, and adequate, and if the parties were contracting in good faith, then, ex aequo et bono, in conscience and fair dealing, these contracts did not falsify the statement of Strouse in his letter of April 25, 1887, that his terms of payment were the same to all. Whether or not the services stipulated for in the contract were real, valuable, adequate, and agreed upon bona fide, was a question for the jury. Whether Strouse stated a moral and deceptive falsehood or merely a technical untruth in his letter of the 25th April, 1887, was also a question for a jury. The averment that these stipulations with the Dukes and the Lone Jack Company were for services not real, not adequate in value, nor made bona fide, and that the statement of Strouse that the royalties paid by these two companies were 30 and 33 cents per 1,000 was false and misleading, was a necessary one in the declaration filed in the suit. The

declaration itself put the bona fides of these stipulations and the truth of Strouse's statement directly in issue. Yet the defendant's evidence on neither one of these issues was allowed to go to the jury. The court below assumed that Strouse's statement was untrue, and refused to allow evidence to be given to the jury on the question of the value of the services and the bona fides of the stipulations relating to them in the contracts. It is needless for us to express any opinion on these two questions put in issue by the pleadings. We are of opinion that they were both questions for the jury, and that the court below erred in refusing to allow the defendant's evidence on them to go to the jury. Let it be observed that in his letters of the 26th March and the 25th April, 1887, Strouse, in detailing with precision the terms on which the Bonsack machines were let to cigarette manufacturers, did not include in his statement of these terms a clause declaring that the royalties specified should invariably be paid in cash. He did not preclude his company from the right, in particular instances, of accepting payment of the royalties, wholly or in part, in property of equivalent value. He virtually reserved that right. If, in a case we shall suppose, the maker of a valuable machine were in the habit of informing his customers that his price, say $100 each, was uniform and the same to all, and yet should accept a winter's supply of coal from one purchaser, worth at market rates $100, and should purchase a horse at $100 from another person to whom he sold a machine, and should allow his dry-goods merchant, whose bill was $100, to take another machine in payment of the debt, and should buy a carriage at $200, and ask a credit on the price of $100, from the carriage maker, in payment for a machine, taken by the latter, we do not think that these transactions would constitute a breach of his guaranty to the public that he charged $100 invariably for all his machines. We do not think that a suit at law could avail in any court to recover damages under such a guaranty. Yet the case supposed differs little from the two contracts under consideration. Confidence in trade and activity in business would be impaired by construing the guaranty in such a manner. Public policy would forbid so rigid a construction, for such transactions are of just the kind which most promote trade and facilitate business. This important question was one of the issues in the case,—indeed the most prominent one,—and important evidence, directly bearing upon it, was withheld from the jury; that evidence being the depositions of James B. Duke and William H. Butler, and the testimony proffered by defendant of Edmund Schaeffer, president of the Lone Jack Company, and Stewart Walker. We think the court below erred in excluding this evidence.

The exceptions taken at the trial by the defendants in the suit below are very numerous, and need not be considered in detail. They relate chiefly to the instructions prayed for respectively by counsel on either side. Those prayed for by counsel for the plaintiffs below were given to the jury, en bloc, by the court. They embody a theory of the case which we think was radically erroneous. They seem to lose sight of the proposition that a plaintiff must

recover on the strength and merits of his own case, and, if these are wanting, cannot recover exclusively on the weakness and demerits of the defendant's case. They virtually put to the jury the question of the defendant's delinquency, and no other. They embodied directions to the jury which excluded from their consideration important evidence which the defendant below offered in their favor. We think the court below erred in granting them in the form in which they were framed. The instructions prayed for by defendant's counsel contained propositions which we think ought to have been presented to the jury in some form or other. Some of the instructions were inadmissible, but we think several of them were proper. It is needless to discuss them in detail. Sufficient has been said to show that the judgment below must be reversed, and the verdict found for the plaintiffs below be set aside.

WESTERN UNION TEL. CO. v. COGGIN et al.

(Circuit Court of Appeals, Eighth Circuit. May 6, 1895.)

No. 510.

TELEGRAPH COMPANIES—LIABILITY FOR NONDELIVERY OF MESSAGE.

One C. made a contract on behalf of himself and his partner, for the purchase of a lot of horses, on which he paid down $250, the balance to be paid on July 24th, or, in default of payment, the $250 to be forfeited. On July 18th C. delivered to defendant's telegraph operator at O. a message addressed to his partner at P., and reading: "Be on hand evening of third. I got early,"—saying to the operator that he wanted his partner to be sure to get the message, as it was a business matter. The message was written on defendant's blank (containing a proviso that defendant should not be liable for the nondelivery of an unrepeated message beyond the sum received for sending it, nor for errors in obscure messages), and was an unrepeated message. C. testified that his purpose in sending the message was to have his partner meet him at W., and bring money to pay for the horses. There was no evidence that his partner would have so understood it, or could or would have complied with the request. The message was not delivered, and C. lost the benefit of the contract. *Held*, that the defendant was not liable for any damages, since it did not appear that the message would have been understood by the person to whom it was addressed, and there was nothing in it to advise the defendant what it was about, nor what damage would result from its nondelivery. Primrose v. Telegraph Co., 14 Sup. Ct. 1098, 154 U. S. 1, followed.

In Error to the United States Court in the Indian Territory.

This was an action by Thomas J. Coggin and Robert E. Farris against the Western Union Telegraph Company to recover damages for the nondelivery of a message. Plaintiffs recovered a judgment in the circuit court. Defendant brings error. Reversed.

The plaintiffs below, Thomas J. Coggin and Robert E. Farris, were partners in the conditional purchase of a lot of horses. Coggin made the contract. He was to pay $1,500 for the horses. He paid $250, and agreed to pay the remaining $1,250 on the 24th day of July, 1892, and, failing to do so, the trade was to be off, and he was to forfeit the $250 he had paid.

On the 18th day of July, 1892, Coggin wrote upon one of the defendant's printed blanks, and delivered to the operator at Okarche, Oklahoma Territory, for transmission to his partner, Farris, at Purcell, in the Indian Territory, a message reading as follows:

"Okarche, O. T., 7-18-1892.

"To R. E. Farris, c/o E. R. Wilson, Purcell, I. T.: Be on hand evening of third. I got early. T. G. Coggin."

Immediately above and preceding the written message on the blank was printed the following: "Send the following message subject to the above terms, which are hereby agreed to." Among the "above terms" were the following:

"The Western Union Telegraph Company.

"All messages taken by this company are subject to the following terms: 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 or delivery of or the 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 repeated 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 plaintiffs alleged the defendant negligently failed to deliver the message, and by reason thereof Farris failed to pay the $1,250 on the 24th day of July, 1892, whereby the plaintiffs were damaged in the sum of $1,750, being the $250 forfeited and $1,500 claimed as profits for the difference between the price the plaintiffs were to pay for the horses and what they were worth in the market at the time and place the contract therefor was forfeited. The answer denied all negligence; denied that the defendant at the time of sending the message had any knowledge that it related to the purchase of horses or to any other matter of business in respect to which the plaintiff would suffer any loss or damage by a failure to transmit or deliver the message; and pleaded that the message was a nonrepeated message, and therefore, by the contract between the parties under which it was sent, the defendant was not liable for any mistake in sending or delay in delivering the same. The plaintiff Coggin testified that, at the time he delivered the message to the operator, he told him he "wanted Farris to be sure and get this message, as it was a business matter," and he says: "My purpose in sending said message was to summon the said Farris to the town of Wolsey, Indian Territory, and to cause him to bring some money to pay the balance of the purchase money on one hundred head of horses and mules that I had purchased from Henry J. Easterwood for myself and the said Farris."

The complaint alleged the message read "substantially as follows":

"Okarche, Oklahoma Ty., July 18, 1892.

"To Robert E. Farris, c/o S. R. Wilson, Purcell, I. T.: Be on hand the evening of the twenty-third without fail. Thos. J. Coggin."

But the original message was produced, and read as given above.

There were a verdict and judgment for the plaintiff for $350, and the defendant sued out this writ of error.

Cassius M. Ferguson (George H. Fearons, Henry E. Asp, J. W. Shartel, and James R. Cottingham, on the brief), for plaintiff in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge, after stating the case as above, delivered the opinion of the court.

This case was brought and tried before the case of Primrose v. Telegraph Co., 154 U. S. 1, 14 Sup. Ct. 1098, was decided. Since the decision in that case it has been the settled law in the federal courts

—First, that the conditions contained in the stipulation quoted, subject to which the unrepeated message of the plaintiffs was sent, are reasonable and valid; second, that, under these stipulations, the telegraph company is not liable for mistakes in the transmission or delivery, or for the nondelivery, of an unrepeated message beyond the sum received for sending the same; and, third, that where an unrepeated message is in cipher or obscure, and does not on its face inform the telegraph company of the importance or extent of the business transaction to which it relates, and the company is not otherwise advised thereof, the measure of damages for mistakes in its transmission or delivery or for its nondelivery is the sum paid for sending it.

The decision of the supreme court in the case of Primrose v. Telegraph Co. silences further contention on these questions in the federal courts. The judgment below cannot be supported for two reasons:

(1) It does not appear from the evidence that, if Farris had received the message, he would have understood it, or taken any action on account of it, or that anything that was not done would have been done if the message had been received. Coggin testifies to his object in sending the message; but neither he nor Farris nor any other witness testifies that, if Farris had received the message as sent, he would have known what it meant, or that he would have been prompted to take any action on account of it. It is not shown or claimed that it was a cipher message to which Farris had a key, or that there was any previous agreement or understanding between Coggin and Farris as to what meaning should be attached to a message couched in the terms of this one. On its face it does not have the remotest relation to the purchase of the horses. The date mentioned varies nearly a month from the date on which the purchase of the horses was to be concluded. There is no hint as to the place of meeting, or about money, or the completion of any contract for the purchase of horses, or indeed of anything else. There is no evidence that, if Farris had received the message, he would have known what it meant, and attended at the proper time and place, and paid for the horses, or that he had or could have procured the money to pay for them, or that he would have paid for them if he had had the money and had been fully advised of all the facts. In a word, the message is so blindly written as to be absolutely meaningless to any one not having a key to the thoughts of the sender. Under the evidence, the message conveyed no more information to Farris or to the defendant than if it had been in a cipher known to Coggin alone, or in an unknown tongue. It is clear from the evidence that Coggin himself blundered in writing it, and that he failed to use language to express what he intended and what he thought he had written at the time his complaint was drawn.

(2) There is nothing in the message to advise the defendant what it was about, nor what nor where any damage would result from its nondelivery; and particularly there is nothing from which it can properly and reasonably be said the alleged damages grow-

ing out of the failure to complete the purchase of the horses was in the contemplation of both parties at the time the message was sent. But it is said Coggin told the operator that the message related to "a business matter." The evidence, however, does not show that Farris would have understood it related to a business matter, and particularly not to the purchase of the horses; and the mere statement made to the defendant at the time of sending the message that it related to a business matter conveyed no information to the defendant as to the nature of the business. It amounted to no more than to say, "This is a business, and not a social, message." The nature of the business was not disclosed. Whether it was of much or little moment, and whether it related to business of the past, present, or future, or to business which, if not transacted at a particular time or place, would be attended with pecuniary loss or damage, was not stated; nor was anything said from which such results can be said to have been within the contemplation of the parties. Certainly, it did not give the defendant the faintest idea of the transaction about the horses, and damages on account of that transaction cannot therefore be said to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it.

In Primrose v. Telegraph Co. the court say:

"In Hadley v. Baxendale (decided in 1854) 9 Exch. 345,—ever since considered a leading case on both sides of the Atlantic, and approved and followed by this court in Telegraph Co. v. Hall [8 Sup. Ct. 577], above cited, and in Howard v. Manufacturing Co., 139 U. S. 199, 206, 207, 11 Sup. Ct. 500,—Baron Alderson laid down, as the principles by which the jury ought to be guided in estimating the damages arising out of any breach of contract, the following: 'Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally (i. e. according to the usual course of things) from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract.' 9 Exch. 354, 355."

The rule is stated in slightly different language by the court of appeals of New York in the case of Baldwin v. Telegraph Co., 45 N. Y. 744. The court say:

"Whenever special or extraordinary damages, such as would not naturally or ordinarily follow a breach, have been awarded for the nonperformance of contracts, whether for the sale or carriage of goods, or for the delivery of messages by telegraph, it has been for the reason that the contracts have been made with reference to peculiar circumstances known to both, and the particular loss has been in the contemplation of both, at the time of making the contract, as a contingency that might follow the nonperformance."

This definition of the rule is quoted approvingly by the supreme court in Primrose v. Telegraph Co.; and it is clear that, under the rule established in that case, the damages claimed by the plaintiffs in this case are too remote.

The judgment of the United States court in the Indian Territory is reversed, and the cause remanded, with instructions to grant a new trial.

WHEELING BRIDGE & TERMINAL RY. CO. v. COCHRAN.

(Circuit Court of Appeals, Fourth Circuit. May 28, 1895.)

No. 115.

1. PRACTICE ON APPEAL—BOND.
   Rule 13 of the circuit courts of appeals (11 C. C. A. cili.) does not apply to bonds required upon the allowance of writs of error, where no supersedeas is asked or granted.
2. PRACTICE—SET-OFF—WEST VIRGINIA CODE.
   Under the Code of West Virginia and the practice prevailing thereunder a defendant may show at the trial all matters of set-off, even though accruing pendente lite, of which the plaintiff has had notice by a bill or amended bill of sets-off.
3. SAME—PARTIES.
   The W. Co. commenced an action against one C. While it was pending, a receiver was appointed in a suit for the foreclosure of a mortgage made by the W. Co., and was directed to take possession of all the property covered by the mortgage, and prosecute and defend all suits relating to such property. It did not appear that the claim against C. on which action had been brought was part of the mortgaged property, and the receiver was refused permission to be made a party plaintiff to the action. C. filed a bill of sets-off including, among others, coupons of bonds secured by the mortgage maturing after the receiver was appointed. *Held*, that such coupons could not properly be allowed as sets-off in the action to which the receiver was not and could not be a party.

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

This was an action by the Wheeling Bridge & Terminal Railway Company against Robert H. Cochran. Judgment was rendered in the circuit court for the defendant upon claims in set-off. Plaintiff brings error. Reversed.

Edward B. Whitney, for plaintiff in error.

Thayer Melvin and Henry M. Russell, for defendant in error.

Before GOFF and SIMONTON, Circuit Judges, and SEYMOUR, District Judge.

SIMONTON, Circuit Judge. This is a writ of error to the circuit court of the United States for the district of West Virginia. The Wheeling Bridge & Terminal Railway Company, a corporation of the state of West Virginia, brought its action to October rules, 1892, against Robert H. Cochran. The declaration is in assumpsit on the common counts for $2,147.22. The bill of particulars filed with the declaration charges him with moneys of the plaintiff, received by him, and credits him with certain moneys paid out by him for plaintiff's use, expenses incurred by him in plaintiff's serv-

ice, and salary as president of the company to March, 1892. The defendant, on 4th April, 1893, pleaded the general issue and filed specifications of payments and sets-off. His bill of sets-off includes items of salary as president of a corporation subordinate to and controlled by the plaintiff, of services rendered plaintiff as agent and counsel, and other services rendered the Wheeling & Eastern Improvement Company, for which he held plaintiff responsible,—in all $7,000; and also of 24 coupons on the first mortgage bonds of the plaintiff, 12 of which matured 1st June, 1892, and 12 on 1st December, 1892, each for $30, and 6 coupons on second mortgage bonds of the same company, 3 of which matured September, 1892, and 3 1st March, 1893, each for $30,—in all $900. The cause was continued from time to time, and on 25th September, 1894, the defendant filed an amended bill of sets-off in which, in addition to the other items, he added coupons on the same first mortgage bonds maturing 1st June, 1893, 1st December, 1893, and 1st June, 1894, and on second mortgage bonds maturing September 1, 1893, March and September 1, 1894, making the total of sets-off $9,250. Pending this suit, on 20th September, 1893, the Wheeling Bridge & Terminal Railway Company was placed in the hands of a receiver by an order entered in the case of the Washington Trust Company against said railway company and others, pending in the circuit court of the United States for the district of West Virginia, Charles O. Brewster being appointed such receiver. On 25th September he interposed in this action, and prayed to be made a party plaintiff. This prayer was refused. The following extracts from the order appointing the receiver will show the scope and extent of his powers:

"Ordered, that Charles O. Brewster, Esq., of the city of New York, be, and he hereby is, appointed receiver herein of all and singular the premises and property described in the complaint, with the usual powers of receivers in such cases according to the law and practice of this court, and with all the powers provided for in the mortgage or deed of trust set out in the complaint, the property described in the said mortgage embracing all and singular the railroad and bridge of said defendant railway company, together with all the real estate, roadbed, rails, ties, piers, fences, lands, approaches, privileges, liberties, rights and franchises, rights of way, easements, licenses, depots, stations, buildings, rolling stock, equipment, tools, machinery, rents, incomes, tolls, and profits thereof, and all other property and rights whatsoever of said defendant railway company, wherever the same may be found, covered by the mortgage or deed of trust made by said railway company to the complainant, dated December 2, 1889. It is further ordered, that upon the approval and filing of said bond the said receiver is hereby authorized and directed to hold, manage, and operate the said railroad and bridge and other mortgaged property under the direction of this court, and to receive the rents, income, and profits thereof, and to employ such agents and servants as may be necessary for the proper operation and maintenance of said property, and to make such repairs as may be necessary to keep the same in good and serviceable condition. It is further ordered, that the defendant railway company and its officers and agents, and any other person having possession or control of any of said property, assign, transfer, and deliver the same, wherever it may be, unto said receiver, including any contracts for purchase of lands or rights of way, and all equitable interests, things in action, and other effects which belong to or are held in trust for said defendant railway company, which are covered by said mortgage, and all books, vouchers, and papers relating thereto; and that said receiver have full power and authority

to receive and take possession of such property. It is further ordered, that said receiver be, and he hereby is, authorized and directed to prosecute and defend any pending suits by or against said railway company affecting said mortgaged property, or against others whom said railway company has undertaken to indemnify, and to defend any suits hereafter brought against him as such receiver, or affecting the receivership, or hereafter brought against said railway company affecting said mortgaged property, with authority also to bring such suits as may be necessary in the discharge of his duties as receiver for the securing and protecting said mortgaged property and the assets of said railway company; and said receiver may employ such attorneys and counsel as may be necessary to enable him to manage such suits, and to advise him in relation to the performance of his duties as receiver; and he may use the property in his hands for any of the purposes set out in this order."

The plaintiff on the same day tendered its replication to the amended bill of sets-off of the defendant, setting forth that the coupons therein set out, maturing December 1, 1893, and afterwards, became due after the corporation had gone into the hands of a receiver, and are not a proper set-off. The court refused leave to file the replication. The cause, being at issue, was tried before the jury, who found a verdict in favor of the defendant below in the sum of $1,784.98.

Plaintiff filed its petition for a writ of error. The writ was allowed "upon the plaintiff giving bond according to law in the sum of one thousand dollars, which shall be for costs only, and shall not operate as a supersedeas bond." This bond was given. The defendant in error moves to dismiss the writ on the ground that no proper or sufficient bond has been required or given by the plaintiff in error. This motion rests on rule 13 (11 C. C. A. ciii.) of this court, and is based on misconception. The rule operates only where a supersedeas is prayed. In this case no supersedeas was asked, and the order granting the writ and requiring the bond distinctly declares that it should not operate as a supersedeas. The bond required in this case and approved by the judge granting the writ is in the words of the statute (Rev. St. U. S. § 1000). The motion to dismiss the writ is refused.

The assignments of error necessary to be considered are as follows:

First. Because the court below admitted as sets-off, coupons accruing pendente lite. Right of set-off does not exist at common law, and is everywhere founded on statutory regulations. U. S. v. Eckford, 6 Wall. 484. The Code of West Virginia (Ed. 1891, p. 812, § 4) provides:

"In a suit for any debt the defendant may at the trial, prove and have allowed against such debt, any payment of set off which is so described in his plea or in an account filed therewith as to give the plaintiff notice of its nature but not otherwise."

This is an exact reproduction of the Code of Virginia on the same subject. 1 Rev. Code Va. 1819, c. 128, p. 510, § 87. The construction put upon this provision of the Code of West Virginia, followed universally in all the lower courts of that state, is to admit all matters of set-off accruing before the trial, when properly pleaded, even although they accrued pendente lite. This practice is also recog-

nized as existing in Virginia by Dr. Minor (4 Minor, Inst. 659), and admitted by Robinson (5 Rob. Prac. p. 1000). It is urged, however, that there is no decision of any court of last resort sustaining this practice. But when it appears that a certain practice exists, and that no case is reported in which it was questioned, or by which the opinion of the appellate court has been asked upon it, we have the highest proof of universal recognition of the practice, and of acquiescence in it. When this practice is proved so to exist without exception or demur, it is overwhelming evidence of the practice prevailing in the state, which in law cases this court must follow and adopt. Rev. St. U. S. § 914. But it is said that the courts of the United States are not bound to adopt a state practice of which they do not approve. It is true that when the state practice conflicts with some statutory regulation of congress, or when it would confer jurisdiction on the court which otherwise had no jurisdiction, the federal courts will not follow it. Mexican Cent. R. Co. v. Pinkney, 149 U. S. 194, 13 Sup. Ct. 859. See, also, Phelps v. Oaks, 117 U. S. 239, 6 Sup. Ct. 714. But when the state courts have an established practice, universally followed, the federal courts do and should follow it. In all cases of concurrent jurisdiction it would be a great misfortune both to suitors and counsel if, when they entered into the federal courts, they would find themselves in a strange atmosphere, governed and guided by new and unknown methods of practice. Nor are we prepared to say that the practice prevailing in the courts of West Virginia should be disapproved.

Second. Because defendant was permitted to put in evidence coupons falling due after the receiver was appointed, and also because the court directed the jury to find a verdict upon them. The court, upon application, had refused to permit the receiver to intervene in the suit. Following this up, the court permitted the defendant to set off against the demand of the plaintiff coupons owned by him, which matured after the receiver was appointed, upon his first and second mortgage bonds. This leads to an examination of the scope of receivership. The receiver's powers are those conferred upon him by the order under which he was appointed. If by this order the receiver was placed in control of the claim of the company against the defendant, then his application for leave to intervene should have been granted, and the defendant should not have been permitted to set off claims accruing during the receivership. 22 Am. & Eng. Enc. Law, 310, note 1. If the appointment of the receiver amounted to an equitable execution upon all the property and choses of the corporation, and the assumption of them by the court for distribution among creditors on equitable principles, the defendant would not be permitted to set up his coupons accruing during the receivership in extinguishment of the debt due by him, for by so doing he would have had a preference given to him to which he would not have been entitled over other creditors. He would thereby obtain payment of his debts, while others holding claims equally meritorious would be compelled to accept a small proportion, or perhaps lose them entirely. Clark v. Brockway, *42 N. Y. 13; Beach, Rec. §§ 702, 703, 705. Upon examination, how-

ever, of the order of the court under which the receiver was appointed, made a part of this record, it will be seen that the powers of the receiver are those provided for in the mortgage, the property described therein being stated; that his authority is declared to be as follows: holding, managing, and operating the railroad and other mortgaged property; that the railroad company is directed to transfer to the receiver all property of every kind and description whatever "which are covered by said mortgage"; that he is authorized and directed to prosecute and defend any pending suits by or against said railway company "affecting said mortgaged property," and to bring such suits as may be necessary in the discharge of his duties as receiver for securing and protecting "said mortgaged property." His powers are limited to the mortgaged property. There is nothing in the record from which it is made to appear that the moneys claimed in the suit by the plaintiff from the defendant constituted any part of the mortgaged property.

Under these circumstances the receiver could not himself have brought suit on the claim, nor have included it in the assets in his hands as receiver. He could not have been permitted to intervene in the suit as first brought before the defendant's set-off was filed, not being a party in interest; and for the same reason the claim remained the property of the corporation, suable by the corporation itself, and subject to all proper defenses and sets-off against the corporation. In Smith v. McCullough, 104 U. S. 25, this state of facts existed: A railroad mortgage was foreclosed in proceedings in which a receiver had been appointed. There were certain county bonds, the property of the railroad company, in the hands of one McCullough. Pending the receivership, sundry creditors of the railroad company attached these bonds in the hands of McCullough for claims against the company. And a contest arose between them and the receiver as to the ownership of the bonds, and their right to recover on them. The court construed the mortgage, and held that these bonds did not pass under it; that they therefore never passed to the receiver, but remained the property of the company, subject to its debts, and recoverable in suits against it to which the receiver was not a party. But, the court having refused to permit the receiver to intervene as a party plaintiff in the suit, was it proper afterwards to permit the defendant to set off against the claim of the plaintiff coupons upon the mortgage bonds maturing after the receiver was appointed? These coupons affected the mortgaged property, and were part and parcel thereof. They were cut off the bonds secured by the mortgage. The duties of the receiver involved provision for their payment, and examination into their validity. The whole scope and purpose of the receivership were designed to secure as much as possible for all holders of the bonds and coupons equally. It was the province of the receiver to defend all suits affecting the mortgaged property. As a set-off is in the nature of a cross action, the setting up these coupons as sets-off was practically the bringing of an action upon them. To such an action the receiver, under the terms of the order appointing him, had the right to be a party. As the receiver had no right to

be made a party to the suit on the cause of action set up because he had no interest therein, the defendant could not set off against this cause of action coupons in which he did have an interest. The claim set out in the declaration, and the coupons maturing after the receiver was appointed, were not in the nature of mutual credits or mutual debts. In permitting these coupons to be used as sets-off, the court below erred. Its judgment is reversed, and the cause is remanded to the circuit court with instructions to grant a new trial

---

UNITED STATES v. McALEER et al.

(Circuit Court of Appeals, Eighth Circuit. May 6, 1895.)

No. 526.

BOND—CONDITION—PROPOSAL TO SUPPLY GOVERNMENT.

Where a bond is given, conditioned that one who has proposed to furnish the government three separate kinds of supplies shall not withdraw his proposal, and shall execute a contract if it is accepted, it is no breach of the condition that such person fails to execute a contract to furnish only one of such kinds of supplies, his proposal for which alone is accepted.

In Error to the District Court of the United States for the District of South Dakota.

This was an action by the United States against James McAleer, John Manning, and Robert W. Cooper upon a bond. The district court sustained a demurrer to the complaint. Plaintiff brings error. Affirmed.

E. W. Miller, U. S. Atty., for the United States.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. This writ of error was sued out by the United States to reverse a judgment which sustained a demurrer to a complaint upon a bond made by James McAleer, principal, and two sureties, the defendants in error. The complaint alleged: That the defendant in error McAleer proposed to furnish to the United States, at Ft. Meade, in Dakota territory, 750,000 pounds of corn, at $2.55 per 100 pounds; 1,500,000 pounds of oats at $2.60 per 100 pounds; and 1,800 tons of hay, at $10 a ton. That under the statutes of the United States and the rules and regulations of the war department, it was understood and agreed between the defendant McAleer and the United States that the latter had the right to accept or reject the whole or any part of his proposal, and that his sureties upon this bond knew this fact. That thereupon the defendants made and delivered to the United States a bond in the sum of $15,024, which recited that McAleer had proposed and agreed to enter into the contract with the assistant quartermaster of the United States to furnish 750,000 pounds of corn, 1,500,000 pounds of oats, and 1,800 tons of hay, and contained this condition:

"Now, therefore, if the said James McAleer shall not withdraw his said proposal within sixty days from the date of opening the proposals, and shall,

within sixty days from the date on which he may be notified that his said proposal has been accepted and the said contract awarded to him (provided the said award be made within the sixty days above mentioned), duly and formally enter into such contract, agreeably to the terms of said proposal, and into such bond for its due performance as shall be required of him, or if his proposal shall not be accepted and such contract not be awarded to him, then this obligation shall be void; otherwise, that is to say, if either he shall withdraw his proposal within sixty days, or fail to enter within said sixty days into said contract if awarded him, and into such bond, to remain in full force, effect, and virtue."

—That the United States, in due time, notified McAleer that they would accept the 1,800 tons of hay, at $10 per ton, and he refused to enter into a contract to furnish it, and never has furnished it, to the damage of the United States in the sum of $2,831.20. The defendant interposed a general demurrer, on the ground that the complaint did not state facts sufficient to constitute a cause of action.

The chief contention of counsel for the government is that the obligors in this bond are liable for the alleged breach of its condition, because it is alleged in the complaint, and under the demurrer is admitted, that they knew and agreed that the government might reject the whole or any part of the proposal. But the difficulty with this case is that neither McAleer nor his sureties ever agreed that he would contract to furnish or that he would furnish anything if the government rejected the whole or any part of his proposal. It was only in case the government accepted the proposal as it was made that they agreed to be bound at all. Their contract was that, within 60 days after McAleer should be notified that his proposal was accepted, he would enter into a contract according to the terms of his proposal, but that, if his proposal should not be accepted, then their obligation should be void. The government might have required, and these defendants in error might have made, a bond conditioned that, if any part of McAleer's proposal was accepted, he should enter into a contract to fulfill and should fulfill that part. It is sufficient for the determination of this case that the defendants did not make such a bond, and it is not the province of the courts to make it for them. This complaint admits that the proposal of McAleer was never accepted. The fact that a third or some like portion of it was accepted, and two-thirds of it was rejected, constituted no acceptance of it. It was no more a breach of the conditions of this bond for McAleer to fail to enter into a contract to furnish the hay, after his bids for the corn and the oats were rejected, than it would have been to fail so to do after all his bids had been rejected. The acceptance of a part and the rejection of another part of a proposal is no more an acceptance of it than the rejection of the whole.

The judgment below is affirmed, without costs to either party in this court.

CHICAGO, ST. P. & K. C. RY. CO. v. CHAMBERS.

(Circuit Court of Appeals, Eighth Circuit. May 6, 1895.)

No. 519.

1. NEGLIGENCE—QUESTION FOR JURY.
In an action against the K. Ry. Co. for causing the death of one C., it appeared that the tracks of the K. Co., running north and south, crossed at grade the tracks of the S. Co., running east and west, a stop board being placed on each line 400 feet from the crossing, and the rule of the road giving the right of way to the train which first arrived at its stop board. There was no obstruction to the view between the tracks. A freight train, of which C. was engineer, consisting of 28 cars, approached the crossing from the east, on the S. road, in the night, stopped at the stop board, and, no train on the K. road being in sight, whistled twice, and started for the crossing. After starting, the fireman notified C. that a train was approaching on the K. road, from the south, whereupon C. stopped his train, about 200 feet from the crossing, until the K. train was seen to stop at its stop board, when C. again whistled twice, and started for the crossing, and the fireman, having reported the stopping of the K. train, turned to shovel coal into the fire box. Just as C.'s engine reached the crossing, it was struck by the K. train, and C. was killed. The headlight of the S. train was burning at the time, and was seen by a brakeman and a passenger on the K. train. *Held*, that it was not error to refuse to direct a verdict in favor of the K. Co., either on the ground that no negligence of the K. Co. was shown, or that C. was shown to be guilty of contributory negligence.

2. SAME—CONTRIBUTORY NEGLIGENCE—FELLOW SERVANTS.
Held, further, that it was no defense for the K. Co. that the fireman on the S. train, C.'s fellow servant, was guilty of contributory negligence.

3. SAME—ORDINARY CARE.
Held, further, that since the engineer of the K. train had no right to proceed if he could have discovered the other train by the use of ordinary care, it was not error to refuse to instruct the jury that if they believed the headlight of the S. train was not lighted, and the engineer of the K. train thereby warned of its approach, he had a right to proceed.

4. SAME—PROXIMATE CAUSE.
Held, further, that it was not error to refuse to instruct the jury that a failure to light the headlight of the S. train would bar a recovery by C., since it did not appear that the absence of such light contributed to cause the accident.

5. EVIDENCE—DESCRIPTION OF LOCALITY.
Held, further, that it was not error to permit a civil engineer, who had made a survey of the locality, to testify that, if the headlight on the S. train was lighted, it would be visible at any point within 400 feet of the crossing, from any point on the K. tracks between the stop board and the crossing.

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

This was an action by Catharine Chambers, as administratrix of Patrick Chambers, deceased, against the Chicago, St. Paul & Kansas City Railway Company, to recover damages for the death of the intestate. Judgment was rendered in the circuit court for the plaintiff. Defendant brings error. Affirmed.

Dan W. Lawler and Lafayette French, for plaintiff in error.

Nathan Kingsley and H. H. Field, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. About 4 o'clock on a dark morning in October, 1891, at Taopi, Minn., a passenger train of the plaintiff in error, the Chicago, St. Paul & Kansas City Railway Company, hereafter called the "Kansas City Company," collided with a freight train of the Chicago, Milwaukee & St. Paul Railway Company, hereafter called the "St. Paul Company," at the intersection of the railroads of these corporations at that place, and Patrick Chambers, the engineer of the freight train, was killed. Catharine Chambers, his widow, the defendant in error, brought an action, as administratrix of her husband's estate, against the Kansas City Company for negligence which she alleged caused the death of her husband, and recovered a judgment of $5,000. The writ of error in this case was sued out to reverse this judgment.

The alleged errors upon which counsel for plaintiff in error seem to rely most confidently are that the court refused to grant their request to instruct the jury to return a verdict for the Kansas City Company at the close of the plaintiff's evidence, and again at the close of all the evidence. This request was based on the grounds that the evidence disclosed no negligence on the part of the Kansas City Company, and that it conclusively appeared from the evidence that Chambers was guilty of negligence that contributed to cause his death. If there was any error in the refusal to grant this request at the close of the plaintiff's evidence, the company waived it by subsequently introducing evidence on its behalf, and proceeding with the trial of the case on its merits. Insurance Co. v. Frederick, 7 C. C. A. 122, 125, 126, 58 Fed. 144, and cases cited.

We turn to the consideration of the refusal to grant this request at the close of all the evidence. There was testimony in the case at that time tending to show these facts: The railroad of the St. Paul Company runs nearly east and west at Taopi, and the railroad of the Kansas City Company runs nearly north and south through that place, and crosses the road of the St. Paul Company at grade. There was a stop board on the road of the St. Paul Company about 400 feet east of the crossing, and one on the Kansas City road about the same distance south of the crossing. There were no obstructions to the vision in the space between these railroads for a distance of more than 400 feet southeasterly of their place of intersection. The train approaching the crossing which first arrived at its stop board had the right of way over the crossing. The freight train of the St. Paul road was running west, and consisted of 28 freight cars and a caboose. When it arrived at Taopi the engine stopped nearly opposite the stop board on that road for about 50 seconds. Chambers, the engineer, was on the north side of his engine, and his fireman was on the south side of it. After the stop Chambers gave two short blasts of the whistle, and started for the crossing. Up to this time there does not seem to have been any appearance of a train approaching upon the Kansas City road. Just after he made this start for the crossing, his fireman told him that there was a train coming from the south on that road. He asked if it was going to stop, and the fireman replied that it was coming pretty fast, and he could not tell. Cham-

bers then shut off steam until the fireman told him that the Kansas City train had stopped, and it had in fact stopped near its stop board. The St. Paul engine was then about 200 feet from the crossing, moving slowly towards it, and under perfect control. When the fireman informed Chambers that the Kansas City train had stopped, he gave two sharp blasts of his whistle, and started again for his crossing, and the fireman turned around, and commenced shoveling coal into the fire box. Just as the St. Paul engine was crossing the tracks of the Kansas City Company the engine of that company struck it, and Chambers was killed. The night was dark, and the engine of the St. Paul Company was burning a headlight according to the testimony of the plaintiff's witnesses, and it was not burning one according to the testimony of the defendant's witnesses. A passenger and a brakeman on the Kansas City train saw the lights on the St. Paul train, and knew that it was there when the Kansas City train was about 300 feet south of the crossing; but the engineer of that train testified that he did not see it until he was upon it. After the Kansas City train stopped at its stop board, neither Chambers nor his fireman looked for or saw it until an instant before it struck their engine, when they were too near the crossing to avoid the accident. Some of the testimony which supports these facts is contradicted, but for the purpose of deciding the question under consideration the court below was, and this court is, bound to consider these facts as proved, and to consider the fact established that the St. Paul engine was burning a bright headlight, because there was sufficient testimony to sustain a finding of the jury that these facts existed.

Upon this state of facts no argument can be necessary to show that there was ample testimony in this case to support a finding that the engineer of the Kansas City train was negligent, and that his negligence was the proximate cause of the injury. When he arrived at his stop board, the St. Paul engine had stopped at the stop board on its railroad, and had started again, and was half way from its stop board to the crossing, moving slowly towards the latter, and under perfect control. That engine had the right of way. A brakeman and passenger on the Kansas City train saw the lights upon it, and knew that it was there, in ample time to have prevented the injury. It was the duty of the engineer of that train to look for it, and, if a man of reasonable prudence and diligence could have seen it, to see it, and to hold his train until the St. Paul train had crossed. The fact that a brakeman and a passenger on his train, upon whom much less responsibility rested, saw it, and were forewarned of the danger 300 feet distant from the crossing, is certainly sufficient evidence to warrant a jury in finding that a man of reasonable prudence and diligence would have seen it; and the fact that this engineer drove his engine upon the crossing under the circumstances without seeing it furnishes ample evidence that he was not exercising ordinary care to prevent this collision.

Nor are we convinced, after a careful examination of all the evidence in this record, that it so conclusively appears from the testi-

mony that Chambers was guilty of contributory negligence that no reasonable man could fairly draw the opposite conclusion. It is only when the facts are undisputed, and are such that reasonable men may fairly draw but one conclusion from them, that the question of negligence is ever considered one of law for the court. Railway Co. v. Jarvi, 10 U. S. App. 439, 451, 3 C. C. A. 433, 437, 438, and 53 Fed. 65, 70; Railway Co. v. Ives, 144 U. S. 408, 417, 12 Sup. Ct. 679; Railroad Co. v. Converse, 139 U. S. 469, 11 Sup. Ct. 569; Railroad Co. v. Pollard, 22 Wall. 341; Bennett v. Insurance Co., 39 Minn. 254, 39 N. W. 488; Abbett v. Railway Co., 30 Minn. 482, 16 N. W. 266. There is no evidence whatever of any negligence on the part of Chambers prior to the time when the Kansas City train arrived at its stop board and stopped. Up to that time he had used every reasonable precaution to prevent a collision. His engine was then moving slowly towards the crossing within 200 feet of it, held under perfect control, awaiting the answer of his fireman to the question he had prudently put, "Is the Kansas City train going to stop?" His fireman was on the south side of the engine, and it was his duty to keep watch of the train approaching from the south, while it was the duty of the engineer, who was on the north side of the engine, to watch for obstructions in front, or trains coming from the north of his engine. He had the right of way over the crossing. The instant that the Kansas City train stopped, it was his duty to take his train across as speedily as he could safely do so, and it was the duty of the engineer of the Kansas City train to hold it back until the St. Paul train had made the crossing. When the engineer of the Kansas City train came towards that crossing, it was his duty to stop at the stop board, and to hold his train back from the crossing until the St. Paul train was over it. Chambers had learned that he was faithfully discharging that duty, that he had stopped at his stop board, and he no doubt presumed that he would continue to discharge his duty by holding back his train until the St. Paul train was over the crossing. It is certainly not so clear as to be stated as a matter of law that a man of ordinary prudence and diligence would not have made so reasonable a presumption. It is earnestly argued that it was his duty to look for that train after he started for the crossing the last time, that it was his duty to keep his train under such perfect control as he approached the crossing that he could stop it at any time, and that the evidence is that, after the Kansas City train stopped, he did not look for it, that his train was moving at the rate of six or eight miles an hour when the collision occurred, and that his negligence in these particulars contributed to the injury. But it must be borne in mind that he had a fireman on the side of the engine towards the approaching Kansas City train, who had been watching it, and whose duty it was to continue to do so; and that there was an engineer on the Kansas City train, whose duty it was to hold it back until he had passed. It was only upon the presumption that both these men would fail in the discharge of their respective duties that his protection required him to personally watch that standing train, while it was his primary duty to watch for trains from the north and for

obstructions in front, and to drive his engine as speedily as safety would permit over the crossing. We are unable to persuade ourselves that all reasonable men would have drawn the conclusion that an engineer in the exercise of ordinary care under these circumstances would have presumed that both his fireman and the engineer of the approaching train would fail in the discharge of their respective duties, and would have looked for that standing train during the brief period when he was running the 200 feet to reach the crossing. Nor are we convinced that they would draw the conclusion that his failure to look contributed to cause the injury. It is always difficult in the night to tell whether a light is approaching or stationary when one is in or near the line it is following, and it is at least doubtful whether, if Chambers had looked towards the standing train, he would have perceived its approach in time to have stopped his long freight train after he had put it in motion to reach the crossing; and, if he had perceived that it was approaching, he might well have inferred that it was not approaching to cross then, but merely to stop again nearer to the crossing, and to wait there, ready to cross, when his train had passed. This certainly would not have been an unnatural supposition in view of the fact that he had the right of way, and that the Kansas City train had stopped in the proper place.

Whether or not he was negligent in controlling his train as he came upon the crossing depended very much upon the considerations to which we have referred, upon whether he saw or might have seen that the Kansas City train was approaching, and upon whether or not he knew or might have known that it was approaching, not to stop again and wait, but to try to cross before his train had passed. If he saw, or might in the exercise of ordinary care have seen and have known, all these facts in time to have stopped his long train of 28 cars before his engine came upon the crossing, he should have stopped; but if, in the exercise of ordinary care, he would not have seen or known that the Kansas City train was approaching to cross then, until it was too late for him to stop his train, it might have been his duty to drive it forward with all possible speed, so that his engine might pass beyond the crossing before the Kansas City train could strike. To determine whether or not the deceased was guilty of contributory negligence in this case required a careful consideration of all the questions to which we have referred, and these questions have been properly considered by the jury under clear and careful instructions regarding the law. The inference of contributory negligence from the complicated facts of this case was not, in our opinion, so clear and conclusive that the court should have declared its existence as a matter of law.

It was no defense for the Kansas City Company that the fireman on the St. Paul train was guilty of negligence that contributed to the injury. His negligence was not imputable to Chambers. The doctrine of imputed negligence rests upon the relation of master and servant or of principal and agent. Railway Co. v. Lapsley's Adm'r, 2 C. C. A. 149, 151, 152, 51 Fed. 174, 176, 177, and 4 U. S. App. 542, 554–556, and cases cited. There was no such relation between this en-

gineer and his fireman. It is true that there is evidence that the fireman was subject to the orders of his engineer, but that was because the discharge of the duties they were performing for a common master required that their work should be supervised by a single mind. This did not make one of them in any sense the agent or the servant of the other in the discharge of any duty imposed upon either of them by their respective positions in the employment of the railroad company. They were still the servants of the railroad company. A decisive test of this question is this: If the Kansas City Company is exempt from the damages caused by its negligence to the engineer of the St. Paul train, because the fireman of the latter train contributed to cause those damages, then the engineer must be equally liable to the Kansas City Company for any damage which that company sustained through the negligence of this fireman. But it is absurd to suppose that the engineer of the St. Paul train could be made to pay for damages resulting to the Kansas City Company from the carelessness of the fireman of the St. Paul train, of which he had no knowledge, and to which he did not assent.

Nor do the facts that the engineer and fireman were fellow servants of the St. Paul Company, and that the negligence of the latter contributed to the injury which the Kansas City Company caused, exempt the latter from liability to the engineer. The fellow-servant doctrine, where it is not abolished or modified by statute, exempts the common master only, from damages caused by the negligence of the fellow servant. That the negligence of the master or of the fellow servant contributed to an injury, the proximate cause of which was the negligence of a stranger, is no defense to the latter. One is liable for an injury caused by the concurring negligence of himself and another to the same extent as for one caused entirely by his own negligence. Railway Co. v. Sutton, 11 C. C. A. 251, 63 Fed. 394, 395; Railway Co. v. Cummings, 106 U. S. 700, 702, 1 Sup. Ct. 493; Railway Co. v. Callaghan, 6 C. C. A. 205, 206, 56 Fed. 988; Harriman v. Railway Co., 45 Ohio St. 11, 32, 12 N. E. 451; Lane v. Atlantic Works, 111 Mass. 136; Griffin v. Railroad Co., 148 Mass. 143, 145, 19 N. E. 166; Cayzer v. Taylor, 10 Gray, 274; Elmer v. Locke, 135 Mass. 575; Booth v. Railroad Co., 73 N. Y. 38; Cone v. Railroad Co., 81 N. Y. 206; Coppins v. Railroad Co., 122 N. Y. 557, 25 N. E. 915; Gray v. Railroad Co., 24 Fed. 168; Railroad Co. v. Young, 1 C. C. A. 428, 49 Fed. 723; Railway Co. v. Mackney (Tex. Sup.) 18 S. W. 949.

The views already expressed dispose of the tenth and eleventh assignments of error, which complain of the refusal of the court to charge that the negligence of the fireman on the St. Paul train in watching for and giving notice of the approach of the Kansas City train after it had stopped, if that negligence contributed to the injury, would prevent a recovery in this action.

It is assigned as error that the court below refused to give the following charge:

"That the engineer in charge of the defendant's train had the right to presume that the ordinary signals of the approach of the Milwaukee train would

be given, and that the headlight of the locomotive would be lighted; and if you believe from the evidence that the headlight on the Milwaukee locomotive was not lighted at the time of approaching the stop board, and that by reason thereof the engineer in charge of defendant's train was not warned of its approach, then the latter had a right, after giving the usual signal, to proceed on his way toward the crossing."

This proposed instruction does not correctly state the law. The engineer of the defendant's train had no right to proceed on his way towards the crossing, although he was not warned of the approach of the St. Paul train by the headlight, if, by the exercise of ordinary care, he would have been warned of the approach of that train without the headlight; and there was very persuasive evidence in the fact that a brakeman and passenger on his train were warned of its approach, that, if he had exercised ordinary care, he would have seen it, whether the headlight was burning or not.

It is assigned as error that the court refused to charge as follows:

"That if the jury believe from the evidence that the headlight on the Milwaukee locomotive was not properly lighted, so as to warn the employés in charge of the defendant's train of its approach to the crossing, then the attempt to make the crossing on the part of the deceased, under those circumstances, was such negligence as would bar the plaintiff's right of recovery in this action."

The proposed instruction was rightly refused. It entirely ignores the element of causation. If the headlight on the St. Paul engine was not properly lighted, and if the fact that it was not lighted contributed to cause the injury, then the attempt to make the crossing was negligence on the part of the engineer of that locomotive; but if it was not properly lighted, and if the negligence of the engineer on the Kansas City train was such that the jury believed that he would have driven his engine upon the crossing in just the same way if it had been lighted, then the absence of a headlight would not bar the plaintiff's recovery in this action. It is negligence contributing to the injury, and not negligence that does not contribute to it, that prevents such a recovery.

No error is assigned to the charge actually given by the court in this case. It was full, clear, explicit, and correctly stated the law. Numerous requests for instructions were presented to the court, and errors are assigned because the court refused to give these requests in the language of counsel. We have carefully and patiently examined them all, and compared them with the charge actually given, and are satisfied that, so far as they correctly state the law, they are substantially contained in the charge of the court. Accordingly the errors assigned for these refusals cannot be sustained. It is not error to refuse to give requests of counsel where the rules of law embodied in them are correctly laid down in the general charge of the court. Railway Co. v. Jarvi, 3 C. C. A. 433, 439, 53 Fed. 65; Railway Co. v. Washington, 4 U. S. App. 129, 1 C. C. A. 286, and 49 Fed. 347, 353.

A single error is assigned to the ruling of the court below in the introduction of evidence. It is that a civil engineer who had made a survey and a map of the intersection of these roads at the place

of the accident was permitted to testify that, if the headlight of the St. Paul engine was lighted, and was at any point on the St. Paul road within 400 feet of the crossing, it would be visible at all points between the stop board on the Kansas City road and the crossing. This engineer had been upon the ground and knew that there was no obstruction to the vision between these points. We can conceive of no reason why the evidence was not competent and material. The judgment below must be affirmed, and it is so ordered.

MICHIGAN LAND & LUMBER CO., Limited, v. RUST.

(Circuit Court of Appeals, Sixth Circuit. May 7, 1895.)

No. 178.

1. PUBLIC LANDS—SWAMP-LAND ACT—VESTING OF TITLE.

The surveys of public lands in the state of Michigan, as originally made, were, in many localities, fraudulent and erroneous, both in respect to lines and corners and to the character of the land. Prior to the passage of the Swamp-Land Act Sept. 28, 1850, these frauds and errors had been discovered, and the general government, at the request of the state of Michigan, had undertaken a resurvey of the lands. After the passage of the swamp-land act, the legislature of Michigan resolved to adopt the notes of the surveys, on file in the office of the surveyor general, as the basis of the lists of lands passing to the state under the act. In 1853 a list of lands, including certain lands in controversy in this action, which were indicated on the list as being included in a fraudulent survey, was approved by the secretary of the interior, and transmitted to the governor of Michigan, who thereupon requested a patent for such lands. No patent, however, was issued until 1857, when, the resurvey having been completed, and the lands in question ascertained not to be swamp lands, a patent was issued for sundry parcels of land, not including the lands in question. In 1858 a supplemental list of lands, intended to supersede the former lists, and covering the township in which the lands in controversy were situated, but not including such lands, was transmitted by the surveyor general to the commissioner of the land office, and such list was approved by the secretary of the interior in 1866, and transmitted to the governor of Michigan, upon whose request a patent was issued to the state, not including the lands in controversy. In 1855, pursuant to information from the general land office of the progress of resurveys and corrections of the erroneous lists and to the request of the general government, the state of Michigan suspended action upon the lists, first furnished, based on the erroneous surveys. The state was also fully advised of the action of the general government in regard to such corrections, and of the substitution of new plats, based on the new surveys in the government land offices. The lands in controversy were sold at auction at the United States land office, without objection by the state, but the state afterwards issued patents therefor to the plaintiff's predecessor in title. *Held* that, although the swamp-land act operated to convey title to the lands affected by it to the state in praesenti, such title did not attach to the lands included in the first list approved by the secretary of the interior, immediately upon such approval and before the issue of a patent, so as to prevent the subsequent correction of such lists to cure frauds or errors, and remove from the operation of the grant lands not properly within it.

2. SAME—MISTAKE.

Held, further, that when a selection or designation of lands granted by congress has been made, under a mistake of fact induced by a false or fraudulent survey, and no rights of third parties have intervened, the secretary of the interior has power, at any time before issuing a patent, to recall and correct such designation.

3. SAME—ACT MARCH 3, 1857.
Held, further, that the act of March 3, 1857 (11 Stat. 251), providing that the selections of swamp lands theretofore made should be approved, and patented to the several states, was not intended to apply to and confirm old lists founded on the erroneous surveys which had been superseded by new lists, nor to override the general power of the secretary of the interior to correct frauds and mistakes.

4. EVIDENCE—JUDGMENT.
Upon the trial of an action of ejectment by a plaintiff, claiming under the patent from the state, against a defendant, claiming under the patent from the United States, the plaintiff offered in evidence the record of a suit brought by the United States on the bond of one of the surveyors who made the original fraudulent survey, in which suit there was a verdict for the defendant. *Held*, that such evidence was properly rejected.

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

This was an action of ejectment by the Michigan Land & Lumber Company, Limited, against Charles A. Rust. Judgment was rendered in the circuit court for the defendant. Plaintiff brings error. Affirmed.

This is an action in ejectment brought in the court below by the plaintiff in error to recover 260 acres of land in township 18 N., of range 3 W., in the county of Clare, state of Michigan. The declaration originally included other lands, but they were stricken out by amendment, and by a further amendment the plaintiff's claim was limited to an undivided half interest, which it claims in fee. The plea was the general issue. The case was tried by the court with a jury upon evidence adduced by the parties, and the jury, by direction of the court, rendered a verdict for the defendant. Judgment having been entered thereon, the plaintiff brings the case here for review upon exceptions taken upon the trial to the rulings admitting or rejecting evidence, and to the giving and refusal of instructions to the jury. The plaintiff founds its right to recover upon a title derived through Edward W. Sparrow, to whom patents of the land were issued by the state of Michigan, bearing date April 14, 1887. It is claimed that the state had acquired title to the lands under the act of congress of September 28, 1850, known as the "Swamp-Land Grant." The defendant claims title through mesne conveyances under patents issued by the United States for parts of the lands in question to William A. Rust, May 10, 1870, and for the other part to Addison P. Brewer, January 10, 1867, upon purchases of the said lands by the respective patentees.

The questions involved render it necessary to take into view a brief history of the proceedings of the United States and of the state of Michigan taken for the survey and disposition of the public lands lying within the state,—proceedings some of which took place prior to the date of the grant, but which created conditions in which the grant was administered, and others of which are explanatory of the intent and purposes of those who participated in its adjustment. So much of this history as is deemed essential in the opinion of the court will now be referred to.

Prior to the enactment of the swamp-land grant (Act Sept. 28, 1850), the larger portion, but not all, of the public lands in Michigan had been surveyed. The work had been done by deputy surveyors under contracts with the United States. Unfortunately such contracts were in many instances defectively and fraudulently executed, and the surveys were so imperfect that great embarrassment and difficulty were experienced in making locations and settling the country, not only from the lack of the marks and indications upon the land required by the law of the survey, but also from the falsity of the character given to the quality of the land, which was likewise required to be stated in the survey. Such imperfections and difficulties arising from defective surveys existed in other states, but they seem to have been extraordinary in Michigan, and the mischief was widely extended through the state. Soon after the admission of the state into the Union the legislature adopted a joint resolution, which was transmitted by the governor to the president of the United States by a communication dated February 3, 1842, re-

citing that large districts of land within the state had been returned by the deputy surveyors as surveyed where no surveys whatever had been made, or where the surveys had been so imperfectly done as to be utterly valueless; and that the lands so represented as surveyed had been offered for sale to the very great injury of the state and the citizens thereof, and requesting the president to cause a resurvey to be made in certain townships, 81 in number, represented to have been surveyed, but which had not been surveyed, or so imperfectly surveyed that the work was valueless. Upon the recommendation of the commissioner of the general land office, the governor's communication and the resolution of the legislature were referred to the surveyor general for a report of the facts, to the end that proper action might be taken. A report was made by that officer, stating that information of a similar character about the surveys in Michigan had come to him, showing how such frauds as were complained of might exist without appearing from anything in his office, and recommending the sending of an experienced surveyor into the field to test enough of the surveys to determine the truth in regard to them. Upon this report the commissioner of the general land office issued instructions to the surveyor general to pursue the course which the latter had recommended, and, if the surveys proved defective in field work, that new surveys in all such cases should be made. The governor of the state was notified of what was being done in response to the request of the legislature. On the 11th day of April, 1842, the surveyor general commissioned William A. Burt to make the proposed examination. This commission was executed by Mr. Burt, and upon his report the surveyor general communicated the results thereof to the commissioner of the general land office, stating that the report furnished abundant proof that the surveys examined by Mr. Burt were grossly defective and fraudulent, and added that there was great probability that the other surveys made under the same contracts were as defective as those which had been examined. The substance of this report was communicated to Senator Porter, of Michigan, by the commissioner of the general land office, with a statement that it was designed to issue instructions for the necessary resurveys. In a further communication from the surveyor general to the commissioner of the general land office in April, 1843, it was stated that by a report of Mr. Burt, whose examinations appear to have been continued, in the townships examined by him, a very small portion of any of the lines had been surveyed or marked, and that what was found to have been done was so erroneous and defective that little or none of it could be relied upon.

In September, 1844, Mr. Woodbridge, who was then a senator from Michigan, addressed the commissioner of the general land office, and, referring to the measures taken by him to obtain appropriations for resurveys in that state, said that the great and increasing evils suffered by the state, in consequence of the false surveys made therein, remained without correction; that they were of incalculable extent, and had produced a deep feeling of wrong throughout the state. In reply to that letter, after referring to the apportionment of an appropriation to be expended in correcting fraudulent surveys in certain parts of the state, the commissioner further said: "All the other cases of erroneous or defective surveys in Michigan will be examined, and instructions issue as speedily as they can be prepared." In pursuance of this general purpose, extensive examinations were made and resurveys were directed in various parts of the state. Resurveys were accordingly made, and instructions were issued by the commissioner of the general land office to the officers of the local land offices in the state, directing them to cancel the plats of the old surveys immediately on receipt of the plats of the new surveys, making proper reference on the old plats to the new ones, so that the old plats should not be used under any circumstances. Reports continued to come in showing the results of the examinations of the old surveys indicating their erroneous and defective character, and under the instructions of the land department resurveys were carried on in the localities which were shown to have been defectively surveyed. On the 10th day of July, 1849, the surveyor general, in a letter to the commissioner of the general land office, stated that from the examinations that had been made by Mr. Burt within the last three months it appeared that most of the field notes originally returned to the surveyor general's office by deputies Nicholson, Brookfield, and

Brink, as containing true descriptions of surveys made by them, were fictitious and fraudulent. The surveyor general thereupon recommended an entirely new survey of the districts just referred to, being those between townships 17 and 24 north, and bounded on the east by the principal meridian. This included town 18 N. of range 3 W., wherein are located the lands involved in the present suit, the original survey of which was made by Nicholson. It appears from the report of the commissioner of the general land office for 1849 that Mr. Burt was employed to fully examine the district which included the lands in question. The plats of 280 townships were furnished to Burt and to Risdon, another surveyor, to the latter of whom was assigned the examination of the lands not assigned to Burt. It was further stated in the commissioner's report that the returns of surveys in seven districts, embracing 91 townships, some of which were made by Nicholson, were grossly fraudulent, "the greater portion of the field notes thereof being wholly fictitious or descriptive of lines and corners that were never established." That the survey in the district of lands in question was contracted by Nicholson, and that examinations of his work made in every township showed that it "was bad throughout." The report also contained an estimate that an additional appropriation of $20,000 would be required for correcting erroneous and fraudulent surveys in Michigan. At the next session of congress the subject of an appropriation for resurveying and correcting erroneous surveys came under consideration, and it appears from an extract from the commissioner's report contained in executive document No. 2, senate, that the general condition of the surveys in that state was fully understood, as well as the measures being taken in the land department for correcting them by resurveys. In this report which the senate had before it was a map of the state which showed the condition of the surveys therein and indicated the towns defectively surveyed. Among those defectively surveyed was township 18 N., of range 3 W. From all this, and from other facts shown by the record of this case, and of which the court might take judicial notice, the general facts sufficiently appear that prior to September 28, 1850, the general government, in response to the request of the state and with its knowledge, had undertaken, and was then carrying on, extensive resurveys of the public lands in the state for the purpose of correcting those which were false, and supplying such portions of the original surveys as had never been made in the field at all; that as fast as the resurveys were made they were returned to the surveyor general's office, and were furnished to the local land offices in the state; and that, by general directions to those officers from the land department, the old surveys were canceled, and the new surveys were adopted as the guide for the disposition of the lands, and that the lands were disposed of on the basis of the new surveys. It is true, as appears, that there was some disregard of this practice at some of the local offices; but it also appears that, as soon as this disregard of instructions was brought to the attention of the land department, it was disapproved and immediately corrected.

This was the state of things when the swamp-land act was passed September 28, 1850. In order to ascertain what lands passed to the state under the provisions of this act, the commissioner of the general land office sent instructions to the surveyor general to make out lists of the land, and in these instructions the commissioner said to the surveyor general: "The only reliable data in your possession from which these lists can be made out are the field notes of the surveys on file in your office, and, if the authorities of the state are willing to adopt these as the basis of these lists, you will so regard them. If not, and these authorities furnish you satisfactory evidence that any lands are of the character embraced by the grant, you will so report them." A copy of these instructions was sent to the governor of the state. The legislature of Michigan, by Act No. 187, Laws 1851, p. 322, resolved to "adopt the notes of the surveys on file in the surveyor general's office as the basis upon which they will receive the swamp lands granted to the state by an act of congress, September 28, 1850." Lists of the swamp lands were made out by the surveyor general from the field notes of the surveys then on file in his office, which lists were furnished to the commissioner of the general land office. When these lists had been purged of the descriptions of lands sold by the United States prior to the date of the grant, they were presented to the secretary of the interior for approval. Among others, such a list, including the

descriptions in question, was approved by the secretary of the interior on the 27th day of October, 1853, and was transmitted by the commissioner of the general land office to the governor of Michigan, by letter dated January 13, 1854, saying that he transmitted "a certified copy of list number 1 of swamp and overflowed lands selected and inuring to the state in the district of land subject to sale at Ionia taken from the original files in this office, which on the 27th day of October, 1853, was approved by the secretary of the interior." This list included the lands in suit and a large quantity of other lands. In the margin of the descriptions contained in town 18 N., of range 3 W., was written the letter "F," which was explained in the accompanying certificate to mean that the survey of that township had been reported as fraudulent. Upon the reception of this list by the governor, and on January 31, 1854, he forwarded to the commissioner of the general land office a request for a patent of the lands contained therein, "conveying the fee-simple title in said lands to the said state of Michigan." This request was not complied with at the time nor until March 17, 1857, when, the surveys having been completed, the character of the land ascertained, and the lands which were fraudulently reported originally as swamp, but afterwards shown not to be so, expunged from the lists, a patent was issued which recited that it was in pursuance of the request of the governor of January 31, 1854. The resurvey of the township in question had in the meantime been made, and the patent did not contain any of the lands in that township. Up to and at the time when the above-mentioned approved list was transmitted by the land department to the governor of Michigan, the examinations of the old surveys and resurveys were going forward in the land district in which the lands in suit are located, and reports had been made to the land department by the surveyor general relative to the lands in the district, stating that "this entire section of country has until recently been considered low, level, and swampy, with pine, cedar, balsam, and hemlock ridges, cold, sterile, and unfit for cultivation. The furthest possible from this are the facts in reference to this region," and that, "in some instances in the original survey, lakes covering many hundred acres have been laid upon the maps where none existed, thus covering with water a large area of beautiful country which, but for these frauds, might long since have been opened for sale and settlement."

In the report of the commissioner of the general land office for 1853, which must have been made up at about the time when the certification of the list in question was pending in the office, it appeared on the authority of the surveyor general that, in the townships recently surveyed, "portions of the lines were run and found to be established; other lines were run, but seemed never to have been corrected; while other portions of the survey were found to be entirely fraudulent, no lines ever having been run." It was further stated in that report that "the examinations in the four districts embraced in my present estimate represent that in many of the townships no lines have ever been run. They also serve to show, as all examinations of defective surveys have ever done, that the field notes of the original surveys are no index to the true and real character and value of the country of which they purport to give a faithful description." "Instances are numerous where valuable agricultural and pine lands are found to exist in place of what has been reported as dense, and in some cases impassable, swamp or nearly worthless lands." The report estimated that an appropriation of $20,160 would be required to complete the work, and it appears that congress made the appropriation as requested. 10 Stat. 565.

On the 29th day of October, 1853, two days later than the date of the secretary's approval of the list of lands in the Ionia district, and while that list was still in the office, the surveyor general transmitted a supplemental list of swamp lands in that district to the general land office, stating that, in obedience to instructions from the commissioner, he had "indicated in the heading of this list that it is intended to abrogate and supersede all lists of swamp lands heretofore made of townships contained within it." To this the commissioner replied on November 7, 1853, saying: "Your letter of the 29th ultimo, transmitting supplemental list of swamp and overflowed lands in the Ionia district, Mich., intended to abrogate and supersede all lists of swamp lands heretofore made of townships contained within it, has been received. The original list will be altered so as to conform to said supplemental list."

Resurveys in this and other districts in the state went on. The commissioner of the general land office, in directing the making of such surveys by the surveyor general, instructed him that "the lines will have to be run, and the corners established as if originally, and all the irregular lines and corners must be most carefully and thoroughly obtained." As fast as they were completed, they were transmitted with the proper plats to the general land office, and to the local land offices, in the several districts in the state, where, by the instructions of the department, they superseded "the old and fraudulent surveys" which were to be treated as "abrogated"; and since that time the business at the general and local offices has been conducted upon the basis of the new surveys. The resurveys in Michigan were continued until as late as 1857, and congress made special appropriations therefor nearly every year from 1845 to 1856, inclusive.

On the 18th day of May, 1858, the surveyor general transmitted to the general land office a supplemental list of swamp lands which included town 18, range 3 W., and stated in the heading thereof that it was intended to supersede lists theretofore made of swamp lands within the townships contained in it. This list did not include the lands in question, and many other lands included in the original list were dropped, and many not included in the first were included in the later list. A list of lands designated in the record as list No. 10, Ionia, containing the lands in this township which were contained in the surveyor general's list last mentioned, was approved by the secretary of the interior, May 15, 1866, which was forwarded to the governor of Michigan on May 26th by letter from the commissioner saying: "You will please to acknowledge the receipt of said list, and transmit your request for the patent to issue, on the receipt of which, or as soon thereafter as practicable, patent will be issued conveying the fee simple in said lands to the state." The governor acknowledged the receipt of this list on May 31, 1866, by letter in which he says: "I have the honor to request that the patents for said lands may issue to the state of Michigan as soon as practicable conveying the fee-simple title thereof to the state." On June 21st following, patent was issued accordingly conveying among other lands those in town 18 N., of range 3 W., but not the lands in controversy here.

On February 24, 1855, the commissioner of the general land office, having received from the surveyor general a list of all resurveyed swamp lands, addressed a letter to the governor of Michigan stating that he had received such a list which he said "abrogates and supersedes all lists of swamp lands heretofore made of the townships contained within it." After giving a list of townships, he adds: "The original selections in the foregoing townships, made from the defective plats, were approved in lists numbers 1, 2, and 3, Ionia district, Mich., certified copies whereof were transmitted to your predecessor January 13, 16, and 18, 1854. In consequence of the alteration necessary, by reason of the list recently received, I have the honor to request a suspension of all action upon the lists heretofore furnished you, so far as these several townships are concerned, until the differences can be ascertained and adjusted." List No. 1 of January 13, 1854, above mentioned, is the one upon which the plaintiff founds its title. The governor took action in accordance with the request. In the report of the commissioner of the state land office for 1855, the above letter to the governor was mentioned, and the commissioner, saying that his office had been notified of the resurvey by the general government of considerable tracts embraced in the lists of swamp lands principally in the Ionia district, added: "And the same have been, as directed, marked as suspended on our books." Township No. 18, range 3, was not included in the above list, but, as already stated, was included in the original survey and certificate. The transaction is given as a sample of the methods by which the land grant was adjusted, and because of its particular relation to the lands involved in the present controversy. In the report of the commissioner of the state land office for the following year (1856), speaking of the swamp lands, he said: "Patents are now received for all these lands in the state except those situated in the Ionia land district, comprising about 1,200,000 acres, and for these we are assured the patents will soon be forwarded, the making of which have been delayed in consequence of extensive resurveys by the general government, which in some instances change the amount and character of the land." "Public sale or offering has not been

deemed advisable until after the title of the state to the grant should be wholly confirmed by the issue of the patents, and the numerous corrections and restatements of the lists necessary to be previously made by the department at Washington."

Further correspondence between the officials of the state and the general government, and the several reports of the commissioner of the state land office during the years while the settlement of the grant was pending, show that the course above indicated was pursued throughout. The evidence on this subject is quite voluminous, and it is impracticable to do more than to state its general results. It is pertinent to add in this connection that the legislature of Michigan in 1857, in a law providing for the sale of the swamp lands coming to it by the grant, forbade the making of such sales until the patent therefor had been received from the United States. The proceedings for the adjustment of the grant went on until in 1869 the commissioner of the state land office reported that the entire amount of swamp lands conveyed to the state by the act of congress had been patented with the exception of about 35,000 acres in Cheboygan county, which consisted of an Indian reservation, the title thereto not having been extinguished. Some fugitive pieces have since that time been discovered and patented to the state, but the business was substantially closed as early as 1868. The lands in question and others in the same plight were sold at auction, after public advertisement, at the land office at Ionia, in November, 1869. No objection on behalf of the state appears to have been made to the sale. Upon the trial the plaintiff offered in evidence the records and files of a suit tried in 1849 in the circuit court of the United States for the district of Michigan, brought by the United States upon the bond of Nicholson, who surveyed the lands in suit, which resulted in a verdict for the defendant, and that, upon the question arising as to whether a new trial should be applied for, the surveyor general instructed the district attorney not to proceed further, upon the advice of the district attorney that the verdict would eventually be for the defendants; which offer was rejected by the court, and the plaintiff excepted.

J. W. Champlin and Frank E. Robson, for plaintiff in error.

Hanchett, Stark & Hanchett and W. L. Webber, for defendant in error.

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

Having stated the case as above, SEVERENS, District Judge, delivered the opinion of the court.

The propositions upon which the plaintiff maintains its right to recover in this case are these, in substance: First, that the swamp-land act of 1850 operated to convey the title to the lands proposed to be granted to the state in praesenti; second, that the ascertainment of the lands granted was delegated to the secretary of the interior to be performed by such method as he should deem expedient; third, that by his approval, and the certification thereof, of the list including these lands, and the transmission thereof to the governor of the state, January 13, 1854, the title attached to the lands, and became irrevocably vested in the state; fourth, that the subsequent transactions between the general government, and the state did not operate to impair the title thus vested.

It is further claimed that the act of 1857 operated to fix the title in the state if the lands had not been so identified that the title had already vested. The latter claim will be discussed in another place.

The first of the above propositions must be conceded. Whatever doubt may have once been entertained, such has become the establish-

ed doctrine as settled by a long line of decisions from Railway Co. v. Smith, 9 Wall. 95, to Iron Co. v. Cunningham, 155 U. S. 354, 15 Sup. Ct. 103. The second proposition may also be conceded. In a wide sense, it would be subject probably to some limitations which, for the purposes of this case, need not be stated. There can be no doubt that, while acting within the limits of his authority, the choice of methods was left to the secretary. The third and fourth propositions involve questions of vital and far-reaching import. If in the circumstances in which the swamp-land grant found the land surveys in Michigan, and as we understand, in some other states also, and in which the grant was adjusted in that state, and notwithstanding the co-operating action of the general government and the state in that adjustment, it is competent now to assert a title in the state which it is competent to convey, founded upon the original surveys and certifications long since superseded, because found erroneous or mistaken and contrary to the purpose of the law, the consequences may be very serious indeed. If all the land, whether swamp or arable, which was once certified upon the original fraudulent surveys, can now be claimed and sold by the state, it is obvious that much disturbance of titles and of what has since been done must ensue. The swamp lands in Michigan, owing to its peculiar topography, were widely scattered through the state. The land in the state of all descriptions has nearly all been sold, and it has been sold as finally surveyed after the discovered frauds were corrected. The old surveys and the new would not be uniform, but would overlap, or spread apart, leaving gores and fractions between. The lands in Michigan covered by this grant amounted to very nearly six millions of acres, being almost one-sixth of the entire area of the state.

In effect, the plaintiff's contention amounts to this: that no matter how gross the error or from what case proceeding, the secretary of the interior, when once he had certified a list of lands as falling due to the state under the grant, was without power to rectify it, though no patent had been issued and the rights of no third party had become involved by purchase from the state; and, further, that the secretary had no power to do this with the consent of the state. We do not think this doctrine can be sound. The identification of the lands affected by the grant was left to the secretary. The mode of doing this which was suggested by him involved concurrent action by the state. The proceedings on both sides should be construed in the light of existing circumstances, and not arbitrarily without regard to them. And the intention with which each step was taken and its purpose should be gathered from all that was mutually done and expressed with reference to the subject. Surely these rules are not too wide to be applied to a great governmental transaction like this. It was said by Judge Graves, in delivering the opinion of the supreme court of Michigan in Dale v. Turner, 34 Mich. 405, 416:

"There is no occasion to assail the position that the swamp-land act was sufficient to work an immediate transfer of the class of lands to which it was applicable; because, if it was so, it was still within the power of the

state and the United States, the parties to the grant, to agree, in the absence of any conflicting right, that sales made by the United States subsequent to the swamp-land act should be respected by the state, and be left to be completed by the United States by conveyance, and that the state should resort to the United States for equivalents."

This case, as does also that of State v. Flint & P. M. R. Co., 89 Mich. 481, 51 N. W. 103, asserts in an unequivocal manner the capacity of the state for active participation and negotiation in the settlement of the grant, and it would seem that its officials charged with the duty of acting in its behalf in that regard should be deemed its representatives.

While it is not now questioned that the act of 1850 transferred the title to the granted lands in praesenti, yet the identification of the lands so that the grant should attach to particular parcels was another matter, and whether a selection of lands was intended to be provisional or final was a question of intention to be gathered in the light of all the circumstances. And while we cannot refer to the understanding with which the law was executed to construe the act of congress, we think it is competent, if such understanding of the law can be ascertained, to take it into consideration in determining the consequences intended by the parties from their acts. It was not until the year 1869, when the case of Railway Co. v. Smith, 9 Wall. 95, was decided, that the doctrine now accepted in regard to the time when the title should be deemed to have vested under this grant was settled. Differing views had been entertained, and in many quarters it was thought that the title did not vest until the issuance of the patent, as required by the second section of the act. Now, we think no one can read the record of what was done in the administration of the grant in the state of Michigan without having a very strong impression that what was done was upon the understanding that the title would not pass until patents were issued,—or, to say the least, that it was thought that the safest way was to act upon that presumption,—and that the state as well as the secretary governed themselves accordingly.

The supreme court of Michigan, in Dale v. Turner, 34 Mich. 405, construed the act of the legislature of the state of June 28, 1851, adopting the field notes as the basis on which the grant would be received, as importing an understanding that the title would not be obtained until patents were received, and the whole tenor of the subsequent transactions indicates that this view continued to be held. What was done was regarded as part of a proceeding which was in fieri until the patent should be issued, and this was expected to come when the surveys were finally completed, and reliable data for making a just segregation of the swamp lands should be obtained. We also think it clear that the field notes mentioned in the act last referred to were intended to be the lawfully established field notes, and not those which had been rejected, or having been impeached, would probably be wiped out. It would have been a comparatively short piece of work to have simply made out the lists from the notes of the original survey. It was for the interest of the state itself as well as of its citizens that the resurveys should be completed, and the

frauds of which it had complained should be corrected. It would then know what it was getting, marked and defined by an actual survey made by the recognized authority, and in harmony with the system upon which contiguous lands would be sold and owned, and, for its honor, that what was awarded to it was according to its rights, and not the fruit of fraud.

In passing, we may advert to a complication arising in the present case. The declaration describes the lands which it seeks to recover by the descriptions of the government survey, and this, without more, must be deemed to refer to the recognized and authorized survey. A judgment in its favor thereon would establish its title accordingly, and entitle it to be put in possession of the lands thus described, and the marshal would have no other guide than the description in the declaration and judgment. Whether that would correspond with the old survey, the court has no means of knowing. The presumption is that it would not, for the old was erroneous, and the new is presumptively correct.

For these and such reasons the state suspended from sale lands contained in selections already made, upon request of the commissioner of the general land office, and when new lists expressly intended, and known to be intended, to supersede the former selections, were received from the general land office, they were adopted by the state, and patents requested thereon by the state officials charged with that duty. The state also in its legislative capacity knew how the adjustment was going forward. The reports of the commissioner of the state land office showed it, and the legislature of 1857 enacted a statute to forbid sales of lands before patents were received. That statutory provision has ever since been in force. Section 2, Act No. 130, Laws Mich. 1883, upon which Sparrow obtained his patents for the lands here claimed by the plaintiff, seems to indicate that the lands appropriated by the state, and authorized to be patented, were lands which were subject to sale, and as these were not, because no patent had been received for them, we have difficulty in finding the authority by which the patent issued to Sparrow. This is a question not submitted by counsel, and therefore we do not pursue it. There are sporadic instances shown by the record where state officials have started suggestions of doubts whether the state was getting all it was entitled to, and of claims for more, but they were either never insisted upon by the state, or were settled by adjustment. We are therefore of opinion that it was not intended by the secretary of the interior, nor expected by the state, that the selection of swamp lands certified and transmitted to the governor on the 13th day of January, 1854, and which included the lands claimed by the plaintiff, should be necessarily final, but that it was intended to be subject to correction to the extent that the facts shown by the resurveys should require, and that, upon its being proven by the resurvey that these lands were not swamp, it was competent to supersede the selection by a correct one.

But, if this were not so, we should still be prepared to hold that where, as in this case, a selection had been made and approved

under a mistake of facts induced by a false and fraudulent survey, whereby lands had been certified which were not swamp, and to which the state had no right whatever, and the rights of no third party had intervened, it was competent for the secretary, on discovering the error at any time before issuing the patent, to correct the wrong by recalling his certifications; not upon "mere error of judgment, but that character of mistake which affords a ground of relief in a court of equity." State of Oregon, 5 Land Dec. Dep. Int. p. 31. The secretary under this grant would exercise his powers consistently with his general authority over the public lands. He had plenary and exclusive power to direct the surveys, to cancel such as he found erroneous, and to order resurveys as the necessities of every occasion should require. He had the power and was charged with the duty of supervising the method by which granted lands should be passed to the beneficiary. If mistakes were committed by his subordinates, the results of which, if suffered to stand, would be to accomplish a wrong, he had power to correct them. If they were made by himself, his duty was as plain and his power no less ample. "The obligations of his oath of office oblige him to see that the law is carried out, and that none of the public domain is wasted or is disposed of to a party not entitled to it. He represents the government, which is a party in interest in every case involving the surveying and disposal of the public lands." Knight v. Association, 142 U. S. 161, 181, 12 Sup. Ct. 258.

The secretary could not abdicate his functions. Nor could he assume any obligation by agreement with the state which would bind him in the discharge of his duty to the general government. The business in which he was engaged was not that of contract, but the exercise of a delegated authority. That duty rested upon him in the transmission of the lands intended by the grant. By the act in question the proceedings in his department extended from the first step to be taken for the identification of the lands to the issuance of the patent to the state, whereupon they became "subject to the disposal of the legislature thereof." The attorney general, in speaking of the patent required to be issued to the state by the second section, in 9 Op. Atty. Gen. 255, said: "The object of that clause was undoubtedly to prevent the legislature of the state from a premature interference with lands before they were so designated as to preclude mistake and confusion."

The secretary may prescribe methods, as he prescribed a method here, for the conduct of business, and "when proceedings affecting title to lands are before the department the power of supervision may be exercised by the secretary, whether these proceedings are called to his attention by formal notice or appeal, and it is sufficient that they are brought to his notice. The rules prescribed are designed to facilitate the department in the dispatch of business, not to defeat the supervision of the secretary. For example, if, when a patent is about to issue, the secretary should discover a fatal defect in the proceedings, or that by reason of some newly-ascertained fact the patent, if issued, would have to be annulled, and that it would be his duty to ask the attorney general to in-

stitute proceedings for its annulment, it would hardly be seriously contended that the secretary might not interfere and prevent the execution of the patent. He could not be obliged to sit quietly and allow a proceeding to be consummated, which it would be immediately his duty to ask the attorney general to take measures to annul. It would not be a sufficient answer against the exercise of his power that no appeal had been taken to him, and therefore he was without authority in the matter." Pueblo Case, 5 Land Dec. Dep. Int. 494.

So here, if the title of the state was irrevocably vested in this land by the certification of the secretary, and there was no duty left but the mere issuance of the patent notwithstanding the discovery of the mistake, he could have been compelled by the court to issue it. When issued, the court would not, under the settled rule, vacate it on account of the original mistake, for that had been discovered by the secretary before the patent was issued. Thus the mistake would be irretrievable. The language of the secretary in 5 Land Dec. Dep. Int. 494, last cited, was quoted and approved in Knight v. Association, 142 U. S. 178, 12 Sup. Ct. 258, and the doctrine fortified by reference to former decisions of the court, citing Maguire v. Tyler, 1 Black, 195, 8 Wall. 650, 661; Snyder v. Sickles, 98 U. S. 203, 211; Buena Vista Co. v. Iowa Falls & S. C. R. Co., 112 U. S. 165, 175, 5 Sup. Ct. 84. And it was further held in that case that the secretary could take action for the correction of such mistakes on his own motion, and that he need not await a contest. It cannot be denied that the power to do this is lodged somewhere. After the patent has issued, or when, under the granting act, no patent is required, all things contemplated by the act have been done, the court is the proper forum in which to deal with the case. But when the patent is required by the act it would seem that congress intended the secretary's supervision to continue until all things contemplated by the act have been accomplished by its issuance. This distinction in the jurisdiction has been adverted to in previous discussions, and appears to be a recognized and established one. It has certainly been acted upon for many years in the land department of the United States, and, although there is no express decision of the supreme court turning on the precise point, yet it has been clearly recognized in several cases as denoting the line between the boundaries of the jurisdiction of the department and of the courts.

Counsel for the plaintiff are mistaken in the suggestion which they make that the doctrine that the secretary has power to correct his own errors in certifying lands before patent originated with Secretary Lamar in 1886. It may be that there was never so definite and formal a promulgation of the doctrine before that time, but the record in the present case shows that it was asserted and acted upon many years before. It passed unchallenged at the time. It was then, and has continued to be, a rule by which the practice of the department has been governed. After the lapse of this long period we do not think it competent, at least unless the unlawfulness of the practice is clear and plain, for private individuals,

having no interest to protect, to buy into the ground of controversy and challenge the validity of a proceeding of this character, upon the foundation of which other interests have been established and now repose.

It is not claimed that these lands were in fact swamp, but the plaintiff founds its right upon the secretary's certification of the list in which they were included, as upon a judgment irrevocably concluding that question. The rule has often been stated and applied that when, under a grant transferring the title in praesenti, the lands have been identified in the manner prescribed by the act, the title to the particular lands so identified becomes vested in the grantee. But these are cases where all had been done which the statute contemplated as necessary to complete the title, or, if in any case it fell short of that, there were no countervailing equities. Some of the more recent cases on this subject are U. S. v. Schurz, 102 U. S. 401; Wright v. Roseberry, 121 U. S. 502, 7 Sup. Ct. 985; Cragin v. Powell, 128 U. S. 691, 9 Sup. Ct. 203; Tubbs v. Wilhoit, 138 U. S. 146, 11 Sup. Ct. 279; Williams v. U. S., 138 U. S. 514, 11 Sup. Ct. 457; Knight v. Association, 142 U. S. 161, 12 Sup. Ct. 258; Noble v. Railroad Co., 147 U. S. 165, 13 Sup. Ct. 271; and the case of Barden v. Railroad Co., 154 U. S. 288, 14 Sup. Ct. 1030, where in the opinions delivered there is a general discussion of the subject.

In the case of Noble v. Railroad Co., 147 U. S. 165, 13 Sup. Ct. 271, the secretary, on the approval of the location of the railroad, was functus officio. That was the only duty devolved upon him; and, further, it was not bound up in another subject over which he had general authority. Besides, from the nature of the subject, congress must have understood when making the grant there in question that the approval of the secretary would be presently acted upon by the railroad company, and a situation created where great hardship would ensue if the approval should be revoked. That being so, it was reasonable to regard the act as intending the secretary's approval to be final when once made. And in the case of Wright v. Roseberry, 121 U. S. 502, 7 Sup. Ct. 985, a case much relied on by the plaintiff, certain propositions are stated, which counsel take from the opinion and lay down upon this as rules and measures by which we should be governed in our decision. We do not question the correctness of the doctrines announced in that case, nor, if we did, should we feel at liberty to disregard its authority. But that case is to be construed, as all decisions are, by reference to the facts involved and the questions presented for decision, and not as an announcement of propositions which would be unaffected by other facts, and the application of other principles which the presence of such facts would involve. And, however correctly that case states the law, we must here take notice of "certain equitable considerations which the department is authorized to recognize"; and in regard to which, "when recognized, no court will ever disturb its action," as was said in Williams v. U. S., 138 U. S. 514, 523, 11 Sup. Ct. 457, in dealing with certain propositions relating to this general subject, the correctness of which was not doubted. What has been said is of general application to the cases cited.

The rulings of the interior department, at least in recent years, have uniformly maintained the right of the secretary to revoke a certification or other equivalent act before patent, on the ground that it had been inadvertently made and was erroneous in fact. Lachance v. State, 4 Land Dec. Dep. Int. 479; State of Oregon, 5 Land Dec. Dep. Int. 31, 300, 374; State of Minnesota, 6 Land Dec. Dep. Int. 37; State of Michigan, 7 Land Dec. Dep. Int. 514; State of Oregon, Id. 572; State v. Wolf, 8 Land Dec. Dep. Int. 555. There are other decisions of the same import. And there is no decision of the supreme court impugning that right, when exercised under an act of congress, contemplating a supervision of the proceedings until completed by the issuance of a patent. On the other hand, the rulings of that court have been in conformity with the practice and decisions of the department. On their own account these decisions of the department are very persuasive as to what the law is, and, as multitudes of titles have been founded upon them, they ought not to be disturbed except for very cogent reasons. Railroad Co. v. Whitney, 132 U. S. 357, 10 Sup. Ct. 112; Knight v. Association, supra.

We now come to the consideration of the act of March 3, 1857 (11 Stat. 251). That act provided that the selection of swamp and overflowed lands granted by the act of 1850 "heretofore made and reported to the commissioner of the general land office so far as the same shall remain vacant and unappropriated, and not interfered with by actual settlement under any existing law of the United States, be and the same are hereby confirmed and shall be approved and patented to the several states in conformity with the provisions of the act aforesaid as soon as may be practicable after the passage of this law."

Delays had occurred in the proceedings in the interior department for the ascertainment of the lands intended to be transmitted under the grant. This act was passed to expedite them. There is nothing in it which indicates any purpose to enlarge the grant. Nearly all the states had chosen to select the lands for themselves, and to furnish proof that the lands were of the character mentioned in the granting act. By the terms of the option extended to the states for the taking of lands under the grant, in case they were not taken by the field notes, the state authorities were required to furnish to the surveyor general satisfactory proof of the character of the lands included in their selections. It is contended by counsel for the defendant that the act of 1857 was intended to apply to those cases only, and there is some plausibility in the argument made in support of that theory. But, as it was customary to speak of the lists made up by the surveyor general in the states which elected to select their lands on the basis of the United States survey as "selections," it seems doubtful whether such selections were not included. We shall not, however, decide that question, being of opinion that the act was not intended to include a list which was in the situation of the one under which the plaintiff claims. The list had some time before been acted upon by the land department, and was expected to stand, except in so far as it should be impeached for fraud or error by the resurveys. Congress knew that those resurveys were going on. For

several years it had been making appropriations therefor. It was a matter of public record that the surveys on which it was based were fraudulent, and that, where the resurveys had developed the fraud and corrected the errors, all traces of the old survey were obliterated. The old survey had been rejected by competent authority. As was said in Knight v. Association, supra, a rejected survey is no survey, and inoperative for any purpose. New lists had been made and filed in the commissioner's office based upon the new survey, and the plats made in conformity therewith. It was held by the secretaries of the interior, and we think with sufficient reason, that the act was not intended to confirm old lists founded upon the first survey which had been thus superseded. It was so held by Secretary Vilas in State of Michigan, 7 Land Dec. Dep. Int. 525; by Secretary Noble in State of Arkansas, 8 Land Dec. Dep. Int. 387; and this is confirmed by the ruling of Secretary Thompson in 1 Lester's Land Laws, 560. And, further, we are of opinion that it was not intended by this act to override the general power of the secretary to correct frauds and mistakes in the preparation of the lists thereby confirmed, and that upon a just construction of the act such frauds and mistakes remained subject to correction.

Whether, upon the application of the doctrine of estoppel, the state should be held to be precluded by the acceptance of the new selection which was expressly confirmed as in lieu of the old one, and upon which new selection it accepted patents for other lands than those included in the first, we have not found it necessary to determine. It was held by the supreme court of that state upon similar facts in State v. Flint & P. M. R. Co., 89 Mich. 481, 51 N. W. 103, that the doctrine was applicable, and it was applied to an attempt made on behalf of the state to assert title to lands of which it had received an equivalent.

We think there was no error in the rejection by the court of the plaintiff's offers in evidence of the record of the suit of the United States against Nicholson and his bondsmen, in the circuit court of the United States for the district of Michigan. That case was not between the parties in the present suit, and could bind neither of them in respect to the subject-matter of this. Besides, there was nothing to show upon what facts the case turned, whether upon any circumstances relevant here or not. If the record of that suit had been admitted, it would have had no material effect, in view of the prime facts of the present case. The other exceptions relate in the main to the admission in evidence of public documents of which we should take judicial notice, and to the correspondence of public officials pertinent to the matters in controversy. None of the rulings excepted to were injurious to the plaintiff, whether any of them were technically erroneous or not. The case was rightly argued upon its main features, and we decide the case by reference to them. For the reasons stated, we think the judgment should be affirmed.

MICHIGAN LAND & LUMBER CO., Limited, v. PACK et al.

SAME v. BUTMAN.

(Circuit Court of Appeals, Sixth Circuit. May 7, 1895.)

Nos. 179 and 180.

PUBLIC LANDS—SWAMP-LAND ACT—VESTING OF TITLE—ACT MARCH 3, 1857.

Upon facts similar to those in Lumber Co. v. Rust, 68 Fed. 155, except that there had been, in this case, no approval of the lists of lands, including those in controversy, by the secretary of the interior, but only a selection thereof by the surveyor general and report by him to the commissioner of the land office, the lists so reported having, afterwards, been superseded by other lists made in accordance with corrected surveys, *held*, that such selection was not confirmed by Act March 3, 1857 (11 Stat. 251).

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

These were two actions of ejectment by the Michigan Land & Lumber Company, Limited, against Pack, Woods & Co. and Myron Butman, respectively. Judgment was rendered in the circuit court for the defendant in each case. Plaintiff brings error. Affirmed.

J. W. Champlin and Frank E. Robson, for plaintiff in error.

Hanchett, Stark & Hanchett and Humphrey & Grant, for defendants in error.

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

SEVERENS, District Judge. The controlling facts in each of these cases are similar to those involved in the case of Same Plaintiff v. Rust (No. 178, just decided) 68 Fed. 155, and are subject to the application of the same principles upon which that decision rests. The most material difference in the facts consists in this: that in these cases there was no approval and certification of the lands in suit by the secretary of the interior, as in the Rust Case, but the plaintiff founds its title upon the selection of lists of swamp lands made by the surveyor general, and reported to the commissioner of the general land office, in pursuance of the instructions of the commissioner of November 21, 1850, in which the surveyor general was directed to tender the option to the state in respect to the basis on which the granted lands should be identified. Those lists, as has been said, were never approved by the secretary, but were superseded by other lists, which were made in correction of the mistakes in the former lists, upon the ascertainment of the frauds and errors of the original survey. The old lists had been thus superseded before the passage of the act of March 3, 1857. We are entirely unable to agree with the plaintiff in its contention that the original selection of the surveyor general was confirmed by that act. We do not think that congress intended to resurrect the lists which had been already discarded because erroneous. But we have discussed this subject in the principal case, and indicated the grounds of our opinion so fully that it is unnecessary to repeat them

here. There is no other difference in the essential facts of the cases which requires especial consideration. The details vary, but not enough to affect the main drift of the facts or the principles applicable to them. We think the judgment in each of these cases should be affirmed.

PAULY JAIL-BLDG. & MANUF'G CO. v. BOARD OF COM'RS OF KEARNEY COUNTY.

(Circuit Court of Appeals, Eighth Circuit. May 6, 1895.)

No. 532.

COUNTY COMMISSIONERS—POWERS—KANSAS STATUTE.

The statutes of Kansas (1 Gen. St. 1889, par. 1633) provide that boards of county commissioners (who have power to purchase sites for, build, and keep in repair, county buildings, levy taxes therefor, and care for the county property) shall not build "any permanent county buildings," or assess any tax for that purpose, without submitting the question to a vote of the electors of the county. *Held*, following the decision of the supreme court of Kansas, that a board of county commissioners has power, without a vote of the electors, to make a contract for the erection of cells in the jail building of the county.

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

This was an action by the Pauly Jail-Building & Manufacturing Company against the board of county commissioners of Kearney county, Kansas, on a contract for the erection of cells in a jail. Judgment was rendered in the circuit court for the defendants. Plaintiff brings error.

Milton Brown (J. W. Phillips, of counsel), for plaintiff in error.

M. G. Kelso, Joseph W. Ady, Samuel R. Peters, and John C. Nicholson, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. Is it beyond the powers of the board of county commissioners of a county in the state of Kansas to make a contract for the manufacture and erection of cells in the cell room of the jail building of the county without submitting the question of the purchase of such cells to the voters of the county? This is the single question presented in this case. The Pauly Jail-Building & Manufacturing Company, the plaintiff in error, brought an action in the court below against the board of county commissioners of Kearney county, Kan., the defendant in error, to recover the purchase price of two cells which the plaintiff had furnished to the defendant pursuant to a written contract between them. A jury trial was waived, and the court, after hearing the evidence, made and filed special findings of fact to the effect that the plaintiff had agreed with the defendant, for the sum of $6,000, to manufacture and erect in the cell room of the jail building in the town of Lakin, in the county of Kearney and state of Kansas, two cells, furnished complete, and ready for occupancy, including all the attachments connected therewith, in accordance with the specifica-

tions attached to the contract; that the plaintiff had delivered the jail cells at the town of Lakin, pursuant to the contract, but that the defendant had refused to accept or pay for them; and that the question of purchasing, and of authorizing a levy to purchase, the cells had never been submitted to the voters of the county. From these facts the court drew the conclusion of law that the contract was for a jail, and not for the furniture or fixtures for a jail building, and that the board of county commissioners had no authority to make the contract without a vote of the people, and entered judgment for the defendant. The error assigned is that the findings of fact are insufficient to support this judgment, and that the legal conclusion from these facts is a judgment for the plaintiff.

It is settled both by statute and by judicial decision, in the state of Kansas, that it is the duty of the board of county commissioners of each county to furnish a good and sufficient jail in their own county. 1 Gen. St. Kan. 1889, par. 1614; Board of Com'rs v. Honn, 23 Kan. 256. The provisions of the statutes of Kansas material to the issue presented in this case are as follows:

"The board of county commissioners of each county shall have power, at any meeting; * * * Third. To purchase sites for, and to build and keep in repair county buildings, and cause the same to be insured in the name of the county treasurer, for the benefit of the county; and, in case there are no county buildings, to provide suitable rooms for county purposes. Fourth. Apportion and order the levying of taxes as provided by law, a sum sufficient for the erection of county buildings, or to meet the current expenses of the county, in case of a deficit in the county revenue. Fifth. To represent the county and have the care of the county property, and the management of the business and concerns of the county, in all cases where no other provision is made by law." 1 Gen. St. Kan. 1889, par. 1630. "No board of county commissioners shall proceed to build any permanent county buildings, and assess any tax for that purpose, without first submitting the question to a vote of the electors of the county at some general or special election." Id. par. 1633.

The extent of the powers and of the liabilities of counties in states, and of their officers, must necessarily be determined by an examination and construction of the constitution and statutes which grant the powers and impose the liabilities. The national courts uniformly follow the construction of the constitution and statutes of the state which grants these powers and imposes these liabilities that is given to them by the highest judicial tribunal of that state, in all cases that involve no question of general or commercial law, and no question of right under the constitution and laws of the nation. Madden v. Lancaster Co., 12 C. C. A. 566, 65 Fed. 188, 192; Dempsey v. Township of Oswego, 4 U. S. App. 416, 435, 2 C. C. A. 110, 51 Fed. 97; Rugan v. Sabin, 10 U. S. App. 519, 3 C. C. A. 578, 53 Fed. 415, 420; Travelers' Ins. Co. v. Oswego Tp:, 7 C. C. A. 669, 674, 59 Fed. 58; Claiborne Co. v. Brooks, 111 U. S. 400, 410, 4 Sup. Ct. 489; Bolles v. Brimfield, 120 U. S. 759, 763, 7 Sup. Ct. 736; Detroit v. Osborne, 135 U. S. 492, 499, 10 Sup. Ct. 1012. The question before us is of this character, and it has been settled by a decision of the highest judicial tribunal of the state of Kansas, rendered in 1880. In State v. Harrison, 24 Kan. 271, it appeared that the board of county commissioners of Marion county, in that

state, had incurred an indebtedness of $7,450 for "additions, extensions, and improvements to the courthouse of said county," without submitting the question of the appropriation of money for this purpose, or of the construction of these improvements, to the legal voters of the county. The question presented was whether or not the board of county commissioners had acted beyond their power. The supreme court of that state declared that they had not. That court announced the rule for the construction of the statute defining the powers of county commissioners in these words:

"It is certainly true that, before the county commissioners of any county can appropriate any money for the purpose of erecting any permanent county building, it is necessary that such commissioners should first submit the question of appropriating such money or of erecting such building to the legal voters of the county. Comp. Laws 1879, p. 276, § 18; State v. Marion Co. [21 Kan. 419] supra. But, for the purpose of making necessary repairs or alterations of an already existing courthouse, it is not necessary that the question should be so submitted."

In that case the supreme court of Kansas was considering the same statutes that are now before this court for construction, and the rule it announced has never been modified in that state. It is decisive of the question presented in this case, and must control its decision in this court. It cannot be successfully maintained that either one or two cells in a jail building constitute "a permanent county building." No argument or illustration can make this proposition much clearer than its statement. A cell is but a very small room,—a room not much larger than many closets in private houses; and it can hardly be contended that the manufacture and erection of a room in a building, whether small or large, would be forbidden by an inhibition to construct a permanent building. The judgment below must be reversed, with costs, and the cause remanded, with directions to grant a new trial, and it is so ordered.

ROBERTSON et al. v. SCOTTISH UNION & NATIONAL INS. CO.

(Circuit Court, W. D. Virginia. March 20, 1895.)

1. AWARD—RELIEF AGAINST—VIRGINIA PRACTICE—INSURANCE POLICY.
   In Virginia, where the distinction between the common-law and equity systems is strictly maintained, no relief against an award, made in pursuance of a submission in pais, can be obtained, except in equity; and, accordingly, when the amount of loss payable under an insurance policy has been fixed by an award made by arbitrators, appointed pursuant to the terms of the policy, no evidence can be received in an action on the policy to prove a loss greater than the amount of such award, or to prove that the arbitrators were not competent and disinterested, as required by the policy.
2. REMOVAL OF CAUSES—CITIZENSHIP OF CORPORATION — SUFFICIENT ALLEGATION.
   The allegation, in a petition for removal of a cause to a federal court, that the defendant is "a company duly chartered and incorporated under the laws of Great Britain," is a sufficient statement of the citizenship of such defendant to give the federal court jurisdiction.
3. SAME—AMENDMENT OF PETITION.
   It seems that where the jurisdictional facts authorizing the removal of a cause from a state to a federal court exist, but are not properly

stated in the petition for removal, such petition may be amended to show the facts properly.

This was an action by C. C. Robertson & Co. against the Scottish Union & National Insurance Company on a policy of insurance, originally brought in the corporation court of the city of Lynchburgh, Va., and removed by the defendant to this court. When the case came on for trial, and after a jury had been impaneled, the plaintiff offered certain evidence, to which the defendant objected, and the court took the question under advisement.

Kirkpatrick & Blackford, for plaintiffs.
Peatross & Harris, for defendant.

PAUL, District Judge. This is an action in assumpsit, brought by the plaintiffs against the defendant company, on a policy of insurance, to recover damages for a loss to the plaintiffs by a fire which occurred in the city of Lynchburgh, Va., on the 3d day of February, 1894. The policy, among its provisions, contains the following:

"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."

The assured and the insurance company failed to agree as to the amount of damage the plaintiffs had sustained, and on the 12th of February, 1894, each selected an appraiser, and on the 14th of February, 1894, these two selected an umpire. On the 24th of February, 1894, the appraiser selected by the insurance company, and the umpire, made an award in writing, fixing the amount of damage sustained by the assured at $4,615.65. The appraiser selected by the assured refused to sign the award. On the 3d of August, 1894, an action on the policy was instituted by the plaintiffs in the corporation court of the city of Lynchburgh, Va., and on the 11th day of September, 1894, on the petition of the defendant company, the case was removed into this court. The case coming on for trial at this term, a jury being impaneled, the plaintiffs have offered to introduce evidence to show that the loss sustained by them was greater than the amount allowed in the award which had been made as above stated, and also to show that the appraiser selected by the defendant company and the umpire were not competent and disinterested, as required by the clause in the policy providing for a submission to arbitration. To the introduction of this evidence the defendant company objects, on the ground that the amount of damages due to the plaintiffs has been ascertained by the award, and that it is not competent for the plaintiffs to assail the award in a court of law. This is the question which the court is to determine.

In Virginia we have two classes of awards,—one provided for by section 3006 of the Code of 1887, as follows:

"Sec. 3006. Persons desiring to end any controversy, whether there be a suit pending therefor or not, may submit the same to arbitration, and agree that such submission may be entered of record in any court. Upon proof of such agreement out of court, or by consent of the parties given in court, in person or by counsel, it shall be entered in the proceedings of such court; and thereupon a rule shall be made, that the parties shall submit to the award which shall have been made in pursuance of such agreement."

The other class of awards is the common-law submission in pais, to which class the award in this case belongs.

Counsel for the plaintiffs have cited in support of their contention several cases decided in other states, especially Bradshaw v. Insurance Co., 137 N. Y. 137, 32 N. E. 1055, and Herndon v. Insurance Co., 14 S. E. 742, decided by the supreme court of North Carolina. In both of these states the common-law system of pleading has been superseded by what is generally termed the "Code Procedure," blending the common-law and equity in one system of practice. As we well know, this innovation on the respective systems of procedure has never been made in Virginia, and the distinction between the two systems has been more closely adhered to in this state than in any other in the Union. The mode of procedure in the two states referred to, no doubt, permits the integrity of an award like the one in this case to be inquired into in an action at law; but the court must determine the question before it in accordance with the common-law system of pleading as we find it in Virginia, and ascertain whether, in accordance with that system, the award in this case can be set aside and annulled in this action.

Mr. Minor, in the fourth volume of his Institutes (page 152), gives three grounds for setting aside an award; namely, improper conduct of the arbitrators, improper conduct of the parties, and objections to the award itself, apparent on its face. Under these general heads, with more or less specific and particular details, the subject is generally treated. At page 153 of the same volume, under the head of "Relief against Erroneous Award in Case of Submission in Pais," he says:

"Relief against an erroneous award upon a submission in pais is to be had in equity alone, and there only upon the reasons stated under the preceding head." 2 Story, Eq. Jur. § 1452.

Miller v. Kennedy, 3 Rand. (Va.) 2, was an action on an award made upon a submission in pais. The court said:

"In such cases it is well established that in an action on the award, or on a bond for performing the award, the plaintiff cannot be required to prove anything more than the execution of the award, according to the submission; and that the defendant in such actions cannot avail himself, in his defense, of want of notice, corruption, or partiality in the arbitrators, or of any other extrinsic circumstance whatever. The defendant's only redress in such cases is a resort to a court of equity."

In Barton's Law Practice (volume 1, p. 587) it is said:

"When, too, the submission to arbitrators and the award are in pais, there is no remedy against the award at law, and resort must be had to a court of equity."

Other authorities to the same effect might be cited, but these will settle the question. Evidence to impeach the award is not admissible in this action. In this forum the award is binding on the

parties, and no recovery can be had in this action beyond the amount therein ascertained.

On Motion to Remand.

After the court had rendered the foregoing decision in this case the counsel for the plaintiffs moved the court to remand the case into the state court from which it had been removed into this court. The court overruled the motion, for reasons stated in writing as follows:

The plaintiffs move the court to remand this case to the corporation court of the city of Lynchburgh, Va., from which it was removed into this court, for the reason that the petition filed in the state court for the removal of the case into this court does not show that this court has jurisdiction of this case; that it does not show that the defendant company is a citizen or subject of a foreign state. The allegation in the petition as to the citizenship of the defendant company is as follows:

"That your petitioner, the Scottish Union and National Insurance Company, resided at the time of the commencement of this action in the city of Edinburgh, Scotland, with its United States branch at Hartford, Conn., and was and is a nonresident of the state of Virginia; and said Scottish Union and National Insurance Company was at the commencement of this action, and still is, a citizen of Scotland, being a company duly chartered and incorporated under the laws of Great Britain."

Counsel for the plaintiffs contend that this statement is not sufficient to confer jurisdiction on this court; that it is not sufficient to show that the defendant company is a citizen or subject of a foreign country. Counsel contend that no person, whether natural or artificial, can be a citizen of Scotland; that Scotland is not a "foreign country" in the sense in which that term is used in the federal constitution and statutes; that a resident of Scotland may be a citizen of Great Britain; that the failure of the defendant company to allege in its petition that it is a citizen or subject of Great Britain is a failure to comply with the requirements of the statute; and that it is the duty of the court to stop proceedings in this case whenever this is shown, and to remand it to the state court.

Waiving the discussion as to whether the allegation that the defendant company is a citizen of Scotland is sufficient to show the jurisdiction of this court, we will consider the sufficiency, for this purpose, of the allegation that the defendant company "is a company duly chartered and incorporated under the laws of Great Britain."

In Steamship Co. v. Tugman, 106 U. S. 118, 1 Sup. Ct. 58, Mr. Justice Harlan, speaking for the court, said:

"A corporation of a foreign state is, for purposes of jurisdiction, to be deemed constructively a citizen or subject of such state."

Wilson v. Telegraph Co., 34 Fed. 561, was an action brought in a state court of California by a citizen of that state against the Western Union Telegraph Company, defendant. The case was removed into the United States court, and, on a motion to remand it to the state court, Justice Field, speaking for the court, denied the motion, and said:

"The plaintiff is a citizen of the state of California, and the defendant is a corporation created under the laws of New York, and is therefore to be deemed, for the purposes of jurisdiction, in the federal courts, a citizen of that state."

In Ayers v. Watson, 113 U. S. 595, 5 Sup. Ct. 641, Justice Bradley said:

"We see no reason, for example, why the other party may not waive * * * informalities in the petition, provided it states the jurisdictional facts; and, if these are not properly stated, there is no good reason why an amendment should not be allowed, so that they may be properly stated."

The court is of opinion that under the decisions in Steamship Co. v. Tugman, supra, and in Wilson v. Telegraph Co., supra, this court has jurisdiction of this case, and must retain it; that the statement in the petition that the defendant company "is a company duly chartered and incorporated under the laws of Great Britain" is such a statement of the jurisdictional facts; and the further fact that the policy on which the action is founded, and which is a part of the record in this case, names the defendant company as "the Scottish Union and National Insurance Company, incorporated by special act of parliament," conclusively shows, by presumption, if not expressly, that the defendant company is a citizen or subject of a foreign state, and, as such, has a right to invoke the jurisdiction of a federal court. And if the jurisdictional facts really exist, which is not denied, but are not properly stated in the petition, it might, according to the views of Justice Bradley in Ayers v. Watson, supra, be amended so as to properly state the jurisdictional facts; for it is not the statement made in the petition to the state court which gives the federal court jurisdiction, but that jurisdiction is conferred by the constitution and the act of congress, because of the jurisdictional facts as they really exist. But, under the authority of the cases cited above, the court holds that the citizenship of the defendant company is sufficiently stated in the petition to give this court jurisdiction; and it is not necessary to amend the petition at this late stage of the case, after the pleadings are made up, and a jury selected and sworn to try the issue joined. The motion to remand the case to the state court must be overruled.

BOARD OF COM'RS OF KEARNEY COUNTY v. McMASTER.

(Circuit Court of Appeals, Eighth Circuit. May 6, 1895.)

No. 538.

1. PRACTICE—QUESTIONS—REVIEWABLE ON ERROR—GENERAL FINDING.
   Where a court before which a case is tried without a jury makes a general finding, no errors in giving or refusing instructions asked for with a view to controlling such general finding can be reviewed on error. Searcy Co. v. Thompson, 13 C. C. A. 349, 66 Fed. 92, followed.
2. FEDERAL COURTS—JURISDICTION—CITIZENSHIP.
   The federal courts have jurisdiction of an action on county warrants made payable to certain payees or bearer, where the assignee of such warrants, who brings the action, is a nonresident of the state in which the county is situated, whether the payees named in the warrants were citizens of such state or not.

3. PLEADING—WAIVING EFFECT OF DEMURRER.
Where a demurrer to several separate defenses, contained in an answer, has been sustained, a stipulation that some of such defenses shall "remain as a part of said answer" cures any error that may have been committed in sustaining the demurrer to such parts of the answer.

4. COUNTY COMMISSIONERS—POWERS—KANSAS STATUTE.
Acting county commissioners appointed by the governor, pursuant to 1 Gen. St. Kan. par. 1577, have power to issue county warrants for the ordinary expenses of the county government. Coffin v. Kearney Co., 12 U. S. App. 562, 6 C. C. A. 288, and 57 Fed. 137, distinguished.

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

Samuel R. Peters (M. G. Kelso, Joseph W. Ady, and John C. Nicholson, on the brief), for plaintiff in error.

Frederic D. Fuller filed brief for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. This was a suit by J. S. McMaster, the defendant in error, against the plaintiff in error, the board of county commissioners of Kearney county, Kan., on 19 county warrants theretofore issued by the county which had been purchased by, and had been assigned to, McMaster by the original payees. The case was tried before the court on a written stipulation waiving a jury, and the finding by the circuit court in favor of the plaintiff was general, and not special. For this reason no errors assigned relative to the giving or refusal of instructions, which were asked with a view of controlling the general finding, are before us for review. Searcy Co. v. Thompson, 13 C. C. A. 349, 66 Fed. 92, recently decided by this court, and cases there cited.

The first question presented by the record which is open for review is whether the circuit court had jurisdiction of the case. The petition was demurred to on the ground that "the court had no jurisdiction of the subject-matter of the action," and the demurrer was overruled. It goes without saying that a demurrer based on such ground is not waived by subsequently pleading to the merits, wherefore it becomes necessary to decide whether this point was well taken. The petition showed that the plaintiff was a citizen and resident of the state of New York, and that the defendant was a municipal corporation created by the state of Kansas. The several causes of action sued upon were county warrants issued by the county, which had been assigned to the plaintiff, but they were made payable to the several payees therein named or bearer. Under these circumstances, it matters not, we think, whether the payees named in the warrants were or were not citizens of Kansas at the date of the several assignments. It has been held that, under the provisions of the act of March 3, 1887, as amended by the act of August 13, 1888, to correct the enrollment of the act of March 3, 1887 (25 Stat. 433, c. 866), the federal courts have jurisdiction of a suit by an assignee of such choses in action against the county issuing the same, when the assignee is a nonresident of the state; and this court has heretofore acted on the assumption, without, however, expressly deciding the point, that such cases are properly within the jurisdiction of the national courts under

the act of March 3, 1887, supra. Aylesworth v. Gratiot Co., 43 Fed. 350, 355. See, also, Wilson v. Knox Co., Id. 481; Holmes v. Goldsmith, 147 U. S. 150, 156, 13 Sup. Ct. 288; Thompson v. Searcy Co., 12 U. S. App. 618, 6 C. C. A. 674, and 57 Fed. 1030; Board v. Sherwood, 11 C. C. A. 507, 64 Fed. 103; Capital Bank of St. Paul v. School Dist. No. 26, 11 C. C. A. 514, 63 Fed. 938. It must be held, therefore, that the demurrer to the petition was properly overruled.

Another question, which is also presented for review by the record, is whether the circuit court erred in sustaining a demurrer to portions of the defendant's answer. The demurrer in question was addressed to the first, third, and fourth paragraphs of the pleading, each of which stated a separate defense, and it appears to have been sustained as to all of said defenses, but, by a stipulation filed by counsel before the trial, it was agreed, in substance, that the defenses stated in the answer, other than the defense pleaded in the fourth paragraph thereof, should "remain as a part of said answer, and that all of such allegations so remaining are considered as denied." The effect of the stipulation, which restored the defenses to the answer, obviously was to cure any error that may have been committed by the court in sustaining the demurrer, except in sustaining it as to the fourth paragraph, which was not thus restored by the stipulation.

The fourth paragraph of the answer pleaded, in substance, that Kearney county had no power to issue the warrants in suit, because, at the time they were issued, to wit, July 2, 1888, it was a newly-organized county, whose affairs were then being administered by a board of county commissioners and a county clerk appointed by the governor of the state pursuant to the provisions of a law of Kansas relative to the organization of new counties. 1 Gen. St. Kan. 1889, par. 1577. It was alleged that, because no election for county or township officers was held in Kearney county until July 21, 1888, the county was not organized for the purpose of issuing warrants for any purpose whatever; and that the acting board of county commissioners and the county clerk theretofore appointed by the governor under the provisions of the statute aforesaid, who issued the warrants in suit, acted wholly without authority of law in so doing. By sustaining the demurrer, the circuit court necessarily refused to adopt that construction of the statute. The act providing for the organization of new counties was under consideration by this court in the case of Coffin v. Kearney Co., 12 U. S. App. 562, 6 C. C. A. 288, and 57 Fed. 137. We held in that case that, by the express provisions of said act, the county was prohibited from issuing bonds, except for the erection and furnishing of schoolhouses, until one year after the organization of the county under the terms of the act; that is to say, until one year after the appointment by the governor of a county clerk and a board of county commissioners. But we fail to find any provision in the statute which thus restricts the power of the commissioners of a newly-organized county in the matter of issuing county warrants for the ordinary expenses of the county government. It must have been intended, we think, that the commissioners appointed by the governor should have the same power to administer the affairs of the county that is given to other boards of

county commissioners, except in those respects where limitations are placed upon their power, or are to be necessarily implied from the provisions of the act. As the circuit court remarked, in deciding the case at bar, if the temporary board of county commissioners provided for by the act relative to the organization of new counties is denied the right to contract any indebtedness in the name of the county, or to issue warrants as an evidence thereof, such board would be unable to carry out the purposes for which it was created. In the absence of any express provision contained in the act withholding the power to issue warrants, it must be held that the legislature intended that such boards should have the same power to issue warrants that is exercised by other boards throughout the state. No error was committed, therefore, in sustaining the demurrer to the fourth paragraph of the answer, which simply alleged, as before stated, that the county had not become fully organized. In the condition in which we find the record, the foregoing are all the questions that this court can review.

The judgment of the circuit court is therefore affirmed.

SALMON v. MILLS et al.

(Circuit Court of Appeals, Eighth Circuit. May 20, 1895.)

No. 545.

ATTACHMENT—SUFFICIENCY OF AFFIDAVIT.

In a statute which makes it ground for attachment that defendant has disposed of his property with the intent to cheat, hinder, and delay his creditors, or is about to do so with the same intent (Mansf. Dig. Ark. c. 9, § 309, subds. 6–8), the word "property" does not mean all the debtor's property, and hence there is no inconsistency in alleging in the affidavit for attachment that defendants have disposed of their property, and that they are about to dispose of the same.

In Error to the United States Court in the Indian Territory.

This was a suit by G. Y. Salmon against Abram Mills and Jackson Mills to recover judgment on two promissory notes. An attachment was levied upon certain property, and thereupon one C. M. Condon obtained leave to intervene, asserting that he was the owner of the attached property. The issue on the attachment was tried by jury, and found for the plaintiff. The court granted a new trial, and afterwards, on motion to vacate the attachment, held that the affidavit upon which the attachment was issued was insufficient. Plaintiff then moved to amend the same, which motion was denied. He thereupon brought the case on error to this court, which on February 1, 1892, reversed the judgment, with instructions to permit the plaintiff to amend the affidavit. 1 C. C. A. 278, 49 Fed. 333. The amendments were accordingly made, whereupon, on motion of defendant, the second and third grounds of attachment alleged therein were stricken out, and plaintiff was compelled to proceed to trial upon a single ground of attachment. This ground was not sustained by the evidence, and the attachment was accordingly dissolved. Plaintiff again brought the case on error to this court. Defendants heretofore moved to dismiss the writ of error on the ground that the judgment below was not a final judgment, but the motion was denied. 13 C. C. A. 372, 66 Fed. 32. The case has now been heard on the merits.

George E. Nelson filed brief for plaintiff in error.

Nelson Case (W. B. Glasse, on the brief), for defendants in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. This case was before this court at a former term, and is reported in 4 U. S. App. 101, 1 C. C. A. 278, 49 Fed. 333. Before the case was retried, G. Y. Salmon, the plaintiff in error, who was also the plaintiff in the trial court, filed an amended affidavit for an attachment, alleging therein the following grounds, to wit:

"First, that the above-named defendants are about to remove and have removed their property, or a material part thereof, out of the Indian Territory, not leaving enough therein to satisfy the plaintiff's claim or the claim of defendants' creditors; second, that they have sold, conveyed, and otherwise disposed of their property, and suffered and permitted it to be sold, with the fraudulent intent to cheat, hinder, and delay their creditors; third, and that they are about to sell, convey, and otherwise dispose of their property with such intent."

These are declared to be grounds of attachment by the Arkansas statute concerning attachments, which has been extended over and is in force in the Indian Territory. Mansf. Dig. Ark. c. 9, § 309, subds. 6–8.

The defendants moved to strike out the second and third grounds of attachment above stated because they were inconsistent and rendered the affidavit uncertain and misleading, which motion was sustained by the trial court. The plaintiff was thereupon compelled to proceed to trial on an affidavit which alleged but a single ground of attachment. The single ground of attachment not having been sustained by the evidence, the attachment was dissolved, and the case has been brought to this court on a writ of error. An exception was duly taken to the action of the trial court in sustaining the motion to strike out the second and third grounds of attachment, and its action in that behalf is the only error which we feel called upon to notice.

Counsel have attempted to sustain the action of the trial court by the contention that the word "property," as used in the affidavit and in subdivisions 7 and 8 of the Arkansas statute, supra, must be taken to mean all of the defendants' property, and that an affidavit which first alleges that a defendant has sold and conveyed his property with intent to cheat, hinder, and delay his creditors, and in the next sentence alleges that he is about to sell and convey his property with such intent, is necessarily inconsistent and self-destructive. The error in the argument consists in the assumption that the word "property," as used in the statute, means all of the debtor's property. If that is the correct construction of the statute, then it follows that an attaching creditor seeking to maintain an attachment on the ground that the debtor has sold and conveyed his property with intent to cheat, hinder, and delay his creditors must fail unless he shows a fraudulent sale or conveyance by the debtor of all his property. This is not a correct interpretation of the statute. A creditor is entitled to a writ of attachment if he succeeds in showing that the debtor has disposed of a portion of his property with the fraudulent intent of cheating his creditors. It was so held in Nelson v. Munch, 23 Minn. 229, and such is undoubtedly the general understanding of the profession in all of those states where a fraudulent sale or conveyance of property is

made a ground of attachment. Smith v. Baker, 80 Ala. 318; Drake, Attachm. (7th Ed.) §§ 101, 102, and cases there cited. A construction of the statute which would require an attaching creditor, in order to sustain an attachment, to prove a fraudulent sale or conveyance by the debtor of all his property, would render that clause of the statute concerning attachments of little practical value. It must be held, therefore, that the second and third grounds of attachment stated in the affidavit were neither inconsistent, uncertain, nor misleading. It may have been true that the defendants had sold and conveyed a portion of their property with intent to cheat, hinder, and delay their creditors, and that they were about to sell another portion of their property with the same intent. The plaintiff was entitled to an opportunity to prove either or both of these facts, to sustain the writ, and proof of either fact would have sufficed to sustain it. While it is to be regretted that a case of such long standing as the one at bar must be reversed the second time for the reasons above indicated, yet the error is of such nature that it cannot be disregarded.

The judgment of the lower court is reversed, and the cause is remanded to the United States court in the Indian Territory, with directions to vacate so much of its order made on January 31, 1894, as sustained the motion to strike out the second and third grounds of attachment contained in the affidavit for attachment on that day filed. And inasmuch as the record discloses that the original affidavit for attachment has been many times amended, and that numerous motions have already been made by the defendants either to strike out portions of the affidavit or to dissolve the attachment, it is further ordered that the retrial of the case be had on the last-amended affidavit for an attachment, which appears to have been filed on January 31, 1894, and that the plaintiff be allowed an opportunity to establish, if he can, either one or all the three grounds of attachment therein alleged.

UNITED STATES v. HARDEN.

(Circuit Court of Appeals, Second Circuit. May 28, 1895.)

CUSTOMS DUTIES—CLASSIFICATION—EMBROIDERED AND HEMSTITCHED HANDKERCHIEFS.

Hemstitched handkerchiefs composed of cotton or other vegetable fiber, and embroidered with only an initial letter, are not dutiable at 60 per cent. ad valorem as "embroidered and hemstitched handkerchiefs," under paragraph 373 of the act of October 1, 1890, but should be assessed at 50 per cent., under paragraph 349, as "handkerchiefs" simply.

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

This was an application by James Harden, importer of certain handkerchiefs, for a review of the decision of the board of general appraisers reversing the action of the collector of the port of New York as to the rate of duty imposed upon such merchandise. The

circuit court affirmed the decision of the board of general appraisers, and the United States appealed.

James T. Van Rensselaer, Asst. U. S. Dist. Atty., for the United States.

W. Wickham Smith, for importer.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. After October 1, 1890, James Harden imported into the port of New York sundry invoices of handkerchiefs composed of cotton or other vegetable fiber, which were hemstitched, and contained an initial embroidered thereon. The collector assessed the merchandise for duty at 60 per cent. ad valorem, as embroidered and hemstitched handkerchiefs, under paragraph 373 of the tariff act of October 1, 1890, which imposed that duty upon "embroidered and hemstitched handkerchiefs * * * composed of flax, jute, cotton or other vegetable fiber." The importers duly protested, and set forth in their protest that the goods were dutiable at 50 per cent. ad valorem, as handkerchiefs, under paragraph 349 of the same act, which imposed that rate of duty upon "handkerchiefs * * * composed of cotton or other vegetable fiber * * * made up or manufactured wholly or in part by the * * * manufacturer." Upon these protests, and other like protests by other importers upon this class and other classes of handkerchiefs, the board of general appraisers took a large amount of testimony, and found that at and prior to the passage of the act of October 1, 1890, the term "hemstitched and embroidered handkerchiefs" was a trade term, having a commercial meaning which excluded hemstitched handkerchiefs which were embroidered simply with an initial letter, and that this class of handkerchiefs is and was at the time of the passage of the act a separate and distinct class of goods from the one which the importers and large dealers were accustomed to designate as "hemstitched and embroidered." The record abundantly discloses that, in the speech of commerce, these goods, though embroidered with an initial, were not classified or regarded as embroidered. Apart from the question whether the term is or is not one of commercial designation, we agree with the circuit judge that the embroidery of a single letter upon the corner of the handkerchief is so limited in its extent and of such comparative narrowness as not to require that the handkerchiefs should be regarded as embroidered. The decision of the circuit court is affirmed.

WEBSTER v. BELL.

(Circuit Court of Appeals, Fourth Circuit. June 5, 1895.)

No. 118.

INTERSTATE COMMERCE—EXPRESS COMPANIES—LICENSE TAX.

An ordinance imposing a license tax upon "every express company having an office in the city of A., Va., and receiving goods, * * * and forwarding them to points within the state of Virginia, or receiving goods

* * * within the state of Virginia, and delivering them in the city of A.," is repugnant to the interstate commerce law, and is void.

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

This was an application for a writ of habeas corpus by Lewis McK. Bell, who claimed that he was illegally restrained of his liberty by James F. Webster, captain of the police force of the city of Alexandria, Va. The circuit court granted the writ, and discharged the relator. The respondent appeals. Affirmed.

This case comes up by way of appeal from the circuit court of the United States for the Eastern district of Virginia. Lewis McK. Bell was in custody of James F. Webster, captain of the police force of the city of Alexandria, under conviction before the mayor of that city for the violation of a city ordinance. The city of Alexandria, on 12th May, 1894, passed an ordinance containing the following provision:

"Sec. 49. On every express company having an office in the city of Alexandria, Virginia, and receiving goods, wares and merchandise, and forwarding them to points within the state of Virginia, or receiving goods, wares or merchandise within the state of Virginia, and delivering them in the city of Alexandria, there shall be levied and collected a license tax of $150. This ordinance shall be of force from its passage."

The United States Express Company, a joint-stock company under the laws of New York, is engaged as common carrier in the express business throughout many states of the Union. It has an office in the city of Alexandria, in which Lewis McK. Bell is the chief manager and agent. A part of the business of the company is transporting from other states into the city of Alexandria packages of goods, wares, and merchandise, and in delivering them in that city, and in receiving goods, wares, and merchandise in Alexandria, and transporting and delivering them elsewhere. All express packages sent from Alexandria elsewhere are forwarded to Washington, in the District of Columbia, and thence forwarded to their destination. Very many express packages so forwarded are destined for points in the state of Virginia, and are thus sent from Alexandria through Washington to those points in Virginia. The express company refused to pay this license tax. Thereupon the proceedings were instituted against Lewis McK. Bell, its manager and agent, under which he was convicted and was in custody as stated. An application was made for his release under habeas corpus before the circuit court of the United States; and, upon hearing the application, Bell was released from custody, upon the ground that the express company was engaged in interstate commerce, and that the ordinance in question was a regulation of interstate commerce, and so void. This is an appeal from this decree.

Samuel G. Brent and E. B. Taylor, for appellant.

John M. Johnson, for petitioner.

Before GOFF and SIMONTON, Circuit Judges.

SIMONTON, Circuit Judge (after stating the facts). Is this ordinance of the city of Alexandria a regulation of and a tax upon commerce between the states? There can be no question that a state, and municipal corporations within a state, acting under state authority, can impose a license upon all business conducted by common carriers within a state. W. U. Tel. Co. v. Texas, 105 U. S. 460; W. U. Tel. Co. v. Alabama State Board of Assessment, 132 U. S. 472, 10 Sup. Ct. 161; Postal Tel. Cable Co. v. City Council of Charleston, 153 U. S. 692, 14 Sup. Ct. 1094. But in the imposition of such tax the interstate business must be discriminated from the infra state business, or it must be made capable of such discrimination, so that it may clearly appear that the infra state business alone is taxed.

Ratterman v. Telegraph Co., 127 U. S. 411, 8 Sup. Ct. 1127; State Freight Tax Cases, 15 Wall. 232; Express Co. v. Seibert, 142 U. S. 339, 12 Sup. Ct. 250. Does the ordinance in question make such discrimination, or can such a discrimination be made under its terms? The tax is on every express company having an office in the city of Alexandria, and receiving goods, etc., and forwarding them to points within the state of Virginia. Receiving them from what points? Evidently from any quarter within or without the state, for the next sentence is "or receiving goods, wares and merchandise within the state of Virginia, and delivering them in the city of Alexandria." This is a description of the business taxed. It includes all the business of the express company, and on that business imposes a tax of $150. The tax is not confined to such business as it does within the state of Virginia, nor is any distinction made between the business done within the state and that done without the state. If the express company does any business within the state of Virginia, and has an office in Alexandria, and thus within reach of the taxing power, it is made to pay on the whole business of receiving and forwarding, from whatever points, the tax of $150. The distinction here drawn is illustrated in the case of Express Co. v. Seibert, supra. That case discussed the question whether an act of the state of Missouri taxing express companies was in conflict with the interstate commerce law:

"The act, after defining in its first section what shall constitute an express company, or what shall be deemed to be such in the sense of the act requiring such express company to file with the state auditor an annual report 'showing the entire receipts for business done within the state of each agent of such company doing business in this state,' etc., further provides that the amount which any express company pays 'to the railroads or steamboats within this state for the transportation of their freight within this state' may be deducted from the gross receipts of the company on such business, and the act also requires the company making the statement of its receipts to include as such all sums earned or charged 'for the business done within this state,' etc. It is manifest that these provisions of the statute, so far from imposing a tax on receipts derived from the transportation of goods between other states and Missouri, expressly limit the tax to receipts for sums earned and charged for business done within the state. This positive and oft-repeated limitation to business done within the state—that is, business begun and ended within the state—is evidently intended to exclude, and the language employed does exclude, the idea that the tax is to be imposed on the interstate business of the company."

The language used in the ordinance discussed in Postal Tel. Cable Co. v. City Council of Charleston, supra, is equally clear in its discrimination:

"Telegraph companies or agents each for business done exclusively within the city of Charleston, and not including any business done to or from points without the state, and not including any business done for the government of the United States, its officers and agents, $500."

The ordinance of the city of Alexandria makes no discrimination whatever between business done without and within the state; but, imposing a tax on the company if it has an office in that city, and if some of its business is between points in the state of Virginia, is repugnant to the interstate commerce law, and is void.

The decree of the circuit court is affirmed, with costs.

WERTHEIMER et al. v. UNITED STATES.

(Circuit Court, S. D. New York. May 9, 1895.)

CUSTOMS DUTIES—EMBROIDERED GLOVES—ACT OCT. 1, 1890.

Ladies' kid gloves, embroidered with more than three single strands or cords, are liable to a duty of 50 cents per dozen pairs, under the provision of paragraph 458 of the act of 1890, in addition to the other applicable rates therein specified, although such gloves may be commercially known as "three row embroidered" gloves. The words "with more than three single strands or cords," in paragraph 458, refer to the actual number of single strands or cords upon the glove, and not to any commercial designation thereof.

At Law.

Appeal by importers from decision of the board of United States general appraisers affirming the decision of the collector of customs at the port of New York in the classification for duty of certain ladies' kid gloves, embroidered, upon which the collector assessed an additional duty of 50 cents per dozen pairs, under the provisions of paragraph 458 of the act of 1890, and under the particular clause thereof reading: "On all embroidered gloves with more than three single strands or cords, fifty cents per dozen pairs."

The protest of Wertheimer & Co., importers, claimed that, while the gloves were embroidered, they were not embroidered with "more than three single strands or cords," and were not subject to such additional duty of 50 cents per dozen pairs. The evidence tended to show that gloves of this character were known in trade as "three row embroidered gloves." As a matter of fact, however, there were actually more than three single strands or cords on said gloves, although there were but three rows of embroidery thereon. Each of said rows of embroidery contained more than one single strand or cord.

On behalf of the United States, it was contended that this was a designation of the articles by specific and particular description, and referred only to their actual condition, and not to any commercial designation thereof, and, while these gloves might be known in trade as "three row embroidered gloves," as a matter of fact they had upon them nine single strands or cords, or three single strands in each row of embroidery.

W. Wickham Smith, for importers.

Henry C. Platt, Asst. U. S. Atty., for the United States.

TOWNSEND, District Judge (orally). It appears that the board of general appraisers classified the gloves in question for duty according to the actual number of single strands or cords on each glove. It has not been proved that there is any established commercial designation by which such gloves are known which conflicts with such classification; and the decision of the board of general appraisers is therefore affirmed

---

UNITED STATES v. FRANKEL et al.

(Circuit Court, S. D. New York. June 3, 1895.)

No. 2,152.

CUSTOMS DUTIES—DIAMONDS—ACT AUG. 28, 1894.

Diamonds, cut but not set, *held* dutiable at 25 per cent. ad valorem, under paragraph 338, Act. Aug. 27, 1894, as "precious stones of all kinds, cut but not set," and not free of duty, under paragraph 467 of said act.

The word "diamonds," in the latter paragraph, *held* to cover only "miners', glaziers', and engravers' diamonds not set," and to be only a heading to that paragraph, and restricted to the particular diamonds therein enumerated.

At Law. Appeal on behalf of the United States from decision of the board of United States general appraisers reversing the decision of the collector. Reversed.

J. Frankel's Sons imported on September 15, 1894, certain diamonds, cut but not set, upon which the collector assessed a duty of 25 per cent. ad valorem, under paragraph 338. Importers protested, claiming all diamonds to be free, under paragraph 467.

Henry C. Platt, Asst. U. S. Atty., for the United States.

W. Wickham Smith, for importers.

TOWNSEND, District Judge (orally). The articles in question in this case are diamonds, cut but not set, imported September 15, 1894, They were assessed for duty by the collector of customs at the port of New York at 25 per cent. ad valorem, under paragraph 338 of the act of August 28, 1894, which reads as follows:

"338. Precious stones of all kinds, cut but not set, twenty five per centum ad valorem; if set, and not specially provided for in this act, including pearls set thirty per centum ad valorem; imitations of precious stones, not exceeding an inch in dimensions, not set, ten per centum ad valorem. And on uncut precious stones of all kinds, ten per centum ad valorem."

The importers protested, claiming that the diamonds were free of duty, under paragraph 467 of the free list of said act, which reads as follows:

"467. Diamonds; miners', glaziers', and engravers' diamonds not set, and diamond dust or bort, and jewels to be used in the manufacture of watches or clocks."

The board of general appraisers were of the opinion that congress did not intend to place the diamonds in question on the free list, but, for certain reasons stated in their opinion, they reversed the decision of the collector and held that said diamonds were entitled to free entry under said paragraph 467. From this decision the United States appeals.

It is admitted that the articles are "diamonds cut but not set," and that they are "precious stones." The position of the word "diamonds" at the head of paragraph 467 in the free list, printed in the same type as the rest of the paragraph, and followed by a semicolon, of itself raises a presumption that congress thereby intended to place all diamonds upon the free list. The rest of said paragraph, and the language of paragraph 338, forcibly suggest a contrary intention. It has therefore been found necessary to examine the general plan of the whole act, and the punctuation, type, and language thereof.

It appears that in said act congress frequently placed at the beginning of a paragraph the general name or description of articles specifically named therein merely as a heading to such paragraph, and for no other purpose. In some of these instances the type and punctuation are the same as in paragraph 467. It also appears

that it is a part of the general plan of the act to arrange articles and their subheadings in alphabetical order. It further appears from an examination of the whole statute that congress could not have intended to make all diamonds free of duty under said act. Irrespective of the history, and admitted object of said statute to increase duties on luxuries, and reduce duties on necessities, the language of paragraph 338 is most significant upon this point, as showing the legislative intent. It not only provides for a duty of 25 per cent. ad valorem upon precious stones of all kinds, cut but not set, but also provides for a duty of 10 per cent. ad valorem on uncut precious stones of all kinds, and on imitations of precious stones. The second section of said act reads as follows:

"On and after the first day of August, eighteen hundred and ninety-four, unless otherwise provided for in this act, the following articles, when imported, shall be exempt from duty."

If, therefore, diamonds are otherwise provided for in said act, they would not be included in the free list. The phrase, "precious stones of all kinds, cut but not set," not only concededly covers diamonds, but is a specific provision, and the only provision, for "cut" diamonds. The counsel for the government strenuously contends that the phrase, "precious stones, cut but not set," is a more specific description of these diamonds, cut but not set, in the condition in which they are imported, than the single word "diamonds" in the free list. In that event the more specific appropriation must control. Magone v. King, 1 U. S. App. 267, 2 C. C. A. 363, 51 Fed. 525. It is further to be borne in mind that paragraph 338, in terms, covers precious stones "of all kinds." If it were intended by the use of the word "diamonds" in paragraph 467 to make all diamonds free, as is contended by counsel for the importer, then miners', glaziers', and engravers' diamonds, when set, would be free of duty. But it is manifest that congress could not have intended this result, because, by the express language of said paragraph, such diamonds are only free of duty when not set. And, finally, if the word "diamonds" in paragraph 467 was anything more than a subheading, there would have been no necessity of adding thereafter, in the same paragraph, the different kinds of diamonds, such as miners', glaziers', and engravers' diamonds. No sufficient reason has been suggested why, if all diamonds were to be free, congress should have specifically provided for miners', glaziers', and engravers' diamonds, cut but not set. I therefore am of the opinion that congress did not intend by the act of August 28, 1894, to admit diamonds free of duty, but that a consideration of the general plan and arrangement of said act, and a comparison of the foregoing provisions, show a plain intent to impose a duty of 25 per cent. on diamonds cut but not set. The decision of the board of general appraisers is reversed.

STUART v. SMITH.

(Circuit Court, S. D. New York. April 16, 1895.)

COPYRIGHT—INFRINGEMENT—INJUNCTION AGAINST OFFICER OF CORPORATION.

In a suit against one S. for an injunction against infringement of a copyright and for an accounting, it appeared that S. was the president and general manager of a corporation, financially responsible, by which, if at all, the infringement had been committed, contrary to the instructions of S., which corporation was not a party to the suit. *Held*, that S. should not alone be held personally responsible for the alleged wrongful acts, merely because he was an officer of the corporation, and that the bill should be dismissed. Linotype Co. v. Ridder, 65 Fed. 853, followed.

This was a suit by Ruth McEnery Stuart against Orlando J. Smith for infringement of a copyright. The cause was heard on the pleadings and proofs.

A. T. Gurlitz, for complainant.
Rowland Cox, for defendant.

TOWNSEND, District Judge. This is a final hearing on a bill alleging infringement of copyright, and praying for an injunction and an accounting. A preliminary injunction was granted November 18, 1893. Two motions to vacate the same have been denied. The complainant is the author of a story originally entitled "Carlotta di Carlo," the title of which was afterwards changed to "Carlotta's Intended." The defendant is the president and general manager of the American Press Association, a corporation which is engaged in furnishing matter in stereotype plate and syndicate form to a large number of newspapers throughout the United States. It is not necessary now to consider the circumstances in which the defendant claims that said press association acquired the right to publish said story, nor the proposed use thereof. Such right, if any, depends upon the construction to be given to a certain contract between the complainant and the J. B. Lippincott Company, which sold said story to said Press Association. The J. B. Lippincott Company is the publisher of Lippincott's Magazine. The complainant first sent her story to the editor of said magazine. Thereupon he called upon her, asked her to enlarge it, so that it might be used as the initial story in his magazine, and agreed to pay her $300 therefor. Afterwards he sent her a check for said sum, and inclosed therewith the following letter and receipt:

"Lippincott's Monthly Magazine.

"Philadelphia, Feb. 27th, 18—.

"Mrs. R. McE. Stuart—Dear Mrs. Stuart: I send herein check for three hundred dollars ($300.00) in accordance with our agreement, which is in payment for the manuscript 'Carlotta di Carlo,' on receipt of which kindly send me receipt as indicated below. We send the manuscript back to you by express, prepaid, for the purpose of your incorporating in it the parts which you said you had previously taken out. In its present shape, I am afraid it will be too short a story for the purpose for which we desire to use it, and if you could add, say a few thousand words, without affecting it disadvantageously, we should like you to do so. The name, of course, you will remember, we have concluded to change, so please suggest some that you think appropriate.

"Yours truly, J. M. Stoddart."

"New York, March 2d, 1891.

"Received of J. B. Lippincott Company the sum of three hundred dollars ($300), which I acknowledge to be in full payment of all rights, title, and interest, in this country and abroad, of the story of which I am the author, entitled 'Carlotta di Carlo,' the name of the same to be changed hereafter. I hereby agree that the J. B. Lippincott Company may publish this in any form without further recompense to me. Ruth McEnery Stuart."

The complainant signed and returned the receipt, and the story was copyrighted, and published in said magazine. Afterwards she wrote said editor, asking to recover her copyright, and in response received an assignment thereof to her. Prior to said assignment the Lippincott Company had sold said story to said American Press Association, which prepared plates of said story, printed 6,000 copies of sample sheets thereof, with other stories, under the title of "Novelettes," and offered to sell the plates for publication in installments to its newspaper patrons throughout the United States.

Counsel for defendant claims that the foregoing receipt fairly states the contract between the parties, and that by said contract the Lippincott Company, the assignor of said press association, acquired a perfect title in law and equity to said copyright. Complainant denies that said receipt states the contract between the parties, and claims that when the editor of Lippincott's Magazine called on her it was agreed that she should enlarge said story, and change its title, for the express purpose of having it published as the initial story in one number of said magazine, and for no other purpose; and that for that reason she accepted a much lower price than she would otherwise have done. In view of the conclusions reached, I shall not review at length the evidence upon this point. If it were necessary to the decision of the question, I should incline to hold that the parties have put a practical construction upon the contract by which the assignment was limited, as claimed by complainant. My reasons for this are as follows: The negotiations and correspondence were carried on between complainant and the editor of Lippincott's Magazine, as its editor and manager only. The story was modified for the express purpose of adapting it for publication in said magazine. The repeated assertions by complainant in her letters to said editor that there was no agreement to part with her copyright were not denied by him. The copyright was reassigned to her without consideration, at her request, without mention of its sale, or claim of further right therein. The language of the receipt, prepared by said editor, "I hereby agree that the J. B. Lippincott Company may publish this in any form without further recompense to me," would be mere surplusage if the prior language were intended as an absolute assignment. In these circumstances, in view of this practical construction of the contract by the parties, the receipt may fairly be so interpreted as to harmonize with the claim of complainant as to their original understanding. The testimony of said editor shows affirmatively that he negotiated on behalf of the magazine only, and fails to satisfactorily show that he disclosed any intention to use the article for any other purpose.

The exhaustive briefs of counsel for defendant contain several defenses, only one of which will be considered, as it alone appears to be

fatal to complainant's claim. The answer alleges, and the evidence shows, that said American Press Association, of which the defendant is president, is a corporation. There is no question as to its financial responsibility. It has not been joined as a party defendant in this suit. The evidence shows that the alleged infringing acts were committed by said corporation, contrary to the express instructions of defendant, and without his knowledge, and that the first intimation he had that said story had been published by said corporation was when he was served with the papers in this case. In these circumstances it would be contrary to the well-settled rules of equity to hold this defendant alone personally liable for such wrongful acts, merely because he was an officer of said corporation. Ambler v. Choteau, 107 U. S. 586, 1 Sup. Ct. 556; Howard v. Plow Works, 35 Fed. 743; Cahoone Barnet Manuf'g Co. v. Rubber & Celluloid Harness Co., 45 Fed. 582. This question is considered, and the cases bearing thereon are collected, in Linotype Co. v. Ridder (recently decided by me) 65 Fed. 853. Let the bill be dismissed.

SINGER MANUF'G CO. v. SCHENCK.

(Circuit Court, S. D. New York. May 22, 1895.)

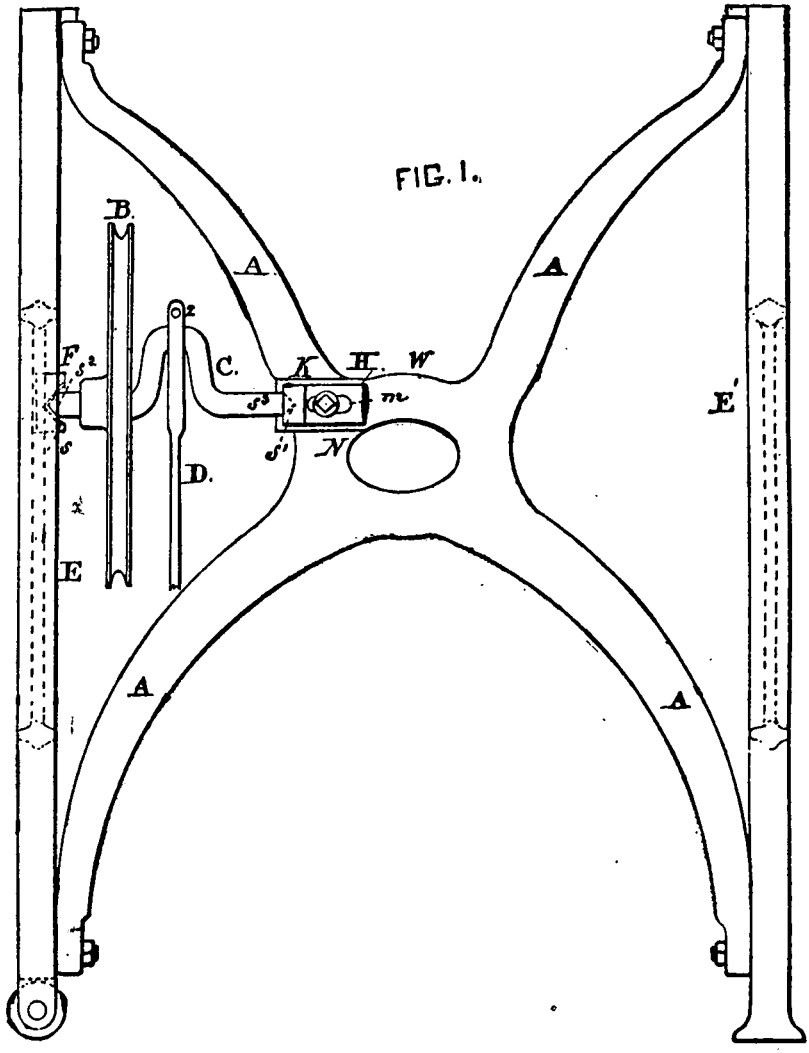
1. PATENTS—PRIOR USE—ADMISSIBILITY OF EVIDENCE.
   Affidavits made by witnesses more than 10 years before the hearing, in respect to the details of construction of a machine which they had not seen for nearly 20 years prior to the date of the affidavits, are not admissible as evidence, when, after reading the same, the witnesses disclaim any present recollection of the features of the machine, and merely say that, if they swore to the affidavits, they were true.
2. SAME—PRIOR USE—EVIDENCE.
   The defense of prior use cannot be sustained upon the testimony of witnesses who attempt to describe the details of a machine from memory after the lapse of nearly 30 years, where their statements are vague, uncertain, and contradictory. To sustain the defense, the evidence in support of it should be so strong as to exclude every reasonable hypothesis that the structure was of an experimental and tentative character.
3. SAME—SEWING MACHINES.
   The Miller and Diehl patent, No. 224,710, for an improvement in band-wheel bearings for sewing machines, *held* not invalid on the ground of prior use, and *held* infringed.

This was a bill by the Singer Manufacturing Company against Allen Schenck, president of the New Home Sewing-Machine Company, for alleged infringement of a patent relating to an improvement in sewing machines.

This action is founded upon letters patent No. 224,710, granted February 17, 1880, to the complainant, as assignee of the inventors, Miller and Diehl, for an improvement in band-wheel bearings for sewing machines.

The specification states as follows: "The object of our invention is to do away with the rattling of the band wheel and to reduce the friction, also to simplify and condense the parts, lessening the cost and avoiding the complications of the anti-rattling journals in use. * * * On band wheels as formerly constructed, having a bearing on a stud, the pitman was applied outside the bearing, causing a side or jamming movement and excessive wear and lost motion. In our improvement the power is applied at the center, and the pressure is always directly upon the bearings, so that there is no tendency to a side or jamming motion, and the friction and wear are consequently re-

duced to the least amount. The crank is supported at one end by the central brace, and at the other end by one of the side pieces of the frame. By this arrangement a great advantage is obtained, as the crank presses down in direct line both upon the side of the frame and upon the central brace, thereby equalizing and distributing the weight throughout the entire frame without any lateral pressure whatever or any tendency to sag or break the side piece, E, or to rack the frame when the machine is in operation. The crank also is thus very much shorter than if extended the whole length of the frame as formerly, and the cost, friction, and wear are proportionally reduced. The bearings also being conical instead of straight, the end play of the crank is prevented, and an adjustment for wear and lost motion may be readily made by means of a set-screw on the central brace or on the side piece, or on both the central brace and the side piece, or by the use of an adjustable lug or bearing upon the central brace or the side piece, substantially as at H, Fig 1."



The first and second claims only are involved. They are as follows: "(1) In the frame of a sewing machine, the central brace, A, as a support or bearing for one end of the crank, C, operating either in direct contact with the said central brace, A, or connected therewith by means of an adjustable lug or bearing, substantially in the manner and for the purposes described. (2) In the frame of a sewing machine, the crank, C, having the conical bearings s s^1 s^2 s^3, in combination with an adjustable lug or bearing on the central brace, A, or on the side piece, E, substantially in the manner and for the purposes described."

The defenses are noninfringement, if the claims are narrowly construed, and anticipation by a structure made by one J. E. Burdge, of Cincinnati, Ohio, prior to 1864.

Livingston Gifford, for complainant.
John Dane, Jr., for defendant.

COXE, District Judge (after stating the facts). The important question in this cause is whether or not the invention is anticipated by the Burdge structure alleged to have been made about 30 years ago. This was the principal question discussed at the argument, and, although other defenses are suggested in the defendant's brief, there can be little doubt that the complainant is entitled to a decree if the Burdge defense is removed from its path. Invention is established and infringement is hardly disputed. The Burdge machine is said to have been invented by Jonathan E. Burdge some time during the war of the Rebellion and prior to 1864. The burden of establishing this defense rests heavily upon the defendant; it must be proved beyond a reasonable doubt. The wisdom of this rule was never more apparent than in the present case. The difficulty, if not the impossibility, of procuring accurate oral testimony regarding commonplace events occurring 30 years ago, is obvious to all. The exhibit "Burdge Sewing-Machine Stand" was used for many years as a flower stand in the dooryard of J. E. Burdge at Home City, near Cincinnati. When resurrected for the purposes of litigation it was merely an iron frame consisting of two side pieces connected with a saw-buck brace. Between one of the legs and the brace there was a crank shaft with a U-shaped crank, one end being mounted in a boss cast upon the machine leg and the other in an adjustable bearing screw which was held in place by a lug screwed to the cross brace. This was all. There was no table, treadle, pitman, band wheel or band. Some boards had been laid over the iron frame, and for many years it had stood outdoors as a stand for flower pots. If this structure were ever used in connection with a sewing machine, it must have been prior to or during the early part of 1864. No one pretends to have seen it so used after that date.

The testimony offered upon this issue is exceedingly voluminous, but it will only be necessary to state generally the reasons for the conclusion reached. Affidavits made in 1883 by two of the defendant's witnesses, Olive Burdge and James Skardon, were offered in evidence under objection. These affidavits were clearly inadmissible. Assuming that papers made 20 years after the event can in any view be used to refresh the recollection of a witness, these affidavits certainly could not be so used, for both witnesses disclaimed any present recollection of the important features of the Burdge machine

even after reading the affidavits. All they could say was that if they swore to the affidavits they were true. When they testified in this cause their minds were blank upon all important matters in controversy. There is no theory upon which the affidavits are competent. Without them the testimony of the witnesses is too indefinite and uncertain to sustain any finding of fact. Mrs. Martha Cole, another of defendant's witnesses, was shown the "Burdge Sewing Stand," and was asked when before she had seen a stand of the same construction. Her answer was, "I recognize the stand as the same one we had at home during the war." It is not pretended that she had the identical stand. What she meant was that she had one of the same construction. Mrs. Cole's mother did have a Burdge sewing machine during the war, but Burdge took it back in less than a year for nonpayment of the purchase money, and the witness never saw it thereafter. Mrs. Cole was between 13 and 14 years of age when the machine was at her home. Her attention was not called to the feature here in controversy, and all she was able to say was that the stand shown her in 1892 was of the same character as the stand seen by her 30 years before. Of course this proves nothing. Even had her attention been called to the crank shaft, and she had testified that it was like the crank shaft of her mother's machine, it would have been entitled to little weight. It is doubted if a single sewing woman in the country can recall the minute details of the driving gear of a sewing machine which she has not seen for 30 years. That part of the mechanism above the table to which her attention is constantly called she might possibly remember, but the particular construction of the crank shaft and its bearings would make only a fleeting impression on her mind. The probability is that she would not examine it at all, and if she did she would not retain such distinctions as we are here dealing with in her mind for a single day. Mrs. Cole says nothing that aids the defendant; the circumstances were such that she could say nothing. Human memory is incapable of performing such miraculous feats. Let any one skeptical on this subject test it by attempting to describe the details of construction of a complicated machine to which his attention was never particularly called and which he has not seen since 1865. No matter how retentive is his memory, he will probably find that certainty and accuracy are simply out of the question.

This leaves the Burdge prior use to depend upon the testimony of one witness—William M. Burdge, a son of the alleged inventor. The considerations to which allusion has just been made apply to this witness as well. If the court is to overthrow a patent upon the testimony of a single witness as to events happening 30 years ago he should be a witness in whose word the court can place implicit reliance. If for any reason the court is in doubt as to the truth of his testimony the defense must fail. The court is now in doubt, and the reasons therefor may be summarized as follows:

First. The witness was but 16 or 17 years of age when he worked at his father's shop, and he was only there about a year. For the reasons already stated, it is hardly possible, in such circumstances, that minute details can be accurately remembered. Indeed, the sit-

uation in this regard cannot be stated more fairly than by the witness himself. He says: "Of course, I assisted on all the machines, and I can't recollect one part any more than another unless the part were shown me to refresh my mind." And, again: "I cannot remember every detail of every or any one machine that was built thirty years ago, when I was about seventeen years of age."

Second. There are numerous contradictions and admitted errors in his testimony. These are not more numerous than would be expected in the testimony of any witness who attempted to describe a machine which he had not seen for 30 years, but they demonstrate how unreliable his memory is. For instance, how can the court find that he is right as to the crank shaft when he is clearly wrong as to the treadle rod?

Third. There is evidence inherent in the stand itself that it was never anything more than an experiment. There is no band wheel. This wheel has to be fitted on the crank shaft before the shaft is mounted in the bearings. If a wheel were ever on the shaft where is it? It could hardly have been broken off without leaving the hub at least. If the machine were dismembered, what possible reason could there be for carefully replacing the shaft in its bearings? The inference that the structure was an experiment is surely as plausible as that it was an operative machine.

Fourth. The presumption that it was never a completed machine may be drawn also from the following facts: The treadle was absent, and there was no hole in which to insert the pin which holds the treadle to the rod. There was no table and no marks indicating that the machine had been used. There was a hole on the left leg directly opposite the boss on the right leg, indicating that a crank shaft running clear across from leg to leg had first been used. There is also the presumption that if the machine had been made for sale the lug would have been cast on the brace, and not made of wrought iron and screwed to the brace.

Fifth. The brace and the adjustable bearing for one end of the crank shaft were improvements which made their appearance in the art after 1865. It is most unlikely that one man in 1863 should have hit upon a stand combining so many valuable features which were produced by the evolution of the art during a series of years by different inventors at different times and places. If these things were well known in 1863, is it probable that they would have lain dormant for half a dozen years? If the experiment were made in the 70's the appearance of these features would be natural enough, but their appearance in 1863, when the art was yet in its infancy, is certainly extraordinary. A structure which anticipated so many inventions would have been put to some nobler use than as a stand for flowers.

Sixth. Burdge can hardly be called a disinterested witness. He contradicts himself and is contradicted by others upon many material points. None of the parties to whom he says machines were sold have been found, and persons who would naturally know of the machines if they had existed never heard of them.

Many other considerations of a similar character tending to cast

suspicion upon the alleged prior use might be alluded to, but it is unnecessary to pursue the subject further. Enough has been said to demonstrate the proposition that the proof in support of defendant's contention is vague, uncertain and contradictory. It fails to carry conviction to the mind; difficulty is encountered at every turn.

The court approached this defense with every inclination to treat it with the utmost fairness. When, however, all has been said in its favor, there is still the ever-present doubt as to its verity. There is still the conviction that the court cannot be sure that a completed operative machine like the exhibit was made by Burdge prior to 1864, or that such a machine was ever made by him. The flower stand is a certainty; all else is uncertain. When, where, by whom and for what purpose the crank shaft was placed on the stand is conjectural. The moment the realm of speculation is entered several theories suggest themselves at least as plausible as that advanced by the defendant. In order to sustain this defense the court must find that the evidence offered in its support is so strong as to exclude every reasonable hypothesis that the structure was of an experimental and tentative character. Can the court find upon this proof that the Burdge flower stand was ever a part of a completed machine? Can it say this beyond a reasonable doubt? It is thought not. No authority has been found where a patent has been defeated upon proof so vulnerable. Something more than probability, certainly something more than possibility, is needed to anticipate a patent.

It is unnecessary to discuss the point suggested at the argument, because upon examination I am convinced that the structure when discovered as a flower stand had not reached such a point of completion as to warrant the inference which might, possibly, be drawn had some of the more important missing parts been present.

It follows that the complainant is entitled to the usual decree.

ROCKER SPRING CO. v. THOMAS.

(Circuit Court, N. D. Ohio, E. D. May 31, 1895.)

No. 5,187.

1. PATENTS—ANTICIPATION.

Patent No. 354,043, issued to Connolly, December 7, 1886, for "spring attachment for rocking chairs," the principal feature of which is the use of spiral or coil springs to connect the base and rocking part of a platform rocking chair, located at opposite sides of the chair center, and in the center of the oscillation of the chair seat, and rigidly connected to such parts, was not anticipated by patent No. 185,501, issued to the same, December 19, 1876, for an improvement in tilting chairs, described as intended to provide a chair furnished with a spring which will afford an elastic or yielding support for the seat, and which will at the same time permit such seat to be tilted or rocked according to the inclination of the occupier's body and limbs, and the essence of which consists in the application or employment of a spiral spring in such a manner as will afford a support to the seat, being compressed fully or in part when such seat

is occupied, and opening and expanding on one side whenever the latter is tilted or rocked, etc.

2. SAME—INFRINGEMENT.

Patent No. 354,043, issued to Connolly, December 7, 1886, for "spring attachment for rocking chairs," the principal feature of which is the use of spiral or coil springs to connect the base and rocking part of a platform rocking chair, located at opposite sides of the chair center, and in the center of the oscillation of the chair seat, and rigidly connected to such parts, but under the claims for which the springs could be applied to any part of the chair where their function could be properly used, is infringed by a platform rocking chair with springs applied directly to the rocker and to the base.

In Equity.

Banning & Banning and M. D. Leggett, for complainant.
M. G. Norton, for defendant.

RICKS, District Judge. This is a bill filed by the complainant to establish the validity of letters patent No. 354,043, which was entitled a patent "for spring attachment for rocking chairs," dated December 7, 1886. The original application for said patent was filed on the 30th day of July, 1880. The complainant avers that the defendant is infringing this patent, and asks for an injunction and an account of profits and damages. The complainant claims title to this patent by assignment from M. Daniel Connolly and Thomas A. Connolly. The same inventors were granted an original patent, No. 185,501, dated December 19, 1876, application for which was filed February 19, 1876. Said original patent covered an improvement in tilting chairs. That invention was described as follows:

"The aim and intent of the improvements herein described are to provide a chair furnished with a spring which will afford an elastic or yielding support for the seat, and which will at the same time permit said seat to be tilted or rocked according to the inclination of the occupier's body and limbs. The essence of the invention consists in the application or employment of a spiral spring in such a manner as will afford a support to the seat, being compressed wholly or in part when said seat is occupied, and opening or expanding on one side whenever the latter is tilted or rocked. * * * The spring thus located forms a yielding or elastic support for the seat, and also permits the rocking of same in any direction from side to side, as well as front and back, facilitating by its tendency to contract or coil the return of said seat to a horizontal or approximately horizontal line after being tilted."

This patent related solely to tilting chairs. In its specifications and claims it is very clear that the spring described was fastened at the center pivot, and was intended to give the chair a tilt. It was soon discovered that this tilt was accompanied by a lateral motion neither comfortable nor safe. Stops and side supports were supplied to remedy this evil. On July 30, 1880, application was filed by the same inventors for letters patent for a spring attachment to rocking chairs, which is the patent now sued upon and in controversy.

The main defense which I deem it necessary to consider in view of the conclusion reached is that this patent was invalid for the reasons:

"(1) That it contains nothing new, and does not describe an invention as shown by the state of the art. (2) That the evidence of the defendant's ex-

pert conclusively shows that said patent contains nothing new, and does not describe an invention, and is not intended for, nor is it applicable to, a platform rocking chair, but is restricted by the claims, specifications, and drawings to a tilting chair. (3) That if an invention is described by the patent in suit, it is but an improvement on patent No. 185,501 by the addition of stops and side supports, or the so-called 'rockers,' E and F, and an extra spring for the purpose of preventing lateral movement resulting from the use of the single spring described in said patent, and is only applicable to a tilting chair constructed specifically in accordance with said patent No. 185,501; and that this is shown both by the file wrapper and the evidence of one of the patentees, Thomas A. Connolly, taken in this case."

It appears from the patent No. 354,043 that, though the original application was filed on July 30, 1880, the patent was not granted until December 7, 1886. This long period of delay in the patent office was occupied quite diligently by the patentees in what seems to me, after a full reading of the file wrapper and contents, to have been an effort to extend the original Connolly patent of 1875 to apply to rocking chairs. After a great many withdrawals, claims, disallowances by the examiner, and amendments by the patentees, the specifications and claims were quite different from those originally set forth. During all this correspondence and proceeding the effort of the patentees was clearly to extend the patent aforesaid so as to embrace rocking chairs. Did they succeed in accomplishing this? In the letters patent in suit the inventors said:

"The object of our invention is to provide a chair consisting of a seat having rockers secured to its under side and a base having a lower support for said rockers, with two connecting springs, which shall be of sufficient strength and tension to securely connect the base and seat parts together and hold the rockers in form alignment with their lower support, so as to prevent the said rockers from slipping forward and backward or sidewise thereon. The two connecting springs are to be placed and secured in or near the center of oscillation, and at off-center points,—that is, at the sides of the chair center, instead of its front or rear,—and to prevent the springs bending or rubbing the edges of the boxes forming the rockers should be a somewhat greater distance apart than the sum of the two diameters of the two springs. The springs are arranged with their longitudinal axes vertical and their ends rigidly attached to the seat and base parts of the chair, so as to hold the rockers in their proper relative position; and by their resisting the rocking motion in one action or direction and assisting it in the other an easy, comfortable, and agreeable motion is produced, closely resembling that of an old-fashioned rocking chair, and wholly different from the abrupt jerk of a pivoted tilting chair, and the swaying motion produced in a seat oscillating on long plate springs. The two springs, arranged as described, constitute the connection between the seat and base parts of the chair for holding the rockers and their lower support in alignment and proper relative position."

The whole intent and purpose of this invention, as set forth in the specifications and drawings accompanying both the patent in suit and those of the original application, show that, though the chair tilted on rockers, these rockers were connected with the bottom of the chair and with the lower base in such a way that from the outside view, at least, the chair presented the appearance of an ordinary tilting chair turning on a pivot. And that was at that time evidently the purpose of the inventor, because he described the location of the two springs as being at "off-center points," and at opposite sides of the "chair center," describing the distance from

each other to be such as would necessarily locate them within the space usually allowed for springs in a rocking chair constructed on a pivotal principle. This arrangement of the springs and of the rocker so located as to produce a comfortable movement backward and forward, and to prevent any lateral motion, obviated the noise and uncertain movements of the single spiral spring or of the other appliances that had been previously used. I refer particularly to the use of rubber bands or ligaments, the long, slender, coil springs, and the flat, steel springs. The patent office, after this long hearing upon the application for a divisional patent, allowed the claims and specifications as set forth in the patent in suit. During such proceedings the inventors made several amendments to their specifications and claims. In one of these earlier amendments the device was claimed to apply to "oscillating or tilting and revolving chairs." In another amendment it was made to apply to an "oscillating chair," and in 1884 an amendment claimed it to apply to a "tilting or rocking chair." In October, 1884, by the appeal then decided, the words used were "the combination in a tilting or rocking chair," and "no reference was afterwards cited "requiring any qualification or limitation in this respect." In April, 1886, an amendment was finally made broadening the language, leaving out the descriptive words, and using the word "chair," claimed explicitly to be "generic and broad enough to cover either a tilting or rocking chair." The object thus sought to be accomplished during all these proceedings was to apply this device to platform rocking chairs. There can be no mistake as to the purpose of the inventors, or that their notification to the patent office in the several arguments and amendments submitted was sufficiently explicit to advise the examiner of the purpose they had in view. For example, in the argument submitted October 1, 1885, the solicitor for the petitioner says:

"The present claims, as well as the claims of the original application, are understood and intended as covering this form of attachment when used in platform rocking chairs, strictly and technically, as well as when used in ordinary tilting chairs; and the claims of the main application were so used by the former examiner, as well as the examiners in chief."

The examiner thereupon insisted that the previous statements made by the applicant that the stops, the relation of the size of the springs to the size of the box, the spider, and the fact that the rocker boxes were made of metal, were omitted from the latest substitute specification, and suggested that these features should be included. In reply to this, however, the applicants expressly refused to do so, and said:

"The intentional and deliberate omission of these words from the claims will, of course, prevent any construction limiting the use of the invention to a chair having the rockers secured to the seat part by a spider. Instead of this, these claims are still intended and understood as covering a chair in which the rockers are secured in any ordinary way,—as, for instance, in platform rockers; and in substance the same is true in reference to the insertion relating to the width or distance apart of the rockers, this being merely intended to show that the rockers must be wider apart than the springs, so as to be on the outside thereof."

This was a distinct affirmation that the inventors did not intend to limit their device to a chair "having the rockers secured to the seat by a spider." This was an important declaration as to its scope, for it permitted a construction that the chair seat might be secured to the rockers otherwise than by a spider. This would enlarge the claim as to the points at which the springs might be attached to perform their function of holding the rocker and base to an alignment, and make it within a fair construction of the patent to use the springs by attachment directly to the rockers.

By these proceedings, extending over a period of several years, it is claimed that the inventors, with full notice to the patent office, gradually broadened their claim and their invention to cover the use of short, stiff spiral springs to the ordinary platform rocking chair. Had they a right to do this? Such right of inventors to broaden their claims by explicit statements as to scope and meaning while the patent is still undergoing examination in the patent office seems to be recognized by the supreme court in the case of Deering v. Harvester Works, 155 U. S. 286, 15 Sup. Ct. 118. In Topliff v. Topliff, 145 U. S. 156, 12 Sup. Ct. 825, the same court recognized the right of the inventor to secure by reissue "his actual invention." The same right to secure such actual invention should be conceded to the applicant while the patent is still in the office undergoing examination, either by interference or otherwise. In the case of Beach v. Box-Machine Co., 63 Fed. 597, Judge Coxe says:

"There can be no dispute that an inventor is entitled so to amend his specification that it will employ perspicuous and artistic language, and enable him to hold all that he has invented."

In construing the effect of the proceedings in the patent office, full force should be given to the language of Justice Swayne, of the supreme court, in the case of Rubber Co. v. Goodyear, 9 Wall. 788, where he said:

"Liberality, rather than strictness, shall prevail where the fate of a patent is involved, and the question to be decided is whether the inventor shall hold or use the fruits of his genius and labors."

Again, in Westinghouse Air-Brake Co. v. New York Air-Brake Co., 11 C. C. A. 528, 63 Fed. 962, the circuit court of appeals for the Second circuit say:

"The patentee was a pioneer, in that he designed * * * a new way to accomplish a desired result, but upon the same general idea which he had unsuccessfully tried to work out in the earlier patent. His later patent was the bridge, and not a mere step."

I had occasion, in considering this same patent in the case of Rocker Spring Co. v. Flinn, 46 Fed. 109, to say that it involved a new and useful invention. A reference is made to that opinion for the grounds upon which that holding was made. Nothing has been offered in evidence in this case which leads me to change my opinion as to the validity of this patent as expressed in the Flinn Case. I do not find that the patent was anticipated by prior use or invention. The only question which follows, therefore, is whether the infringement has been established. If the complainant's inven-

tion could be limited to the use of the spiral springs within the iron frame described and specified in their original patent, and the tilting motion of the chair be limited to the use of the iron rockers constructed about the center or pivot of the tilting chair, so that the springs could be applied directly to the iron rocker and the iron base upon which it moves, then the defendant's chair would not be an infringement. But the inventors, in the proceedings in the patent office, distinctly stated that they did not limit the use of the springs to that location, or the rockers to the iron frame described in their original application. If, under the claims so broadened, the springs could be applied to any part of the chair where their function could be properly used, then the defendant's chair is a clear infringement. The springs on the defendant's chair are applied directly to the rocker and to the base. They there hold the chair in such a position as to keep the rocker and the base upon which it moves in direct alignment, and perform exactly the same functions that they did in the plaintiff's original application. The moment the patent office recognized the petitioner's claim to the right to apply these springs to platform rocking chairs, that moment the claim was broadened so as to notify all concerned that these springs might be used either by direct application to the rocker and the base, or in the contracted position under the center of the chair, where they were first used in the tilting or revolving chair. For these reasons, I think the use of the springs as applied on the defendant's chair is an infringement, and a decree may be prepared accordingly.

CRAMER v. FRY.

(Circuit Court, N. D. California. April 12, 1895.)

1. PATENTS—INFRINGEMENT—LIABILITY OF AGENT.
   The general agent of a corporation engaged in the manufacture and sale of infringing machines, who is the medium to execute the instructions of the company in the receipt, issue, and sale of the machines, for which he receives a salary, and a commission on all moneys reported by him, is liable for the infringement, though he makes no sales personally.
2. SAME—SEWING-MACHINE TREADLES.
   The first claim of the Cramer patent for an improvement in sewing-machine treadles, which is for a vertical double brace joining the legs of the two ends of the machine, provided with holes through its lower extremities to serve as bearings, in combination with a treadle provided with trunnions having knife edges to oscillate in such bearings, is not infringed by treadles manufactured under the patent granted to the Singer Manufacturing Company, as assignee of Philip Diehl, for treadles hung in a loop-like downward extension of the usual upright cross brace, and operated on conical pointed screws extending through the sides of the downward extension of the brace, and acting in suitable bearing recesses in the ends of the treadle.

Action at law for infringement of letters patent for an invention, commenced against the Singer Manufacturing Company, a New Jersey corporation, and Willis B. Fry, manager on the Pacific coast of the business of the Singer Company. A demurrer was inter-

posed on behalf of the Singer Company upon jurisdictional grounds, and was sustained upon the authority of Shaw v. Mining Co., 145 U. S. 444, 12 Sup. Ct. 935, and other cases. The action then proceeded against Fry alone.

The patent sued upon was granted to the plaintiff on January 30, 1883, and was for an improvement in sewing-machine treadles. In the specification the patentee described his invention as relating to improvements in the bearings of sewing-machine treadles, and in the specification and drawings the treadle of the patent was specifically described, and shown to work upon trunnions integral with the treadle, and extending into bearing holes in the lower ends of the usual upright cross brace of the machine, said trunnions being V-shaped, or sharpened to an edge along their lower surfaces; the usual foot bar or cross bar passing through the lower ends of the upright cross brace below the treadle, and serving its customary purpose of rigidly joining the cross brace and legs of the machine at their lower points of contact.

Drawings of Plaintiff's Patent.

Fig. 1.

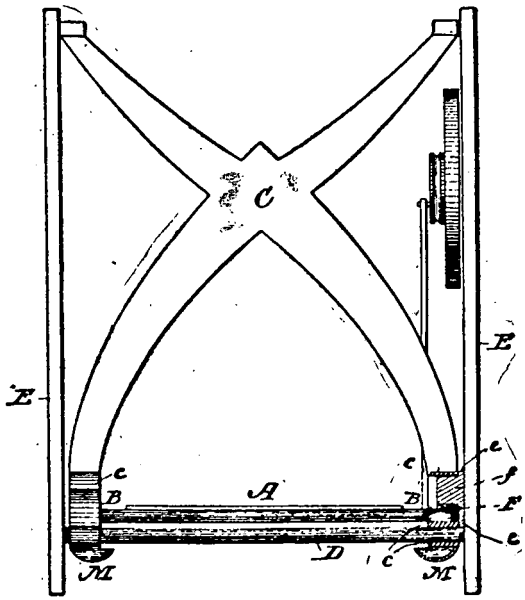
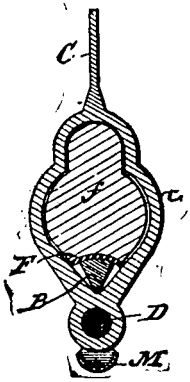


Fig. 2.



Specification and Claims of Plaintiff's Patent.

"To All Whom It may Concern: Be it known that I, Herman Cramer, of Sonora, in the county of Tuolumne, and state of California, have invented a new and improved sewing-machine treadle; and I do hereby declare that the following is a full, clear, and exact description of the same, reference being had to the accompanying drawings, forming part of this specification: My invention relates to improvements in the bearings of sewing-machine treadles; and it has for its object to provide means—First, to keep the treadle bearings rigidly in line and at a fixed distance apart, to avoid friction; and, second, to make its movement in use noiseless. To this end my invention consists in the construction and combination of parts herein-

after fully described and claimed, reference being had to the accompanying drawings, in which Fig. 1 is a perspective view of a portion of a sewing machine, showing my invention. Fig. 2 is a transverse vertical section through one bearing of the treadle. A represents the treadle provided with the usual pitman connection by which to run the sewing-machine wheel. B represents the two trunnions, cast as a portion of the treadle, and extending from its sides into loopholes in the common cast-iron cross brace, C. These trunnions are sharpened to an edge or corner along their lower sides, and the lower end of the loophole is hollowed to an angle more obtuse than the edge of the trunnion, to serve as a bearing for the same, and permit the rocking motion common to treadles. C represents the usual cast-iron double brace connecting the two end legs diagonally in a plane generally vertical. The lower ends of this brace are secured directly to the web of the legs by bolts, d, and for convenience and strength I make the two ends of the common cross bar, D, serve as these bolts. The upper ends of the brace are secured, as usual, either to the web of the legs, or to the table of the machine, near the legs. The treadle and its trunnion bearings are wholly independent of the cross bar, D, except its service, as stated, to hold the brace to the legs. The bearing holes in the brace are formed into long vertical loops to permit the entrance of the treadle. Pieces of leather, F, or other soft material, cover the top and end of each trunnion, to serve as cushions to keep the same close in its bearing, to prevent the noise which would result were the trunnions permitted to bounce and thump endwise when the treadle is in motion. The leather, F, is fitted to the curve of the upper side of the trunnion, which is an arc of a cylinder whose center of oscillation is the lower edge of the trunnion. The same leather also interposes between the end of the trunnion and the adjacent iron. f is a block, serving as a mere backer, to which the cushion, F, is attached. This block conforms to the back and top side of the cushion, and fills the loophole in the brace above the trunnion. It also has tangs or projections, e, resting in suitable recesses in the brace, C, which are held between the brace and the web of the leg, E, by which means the block and cushion are held in place. Below the bearings of the trunnions, B, I provide cups, M, attached to the ends of brace, C, to catch the oil that usually drips from such bearings. By this construction my treadle bearings are rigidly fixed, and in no way liable to get out of line or to require adjustment. The usual noise is prevented, and overflowing oil is caught before it can do damage. I am aware that sewing-machine treadles have before been provided with V-shaped bearings, and I do not claim the same as my invention; but what I claim, and wish to secure by letters patent, is: (1) The vertical double brace joining the legs of the two ends of a sewing machine, provided with holes through its lower extremities, to serve as bearings, in combination with a treadle provided with trunnions fitted to oscillate in said bearings, substantially as specified. (2) The sewing-machine legs, E, the vertical double brace, C, secured thereto, and provided with holes to serve as bearings for the treadle, A, and the treadle provided with trunnions, B, to oscillate in said bearings, in combination with the cushion, F, and the block, f, as and for the purpose specified. Herman Cramer.

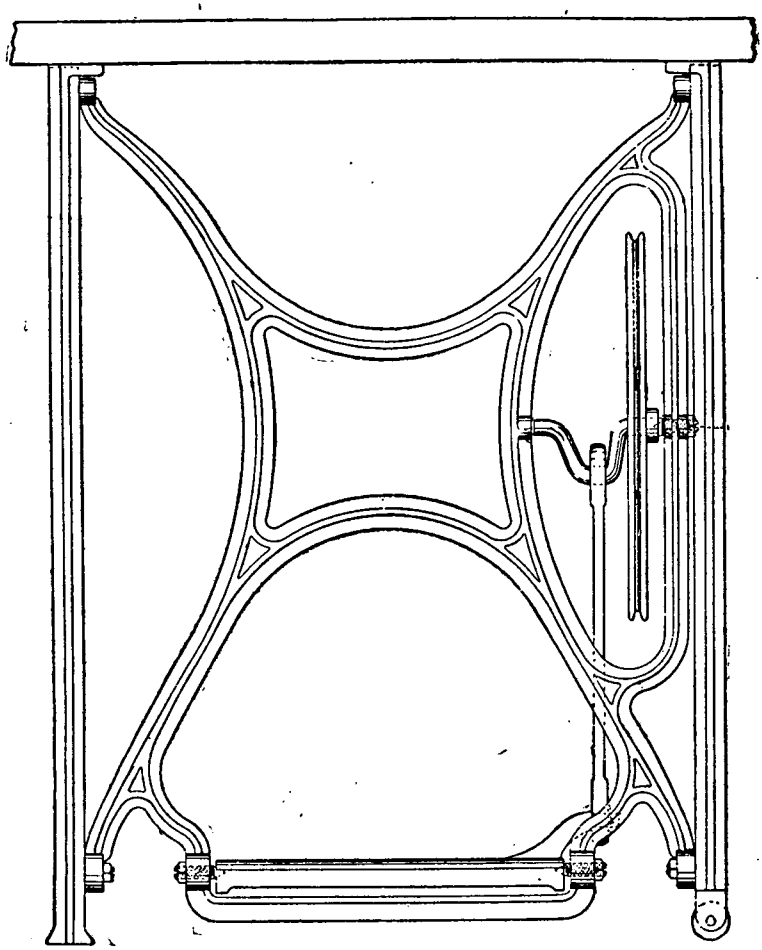
"Witnesses:

"Frank W. Street,

"Charles L. Street."

The first claim only of plaintiff's patent was alleged to have been infringed.

Letters patent for certain improvements in sewing-machine stands and treadles were granted to the Singer Manufacturing Company, assignee of Philip Diehl, on October 14, 1884. Under this patent the Singer Company constructed and sold in sewing machines a form of treadle hung in a loop-like downward extension of the usual upright cross brace, which downward extension also served as the ordinary foot bar or cross bar. The treadle operated upon conical pointed screws extending through the sides of the downward extension of the brace and acting in suitable bearing recesses in the ends of the treadle. The following drawing from the Diehl patent fully illustrates its treadle and bearings:



The defendant did not himself make, use, or sell any machine containing the Diehl treadle, but exercised supervision over the Pacific coast business of the Singer Company, under instructions from the central office at New York, and, as a part of his compensation, received a commission upon the net profits accruing to the Singer Company from its entire Pacific coast business. At the conclusion of the testimony, counsel moved for an instruction to the jury to bring in a verdict for the defendant, because (1) the defendant, as a mere agent or employé, was not liable in an action at law for damages on account of infringements committed by the Singer Company, if at all; and because (2) the Diehl treadle used by the Singer Company was not an infringement of the plaintiff's device.

John L. Boone, Jos. Nougues, and Chas. F. Hanlon, for plaintiff.
Wheaton, Kalloch & Kierce and Chas. K. Offield, for defendant.

McKENNA, Circuit Judge (orally). At the close of the plaintiff's testimony, the defendant made a motion for the court to instruct the jury to find a verdict for the defendant, which motion

was reserved for consideration. The motion was again repeated at the close of the testimony in the case. The motion is made on two grounds. One is that the defendant in the case is the agent of the Singer Sewing-Machine Company, and is not liable; and the other, that there is no infringement.

Considering the first ground, in an action in form ex delicto,—that is, for a tort,—the rule is, all who participate in a wrong are liable. In other words, a tort is the separate act of each individual, and all may be joined, or either may be sued separately. The relation of master and servant—principal and agent—does not relieve from liability. It may make the master or principal liable, but it does not release the servant or agent.

"An agent or servant,"—I read from 1 Chit. Pl. p. *84,—"an agent or servant, though acting bona fide under the directions and for the benefit of his employer, is personally liable to third persons for any tort or trespass he may commit in the execution of the orders he has received. If the master has not the right or power to do the act complained of, he cannot delegate an authority to the servant which will protect the latter from responsibility. Therefore a servant may be charged in trover, although the act of conversion be done by him for his master's benefit. And a bailiff who distrains is liable, if the principal has no right of distress. And a customhouse officer may be sued for a wrongful seizure made by him in that character. There is no injustice in this doctrine, as regards the servant; for, if the act were not manifestly illegal, the indemnity of the principal to the servant against the consequences is not illegal, and will, in many instances, be implied."

What is the nature of an action for an infringement of a patent? Undoubtedly a tort, and the rule necessarily applies, unless the statute relieves from it. The statute says: "That damages for the infringement of any patent may be recovered by action on the case. * * *" There is no obscurity as to what this means. An action on the case is a well-known action in form ex delicto. Judge Lowell, in Nickel Co. v. Worthington, 13 Fed. 392, says: "Infringement is not a trespass." He evidently did not mean it was not a tort, and the distinction he made between trespass and case—which was the common-law one—did not justify the learned judge in applying the law of torts to one and exempting the other. Trespass and case are both forms of action ex delicto; both brought for torts,—the first those committed by force and immediately; the second, those not committed with force, or not immediately. The rule as to participants and parties applies to both. The inquiry necessarily is, who are participants in an act of infringement in making or using or selling the patented article? Regarding cases alone, they are neither, abstractly considered, clear, nor, comparatively considered, harmonious. Robinson on Patents says (section 912):

"How far the officers, stockholders, and employés of a private corporation participate in its infringing acts, and thereby share its liability, is still an open question. That they may be enjoined whenever this is necessary to protect the patentee against future infringements is universally conceded; but whether they can be held in damages for past infringements has been variously decided. One opinion, following the doctrine of limited liability as usually applied to private corporate bodies, regards the infringing act as the act of the corporation alone, and declares that none of its members or officials legally participate therein. Another, affirming the rule that every voluntary

perpetrator of a wrongful act of manufacture, use, or sale is an infringer, considers its directors, agents, and other servants, actually employing or authorizing the employment of the patented invention, as guilty of the infringement, and personally answerable to the patentee. A third, viewing the acceptance of the benefit of the infringing act as furnishing the test of liability, treats its stockholders as infringers, whether or not they are its officers or agents, and exempts the latter, unless they are also members of the corporation. The first opinion is scarcely consistent with a due regard to the rights of the patentee, whose invention might then be practiced with impunity by an insolvent corporation, nor with the general tenor of the patent laws, which permit no voluntary and unauthorized act of manufacture, use, or sale, direct or indirect, to pass unpunished. The third confuses the benefit derived by the stockholders with that accruing to the corporation,—the benefit of the former being no more closely related to the infringement than that of creditors or innocent employés, or that of dealers in or users of the products of infringing processes,—and is pregnant with evil and unjust consequences to all members of private corporations, especially to minorities who neither acquiesce in the infringement nor in the appointment of the officers or agents by whom it is committed. The second is in harmony with other doctrines of the law, sufficiently protects the patentee, and justly punishes those whose willful acts place them on the same footing with individual infringers. Under this opinion, all agents who perform acts of infringement, and all stockholders, directors, and other officers who, in the prosecution of the business of the corporation, authorize them, participate in the infringement, and are personally responsible to the patentee."

The learned author's conclusion is certainly in harmony with the law of the liability for torts of misfeasance. See Cooley, Torts, 133 et seq. A strict application of the rule would make all servants liable, but a distinction has obtained between mere workmen and agents. The distinction may be artificial and arbitrary, and though starting apparently in a dictum of Judge Hopkinson in Delano v. Scott, Gilp. 489, Fed. Cas. No. 3,753, and based upon consequences somewhat fanciful, nevertheless seems to have maintained itself, and is as firmly established as nisi prius decisions can establish any rule of law. With this exception, the rule is, both on principle and authority, that servants and agents are responsible. Estes v. Worthington, 30 Fed. 465, and cases cited; Rob. Pat. § 920, and notes; National Car-Brake Shoe Co. v. Terre Haute Car & Manuf'g Co., 19 Fed. 514. It is not necessary to review all the cases. They are classed in the quotation from Rob. Pat., supra. What acts of participation in infringement, if there was infringement, did the defendant perform? In his answer he says:

"That during more than twelve years last past the said corporation, the Singer Manufacturing Company, has had and maintained a place of business in the city of San Francisco, in the said Northern district of California, where it has carried on a local business in selling the said Singer sewing machines, and which machines it has sent from its factory in New Jersey to said city of San Francisco for that purpose. Defendant further avers that, in carrying on its said business of selling said sewing machines, the said corporation, the Singer Manufacturing Company, has employed this defendant to act as its employé in making sales of said sewing machines, and in attending to said local business in said city of San Francisco, and this defendant has acted as the employé of said corporation, the Singer Manufacturing Company, in repairing and using, so far as it was necessary to use them for testing their condition, and in selling, the said sewing machines, and has done whatever was necessary in and about the carrying on of said local business in the city of San Francisco, as the employé of said corporation, the Singer Manufacturing Company, and in no other way or manner whatever; that he has neither made nor used nor repaired nor sold any sew-

ing machines or sewing-machine treadles in his own right, nor in his own name, but that all the making, repairing, using, and selling of sewing machines or sewing-machine treadles that has been done by this defendant, and which is claimed to constitute an infringement of said letters patent, has been the making or repairing or using or selling done and performed by the said corporation, the Singer Manufacturing Company, by and through this defendant, as its employé, and in no other way; that this defendant has not, at any time, been the owner of any sewing machines or treadles, and has not, at any time, either made or used or repaired or sold any sewing machines, or sewing-machine treadles, or sewing-machine apparatus, or sewing-machine attachments of any nature or kind, otherwise than as employé as aforesaid."

He testified, however, that he made no sale personally, but he is at the head of the agency of this coast, and is the medium to execute the instructions of the company in the receipt and issue and sale of the machines, and for this he receives a salary of $25 per week, and a commission on all moneys reported by him. Manifestly, the amount of commission is dependent on the sales, rising and falling with them. I think this makes him quite an active instrument in the disposition of the machines and participant in the infringement, if infringement exists.

That brings us to the second ground of defendant's motion. Infringement, of course, is usually a question of fact, and whether an answer to this question is a question of law, as contended for by defendant, will be determined by the construction of the patent. It has two claims, the first only being alleged to be infringed. It is as follows:

"What I claim, and wish to secure by letters patent, is the vertical double brace joining the legs of the two ends of a sewing machine, provided with holes through its lower extremities to serve as bearings, in combination with a treadle provided with trunnions fitted to oscillate in said bearings, substantially as specified."

The language of itself is clear enough, and the controversy between the parties is whether it shall be confined to the mechanism described and its arrangement, or be held to cover structurally different mechanism, and a different arrangement. In the first specification filed by plaintiff he said, reverting to what took place in the patent office:

"I, Herman Cramer, of the city of Sonora, in Tuolumne county, in the state of California, have invented certain improvements in a treadle to be used in sewing machines, or other machinery where a noiseless treadle may be required, of which the following is a specification."

He then describes the treadle. He says the treadle is V-shaped; the treadle bar rests in socket in the brace, C, which is immediately above a cross brace; and then says:

"My invention consists in having the ends of the treadle bar V-shaped, to fit in hole in brace, C, also ◡-shaped to receive the ends of the treadle bar. This V-shaped treadle bar in brace, C, entirely prevents noise from the treadle, is self-adjusting, and does away with the necessity of coons and set screws now in use. This I claim as my invention."

This was rejected for informality by the examiner of the patent office, but in his letter he refers to a patent to G. W. Gregory, April 18, 1882, as exhibiting the alleged invention. This patent is in evidence, and is one for knife-edge bearings, which seems to indi-

cate that the examiner thought that Cramer's invention was for knife-edge bearings. To correct the informality, other specifications were filed, which are as follows:

"I, Herman Cramer, of the city of Sonora, in Tuolumne county, in the state of California, have invented certain improvements in a treadle and brace to be used in sewing machines, or other machinery where a noiseless treadle may be required, of which the following is a specification: My invention consists in a combination of the usual platform, marked 'A,' in Fig. 1 of diagram on treadle bar. The ends of said treadle bar, marked 'B,' are to bear against mufflers."

Then he proceeds to describe as in the other:

"The treadle bar, with mufflers on the ends working or bearing in or on brace, entirely prevents noise from the treadle, is self-adjusting, and does away with the necessity for coons and set screws now in use. [Then he represents by figures.] What I claim is a combination of brace, C, with socket or bearing in it or on it, to receive the treadle bar with the mufflers at the ends of treadle bar, or in or on brace, C, in connection with said brace, C, and the treadle bar in connection with brace, C, and mufflers to work in or on the brace, C, substantially as set forth."

To these specifications and claims the examiner replied on August 14, 1882:

"Applicant's amended claims are met by the patent of J. E. Donovan, June 28, 1880, No. 243,529, in view of which a patent is again refused."

The Donovan patent is in evidence, and I will not detail it. It is also for knife-edge bearings situated on the cross bar or on the legs of the machine.

Becoming dissatisfied with his attorneys, as he testifies, they not comprehending him or his invention, he changed to Munn & Co., of Washington, considered to be competent patent attorneys. They filed another specification, which specification constitutes the specification of the patent. It is as follows:

"Be it known that I, Herman Cramer, of Sonora, in the county of Tuolumne, and state of California, have invented a new and improved sewing-machine treadle; 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: My invention relates to improvements in the bearings of sewing-machine treadles; and it has for its object to provide means, first,"—mark the language,—"improvements in the bearings of sewing-machine treadles; and it has for its object to provide means—First, to keep the treadle bearings rigidly in line, and at a fixed distance apart, to avoid friction; and, second, to make its movement, in use, noiseless. To this end my invention consists in the construction and combination of parts hereinafter fully described and claimed,"—mark the language again,—"my invention consists in the construction and combination of parts hereinafter fully described and claimed, reference being had to the accompanying drawings, in which," etc.

Then follows a detailed representation by figures, disclaiming, however, the invention of knife-edge bearings, simply, by the following language:

"I am aware that sewing-machine treadles have before been provided with V-shaped bearings, and I do not claim the same as my invention."

Then follows the claim which I have already read. Accompanying this specification was the following letter from Munn & Co.:

"A new oath is herewith filed. Gregory, referred to, pivots the grooved trunnions of his treadle upon knife edges secured within the upper loops of

two collars, which are secured to the cross bar by means of set screws to keep them from turning. Donovan pivots his treadle upon its trunnions, having sharpened edges, in grooves in the cross bar, where it is held by collars provided with flanges projecting over the trunnions. Applicant pivots his treadle upon the sharpened edges of its trunnions, in loopholes in the two ends of the brace, which is bolted to the legs of the machine by the two ends of the cross bar. This service of the cross bar might be as well performed by two short bolts; but, the bar being a usual cross tie to stiffen the legs, applicant uses its ends as bolts to hold his brace ends to the legs. We have rewritten the specification, to elucidate the inventor's claim. Should the case meet with favorable consideration, a new drawing will be furnished. For the purpose of examination, see pencil sketch on sheet of drawing filed."

The examiner still objected, and seemed persistent in understanding that the patent was for the knife-edge bearings, whereupon Munn & Co. write another letter, dated October 25, 1882, and say:

"In the matter of the application for letters patent for sewing-machine treadle by H. Cramer, filed May 25, 1882, we file herewith a new drawing in this case.

"Your obedient servants, Munn & Co."

It will be observed that these proceedings all tend to making special the devices, and fixing their relations. It must be assumed, of course, that the technical language of the claim of the patentee was used technically. The double brace is provided with holes to serve as bearings, and the treadle provided with trunnions having knife edges to oscillate in said bearings. What, then, is a bearing? It is defined by Webster to be, in mechanics: (a) The part in contact with which a journal moves, as the journal boxes, trusses, etc.; (b) that part of the shaft or axle which is in contact with the supports. To the same effect is Knight's American Mechanical Dictionary, only reversing the order: (a) The portion of an axle or shaft in contact with its collar or boxing; (b) the portion of the support on which the gudgeon rests and rotates. The definition of the witnesses makes the bearing consist of two parts, one movable and one immovable; the definition of the books makes it consist of either part,—either the movable or immovable part; the patentee uses it for the immovable part. The holes in the cross brace are to be the bearings for the trunnions of the treadle. The corresponding bearing in the defendant's machine is not in the treadle. In this particular the devices are different,—the bearings are not in the same place. In plaintiff's device it happens that both bearings are in the cross brace. In defendant's device, however, even if we consider the support as part of the bearings, as contended for by plaintiff, only one bearing is in the cross brace. But in the definition of a bearing we observe that the support is not a part of it; a bearing being "the portion of the support on which the gudgeon rests and rotates." Again, the treadle of the patentee is provided with trunnions with knife edges; the treadle of the defendant is without trunnions and without knife edges. This makes another difference. It is familiar law that all the elements of a combination must be used to make infringement, no matter how immaterial any one may be. Is a treadle with a trunnion the same thing as a treadle without a trunnion? If not, the omission of the trunnion is the omission of the element. But, passing this, is a treadle with

a trunnion with knife edges having bearings in holes in the cross brace substantial to the plaintiff's purpose? It seems to me to be. It was urged as the value of the plaintiff's device by Mr. Munn in his letter of October 25th, supra, and the language of the claim cannot be escaped.

It appears to me this case is very similar to Prouty v. Ruggles, 16 Pet. 337, cited by defendant's counsel. In the latter case the patent was for a combination. The syllabus of the case says:

"Where that third element, as described in the specification, was forming the top of the standard of a plow so as to secure brace and draft, by extending the standard back from the bolt to such a distance as to form a brace to the beam, and making the after part of this extension square, in such a manner that, being jogged into the beam, it relieved the bolt in a heavy draft. Held, that the specification and claim covered only this described manner of relieving the bolt, and, if the defendant did not jog the bolt into the beam, he did not infringe."

The court in commenting on the case, at page 339, states what the claims are:

"(1) * * * (2) * * * (3) The forming the top of the standard for brace and draft. We do not intend to confine our claim to any particular form or construction. * * *"

The court, commenting, says:

"The plaintiffs offered to prove utility of the alleged improvement, which proof was dispensed with by the defendants. Certain plows alleged by the plaintiffs to be made in conformity with their letters patent, and certain plows made by the defendants, which were the alleged infringement of the plaintiffs' patent, were produced in court; and no substantial difference between them was shown by the defendants to exist, unless the fact that the top of the standard in the defendants' plow was not jogged into the beam, and did not extend so far back upon the beam, was to be so considered. And the plaintiffs offered evidence to show that the top of the standard formed, as stated in the specification, would serve for both purposes of brace and draft, although not jogged into the beam. The defendants introduced no evidence. The counsel for the plaintiffs requested the court to instruct the jury as follows, to wit: 'The counsel of plaintiffs respectfully move the court to instruct the jury that if the defendants have used, in combination with the other two parts, a standard of the description set forth in the specification, and it is proved to serve both for brace and draft, such use was an infringement of the plaintiff's claim in that particular, although the defendants may not have inserted into a jog in the beam. Also, that, if any two of the three parts described as composing the construction claimed in the specification had been used in combination by the defendants, it was an infringement of the patent, although the third had not been used with them.' The court refused to give the instruction so prayed, or either of them, in manner and form as prayed by the plaintiffs; but did instruct the jury as follows, to wit: 'That, upon the true construction of the patent, it is for a combination, and for a combination only. That the combination, as stated in the summing up, consists of three things, namely: (1) * * * (2) * * * (3) The forming the top of the standard for brace and draft. That, unless it is proved that the whole combination is substantially used in the defendants' plows, it is not a violation of the plaintiffs' patent, although one or more of the parts specified, as aforesaid, may be used in combination by the defendants. And that the plaintiffs, by their specification and summing up, have treated the jogging of the standard behind, as well as the extension, to be essential parts of their combination for the purpose of brace and draft; and that the use of either alone by the defendants would not be an infringement of the combination patented.' And thereupon the jury rendered their verdict for the defendants."

The supreme court held that:

"The first question presented by the exception is whether the extension of the standard, and the jogging of it into the beam, are claimed as material parts of the plaintiffs' improvement. We think they are."

These views were elaborated, but I need not quote further.

But plaintiff contends, if the parts of the defendant's device be different, they are nevertheless equivalents. The plaintiff's invention is an extremely narrow one, and I think it would broaden it too much to give it so liberal a rule of equivalents. It seems to me the comments of the supreme court in the cases of Miller v. Manufacturing Co., 151 U. S. 186–208, 14 Sup. Ct. 310; Knapp v. Morss, 150 U. S. 221–230, 14 Sup. Ct. 81; Wright v. Yuengling, 155 U. S. 47–51, 15 Sup. Ct. 1; Coupe v. Royer, 155 U. S. 565–576, 15 Sup. Ct. 199; Deering v. Harvester Works, 155 U. S. 286, 15 Sup. Ct. 118,—apply.

In Knapp v. Morss the court said (and I only quote the principle, omitting the facts):

"If the Hall patent was a valid pioneer invention, the doctrine of equivalents might be invoked with regard to the sliding blocks and rests, and thus a different question would be raised; but, being confined to the specific elements enumerated by letters of reference, it is neither entitled to a broad construction, nor can any doctrine of equivalents be invoked so as to make the appellants' device an infringement of the second claim in controversy. Our conclusion, therefore, is that the Hall patent is invalid, and, further, if it could be sustained at all, it would have to be in the most restricted form, and, thus restricted, it is not infringed by the appellants. It follows, therefore, that in each case the judgment of the courts below must be reversed."

In the case of Wright v. Yuengling the same doctrine is applied. The court, after commenting on the narrowness of plaintiff's invention, said:

"But the absence of the semicircular connecting piece, d, is a circumstance worthy of more serious consideration. In the defendant's engine there is no such semicircular connecting piece as is described in the Wright patent, but the guiding cylinder extends backward to a connection with the head of the steam cylinder, the side of such guiding cylinder, through which the crosshead operates, containing an opening oval in shape, and narrower at each end than in the center. The equivalent for the connecting piece, if found at all, must be in this continuation of the guiding cylinder backward to the steam cylinder. But this portion of the cylinder is neither scooped out in a semicircular form, nor does it admit of ready access to the crosshead shown at this point in the Wright patent. Instead of access to the crosshead being easier at this point than any other, it is in reality more difficult, as the oval opening is narrower there than in the center. Now, while this semicircular connecting piece may be an immaterial feature of the Wright invention, and the purpose for which it is employed accomplished, though less perfectly, by the extension of the guiding cylinder in the manner indicated in defendant's device, yet the patentee, having described it in the specification, and declared it to be an essential feature of his invention, and having made it an element of these two claims, is not now at liberty to say that it is immaterial, or that a device which dispenses with it is an infringement, though it accomplish the same purpose in, perhaps, an equally effective manner."

In Coupe v. Royer the court said:

"The principle of construction which we think applicable to plaintiffs' patent is that such construction must be in conformity with the self-imposed limitations which are contained in the claims. Such claims are the meas-

ure of their right to relief. Keystone Bridge Co. v. Phoenix Iron Co., 95 U. S. 274, 278, was a case where the manufacture of round bars, flattened and drilled at the eye, for use in the lower chords of iron bridges, was held not to be an infringement of a patent for an improvement in such bridges, where the specification described the patented invention as consisting in the use of wide and thin drilled eye bars applied on edge; and Mr. Justice Bradley, delivering the opinion of the court, said: 'It is plain, therefore, that the defendant company, which does not make said bars at all (that is, wide and thin bars), but round and cylindrical bars, does not infringe this claim of the patent. When a claim is so explicit, the courts cannot alter or enlarge it. If the patentees have not claimed the whole of their invention, and the omission has been the result of inadvertence, they should have sought to correct the error by a surrender of their patent and an application for a reissue. * * * But the courts have no right to enlarge a patent beyond the scope of its claim as allowed by the patent office, or the appellate tribunal to which contested applications are referred. When the terms of a claim in a patent are clear and distinct (as they should always be), the patentee, in a suit brought upon the patent, is bound by it. * * * He can claim nothing beyond it.' "

To the same effect is the case of Deering v. Harvester Works.

It follows from these views that the instruction will have to be granted. To make myself clear as to the grounds of my ruling, defendant's motion is denied on the first point, to wit, that defendant is only the agent of the Singer Sewing-Machine Company. It is granted on the second point, to wit, that the defendant is not guilty of infringement because the machines sold by him are not similar to that described in the plaintiff's patent.

Mr. Boone: Will your honor permit us to save an exception?

The Court: Of course. Gentlemen of the jury, you may not understand my views, which are more or less technical, and addressed to the lawyers rather than to the jury, but it follows that it devolves upon me as a matter of law to instruct you to bring in a verdict for the defendant. This being a matter of law, you have no concern with it. If I have committed an error, it is easily corrected. You will therefore find a verdict for the defendant. You can do that by retiring to the jury room, or select one of your number as foreman here, and sign the verdict.

The jury accordingly selected one of their number as foreman, and signed a verdict in favor of the defendant.

JOHNSON CO. v. PENNSYLVANIA STEEL CO.

(Circuit Court, E. D. Pennsylvania. May 14, 1895.)

No. 21.

PATENTS—LIMITATION—ROLLING MILLS.

The Moxham patent, No. 303,036, for an improvement in rolls for rolling metal blooms or piles into girder shapes, construed as to claim 2, and *held* to be limited to rolls having a "pass" substantially of the contour shown in the drawings, and therefore *held* not to have been infringed.

This was a bill by the Johnson Company against the Pennsylvania Steel Company for infringement of a patent relating to rolling mills.

Harding & Harding, for complainant.
Philip T. Dodge and Joshua Pusey, for defendant.

DALLAS, Circuit Judge. This is a suit brought by the Johnson Company, a corporation of the state of Kentucky, and having a rolling mill and plant at Johnstown, Pa., against Pennsylvania Steel Company, a Pennsylvania corporation, having a rolling mill and plant at Steelton, Pa., for infringement of the second claim of letters patent No. 303,036, dated August 5, 1884, granted to Arthur J. Moxham, and by him assigned to the complainant.

The claim involved reads as follows:

"(2) A set of rolls for rolling metal blooms or piles into girder shapes, provided with a dummy pass or grooves, having spaces, as at E and D, substantially of the contour indicated in Fig. 2, the desired shape of metal in the space E being imparted by elongation, but in the space D mainly by displacement independently of elongation, all substantially as described and for the purposes set forth."

The learned counsel of the complainant have ingeniously argued "that rolling is a combination of the entering piece and the pass into which it is entered," and that "the true scope of the claim under consideration, to be effective, like all rolling actions, consists in the combination of a piece having certain characteristics, and a pass adapted to act upon that piece in a particular manner." The plaintiff's case rests upon the assumption that the claim should be construed in accordance with the theory thus suggested, but I find it impossible to acquiesce in this. It is strenuously insisted by the defendant that its pass does not act upon the piece in the "particular manner" in which the plaintiff's pass acts upon it; but, waiving this question, it is, at least, clear that the defendant's pass is not "substantially of the contour indicated in Fig. 2" of the patent, and I have no doubt that to the pass so specified the claim in suit should be restricted. To give to the language by which the action of the pass is described the effect of burdening this great industry with a monopoly covering any pass whatever by means whereof the peculiar desired shape may be imparted to the metal, "mainly by displacement independently of elongation," would be to construe the patent as for the mechanical operation or function of the device, and this, too, in contravention of the plain terms of the claim, by which a particular structure is specifically designated.

The bill is dismissed.

MAST, FOOS & CO. et al. v. IOWA WINDMILL & PUMP CO.

(Circuit Court, N. D. Iowa, Cedar Rapids Division. May 13, 1895.)

1. PATENTS—REISSUES—BROADENING OF CLAIMS.
   A reissue which broadens the original claims can only be had when mistake or inadvertency is shown whereby the original patent failed to cover what it was then intended should be covered, and when the application for a reissue is made within a reasonable time; and, where the application is delayed for nearly three years, it is too late.

2. SAME—ANTICIPATION—PRIOR USE.
   The fact that another than the patentee first conceived the idea of his invention, and reduced it to a successful experimental form, does not

amount to anticipation where the experiment was then abandoned and was not made the basis for an application for a patent, and there was no attempt to manufacture and sell the article.

3. SAME—PUMPS.
The Bean original and reissued patents, No. 175,588 and No. 8,631, respectively, analyzed and construed, and the first four claims of the reissue found to be broader than the claims of the original patent; *held*, therefore, that such reissue claims are void, because the application for the reissue was delayed for nearly three years, and because no mistake was shown in procuring the original.

4. SAME.
The Martin patent, No. 339,445, and the Hooker patent, No. 259,394, for improvements in pumps, *held* valid and infringed; the first as to claims 1 and 3, and the second as to claim 1.

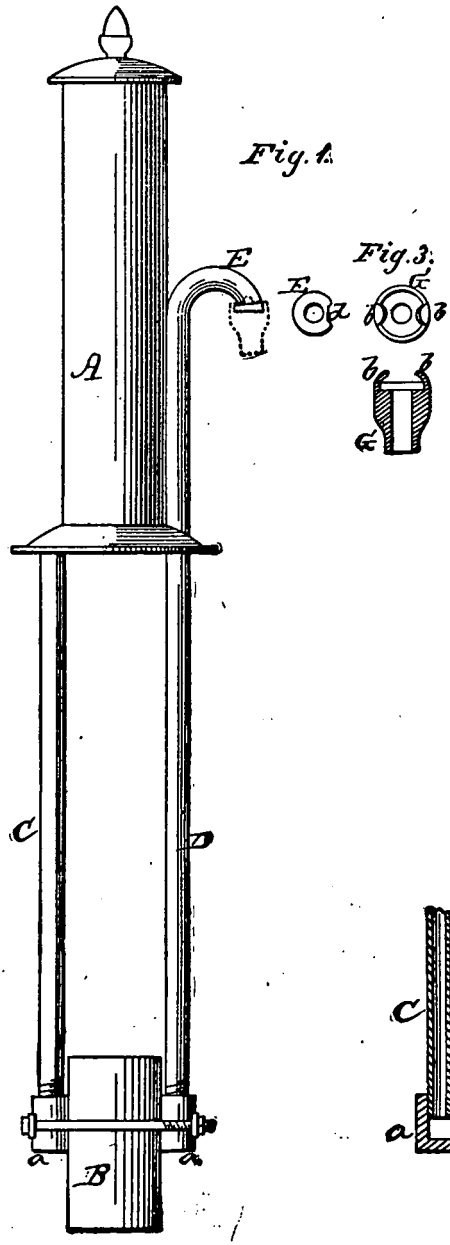
This was a bill by Mast, Foos & Co. and William B. Hooker against the Iowa Windmill & Pump Company for alleged infringement of certain patents relating to improvements in pumps.

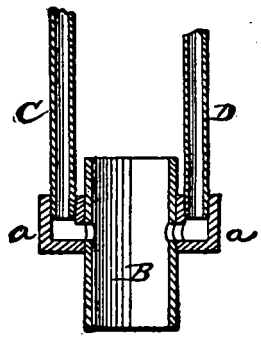
H. A. Toulmin and Lysander Hill, for complainants.
R. S. Taylor and C. H. Worden, for defendant.

SHIRAS, District Judge. The bill charges an infringement by the defendant of the first, second, third, and fourth claims of a patent reissued to Roscoe Bean, under date of March 25, 1879, and numbered 8,631, the original patent being No. 175,588, and dated April 4, 1876; also, of the first and third claims of patent No. 339,445, issued to Samuel W. Martin, under date of April 6, 1886, and of the first claim of patent No. 259,394, issued to William B. Hooker, under date of June 13, 1882,—it being averred that the complainants are the owners, by proper conveyances, from the patentees of the rights secured by the named patents, all of which are for improvements in the mode of constructing pumps.

The first defense pleaded to the Bean reissued patent No. 8,631 is the invalidity or illegality of the reissue upon the ground that the reissue broadens the terms of the original patent in a material matter, and as it was not applied for until nearly three years after the issuance of the original, and as the latter patent was not inoperative or invalid by reason of a defective or insufficient specification or by reason of the patentee claiming as his own invention or discovery more than he had a right to claim as new, and as there are no special circumstances disclosed excusing the delay in applying for the reissue, it must be held that the purpose of the reissue was to broaden the claim, and, consequently, the reissue must be held, pro tanto, to be invalid. As already stated, the original patent to Roscoe Bean was issued April 4, 1876, and it has therefore expired by limitation, although not until after this suit was brought, the bill herein having been filed in 1891. No case involving the validity of the reissue has been brought to trial, and hence the question is res nova. It will probably aid in the presentation of the questions involved to set forth in parallel columns the material portions of the specifications in the original and reissued patents, together with a copy of the drawing attached to both patents.

Drawing attached to Bean patent.





Original.

The nature of my invention consists in the construction and novel arrangement of a pump stock, connected with the cylinder by two tubes, one forming an air chamber and the other the discharge pipe, said tubes opening into the cylinder directly opposite each other, as will be hereinafter more fully set forth.

A represents an ordinary pump or pump stock as used above ground. B is the pump cylinder, connected to the pump, A, by means of two tubes, C and D. The lower ends of these tubes are screwed into pieces, a, a, between which the cylinder, B, is placed, and the parts there firmly bolted together. The pieces or elbows, a, a, open into the cylinder on opposite sides thereof, and in the same horizontal plane. The tube, C, is closed at its upper end, and forms, not only a support for the pump, but also the air chamber. This air chamber, being in the form of a tube, has a direct action on the water, and also has greater power for forcing water as well as to give it a more steady action. The pipe, D, extends up along the pump stock, A, and forms the discharge pipe as well as the second support for the pump cylinder. By this mode of connecting the pump stock and cylinder, a substantial support is formed for the cylinder, and it is very simple and readily put together. By these means, also, the cylinder is placed down in the well below the freezing point; and in cisterns or where the cylinder is submerged it will not fill up with water, and at the same time connects and supports the cylinder, however deep the well may be.

By having two holes in the cylinder, one for discharge and one for air chamber, it gives a place for the air chamber to have a direct action on the water while in use, giving it an even, steady stream, and a direct discharge for the water, independent of the air chamber.

Having thus fully described my invention, what I claim as new, and desire to secure by letters patent, is:

1. The combination of the pump stock, A, and cylinder, B, with the pipe, C, forming the air chamber, as well as the supporter, between the pump and cylinder, substantially as herein set forth.

2. The combination of the pump stock, A, and cylinder, B, with the tubular air chamber, C, and discharge pipe, D, forming connection between the pump and cylinder, substantially as herein set forth.

3. The cylinder, B, having the air chamber and discharge pipe opening into

Reissue.

The nature of my invention relates to force pumps; and it consists in a tubular air chamber attached to the pump stock or platform flange, and connecting to and opening into the cylinder or chamber, and forming also a support for the same.

My invention further consists in a supporting tubular air chamber and discharge pipe attached to the pump stock or flange plate, and connecting with and opening into a cylinder or chamber; also, in the combination of parts, as will be hereinafter more fully set forth and pointed out in the claims.

A represents an ordinary pump stock connected to the platform flange or flange plate, A'. B is the pump cylinder, connected to the pump stock, A, or flange, A', by means of two tubes, C and D. The lower ends of these tubes connect with the cylinder, B, and open into the same, or into a chamber, a, interposed in any suitable manner, the object being simply to form a connection between said cylinder and the tubes.

The tube, C, is closed at its upper end, and forms, not only a support for the pump, but also the air chamber. This air chamber, being in the form of a tube, has a direct action on the water, and has also greater power for forcing water, as well as to give it a more steady action.

The pipe, D, extends a suitable distance above the flange, A', and forms the discharge pipe as well as the second support for the pump cylinder.

By this mode of connecting the pump stock or flange with the cylinder or chamber a substantial support is formed, which is very simple and readily put together. By these means, also, the cylinder may be placed down in the well below the freezing point; and in cisterns or where the cylinder is submerged it will not fill up with water, and at the same time connects and supports the cylinder, however deep the well may be.

By having two openings, one for the discharge and one for the air chamber, it gives a place for the air to have a direct action on the water while in use, giving it an even, steady stream, and a direct discharge for the water, independent of the air chamber.

Having thus fully described my invention, what I claim as new, and desire to secure by letters patent, is:

1. A supporting tubular air chamber attached to pump stock or platform flange, connecting to and opening into a cylinder or chamber.

2. A supporting tubular air chamber and discharge pipe attached to pump stock or flange plate, connecting to and opening into a cylinder or chamber.

3. In a pump, a tubular air chamber, forming a support for the lower part of the pump, and connecting the same with the upper part, substantially as herein set forth.

the same on opposite sides. substantially as and for the purposes herein set forth.

In testimony that I claim the foregoing, I have hereunto set my hand this 15th day of July, 1875.

Roscoe Bean.

Witnesses:
Wm. A. Skinkle.
Monroe Alleman.

4. In a pump, a tubular air chamber and a discharge tube, forming supports for the lower part of the pump, and connecting the same with the upper part, substantially as herein set forth.

5. The cylinder, B, having the air chamber and discharge pipe opening into the same on opposite sides, substantially as and for the purposes herein set forth.

In testimony that I claim the foregoing, I have hereunto set my hand this 21st day of February, 1879.

Roscoe Bean.

Witnesses:
John Bean,
T. W. Tolchard.

Thus we find that in the original application it is expressly declared that the nature of the invention consists in the construction and novel arrangement of the pump stock, the cylinder or pump proper, the air chamber, and discharge pipe. The first and second claims in the patent cover the combination of the pump stock, the cylinder, the tubular air chamber, and the discharge pipe, and it clearly appears in the specification that the patented combination expressly provided for the immediate connection of the tubes forming the air chamber and the discharge pipe with the cylinder, being connected therewith through elbows opening into opposite sides thereof and in the same horizontal plane. In the testimony of James W. Lee, an expert witness called by the complainants, is found the following exposition of the merits of the Bean patent:

"In this patent, the pump stock is located as usual, and so is the spout and other parts pertinent to the pump; the pump barrel is located as far down as is desired; the discharge pipe leads up from the barrel to the spout, and is attached to the pump stock, and forms a water way and also a support for the barrel, but the piston rod does not pass through the discharge pipe at all, but passes up entirely independent of the discharge pipe, the discharge pipe being connected with the barrel to one side of the center, so as to not interfere with or be interfered with by the piston rod. There is no air chamber on the pump stock, as usual. A second pipe, closed at its top, is firmly connected to the pump stock, and goes down parallel with the discharge pipe, and connects with the barrel again at one side of the center of the barrel, so as to have nothing to do with the piston rod. This second pipe forms the air chamber, and it also forms one supporting leg extending from the pump stock to the barrel. It is not only an air chamber, but it is a good one and properly placed. It is long, as long as the distance between stock and barrel, and that is the proper form for an air chamber, so that the water, acting in its lower end, acts like a piston in a cylinder pressing upward on the elastic air within it. And it is properly located, for its lower end is in communication with the pump, right where the shocking force of the 'water ram' originates. In the old construction, it was put way up on top of a column of water, and the distance between the barrel and the air chamber always equaled the distance between the barrel and the stock. In the Bean patent, the distance between the barrel and the air chamber is zero. It will, therefore, be readily understood that in the Bean construction the pump barrel finds a support in the air chamber; that it finds an additional support in the discharge pipe; that the tubular air chamber, by its peculiar disposition, is peculiarly efficient as an air chamber, independent of its office as a support for the barrel; and that the discharge pipe and air chamber connect with the pump barrel at opposite sides, leaving the central or piston rod point unobstructed."

It is entirely clear that, in the original patent, Bean did not seek to patent as his invention a tubular air chamber. The patent is for a combination which includes as one of its elements a tubular air chamber, also serving as a support or connection between the cylinder and pump stock, but it does not cover or protect a tubular air chamber, except as part of the combination. Thus a pump constructed with a tubular air chamber, not serving, however, as a support to the pump, would not infringe the claims of the patent. In the testimony of the witness Lee, as above quoted, it is said that the chief merits of the combination consist in the air chamber acting as a support, and also in the position of the air chamber, whereby the distance between the air chamber and the barrel being reduced to zero, the elastic force of the air in the chamber acts directly at the pump, where the shocking force of the water originates. It is apparent that, as complainant's expert understands or construes the Bean combination, it requires the placing the pump cylinder between the lower ends of the tubes forming the air chamber and the discharge pipe, and this accords exactly with the description in the original application and with the drawing attached to the patent. Thus it is made clear that the combination described in the first claim of the original patent embraces four elements, to wit, the pump stock, the cylinder or pump proper, a support connecting the pump stock and cylinder, and an air chamber. All of these elements were old. Bean was not the original inventor of any one of these elements. In the second claim of the original patent there are likewise embraced the four elements found in the first, but the means of support between the pump and stock is made to include the discharge pipe. The novelty in the combination consists in making one pipe serve the double purpose of an efficient air chamber and a support between the pump stock and cylinder, and the combination is made effectual by bringing the several parts together and uniting them in the mode described in the patent. According to the express statements found in the specifications of the original patent, three beneficial results are obtained from the patented combination: First. A simple yet substantial support for the cylinder, formed by placing the same between the lower ends of the tubular air chamber and the discharge pipe, and firmly bolting the same together. Second. An efficient air chamber, resulting from the lower end of the air chamber being connected with the cylinder through an opening therein opposite to the discharge opening, thus bringing the air chamber into close contact with and giving it direct action upon the water in the pump cylinder. And, third, a direct discharge of the water, independent of the air chamber. These beneficial results were sought to be accomplished under the original Bean patent by a combination wherein the cylinder was fastened between the lower ends of two tubes forming the air chamber and discharge pipe, and which were fastened to the pump stock by bringing the lower end of the tubular air chamber into direct connection with the pump cylinder, and by having the discharge pipe connected with the cylinder through an opening therein opposite to the opening between the air chamber

and cylinder, and this is the combination which is described and claimed in the application upon which the original patent was issued.

On behalf of complainants, it is contended that the invention covered by the original patent belongs to the class known as generic or primary patents, and should therefore be construed broadly and liberally, according to the rule laid down in Winans v. Denmead, 15 How. 330; Electric Co. v. LaRue, 139 U. S. 606, 11 Sup. Ct. 670; Sewing Mach. Co. v. Lancaster, 129 U. S. 263, 9 Sup. Ct. 299; and other cases based thereon. Any valid patent, no matter how narrow in scope, is nevertheless entitled to a fair construction, so as to give the inventor the benefit of all his invention that can reasonably be brought within the claims of the patent, but the rule contended for, under the authorities above cited, is properly applicable to those inventions which originate new and useful results, and I do not deem the Bean patent to be included in this category, and yet the patent is nevertheless to be fairly construed; but, giving the language used in claims Nos. 1 and 2 all the latitude reasonably applicable thereto, I can reach no other conclusion than that these claims cover a combination of the pump stock and cylinder with a supporting tubular pipe acting as an air chamber, and a discharge pipe also acting as a supporter to the cylinder, the mode of combination being to connect the lower ends of the tubes to the opposite sides of the cylinder and the upper portions to the pump stock or flange. The patent does not seek to cover the invention of a tubular air chamber per se. As already said, every element found in the combination, aside from the mere form or position of the parts, was old and well known at the date of the filing of the application for the patent in question. Pump stocks and cylinders were old; air chambers were well known. Connections between the pump stock and cylinder had been in use since pumps were first made, and the use of a pipe as a connection between the stock and cylinder was old; as well as using a pipe, not only as a support or connection, but as a discharge pipe also, thus putting a connecting or supporting pipe to a double use. It seems to me, therefore, that the position of the several elements described in the first and second claims of this patent enter into the combination, and in fact wholly, or at least largely, give it the usefulness relied on as supporting its patentable character.

It is said in the specifications that:

"By this mode of connecting the pump stock and cylinder, a substantial support is formed for the cylinder, and it is very simply and readily put together."

The mode of connecting the stock and cylinder thus referred to is by means of two tubes, between the lower ends of which the cylinder is placed, and the parts are firmly bolted together, and the upper portions are fastened to the pump stock. It is further said in the specification that:

"By having two holes in the cylinder, one for discharge and one for air chamber, it gives a place for the air chamber to have a direct action on the water while in use, giving it an even, steady stream, and a direct discharge for the water, independent of the air chamber."

Thus it is made plain that the purpose was to connect the air chamber directly to the cylinder, so as to have a direct action on the water in the cylinder, and also to have a direct discharge for the water, independent of the air chamber. This direct action of the air in the air chamber upon the water in the cylinder, and the direct discharge of the water through a discharge pipe, independent of the air chamber, were secured by connecting the air chamber to an opening on one side of the cylinder and the discharge pipe to an opening in the opposite side of the cylinder, and by keeping the pipe forming the air chamber wholly unconnected with the discharge pipe. By means of the combinations thus formed, Bean was enabled to furnish a better mode of connecting the pump stock and cylinder, and also a more efficient form of air chamber; but the means pointed out by him of accomplishing these ends, as set forth in his original application, consist of the form or mode of combining old elements, and this is the construction which must be placed upon the first and second claims of the original patent.

Turning now to the reissue, it appears that the first and second claims of the original patent are replaced by the first, second, third, and fourth claims of the reissue, wherein the invention is declared to be a supporting tubular air chamber, connected at the lower end with a cylinder or chamber. Practically, these claims cover any form wherein a supporting tubular air chamber is interposed between the pump stock and the pump cylinder, no matter how far separated it may be from the latter. The interpolation of the word "chamber" in the description and claims makes provision for entirely separating the ends of the air chamber and discharge pipe from the cylinder, and the reissue covers, therefore, pumps wherein the tubular air chamber and discharge pipe, instead of opening into the cylinder at opposite sides, open into a T, from which a single tube extends down to the cylinder. In pumps thus constructed would be found a tubular air chamber, opening into a chamber connected with the pump stock and aiding in supporting the structure, thus meeting the requirements of the first and third claims of the reissue, and by adding a discharge pipe the requirements of the second claim would be fulfilled. Pumps thus constructed would certainly show a wide departure from the combinations described in the first and second claims of the original patent. There would not be found therein the simple and substantial support for the cylinder formed by placing the same between the lower ends of the air chamber and the discharge pipe, and firmly bolting them together, as described in the original patent; the air chamber and discharge pipe would not open into the cylinder directly opposite each other. The cylinder would not have two holes therein, one for discharge and one for the air chamber, thus giving the air of the chamber direct action upon the water in the cylinder, as described in the original patent; nor would there be provided a direct discharge for the water, independent of the air chamber, because the pipe or tube extending from the T into which the air chamber and discharge pipe open would not afford a discharge pipe wholly independent of the air chamber, nor would the distance be-

tween the lower end of the air chamber and the pump cylinder be reduced to zero, which, according to the testimony of complainants' expert witness, is one of the valuable features of the Bean invention. In fact, the difference existing between the original and reissued patents is shown by comparing the statements in the two patents of the nature of the invention claimed. In the original it is said:

"The nature of my invention consists in the construction and novel arrangement of a pump stock, connected with the cylinder by two tubes, one forming an air chamber and the other the discharge pipe, said tubes opening into the cylinder directly opposite each other, as will be hereinafter more fully set forth."

Whereas in the reissue it is said:

"The nature of my invention relates to force pumps, and it consists in a tubular air chamber attached to the pump stock or platform flange, and connecting to and opening into the cylinder or chamber, and forming also a support for the same. My invention consists further in a supporting tubular air chamber and discharge pipe, attached to the pump stock or flange plate, and connecting with and opening into a cylinder or chamber; also, in the combination of the parts, as will be hereinafter more fully set forth, and pointed out in the claims."

In the original application the invention claimed was the novel arrangement and combination of the parts, which consisted in having the tubes forming the air chamber and discharge pipe open directly into the cylinder at opposite points, and by firmly bolting the parts together, and then connecting the upper ends of the tubes to the pump stock, the double purpose of affording a steady support to the pump cylinder and of furnishing an efficient air chamber acting directly on the water in the cylinder was accomplished. In the reissue the main feature claimed is a supporting tubular air chamber. In the reissue the form of the combination of the parts is not of the essence of the claimed invention, but the purpose is to cover a supporting tubular air chamber, and thus to bring within the scope of the patent all pumps which include in their structure a tubular air chamber giving support to any of the parts, for, under the first and second claims of the reissue, it is not requisite that the air chamber should be the support of the pump cylinder. These considerations make it apparent that the purpose of the reissue was to patent the conception of a supporting tubular air chamber, and to thus bring within the patent forms of pumps which would not be within the terms of the combination covered by the original patent, and it must, therefore, be held that the reissue broadens the claims found in the original patent.

It may be urged, and strong support to the contention would be found in the evidence, that the reissue patent does not in fact cover more than Bean is justly entitled to lay claim to as an inventor. If the reissue had been promptly applied for on the ground that the original patent, through mistake or inadvertence, did not contain claims broad enough to protect the invention to its full extent, it might be held valid. The difficulty lies, not only in the length of time which was allowed to elapse before the reissue was applied for, but in the failure to show that any mistake existed in the original

application. It is now settled that when a reissue is sought for the purpose of enlarging or broadening the claims of an existing patent, the application must be made within a reasonable time. Miller v. Brass Co., 104 U. S. 350; Mahn v. Harwood, 112 U. S. 354, 5 Sup. Ct. 174, and 6 Sup. Ct. 451. Not only so, but it must also be shown that there was a mistake, inadvertently committed, whereby the original patent failed to cover what it was then intended should be covered by the patent then applied for. Mahn v. Harwood, supra; Coon v. Wilson, 113 U. S. 268–277, 5 Sup. Ct. 537; Corbin Cabinet Lock Co. v. Eagle Lock Co., 150 U. S. 38, 14 Sup. Ct. 28; Topliff v. Topliff, 145 U. S. 156–170, 12 Sup. Ct. 825; Huber v. Manufacturing Co., 148 U. S. 270, 13 Sup. Ct. 603; Dunham v. Manufacturing Co., 154 U. S. 103, 14 Sup. Ct. 986. Under the doctrine of these cases, the first, second, third, and fourth claims of the reissue must be held void, because they clearly broaden the first and second claims of the original patent, and it appears that there was not any mistake or omission in the original application, and because, further, the reissue was not applied for within a reasonable time, nearly three years intervening between the issuance of the original patent and the filing of the application for the reissue.

In a supplemental brief, filed by counsel for complainants since the oral agreement in the case was had, it is contended that the averments of the bill are sufficient to bring before the court the question of the infringement of the fifth claim of the reissue, which corresponds to the third claim in the original patent. Before entering upon the hearing of the case, complainants asked leave to file an amendment to the bill, covering the fifth claim. The court stated that leave would be granted to file the amendment, but the defendants, if they desired it, would be granted time to meet by evidence and argument any new questions thus presented. Thereupon complainants withdrew the application for leave to amend, and it was expressly stated and understood that the case would proceed upon the theory that the bill charged only an infringement of the four first-named claims of the reissue, and it would not be fair, either to the defendant or the court, to now insist that the fifth claim was in issue in the case.

The view reached upon the question of the validity of the four claims of the reissue, being adverse thereto, obviates all need for considering the other defenses pleaded, although the same have been very fully and carefully presented and discussed by the counsel in the case. The conclusion is that so far as the bill is based upon the patent reissued to Roscoe Bean, under date of March 25, 1879, the same is dismissed upon the merits. As already stated, the bill charged an infringement of the first and third claims of patent No. 339,445, issued to Samuel W. Martin, under date of April 6, 1886, and of the first claim of patent No. 259,394, issued to Wm. D. Hooker, under date of June 13, 1882. These patents are so closely related in their subject-matter that they can be considered together. The first claim of the Hooker patent covers a cap or discharge chamber, from the rim of which depends an outer supporting cylinder, connected with the bucket barrel, and containing an inner cylinder,

within which the plunger operates, both cylinders being attached to the cap or discharge chamber, with a space between them which forms the water way, the cap having also three sockets therein, the central one being used for the pump rod and the other two receiving the ends of the discharge pipes through which the water passes into a common air chamber. This arrangement of the parts gives compactness thereto, and its usefulness consists in so uniting the parts that the structure can be used in a well of a diameter sufficient to receive the rim of the discharge chamber, which was screwed upon the ouside of the outer cylinder. The Martin patent was an improvement in the same direction, the plan adopted being to reduce the size of the cap by screwing it to the inside of the main cylinder, so as to make the outer portion of the cap flush with the outer portion of the cylinder, and thus enabling the structure to be used in wells of small diameter. Had this been the only difference between the modes adopted by Hooker and Martin, the mere change in the form of uniting the cap and cylinder would not have shown a patentable invention. In fact, however, if in the Hooker structure the cap should be screwed into the end of the cylinder, it would prevent in whole, or nearly so, the flow of the water from the water way into the cap space, thus destroying the value of the combination. To obviate this difficulty, Martin did not connect the inner cylinder directly to the cap, as is the form in the Hooker patent, but he connected it to a tube of smaller diameter, interposed between the top of the inner cylinder and the cap, thus leaving a water space free and unobstructed for the upward passage of the water. In the brief of defendant, it is stated that the defense chiefly relied upon against the Martin patent is that of anticipation, this defense being based upon the evidence regarding a pump claimed to have been made by Daniel Johnson at Ashland, Ohio, and put into a well on the premises of Wilbur F. Felger in the year 1883. It is well settled that to sustain the defense of prior invention or use, the evidence must be clear, satisfactory, and such as to leave no reasonable doubt as to the material facts. Furthermore, when it appears that several parties have been independently engaged in experiments upon the same invention or device, the one who succeeds in first giving it a practical form, who brings it to public knowledge by obtaining a patent therefor, and makes it of general use and value by manufacturing or causing to be manufactured machines or articles embracing the invention, will be protected in the rights secured by his patent, even though it be shown that another may have mentally conceived the invention at an earlier day, or even if, in addition to the mental conception, he may have embodied it in a successful experimental form, and then abandoned it. The benefits and protection of the patent law are not for those who indulge in speculations and experiments only, but are intended to protect those who make available to the public novel and useful inventions by following up the original conception, carrying it through the experimental stage, and so far perfecting it as to furnish to the public a practical means of utilizing the novelty sought to be patented. Barbed Wire Patent, 143 U. S. 275, 292, 12 Sup. Ct. 443, 450; Coffin v. Ogden, 18

Wall. 120; Cantrell v. Wallick, 117 U. S. 689, 6 Sup. Ct. 970; Deering v. Harvester Works, 155 U. S. 286, 15 Sup. Ct. 118. It may, therefore, be admitted that the evidence shows that Johnson was experimenting in the same direction pursued by Martin, and that his efforts in this line antedated those of Martin; but it is no less clear that if the public knew no more of the invention than was communicated to it by the making and use of the Felger pumps, in 1883 and 1884, it would be in entire ignorance of the improvement. The experiment was made, and then abandoned; that is to say, it was not made the basis of an application for a patent, nor was the manufacture and sale of pumps embracing the invention entered upon. I do not, therefore, deem it necessary to consider in detail the evidence upon the question of the actual date of the making of the Felger pumps, as it must be held that they do not defeat the Martin patent, even if made before the date thereof. In regard to the Hooker patent, the point is made that the evidence fails to show title thereto in the complainants. It is admitted by counsel for complainants that, through oversight, the conveyance or assignment to Mast, Foos & Co. was not put in evidence, and leave is therefore given to supply the lacking link in the chain of title. Assuming that this will be done, I hold that the Hooker and Martin patents are valid, and that the first and third claims of the Martin patent and the first claim of the Hooker patent are infringed by the pumps put in evidence by the defendant. The result is that the bill is dismissed upon the merits, and at the cost of complainants, on the Bean patent, and is sustained on the Hooker and Martin patents. Decree accordingly.

NEW HOME SEWING-MACH. CO. v. SINGER MANUF'G CO.

(Circuit Court, S. D. New York. May 22, 1895.)

PATENTS—INFRINGEMENT OF COMBINATION CLAIM—SEWING MACHINE.

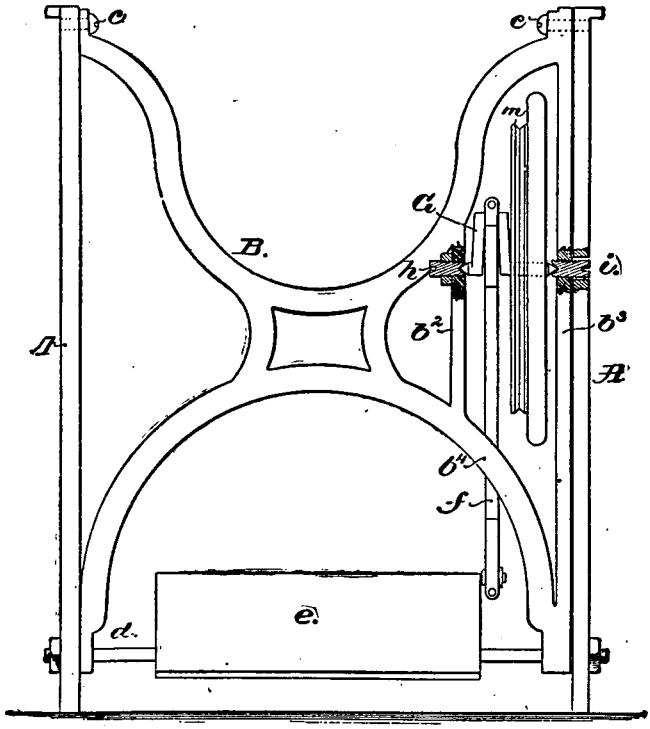
The Grout patent, No. 261,446, for an improvement in sewing-machine treadles, construed narrowly, and, being for a combination, *held* not infringed by a machine which omitted two of the elements expressly named in the claim.

This was a bill by the New Home Sewing-Machine Company against the Singer Manufacturing Company for infringement of a patent relating to sewing-machine treadles.

This action is based upon letters patent, No. 261,446, granted to W. L. Grout, July 18, 1882, for an improvement in sewing-machine treadles. The patent is now owned by the complainant. The specification is as follows:

"My invention has for its object a novel construction of the treadle to support the crank of the driving-wheel at each end. In this my invention I have mounted the adjustable bearing-screws in a brace which connects together the side pieces of the treadle, thus making a very firm support for the crank-shaft and bracing the table very firmly. The drawing represents in front elevation a sewing-machine table embodying my invention.

"In the drawing, A represents the side pieces of the treadle, and B the brace connecting the said side pieces, the screws, c, and rod, d, uniting the said side pieces and brace, the rod, d, also supporting the treadle, e, connected by link, f, with the crank of the crank-shaft, G, pointed or made conical at its ends and supported by the bearing-screws, h, i, having conical re-



cesses at their inner ends and made adjustable in the upright bearing-bars, b^2, b^3, of the brace, B, the said brace being as usual, with the exception of the addition of the said bearing-bars. The driving-wheel, m, is fixed to the crank-shaft, G. The head of the bearing-screw, i, is exposed through a hole left for that purpose in the side piece, so that the said screw may be readily adjusted by means of a set-screw. Outward bending of the bar, b^3, is obviated by the side frame against which it rests. The link, f, passes back of the curved part, b^4, of the frame, and acts to prevent the dress of the operator coming against the link and wheel, m. The addition to the usual brace, G, of the two bearing-bars enables me in a very cheap and simple manner to support the driving-wheel at both ends of its crank-shaft and in adjustable bearings, which enables the crank-shaft to be held steadily and to be run with the minimum of friction, and enables wear in the bearings to be compensated for.

"I claim—

"The side pieces, A, the brace, B, provided with the bearing-bars and the adjustable bearing-screws, combined with the crank-shaft supported at each end in the said bearing-screws, and the balance-wheel thereon, as shown and described."

John Dane, Jr., for complainant.

Livingston Gifford, for defendant.

COXE, District Judge. It is not pretended that the invention is a broad one. It relates only to a minor improvement in an over crowded art. The claim is clear and explicit. There is no room for mistake; a tyro in mechanics can understand its

provisions. It contains the following elements: First. The two side pieces, A. These are the ordinary legs which support the table of a sewing machine. Second. The brace, B. This brace is of the well known saw-buck pattern. Third. The upright bearing-bars, b^2, b^3, being integral, but additional, parts of the brace. Fourth. The adjustable bearing-screws, h, i, located in the bearing-bars. Fifth. The crank-shaft, supported at each end in the bearing-screws. Sixth. The balance wheel on the crank-shaft. It is admitted that the defendant's machine omits the upright bearing-bar, b^2, and the adjustable bearing-screw, h; both of which are particularly pointed out and distinctly claimed in the patent. It is possible that the frame of the brace which is made to serve as the inside bearing-bar in the defendant's machine might be construed as a substitute for the bar, b^2, but there is no way in which the complainant can avoid the effect of the omission of the bearing-screw, h. The claim covers both screws. Not only does the patentee claim both screws, but that he did so deliberately is placed beyond doubt not only by a reference to the plain language of the description, but also by the further claim of the "crank-shaft supported at each end in the said bearing-screws." Even if the patentee were entitled to a wide range of equivalents it is doubtful if he could hold the defendant's machine, for the reason that one element of the claim is omitted entirely and nothing is put in its place. But the patentee is not entitled to the liberal treatment accorded to a pioneer. He has made a small advance in the art and has informed the public of the precise nature of his improvement. He must abide by the language of the claim as he has chosen to write it. If there were an opportunity for interpretation the court would undoubtedly adopt the broadest construction compatible with the proofs; but the claim needs no interpretation; its meaning is perfectly clear. When the patentee says "bearing-screws" he does not mean "one bearing-screw." When he speaks of "the crank-shaft supported at each end in the said bearing-screws" he does not mean "the crank-shaft supported at one end in a bearing-screw." It is no answer to say that the patentee has placed an unnecessary limitation upon his claim. It is plain that the patentee regarded the two bars and the two screws as important elements of his invention and intended thus to cover features not found in the antecedent art. The specification is consistent with this view and inconsistent with any other view. But the patentee's intentions are immaterial in a case where there is absolutely no doubt as to what he actually did. The question is not what might have been claimed, but what is claimed. The courts cannot undertake to construct new claims for inventors. If they have made their claims too narrow it is their misfortune—beyond the power of the court to remedy. Keystone Bridge Co. v. Phoenix Iron Co., 95 U. S. 274; McClain v. Ortmayer, 141 U. S. 419, 12 Sup. Ct. 76; Baumer v. Will, 53 Fed. 373.

For the reason, then, that the defendant's machine omits two elements of the combination of the claim it must be held that it does not infringe. The bill is dismissed.

AMERICAN CABLE RY. CO. v. MAYOR, ETC., OF CITY OF NEW YORK et al.

(Circuit Court, S. D. New York. May 21, 1895.)

1. PLEADINGS AND PROOF—DEPARTURE—ASSIGNMENT OF PATENT.
Proof of a direct assignment of a patent from the patentee to complainant does not constitute a departure, although the bill alleges an assignment from the patentee through two intermediate parties to the complainant.

2. PATENTS—CABLE RAILWAY.
The Miller patent, No. 271,727, for an improvement in cable railways, for raising the cable to the grip. *held* not anticipated.

3. CORPORATIONS—CORPORATE EXISTENCE—SUIT FOR INFRINGEMENT OF PATENT.
Where a corporation has been organized, and has taken title to a patent (which action is apparently within the scope of its powers), and no proceedings have been taken to terminate its existence, it may maintain a suit for infringement of the patent notwithstanding that defendant questions its corporate existence on the ground of failure to seasonably commence the corporate business.

This was a suit by the American Cable Railway Company against the mayor, aldermen, and commonalty of the city of New York and the city of Brooklyn for alleged infringement of a patent relating to an improvement in cable railways.

Chas. Howard Williams and Daniel H. Driscoll, for plaintiff.
Francis Forbes and William H. Dykman, for defendants.

WHEELER, District Judge. This suit was brought for infringement on the New York and Brooklyn bridge of patent No. 271,727, dated February 6, 1883, and granted to Daniel J. Miller for an improvement in cable railways for raising the cable to the grip, alleged to have been assigned May 14, 1883, by Miller to Otis S. Horton; by him, July 10, 1883, to the Cable Construction Company; and by that company, February 25, 1888, to the orator,—by instruments in writing recorded in the patent office. Certified copies from the patent office were put in evidence for proof of the assignments. On hearing before Judge Coxe, this proof of title was held to be sufficient, the patent was sustained, infringement was found, and a decree was entered for the plaintiff. 56 Fed. 149. On appeal, the circuit court of appeals held the proof of title to have been insufficient, and the decree was reversed, without prejudice to reopening the proofs. 9 C. C. A. 336, 60 Fed. 1016. The proofs have been reopened, and testimony introduced by the plaintiff tending to prove the absence beyond knowledge of the subscribing witnesses, and by the plaintiff to prove and by the defendants to disprove the signature of Miller to the assignments; and the plaintiff has proved, beyond question made, the execution of an instrument in writing between Miller and the plaintiff dated February 23, 1888, which recites the ownership of many patents by Miller, naming them by number and date, and that the plaintiff "is the holder and owner of certain letters patent of the United States, numbered, entitled, and dated as follows: No. 271,727. The Construction of Railways. February 6, 1883,"—and, after further recitals, provides in consideration of the premises

that "the said Miller hereby sells, assigns, and conveys to the said American Cable Railway Company, its successors and assigns, each and all of said letters patent," etc. The defendant still insists, not only that the signatures to the assignments from Miller to Horton and from Horton to the Cable Construction Company are still insufficiently proved, but that the signature to that from Miller to Horton is a forgery. In view of all the circumstances, and especially of the recital in this later instrument of the ownership by the plaintiff of this patent, which would come by way of these assignments, their execution and the genuineness of this signature of Miller seem to be well enough proved. But, if the position of the defendants should be sustained and those assignments fail, the title would then be left remaining in Miller, and be conveyed by this latter instrument to the plaintiff. Objection is made that proof of an assignment from Miller directly to the plaintiff would be a departure from the bill, but the substance of the allegation of assignment from Miller by way of Horton and the Cable Construction Company to the plaintiff is proved by showing an assignment from Miller to the plaintiff, without following all the intermediate steps.

The defendants have also by leave introduced an Italian patent, dated December 31, 1868, and granted to Edmund Barnes, for lowering out of the way at grade crossings the high central rail of railways having such a rail to engage horizontal driving wheels on steep places, according to the English patent No. 277, dated January 26, 1863, and granted John Barraclough Fell. That is a different thing, however, from raising a limber cable on pulleys to bring it within reach of the grip, and it appears to have been contrived to be done in a different way. These patents do not affect the case, as now understood, sufficiently to vary the result.

The defendants now make question about the corporate existence of the plaintiff, principally with reference to the seasonable commencement of corporate business. The corporation was organized, and took the title to this patent, which seems to be within the scope of its corporate powers. No proceedings have been taken to terminate it. Under these circumstances, it seems to exist, so far at least as to be able to maintain this suit against wrongdoers for trespassing upon this corporate property. Decree for plaintiff as before.

THE EARNWELL.

MARSHALL v. THE EARNWELL.

(District Court, E. D. Pennsylvania. May 28, 1895.)

No. 10.

1. ADMIRALTY—PLEADINGS AND PROOF.

Where, in defense to a libel by a pilot to recover fees from a vessel which had rejected his services, it was pleaded that libelant, after signaling an offer of services, hauled down the signal, and sailed away, thus preventing the ship from taking him, *held*, that on failure of the evidence to sustain this claim, respondent was not entitled to prove that other pilots also offered their services at the same time, and that the vessel would have been subjected to serious inconvenience in order to take libelant.

2. PILOTS—OFFER OF SERVICES—OBLIGATION TO ACCEPT.
A vessel bound up the Delaware river to Philadelphia is obliged to accept the first available pilot who offers his services, and if she refuses him, and takes one who at the time was further away, she is nevertheless liable to the former for his fees. The Clymene, 9 Fed. 164, and The Alzena, 14 Fed. 174, followed.

This was a libel by William F. Marshall, a pilot, against the steamship Earnwell, for refusal to accept his services when offered.

Edward F. Pugh and Henry Flanders, for libelant.
Henry R. Edmunds, for respondent.

BUTLER, District Judge. No question of law is involved. The respondent was bound to accept the first available pilot who offered his services. The Clymene, 9 Fed. 164; The Alzena, 14 Fed. 174. She was not required however to go materially out of her way to meet him or stop and wait, if others were more convenient, because he first signaled, but simply to accept the services of the pilot first offering where she could do so without disadvantage. If several offered simultaneously she could accept the services of either.

The questions raised by the pleadings are first: Is the libelant a pilot? Second. Was the respondent required to take a pilot? Third. Was she excusable in refusing the libelant's services? That the libelant is a pilot, and that the respondent was required to take one is now conceded. The only question therefore is, was she excusable in refusing to take the libelant? The single excuse set out in the answer is, that he withdrew the offer of his services after having made it, and "thus prevented the respondent taking him." The answer says:

"At about 5:45 o'clock a. m. of the 3d day of February, A. D. 1894, the steamship Earnwell passed Fenwick's Island light, bound in, and her course was set for Cape Henlopen. At daybreak there were three pilot boats in sight: one about six miles to the eastward, another about four miles northeastwardly, and the third about north, distant about four miles. The latter standing directly across the track of the steamer. The libelant was on the boat, named above, as being northeastwardly, and was out of the track of the steamer. That shortly after sighting the said boats, libelant's boat signaled by hoisting her flag and continued coming towards the steamer, but when within about one and a half miles from the steamer, for some cause unknown to deponent, she hauled down her signal and sailed away, thus preventing the Earnwell from accepting the service. The steamer continued on her course until she intercepted the boat, whose course was above given as north, from which a duly-licensed pilot was taken."

Thus it is seen that the only issue presented by the pleadings is, did the libelant withdraw his tender of services, and thus "prevent the respondent accepting them?" The evidence shows that he did not; and the defense is now shifted to other grounds. It is asserted that two other pilots also offered their services at the same time, and that the respondent would have been subjected to serious inconvenience in taking the libelant. If this is true it should have been averred in the answer, and the defense put upon it. It is as important that the pleadings in the admiralty shall show the issue to be tried, as it is in other courts.

The truth, as I find it, however, is that the only offer of services which the respondent was bound to regard, was the libelant's. The offer from a boat several miles away in the rear was out of the question. The libelant's boat and the Bayard, from which the pilot was taken, were similarly situated; and alone were available. The respondent could have taken a pilot from one of them as readily as from the other. The former offered his services by the usual signal, which the respondent understood, as the answer shows, and the latter did not. He did not expect to be employed—recognizing the libelant's right, arising from his tender. The respondent chose however to run by the libelant and select a pilot from the other, which she had no right to do. She would not have suffered materially more delay in taking the libelant than she sustained in changing her course to come up with the Bayard.

The libelant must have a decree for the sum claimed.

THE SILVIA.

FRANKLIN SUGAR REFINING CO. v. RED CROSS LINE.

(Circuit Court of Appeals, Second Circuit. May 28, 1895.)

1. SHIPPING — DAMAGE TO CARGO—SEAWORTHINESS—NEGLIGENT MANAGEMENT.
The fact that ports only eight inches in diameter, situated eight or nine feet above the water, are closed at the commencement of a voyage only by heavy glass covers, set in brass frames, leaving open additional iron covers with which they are provided, does not constitute unseaworthiness; and if the failure of the officers to have the iron covers closed upon encountering rough weather is a fault or negligent omission, it is one occurring "in the management of said vessel," from the results of which the owner and vessel are freed from liability by section 3 of the act of February 13, 1893.

2. SAME—FOREIGN VESSELS.
Section 3 of the act of February 13, 1893, which relieves vessels and their owners from liability for loss or damage resulting from faults or errors in navigation or in the management of the vessel, if the owners have exercised due diligence to make her seaworthy, and have her properly equipped, manned, and supplied, applies to foreign vessels transporting merchandise to or from American ports as well as to American vessels.

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

This was a libel by the Franklin Sugar Refining Company against the steamship Silvia to recover for damage to cargo. The district court dismissed the libel (64 Fed. 607), and the libelant appeals.

Wing, Putnam & Burlingham, for appellant.

Convers & Kirlin, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. The cargo for the injury to which this suit was brought was shipped at Matanzas for Philadelphia under a bill of lading which provided for the delivery in good order and well conditioned, "the dangers of the seas only excepted." It was injured

by sea water, which came through a port in one of the compartments of the between decks, which had been recently fitted up to carry steerage passengers, but which at the time was only used for the storage of ropes and extra gearing. The port was one of several in the compartment, was of the diameter of eight inches, was furnished with a heavy glass cover, set in a brass frame, and also with an extra cover of iron, and was eight or nine feet above the water when the vessel was deep-laden. When the steamship left Matanzas the weather was fine. None of the ports in the compartment were closed otherwise than by the glass cover, and the hatch, which was the only entrance to the compartment, was battened down. After getting out to sea, rough weather was encountered, and soon after, and when the steamship had been six or eight hours on her voyage, it was found that water was entering the engine room. An investigation ensued, which resulted in ascertaining that the glass cover of one of the ports was broken, and the water had entered in consequence. Whether the cover was broken by the force of the seas, or by floating timber, or a piece of wreckage, was wholly a matter of conjecture. The officers of the vessel regarded the glass covers as strong enough to resist ordinarily heavy seas, and seem to have left the iron covers unclosed intentionally upon the present voyage, in order that the compartment might be light in case it became necessary to visit it. In every other respect, save that when she sailed the iron shutters were not fastened over the ports, the vessel was tight, staunch, and fit for the voyage.

The learned district judge who heard the cause in the court below was of the opinion that the steamship was not in a seaworthy condition at the beginning of her voyage, but that her owners had used due diligence to make her so, and consequently that she was exonerated from liability for the injury to the cargo by the provisions of the act of congress of February 13, 1893, relating to navigation of vessels, commonly known as the "Harter Act."

We are of the opinion that the steamship was not unseaworthy when she began her voyage. Granting that the glass covers were not a sufficient protection for the ports in rough weather, they were adequate for fair weather, and it would have been but the work of a few moments to unbatten the hatch of the compartment, and close them with the iron covers. In the state of the weather during the first few hours of the voyage there was no necessity for closing the ports with the iron covers; none even for closing them with the glass covers; and it can hardly be imagined that a storm would be encountered without premonitions affording ample time for access to the compartment, and for fastening the iron covers. The case of Steel v. Steamship Co., 3 App. Cas. 72, is quite in point. In that case a cargo of wheat was damaged by sea water entering a port about a foot above the water line, owing to the insufficiency of the fastenings. The special finding of the jury did not state whether the insufficient fastening of the port happened before starting on the voyage or afterwards. The bill of lading contained the usual negligence exemptions, which were sustained in the court below, where judgment was given for the defendants. On appeal it

was held that the judgment must be reversed, and the cause remanded for a specific finding as to whether the port was insufficiently fastened when the steamer sailed, and, if so, whether the cargo was so stowed with reference to the port that it could not be readily closed on short notice, on the approach of storm. Lord Blackburn expressed the opinion that if the port was in a place where it would be in practice left open from time to time, but was capable of being speedily shut if occasion required, the vessel could not be said to be unfit to encounter the perils of the voyage; that if, when bad weather threatened, it was not shut, that would be negligence of the crew, and not unseaworthiness of the ship.

If the steamship was seaworthy, she was nevertheless liable for the loss, notwithstanding the exception against dangers of the seas in the bill of lading, if those in charge of her navigation were negligent in not causing the port to be sufficiently secured after the steamship got out to sea, unless the act of congress relieves her. Whether they were justified in supposing that there could be any reasonable apprehension of risk from a port so small and so high above the water line as this, protected as it was by a glass cover of such thickness, is a question of fact in respect to which different minds might differ. Assuming, however, that they were not, and that they were negligent in not putting on the iron cover, we think the case is controlled by the act of congress, and that its provisions relieve the steamship from liability. Section 3 of that act provides:

"If the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped and supplied, neither the vessel, her owner or owners, agent or charterers shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel, nor shall the vessel, her owner or owners, charterers, agent or master be held liable for losses arising from dangers of the sea or other navigable waters."

It is perfectly obvious from the language of this act that congress intended to relax the severity of the obligation imposed on the shipowner as a carrier of goods by the pre-existing law as it had been declared by the courts. It had long been determined that in every contract for the carriage of goods by sea there is an implied warranty that the vessel is seaworthy at the time of beginning her voyage, unless this is superseded by some express condition in the contract. The very term "warranty" imports an absolute undertaking that the fact is as represented; and it was the settled meaning of the term as implied in contracts of affreightment or of insurance that it is an undertaking by the shipowner not only that he will exercise due diligence to have the vessel seaworthy, but that she shall really be so. "If there should be a latent defect in the vessel, unknown to the owner, and not discoverable upon examination, yet the better opinion is that the owner must answer for the damage caused by the defect." 3 Kent, Comm. 205. Modern adjudications affirm this proposition in the strongest terms, and declare the implied warranty to be an absolute undertaking, not dependent on the owner's care or negligence, that the ship is in fact fit to undergo the perils of the seas, and other incidental risks, covering latent defects, not ordi-

narily susceptible of detection, as well as those which are known, or are discoverable by inspection. The Edwin I. Morrison, 153 U. S. 199, 14 Sup. Ct. 823; The Caledonia, 157 U. S. 124, 15 Sup. Ct. 537. It has also always been the law that the exemption of the dangers of the seas in the bill of lading or other contract of affreightment does not exonerate the shipowner from responsibility for injury to the goods which results from a breach of his implied obligation to provide a seaworthy vessel. Thus the carrier was responsible for a loss produced by the dangers of the sea if it was one which would not have happened except for the concurrence of some unknown and undiscoverable defect in the equipment of the vessel, which defect, because it was not discoverable, could not be remedied. In the place of this responsibility the act of congress substitutes a less stringent one by declaring that if the owner shall exercise "due diligence" to make the vessel in all respects seaworthy, neither he nor the vessel is to be responsible for damages or loss in transporting merchandise, resulting from "faults or errors in her navigation or management," nor for losses arising from dangers of the sea. Other sections of the act emphasize the meaning of the particular section. Sections 1 and 2 prohibit carriers from relieving themselves by contract from the obligation of exercising "due diligence to make their vessels seaworthy," or from liability for loss or damage to cargo arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery; that it does not prohibit them from displacing by contract the warranty of seaworthiness, or their responsibility as insurers of cargo. Read as a whole, the purpose of the act manifestly is, on the one hand, in the interests of the public, to prevent carriers from evading responsibility to exercise due diligence in providing seaworthy vessels, and in the handling and care of the cargo; and, on the other hand, whenever they have exercised due diligence in these respects, to absolve them from liability for losses arising during the transit from the perils of the sea and from faults or errors in the navigation or management of vessels.

Doubtless the act does not prevent the carrier from waiving by contract with the cargo owner those provisions which relax his ordinary obligations. He may do so by a charter party or bill of lading containing an express warranty of seaworthiness, or by a foreign contract with the provision that it shall be governed by the law of the place of the contract. But his responsibility to a cargo owner who sues in the courts of this country cannot be curtailed in any of the particulars prohibited by the act, and he is entitled to the benefits of the less rigorous liability which is substituted in place of his liability as an insurer.

It has been urged that section 3 is not intended to apply to foreign vessels, but the argument finds no support in the language of the section; and the intention to subject foreign vessels to a measure of responsibility, which is, as to domestic vessels, regarded by the act as too severe, ought not to be unnecessarily imputed to congress.

In the present case the vessel owners certainly did exercise due diligence to make the vessel seaworthy, and, if the failure to fasten the port with its iron cover was in any sense a fault or negligent

omission, it was one in the management of the vessel, committed by those in charge of her navigation after she had started on her voyage.

For these reasons we conclude that the district court properly dismissed the libel, and that the decree should be affirmed, with costs.

STARR & CO. v. GALGATE SHIP CO.

(Circuit Court of Appeals, Ninth Circuit. April 22, 1895.)

No. 179.

1. PRINCIPAL AND AGENT — NEGOTIATION OF CHARTER PARTY BY BROKERS — BOUGHT AND SOLD NOTES.

A firm of brokers in San Francisco, having correspondents in London, offered to defendants, who were exporters of wheat and flour in San Francisco, a British ship for charter. After some negotiations, in which defendants required, as was their custom (the same being well known to the brokers), that the charter should contain a provision for "charterers' surveyor," the brokers telegraphed their correspondents in Liverpool an acceptance of the terms offered. The Liverpool correspondents then arranged for signing the charter party there, and the same was executed in behalf of the ship owners, but in doing so their agent struck from the printed form the word "charterers'," and inserted "competent" before the word "surveyor." This was objected to by the correspondents of the San Francisco brokers, but, failing to get it changed, they nevertheless signed the charter party, styling themselves "agents for defendants." On receiving notice thereof, the San Francisco brokers addressed a letter to defendants, stating that the charter party had been signed, giving its provisions as to rate of freight, time of arrival, etc., but failing to state the action taken in regard to the surveyor, merely concluding their statement with the expression, "all other usual conditions"; and they asked defendants to confirm the charter. This defendants accordingly did, but without any knowledge of the change that had been made. No authority had previously been given to execute the charter in Liverpool. *Held*, that the confirmation, having been made without knowledge of a material provision, was inoperative, and that the letter of notification and the answer of confirmation could not be regarded as a transaction by bought and sold notes so as to constitute them the sole evidence of the contract. 58 Fed. 894, reversed.

2. SAME—RATIFICATION.

Copies of the charter party having been transmitted in due course of time to the San Francisco brokers, they inclosed the same to defendants, and the latter immediately replied, stating that the terms were right, except that they should insist upon "charterers' surveyor." Some negotiations were had for the purpose of inducing them to waive this provision, but they never did so, and the brokers assured them that they would see that there was no trouble in that connection. On the arrival of the ship, the brokers notified defendants thereof, to which defendants replied that the ship was not under charter to them. Rates of freight had declined in the meantime. *Held*, that there was nothing in the circumstances or in the conduct of defendants which operated as a ratification of the charter or a waiver of the condition, and that they were not liable for refusal to load the ship.

Appeal from the District Court of the United States for the Northern District of California.

This was a libel in personam by the Galgate Ship Company against Starr & Co., a corporation, to recover damages for an alleged breach

of a charter party. The district court rendered a decree for libelant. 58 Fed. 894. Respondent appeals.

Joseph Hutchinson and George W. Towle, for appellant.
Page & Ells and Andros & Frank, for appellee.

Before McKENNA, Circuit Judge, and HANFORD and HAWLEY, District Judges.

HAWLEY, District Judge. This is a libel in personam, in admiralty, brought to recover damages alleged to have been sustained by appellee by reason of the refusal of appellant to fulfill the terms of a charter party alleged to have been entered into by it, through its agents, Balfour, Williamson & Co., of Liverpool, with John Joyce & Co., agents of the owner of the ship Galgate. Appellant denies the making of the agreement and also denies that Balfour, Williamson & Co. were its agents for the charter of the ship. The district court, after the trial and hearing of the case, entered an order dismissing the libel, with costs. It subsequently vacated this order, and granted a rehearing, and, after argument of counsel, it adjudged that the appellee herein was entitled to recover from appellant the sum of $19,180. Galgate Ship Co. v. Starr & Co., 58 Fed. 894.

Appellant is a California corporation, and is extensively engaged in the shipment of wheat and flour to foreign countries. Appellee is a foreign corporation, having its principal place of business in Liverpool, and is the owner of the ship Galgate. Balfour, Guthrie & Co. are San Francisco merchants, who include in their business the chartering of vessels for themselves and for other parties. Balfour, Williamson & Co. are Liverpool merchants engaged in like business. These respective houses or firms are intimately related to each other by a community of partnership interests. The charter party, for a breach of which this action is brought, is dated at Liverpool, June 4, 1891. It is signed by John Joyce & Co., managing owners of the Galgate, as the party of the first part, and "by authority of Starr & Co., Balfour, Williamson & Co. as agents," the party of the second part. It provides for the chartering of the steel ship Galgate to Starr & Co. for a voyage from San Francisco to certain ports in Europe, at the option of the charterer, with a cargo of wheat, flour, or other lawful merchandise, and recites the fact that the vessel was then on a voyage from New York to Melbourne, with liberty to take cargo from Newcastle to San Francisco for owners' benefit. It was filled out on a printed form which, among other things, contained the following printed condition: "Vessel to be properly stowed and dunnaged; and certificate thereof, and of good general condition, draft of water, and ventilation, to be furnished to the charterers from charterers' surveyor." When executed the word "charterers" in the last clause was erased, and the word "competent" interlined in lieu thereof, so that it read "competent surveyor," instead of "charterers' surveyor." The controverted question as to the agreement between the parties centralizes around these words "competent surveyor" and "charterers' surveyor," and, incidentally, as to the meaning of the words "usual terms"

or "usual conditions," as used in certain cables and letters hereinafter referred to.

The contention of appellant is that it never authorized the signing of the charter party except it contained the condition that the certificate referred to in the clause above quoted was to be furnished by "charterers' surveyor." This is denied by appellee. The oral testimony upon this point is conflicting. It therefore becomes necessary to closely examine all the facts and circumstances furnished by the documentary evidence on both sides, so that from all the evidence the truth may be ascertained. There is no controversy whatever as to the importance of the provision in the charter for charterers' surveyor. It is admitted that there are certain risks attending the stowage of a cargo of wheat or flour not covered by the ordinary insurance policy; if, for instance, the previous cargo has left any taint in the ship, the flour will absorb it, and thus become damaged. There is also a risk of loss and damage arising out of the stowage of certain goods or merchandise in contact with or in proximity to flour. For the purpose of guarding against these and other like risks, Starr & Co. have a surveyor in their employ, whose duty it is to visit the ship constantly as the cargo is being received on board, to see that the vessel is properly lined and dunnaged; to go below into the hold of the ship, and personally superintend the stowage of the cargo. It is also his duty to see that all the ship's stanchions, and parts composed of metal near the cargo, are carefully wrapped in bags, gunnies, or other material to protect flour from contact with rust; in short, he does whatever is necessary to reduce the sea damage to the cargo to the smallest possible amount. The marine surveyor who represents the insurance companies may be entirely competent for the services for which he is employed, but he is not required to render the special services secured by the charterer in the employment of his own surveyor. It has, therefore, been customary in the port of San Francisco for charterers to provide in the charter party that the certificate of the ship's condition shall be furnished by the charterers' surveyor, or they have it understood that he may be so employed. The first negotiations for the charter of the ship took place in San Francisco about June 1, 1891, when Robert Bruce, of the firm of Balfour, Guthrie & Co., offered the ship for charter to Alfred Bannister, vice president of appellant. On June 2, 1891, Balfour, Williamson & Co. cabled Balfour, Guthrie & Co.: "Galgate: We offer, for reply here to-morrow, 14s. Newcastle, N. S. W., to San Francisco, 39 U. K., Havre, Antwerp, and Dunkirk, 44 continent, 1s. 3d. less direct, 28 February canceling, 1s. extra freight 31 January canceling." Upon the receipt of the telegram, several interviews were had between Bruce and Bannister, which resulted in an offer by Mr. Bannister, on behalf of Starr & Co., to Bruce, which was communicated, June 2, by Balfour, Guthrie & Co. to Balfour, Williamson & Co. by cable, as follows: "Galgate: We offer, for reply here noon to-morrow, Starr & Co. 38s. 9d. U. K., H., or A., Dunkirk, 5s. extra freight for one month's earlier arrival." To this cablegram Balfour, Williamson & Co. replied, June 3, 1891: "Gal-

gate declined. We might arrange with firm offer in hand, 38s. 9d. U. K., H., A., D., 43s. 9d. continent, 2s. 6d. off direct, 31 March canceling, 1s. 3d. extra freight for one month earlier arrival." This offer was accepted by Starr & Co., and on the same day Balfour, Guthrie & Co. cabled Balfour, Williamson & Co.: "Galgate: Starr & Co. willing to accept your last quotation. Exceptional offer. We recommend acceptance." Balfour, Williamson & Co. replied June 4, 1891: "Galgate: We have arranged 14 Newcastle to San Francisco 38–9 U. K., H., A., D., 43–9 continent, 2s. 6d. off direct, 31 March canceling, 1s. 3d. more for one month's earlier arrival. We are arranging and signing here homeward charter for Starr & Co." What occurred in Liverpool in relation to the signing of the charter party is testified to by P. D. Toosey, as follows:

"There was no discussion between John Joyce & Co. and Balfour, Williamson & Co. direct, for they never met, but there was some discussion, through me as broker, as to the word 'competent' being inserted before 'surveyor,' instead of 'charterers'.' The charter party was first signed by John Joyce & Co., and at the time of signing it they inserted the word 'competent,' instead of 'charterers'.' I took the charter party over to Balfour, Williamson & Co., and Mr. Fortune objected to the alteration. I then said that Mr. Joyce might possibly agree to the words 'charterers' surveyor, provided competent,' and Mr. Fortune agreed to this, and the words were inserted. I then took the charter party back to John Joyce & Co., but Mr. Joyce refused to agree to the alteration I had suggested, and insisted on the word 'competent' alone being substituted for 'charterers'.' I then took the charter party back to Balfour, Williamson & Co., and Mr. Fortune reluctantly agreed to the alteration which Mr. Joyce required rather than let the charter fall through. Before Mr. Fortune agreed to this alteration I told him, in order to induce him to give way, that I knew Starr & Co. had agreed to the words 'competent surveyor' being inserted in the charter party of another vessel, the 'Speake,' only a short time previously. This discussion took place in Liverpool on the 4th and 5th of June, 1891."

The facts in relation to the "Speake" are that the ship, after being chartered with the words "competent surveyor," was rechartered to Starr & Co. with the verbal understanding that Starr & Co. should employ their own surveyor, which was done. In the interviews had between Bruce and Bannister prior to June 4th nothing had been said with reference to the place where the charter party of the Galgate should be signed. There is nothing in the record to show that any authority had previously been given by Starr & Co. to have the charter party signed in Liverpool. The previous cablegram that had been sent had no reference to the signing of the charter, and the cable last sent by Balfour, Williamson & Co. was the first information that the parties in San Francisco had that it would be signed in Liverpool. In reply to this cable, Balfour, Guthrie & Co., on June 4th, cabled Balfour, Williamson & Co.: "Galgate: Confirm charter to be signed on your side. Be particular. Usual terms. Charterers' surveyor." Mr. Bannister testifies that June 4 was the first day that Starr & Co. had any firm offer on the ship; that, after the offer was made, he authorized Bruce to cable to his friends that Starr & Co. would accept the offer, and that he then and there stated to him the terms and conditions upon which the charter party was to be signed. In answer to the question: "You say you told Mr. Bruce, as he stepped outside, it was to

be on the San Francisco form of charter, and certain other things?" he said:

"I intended to say that the charter was to be written on the San Francisco form of charter party, drawn by San Francisco shippers, a committee of which I was one, and Mr. Balfour was one, and Mr. McNear, and other shippers. It specified a great many conditions that we had all agreed on, uniformly putting in the strike clause, as Mr. Bruce testified, and many other conditions that we all agreed we would adhere to. It had the stiffening clause, the surveyor's clause, the loading clause, places of loading, and everything distinctly specified. I stated to Mr. Bruce, just as he was quitting the office, it was understood, as usual, between our two firms, that this charter was to be drawn on that form, giving us the usual conditions and charterers' surveyor in the document. * * * To which he replied: 'Oh, yes; that is all right; that is always understood with you.' I had a general understanding with him before to that effect."

Mr. Bruce had previously denied that any such conversation occurred between him and Mr. Bannister. His testimony in chief, in the main, tended to support the contention of appellee that, while Starr & Co. were giving authority to an agent to execute a charter party in their behalf, they failed to instruct the agent in this important particular as to charterers' surveyor, and that the agent voluntarily undertook to secure the condition, "charterers' surveyor," as a favor to Starr & Co., and for the further reason that such a condition in the charter was remotely beneficial to the agent. Mr. Bruce testified that he did not know who originated the provision for "charterers' surveyor" in this case, and that he did not remember who sent the cablegram of June 4th. Upon his cross-examination, he testified as follows:

"Q. Do you know anything about Starr & Co.'s negotiations with you at that time, as to whether the terms were expressed that 'charterers' surveyor' should be incorporated? A. I have no recollection of Mr. Bannister ever bringing the subject up. I am rather confirmed in my opinion from the fact that he sent on the original offer for Starr & Co. on the 2d day of June, and there was not a single word in that cable conveying any special conditions. If there had been any, it was our duty to have sent them forward. Q. Who inserted that requirement, 'Usual terms, charterers' surveyor'? A. That would mean that there was to be no deviation in the conditions under which the ship was to be loaded at this port, and that it should cover wheat, flour, and general merchandise. Q. And charterers' surveyor? A. If the charter came out containing charterers' surveyor, Mr. Bannister would be extra well pleased, probably, in having his own way. Q. What I want to find out is whether or not that particular provision of this cable originated from Balfour, Guthrie & Co. or originated from Mr. Bannister. A. My impression is that it originated from Balfour, Guthrie & Co., and not from Mr. Bannister. Q. They simply made it a gratuitous suggestion for them to make it charterers' surveyor? A. That is my impression from the fact that the cable sending the positive offer contained no provisions. Q. You say Mr. Bannister might be extra well pleased to have his own way, if the charter came out that way. Having his own way how? A. Mr. Bannister very often used to remark that ship owners were generally getting everything their own way, and that it was just as well for charterers occasionally to have a little their own way. I suppose when the charter came out containing those words, 'charterers' surveyor,' that Mr. Bannister might be extra well pleased that he was getting what you might call a straight charter. Q. That is, one satisfactory to himself; the usual charter in this case? A. The usual charter, I consider, has nothing whatever to do with the term 'surveyor.' * * * Q. Do you wish to be understood as saying that that cablegram was sent with that express caution with reference to 'charterers' surveyor' without any understanding between Balfour, Guthrie & Co. and Starr & Co. with reference to it? A. Yes;

that is my impression at this existence of time. Q. From what did Balfour, Guthrie & Co. get the information that Starr & Co. desired such a stipulation? A. I do not know that they ever got the information at all until the receipt of the charter parties. * * * The Court: Q. Now, then, 'charterers' surveyor,'—how did you happen to insert that in this cable? A. I have no recollection of Mr. Bannister ever referring to the charterers' surveyor in connection with that vessel. Probably the reason that that was put in was simply because Mr. Bannister was always glad when he got a little more than he expected. If the charter came out containing the words 'charterers' surveyor,' he probably would be extra well pleased. That is the only conclusion I can come to. Q. Do you think you had any conversation with him about it? A. I really do not recollect whether I had any conversation or not on that subject. Q. Can you say whether you had any conversation about the usual terms? A. It is possible he may have spoken about the usual terms; it is quite likely he did. Q. You are of opinion that you conferred with him as to the charter being signed on the other side? A. I am positive of that. Q. You had his agreement to that? A. It could not have been signed there without his consent. Q. With respect to the other portion of the cable, you do not know whether you consulted him or not? A. I do not recollect."

It will readily be observed that the testimony given by this witness upon his cross-examination materially qualifies the denial of the conversation testified to by Mr. Bannister about having the provision for charterers' surveyor inserted in the charter. Bruce admits that there was a conversation about inserting the "usual terms," but says that that had no reference to the surveyor clause. He does not remember who originated the condition in the cable as to "charterers' surveyor," but thinks it must have been Balfour, Guthrie & Co., and that they put it in so as to please Mr. Bannister by getting Starr & Co. a straight charter. When witnesses disagree, courts must look at the conditions and surroundings of the respective parties; the probabilities or improbabilities of their respective statements; their interest, if any, in the result of the litigation; their manner of answering questions. Their memories must be tested; their credibility established by satisfactory evidence. The presumption is that witnesses tell the truth. Courts usually hesitate to disregard the testimony of any witness unless he has been impeached or his credibility successfully established. They seek to determine the weight of evidence by other means. The wholesale and gratuitous assaults upon the character of a witness, too often indulged in by counsel, are not looked upon with favor, and are never given any weight unless it is clearly shown that the witness is unworthy of belief. Ordinarily, abuse of a witness does not reach the dignity of an argument. It is always better, where discrepancies exist, to search for the truth from the surrounding circumstances,—the reasonableness of the testimony; whether the acts alleged to have taken place did occur, or whether a conversation upon the particular subject was naturally liable to take place. These, and other considerations of like character, which readily suggest themselves to the mind, are the safest guides to enable the court to determine where the weight of testimony is to be found. In this case the witnesses seem to be of even credit; their interests are equal; their character and standing alike. Both are entitled to respectful consideration. The contradictions and discrepancies of each upon other points con-

tained in the record, which have been severely criticised by respective counsel, are about evenly divided.

We therefore turn our attention to other facts. The condition of "charterers' surveyor" in the charter is of especial importance to the charterers of the ship. This is conceded by both parties. It was, therefore, natural that such a condition would be insisted upon by Starr & Co. The previous interviews had been with reference to other conditions and other terms,—as to the price of freight, time of loading the ship, and where the cargo was to be taken, etc. There had been nothing said as to where the charter was to be signed. No authority had been given for the signing of the charter. When the cable came from Balfour, Williamson & Co. that they were arranging for the signing of the charter at Liverpool, it would be unreasonable to believe that the charterers would authorize the signing of the charter without some understanding and direction as to the usual terms and the insertion of the condition "charterers' surveyor." It would be unbusinesslike for merchants or shippers to overlook this important provision. The testimony of Mr. Bannister is in accord with business methods of business men engaged in such business transactions. There is nothing unreasonable about it. Mr. Bruce, in his testimony, recognizes the importance and reasonableness of such a proposition. He gives as a reason for believing that Mr. Bannister had not previously referred to the terms "charterers' surveyor" the fact that the original offer for the ship, on the 2d day of June, was cabled without a "single word in that cable conveying any special conditions," and immediately adds that, "if there had been any, it was our duty to have sent them forward." Here is a special recognition of the duty of Balfour, Guthrie & Co. to be loyal to their agents, a principle that is well established in the law. Mechem, Ag. § 454. If the reason thus given by Mr. Bruce is sound, and it certainly is, it logically follows that the cable of June 4 must have been inspired by Mr. Bannister, for this cable does contain the special conditions that Mr. Bannister testifies he gave to Mr. Bruce, and it was the duty of Balfour, Guthrie & Co. to embody the conditions in the cable. Moreover, it is perfectly clear from the evidence that the cable of June 4 was sent by Balfour, Guthrie & Co. with full knowledge that charterers of vessels for cargoes of wheat or flour always desired to appoint their own surveyors, and especially was this true of Starr & Co. This Mr. Bruce admits to be true, and by his own reasoning it was the duty of his firm to insist upon such terms being provided for in the charter, and, in this connection, it must be borne in mind that there is no evidence that Starr & Co. had at any time authorized its agent to sign the charter upon any other condition. The subsequent acts of the parties show still more clearly that Starr & Co. never consented to the signing of the charter without "charterers' surveyor" was specified therein. On June 5, Balfour, Williamson & Co., in answer to the cable of June 4, sent by Balfour, Guthrie & Co., replied, "Galgate: Charter signed here. Previously agreed 'competent surveyor.' We cannot arrange otherwise." Is it not evident, without further discus-

sion, that Balfour, Williamson & Co. exceeded their authority in agreeing to such terms and in signing the charter for Starr & Co.? The only authority ever given by Starr & Co., under any reasonable view that can be taken of this case from the evidence, was that contained in the cable sent by Balfour, Guthrie & Co. on June 4th. Up to that time there had been no authority to have the charter party signed in Liverpool. Bruce testified positively that the charter could not have been signed in Liverpool without Starr & Co.'s consent. They never consented except upon condition that "charterers' surveyor" should be inserted. There never was any valid contract agreed to between the parties which authorized the use of the terms "competent surveyor." If there is any clause in the charter party "in regard to which the minds of the parties have not met, the entire instrument is a nullity as to all its clauses." Compania Bilbaina de Navegacion, de Bilbao v. Spanish-American Light & Power Co., 146 U. S. 483, 497, 13 Sup. Ct. 142; Eliason v. Henshaw, 4 Wheat. 225; Insurance Co. v. Young, 23 Wall. 86; Minneapolis & St. L. Ry. Co. v. Columbus Rolling-Mill Co., 119 U. S. 151, 7 Sup. Ct. 168; Stove Co. v. Holbrook, 101 N. Y. 48, 4 N. E. 4. On the 5th of June Balfour, Guthrie & Co. addressed to Starr & Co. a letter, as follows:

"San Francisco, 5th June, 1891.

"Messrs. Starr & Co., San Francisco—Dear Sirs: We confirm having chartered to you the Br. steel ship 'Galgate,' 2,291 tons register, which sailed recently from New York for Sydney, on the following terms, viz.: To load as customary at this port at 38/9 U. K., H., A., Dunkirk, 5/– extra other usual continent, 2/6 less direct; canceling 31st March, 1/3 extra freight should vessel arrive on or before 29th Febr'y, 30 lay days; all other usual conditions; owners having the liberty of loading the vessel with coals at Newcastle, N. S. W., for this port, for their benefit; and, in accordance with your authority, our Liverpool friends advise that they have signed the charter in Liverpool on your behalf, copies of which will be handed to you as soon as received from them. Please confirm the foregoing and oblige. * * *"

—To which Starr & Co. replied:

"San Francisco, June 5, 1891.

"Galgate.

"Dear Sirs: We have your favor of this date advising charter to us of the above ship, and we hereby confirm said charter in terms of your letter. * * *"

The contention of appellee is that these letters constitute the contract; that, the contract being in writing, its terms cannot be changed by parol evidence. It is, among other things, argued by appellee in support of this contention that the principles announced in the cases of bought and sold notes should be applied to this case, and, in this connection, several authorities are cited tending to show that Balfour, Guthrie & Co. were not under any obligation to disclose to Starr & Co. the information they possessed concerning the surveyor clause in the charter party, and that the letter of Balfour, Guthrie & Co. of June 5th was confirmed by Starr & Co., and hence these two letters of that date must be accepted as stating the terms of the contract entered into by the parties. The authorities cited relate to cases where the business was conducted by a broker who acted for both parties, and in such cases the entry in the broker's books is held to constitute the contract, and to be such a written contract as

will take the case out of the statute of frauds, which requires the contract to be in writing. Lord Ellenborough, in Heyman v. Neale, 2 Camp. 337, said:

"After the broker has entered the contract in his book, I am of opinion that neither party can recede from it. The bought and sold note is not sent on approbation, nor does it constitute the contract. The entry made and signed by the broker, who is the agent of both parties, is alone the binding contract. What is called the bought and sold note is only a copy of the other, which would be valid and binding, although no bought or sold note was ever sent to the vendor or purchaser. The defendant is equally liable in this case as if he had signed the entry in the broker's book with his own hand."

This rule necessarily implies that the principal, from the very nature of the transaction, must have had full knowledge of all the facts. If it be affirmatively established by parol evidence that the broker, in any given case, exceeded his authority, then the principal would not be bound by any entry made by the broker. The rule contended for is based on the presumption of knowledge on the part of the principal of all the essential facts, and this principle is recognized in all the authorities in relation to bought and sold notes, where the question is presented and discussed. Thus, in 1 Benj. Sales, § 296, it is said that "the bought and sold notes, when they correspond and state all the terms of the bargain, are complete and sufficient evidence to satisfy the statute." Goom v. Aflalo, 6 Barn. & C. 117; Sivewright v. Archibald, 20 Law J. Q. B. 529. But it may be shown that the broker had no authority from his employer to make the bargain which he has entered in his book. 1 Benj. Sales, p. 315, note 13; Peltier v. Collins, 3 Wend. 465. If the entry in the broker's books varies upon any material point from the contract concluded and agreed upon between the parties, the entry is not binding. Davis v. Shields, 26 Wend. 341; Pitts v. Beckett, 13 Mees. & W. 743; Goodman v. Griffiths, 1 Hurl. & N. 577; Sumner v. Stewart, 69 Pa. St. 321. In Benjamin on Sales (section 209) the author says:

"Parol evidence is always admissible to show that the writing which purports to be a note or memorandum of the bargain is not a record of any antecedent parol contract at all; * * * on the same principle, parol evidence is admissible for the purpose of showing that the written paper is not a note or memorandum of the antecedent parol agreement, but only of part of it, and the decisions are quite in accordance with this view. Thus, if the writing offered in evidence contains no reference to the price at which the goods were sold, parol evidence is admissible to prove that a price was actually fixed, and that the writing is thus shown not to be a note of the agreement, but only of some of its terms. So where a sale of wool was made by sample, and one of the terms of the bargain was that the wool should be in good dry condition, parol evidence was admitted to show this fact, and thus to invalidate the sold note signed by the broker, which omitted that stipulation."

In order to exclude oral evidence of a contract, it must first be settled that there is a subsisting written contract between the parties, and, where the immediate issue is whether the writing was signed by authority covering the contract, it is not competent to exclude oral testimony bearing on that issue upon an assumption of such writing. "To do so is to beg the question." Manufacturing Co. v. Maclister, 40 Mich. 84. Where a broker acts merely to bring the parties together, after which the parties negotiate with each other

directly, and the broker makes an entry of the sale in his book, such entry will not bind either party, nor will it prevent either party from giving parol evidence of the contract. Aguirre v. Allen, 10 Barb. 74. The contention of appellee cannot be sustained. Balfour, Williamson & Co. were not the agents of both parties. The contract here sued upon is contained in the charter party.

The real question to be decided is whether it was ever executed by the authority of Starr & Co. If it was, then appellee is entitled to recover. If it was not, then appellant is entitled to have the libel dismissed, unless it subsequently, with full knowledge of all the facts, confirmed or ratified the contract. To determine the question of authority, it becomes necessary to consider, as we have already done, all the facts and circumstances prior to and at the time of the signing of the charter, whether such facts are found in written instruments or by parol evidence. There is no dispute as to the terms or conditions expressed in the charter party. They are clear, plain, and unambiguous. No parol evidence was offered to change or vary any of its terms. Having arrived at the conclusion that appellant never authorized Balfour, Williamson & Co. to execute the charter in its behalf unless it contained the provision for charterers' surveyor, the only other question to be determined is whether it, with full knowledge of all the facts, has confirmed or ratified the same, or waived the condition of charterers' surveyor. The cable from Balfour, Williamson & Co. of June 5th, that they had previously agreed to "competent surveyor," was never shown to appellant. It had no knowledge of that fact. The letter of Balfour, Guthrie & Co. of June 5th did not inform appellant of the fact that the charter was executed with the clause "competent surveyor." It had the right, therefore, to assume that its demand in this respect had been inserted in the charter party. Unless it had full knowledge of what had been done, its letter in reply did not constitute a confirmation of the contract. It was the duty of Balfour, Guthrie & Co. in the letter of June 5th to have informed appellant of the facts set forth in the cable that day received by them from Balfour, Williamson & Co. Mechem, Ag. § 538; Devall v. Burbridge, 4 Watts & S. 305; The Distilled Spirits, 11 Wall. 356, 367. When an agent departs from instructions, and does not inform his principal of the fact of his departure, the principal cannot be supposed to confirm or ratify. Bell v. Cunningham, 3 Pet. 69. The general rule is well settled that a confirmation or ratification of the unauthorized acts of an agent, in order to be effectual and binding on the principal, must have been made with a full knowledge of all material facts, and that ignorance, mistake, or misapprehension of any of the essential circumstances relating to the particular transaction alleged to have been ratified will absolve the principal from all liability by reason of any supposed adoption of or assent to the previously unauthorized acts of an agent. Combs v. Scott, 12 Allen, 496; Clarke v. Lyon Co., 7 Nev. 75; Reese v. Medlock, 27 Tex. 121; Bannon v. Warfield, 42 Md. 22; Barnard v. Wheeler, 24 Me. 412; Bennecke v. Insurance Co., 105 U. S. 355; Owings v. Hull, 9 Pet. 607, 629. A waiver, to be available, must be clearly and explicitly

shown. There must be knowledge of all the facts. A waiver of a condition in a contract never occurs unless intended by the party, or where the act relied upon ought in equity to estop the party from denying it. Diehl v. Insurance Co., 58 Pa. St. 443; Bennecke v. Insurance Co., 105 U. S. 359.

It is argued by appellant that the words "usual terms" and "usual conditions," as mentioned in the telegrams and letters, meant San Francisco form of charter and charterers' surveyor. This is denied by appellee. It is unnecessary to decide this question. So far as the letters of June 5th are concerned, it is wholly immaterial what construction should be given to these words. If, as appellant contends, the term "usual conditions" includes charterers' surveyor, then it would be considered from the letters of Balfour, Guthrie & Co. that the condition for charterers' surveyor had been complied with, and Starr & Co's. confirmation would be in accordance with that understanding. If the term "usual conditions" did not include charterers' surveyor, then Balfour, Guthrie & Co. failed and neglected to inform Starr & Co. of the fact that "competent surveyor" had been inserted in the charter, as it was their duty to do, and Starr & Co. cannot be held to have confirmed the charter party with that provision, because they had never authorized its execution without the condition, "charterers' surveyor." Balfour, Guthrie & Co. must have known that Starr & Co. would not desire to confirm the charter unless charterers' surveyor was provided for therein. On the 5th of June, 1891, the same day of the letter to Starr & Co., Balfour, Guthrie & Co. addressed a letter to Balfour, Williamson & Co. which, among other things, contained the following:

"We confirm having fixed to Messrs. Starr & Co. the Galgate. * * * Messrs. Starr & Co., we may mention, are not in favor of charters being signed on your side, as they distinctly prefer to use their own form of charter, which, however, in all respects is identical with that used by ourselves and other shippers. They are, however, perfectly definite in insisting that the ship shall employ their surveyor, and that no change whatever shall be made in the usual stevedore clause, and we cannot in the meantime state how they may view your having agreed to a 'competent' instead of 'charterers' ' surveyor in connection with the Galgate, although probably we may not have any difficulty regarding this. You must, however, bear in mind that, when charterers consent to your signing charter on their behalf, they do not expect that the conditions will be different in any way from those which would be granted to them here, and it is essential in cabling offers of vessels that you should distinctly advise us when the owners insist on any alteration in the form of the usual charter. * * * Please send us six copies of each of the charters of these two vessels, so that we may hand them over to Starr & Co."

Leaving out of consideration the general remarks relating to the signing of all charters, and confining the construction of the letter to that portion which refers distinctly to the Galgate, it plainly indicates, in clear and unmistakable language, that Starr & Co. had never given any authority to have the charter signed without the proviso, "charterers' surveyor." They were unable to say how Starr & Co. would view the matter of having a "competent" instead of "charterers' " surveyor, but thought it probable there might be "no difficulty regarding this." On the 22d of June, 1891, after the re-

ceipt of the charters referred to in the foregoing letter, Balfour, Guthrie & Co. addressed the following letter to Starr & Co.:

"Dear Sirs: We now have pleasure in handing you copy of charter party effected through our Liverpool friends on your account per Avanta Savoia, and also per Galgate, all the terms of which we trust you will find in order. Kindly acknowledge and oblige. * * *"

—To which, on the same day, Starr & Co. replied as follows:

"Yours of the 22d inst. to hand, inclosing charter parties of the Galgate and the Avanta Savoia, which are in order, except that we shall require the word 'charterers' ' before 'surveyor' in the Galgate charter, which has been struck out, to stand as printed. Will you oblige us with any information you possess as regards the means and standing of the owners of these two ships? We presume your Liverpool firm are satisfied that the signatures of the owners of these ships are correct and under proper authority. * * *"

Here is a direct statement that Starr & Co. required the correction of the charter so as to read "charterers' surveyor." This letter shows that Starr & Co. did not repudiate the clause "competent surveyor" until the price of freight for the charter of the ship had declined, as claimed by appellee. Mr. Bruce testified upon this point as follows:

"The freights in this market remained strong for some time after the 4th day of June. The freight market remained strong, both for ships on the spot and ships to arrive. Q. About how long did that continue? A. That continued for a few months. Q. What was it that upset the freight market here, if anything? * * * A. The freight market was practically demoralized or upset by the default of Dresbach and Lowenthal, Livingstone & Co. to load their ships. * * * Q. After that time there was a drop in freights? A. A complete and steady decline. Q. Up to the time of the arrival of the Galgate (January 30, 1892)? A. Yes, sir."

On the 25th of June, 1891, three days after the letter of Starr & Co. had been received, the following letter was written by Balfour, Guthrie & Co. to Starr & Co.:

"We duly received your favor of the 22d inst., and we have since explained to you verbally the reason our Liverpool friends were unable to get the words 'charterers' surveyor' left in the charter party for Galgate. You may rest satisfied, however, that we will see that there is no trouble in this connection. You may be sure our Liverpool friends have satisfied themselves that the signatures under these charter parties are correct, and under proper authority."

The interviews referred to in this letter occurred between Mr. Williamson, a clerk for Balfour, Guthrie & Co., and Mr. Bannister. Mr. Williamson testifies that he endeavored to convince Bannister that Starr & Co. ought to accept the charter of the Galgate with the words "competent surveyor," because they had accepted other charters with a like provision, and that Bannister did not at that time repudiate the charter. Mr. Bannister testifies that he informed Mr. Williamson that the word "charterers' " with reference to the surveyor must be inserted if they wished Starr & Co. to load that ship. Mr. Williamson testifies as follows:

"My interview was with Mr. Bannister, and I referred to the letter which we had received, and Mr. Bannister expressed disappointment that our Liverpool firm had allowed the word 'charterers' ' to be deleted, and 'competent' inserted. I told him that our Liverpool firm had tried to exclude the word 'competent,' but we had been advised by them that they had been unable to do so. He said that he should want his own surveyor to be employed, and I said he

could not expect our firm to carry out his wishes in that respect if he chartered vessels through other firms here, accepting the word 'competent'."

Mr. Bannister's version of this interview is given as follows:

"Mr. Williamson came down to our office, and saw me, and tried to get me to waive the objection I had raised, and to allow 'competent surveyor' to stand in the charter. I told him I was very sorry I could not do this, although I had no doubt, as he said, his firm would see there was no trouble in loading the ship for us; but I said my bid to Mr. Bruce was based on the San Francisco shippers' form of charter and especially I named to Mr. Bruce when I bid him on the ship that 'charterers' surveyor' was to be in the charter party, and, if he wanted us to load the ship, he had to complete the charter in the terms of my bid. He argued with me a little, and tried to get me to waive that, but I insisted on it, and told him we should not change. He then agreed to get the word 'charterers' ' inserted in the charter party, and to cable that night to his Liverpool firm to have it done."

Other interviews were had. It is unnecessary to refer to them. Mr. Williamson wrote the letter of June 25th, and says it was intended to supplement his understanding with Bannister. The letter speaks for itself. It contains a promise on the part of Balfour, Guthrie & Co. that they will see that there is no trouble about the surveyor. Mr. Bruce, in his testimony, states that Balfour, Guthrie & Co. "sent no cables to Liverpool regarding the ship Galgate, after the 5th of June, until the 30th of January, 1892," and that "none were received from them." On the 1st day of February, 1892, the following letter was sent to Starr & Co.:

"Galgate.

"Messrs. Starr & Co., San Francisco—Dear Sirs: We beg to advise you of the safe arrival of the above vessel in this port on the 30th ult., under charter to your good selves outwards. We are, dear sirs,

"Yours, faithfully, Balfour, Guthrie & Co.,
"Alex. B. Williamson, Agents."

—To which Starr & Co. replied, on February 2d, as follows:

"Galgate.

"Messrs Balfour, Guthrie & Co., San Francisco—Dear Sirs: We have your favor of the 1st inst. regarding above vessel, which, however, is not under charter to us.

"Yours, truly, A. Bannister, Vice President and Manager."

What occurred after this has no special bearing on the questions involved in this case. It is deemed proper to state that Balfour, Guthrie & Co. immediately cabled to Liverpool, and tried to get the provision in the charter changed, and that the owners of the ship declined to make any alteration in the clause "competent surveyor."

After a careful investigation of all the evidence, our conclusions are: (1) That Starr & Co. never authorized the signing of the charter party, except upon the condition that charterers' surveyor was provided for therein; (2) that Starr & Co. never confirmed or ratified the signing of the charter with the clause "competent surveyor" at any time after full knowledge of that fact had been communicated; and (3) that Starr & Co. never at any time waived the condition as to charterers' surveyor. The libel should have been dismissed.

The judgment of the district court is reversed, with costs in favor of appellant.

THE LONDON ASSURANCE v. COMPANHIA DE MOAGENS DO BARREIRO.

(Circuit Court of Appeals, Third Circuit. May 14, 1895.)

No. 6.

1. MARINE INSURANCE—PARTICULAR AVERAGE CLAUSE—EFFECT OF COLLISION.
An exception in the words, "Free of particular average unless the vessel be sunk, burned, stranded, or in collision," ceases to operate as soon as a collision has occurred; and the insurer is liable for subsequent loss, whether the same resulted from the collision or not. 56 Fed. 44, affirmed.

2. SAME—"COLLISION" DEFINED.
Where a policy contained the words, "Free of particular average unless the vessel be sunk, burned, stranded, or in collision," *held*, that there was a "collision," within the meaning thereof, where the vessel, after being completely loaded and casting off her moorings, was made fast again to the wharf, because of a difficulty with her engines, and was there run into by a scow, in tow of a tug boat, which made a substantial break in her bulwarks.

3. SAME—DAMAGE TO CARGO—BREAKING UP OF VOYAGE—ADJUSTMENT OF LOSS.
A vessel bound from New York to Lisbon, with a cargo of wheat, was compelled to put into Boston harbor, because of a protracted storm, where her cargo was found to be so damaged by water that it could not be restored to a merchantable condition, and it was accordingly sold at that place. In an action against the insurers of the cargo, it was shown that, owing to peculiar conditions in Portugal, damaged wheat was unsalable there. *Held*, that the sale at Boston must be regarded as made from necessity for the benefit of all concerned, and that the insurer was liable as upon a salvage loss for the difference between the valuation in the policy and the sum realized.

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

This was a libel by the Companhia De Moagens Do Barreiro against the London Assurance, a corporation, to recover upon a policy of insurance for damage to a cargo of wheat shipped on board the steamer Liscard. The cause was tried in the district court, together with another libel by the same company against the Manheim Insurance Company, upon a similar policy. Decrees were entered in favor of the libelant in each case. 56 Fed. 44. An appeal was taken by the London Assurance, a stipulation having been filed that the other case should abide the event of this one.

W. W. MacFarland and Wm. Parkin, for appellant.

John F. Lewis, for appellee.

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

ACHESON, Circuit Judge. This is an appeal by the London Assurance, a corporation of the kingdom of Great Britain, the respondent in the court below, from a decree of the district court, sitting in admiralty, in a suit on a policy of marine insurance. The material facts as disclosed by the record are these: On the 10th of December, 1890, the London Assurance insured for the libelants

$20,000 on 33,000 bushels of wheat, the property of the libelants, valued at $40,887, shipped on board of the steamship Liscard, in the port of New York, for a voyage "at and from New York to Lisbon, Portugal." A policy in the usual form and a short certificate, taken together, constituted the contract of insurance. The policy, by its terms, covers all losses and damages by the perils of the sea, but the certificate contains the memorandum: "Free of particular average unless the vessel be sunk, burned, stranded, or in collision." The policy provides that the risk shall begin "upon the said goods and merchandises from and immediately following the loading thereof on board of the said vessel," and shall continue until the same shall be safely landed at the port of destination. The libelants shipped upon the Liscard, for the same voyage, other lots of wheat, which were insured in other companies, upon the like terms and conditions. The loading of the wheat here in question and of the entire cargo on board the Liscard was completed, and her bills of lading were signed and delivered to the libelants, by December 11th. On the next day, December 12th, the ship was unmoored for the purpose of starting on her voyage; but, on account of some trifling derangement of the engines, they would not work, and therefore the ship was made fast again to the wharf. After she was remoored, on the evening of the same day, shortly after 8 o'clock, the Liscard was run into by a scow or lighter in tow of the tug George Carnie. By this collision a break was made in the bulwark or inclosed iron side of the Liscard above her deck. The break was a continuous one in two of the iron plates of the bulwark, was eleven feet long, and for most of its length was open a width of from one-half inch to one and a half inches. The bulwark was an important part of the vessel, essential in her design and construction, and intended to keep the water off her deck and hatches. A claim upon the tug and scow for damages sustained by the collision was made by the master of the Liscard, and the sum of $250 was paid in settlement. After the collision, and before starting on her voyage, the vessel was surveyed and pronounced seaworthy. The Liscard finally left New York on December 15th. In the course of her voyage, the vessel encountered very bad weather,—"gales and hurricanes,"—which lasted eight days, and by the excessive straining of the ship opened the seams of the deck, admitting water to the cargo; and in that way, and also by water going down the hatchways, from which the canvas coverings were swept by the storm, the wheat was injured. On December 24th the vessel put into Boston Bay in distress. At Boston the cargo was discharged into lighters for examination, and was found to be badly damaged by sea water, and unfit for reshipment in its then condition. A survey made January 16, 1891, recommended that the entire cargo be sold for the benefit of all concerned. Later surveys reported the wheat to be in an improved condition, in consequence of the judicious treatment to which it had been subjected. But by the last survey, which was made on February 28, 1891, and from other evidence, it appears that none of the wheat had been restored to a first-rate condition. Even

the part reported by that survey as in "fair merchantable condition" was "slightly damp," and had a "slight smell." About one-half of the wheat remained in a seriously damaged state, a great part of it beyond remedy, and some was practically worthless. On February 20th all the underwriters on the cargo (including the London Assurance) agreed in writing that the payment of $3,600 freight on the damaged cargo, "and the acceptance and sale of said cargo" by the owners, should be "without prejudice to any of the rights or claims the shippers or owners of the cargo may have against the insurers of said cargo, and 'shall not be considered a waiver or an acceptance of an abandonment,' and shall be without prejudice to any defense that the insurers of the cargo may have under their contract of insurance." On February 27th the agents of the ship entered into an agreement with the agents of the owners of the cargo to terminate the voyage, and surrender the cargo to the owners, in consideration of the payment by them of $3,600, as full freight, and this agreement was carried out. Shortly thereafter the owners of the cargo sold the greater part of the wheat at Boston, and a small portion, which could not be disposed of there, was taken to New York, and sold.

The first question with which we have to deal arises upon the memorandum clause: "Free of particular average unless the vessel be sunk, burned, stranded, or in collision." This clause is of ancient origin, but originally was confined to the stranding of the ship. We learn from the elementary works on marine insurance that it was introduced into English policies, with respect to stranding, as early as the year 1749. Afterwards it was extended so as to cover other casualties to the ship besides stranding. The clause, "Free from average unless general, or the ship be stranded," was first judicially considered in 1754, curiously enough, in an action against the present appellant (Cantillon v. London Assurance Co., cited in 3 Burrows, 1553), where it was held that these words amounted to a condition, and that, upon the ship's being stranded, the insured was let in to claim his whole partial loss. The London Assurance Company then struck the clause out of its policies, but has since reinserted it. Marsh. Ins. 140; 1 Pars. Mar. Ins. 629, note 3. The meaning and effect of the clause were finally settled in 1797, in the leading case of Burnett v. Kensington, 7 Durn. & E. (7 Term. R.) 210, where the whole court of king's bench, after the fullest argument and upon great consideration, determined that a stranding destroys the exception in the memorandum, and lets in the general words of the policy; and that, therefore, where the ship has been stranded, the insurer is liable for any partial loss sustained by any of the articles mentioned in the memorandum, although such loss did not arise from the stranding, but solely from another cause. Marsh. Ins. 151. This has been the accepted doctrine ever since that adjudication. All the text-book writers agree that this is the well-settled construction of the clause, and that if the ship be stranded while the memorandum articles are on board, and during the continuance of the risk, then the underwriter is liable to pay all particular average losses, although they may have taken place at a different time,

from a different cause, and at a different place. Marsh. Ins., supra; 2 Arn. Ins. 795; McArthur, Ins. 285; 1 Pars. Mar. Ins. 630, 631. It is true that Mr. Parsons criticises the grounds upon which this construction rests, and, while stating that it is the established law of England, suggests that some question exists whether the same construction would be given to the clause in this country. There has been, however, no American decision in conflict with the English doctrine; and a departure from that principle by our courts, we think, would be unwise. As was said by Mr. Justice Gray in Norrington v. Wright, 115 U. S. 188, 206, 6 Sup. Ct. 12: "A diversity in the law, as administered on the two sides of the Atlantic, concerning the interpretation and effect of commercial contracts of this kind, is greatly to be deprecated."

Moreover, if the parties to a contract of insurance mean that the insurer shall be liable for partial losses only when they are occasioned by the specified casualties, nothing is easier than to give expression to that intention. Thus, we find from the evidence that in Philadelphia, where this insurance was effected, marine underwriters employ two different clauses respecting particular average losses, to vary the risk as may be agreed on. One of these clauses is that used in this instance; the other is in these words: "Free of particular average unless caused by stranding, sinking, burning, or collision." It cannot be doubted that the parties to the contract in suit intelligently adopted the form which omits the "caused-by" limitation.

It is a sound principle of interpretation that words whose meaning has been defined by the law or fixed by judicial decision will be presumed to have been used in that sense. 2 Pars. Cont. *501, note t; Doebler's Appeal, 64 Pa. St. 9, 15. That principle should have full sway here. If this is not to be regarded as a contract subject in all respects to the law of England, by reason of the fact that the policy and certificate were issued in Philadelphia by a local agency of the insurance company, still the company is an English corporation, and the certificate of insurance provides that any loss "shall be reported to the corporation in London," and shall be paid there, and that claims shall be adjusted according to "the usages of Lloyds"; and the certificate contains a notice that "to conform with the revenue laws of Great Britain," in order to collect a claim thereunder, "it must be stamped within ten days after its receipt in the United Kingdom." Now, the words here involved are the words of this corporation, and it may reasonably be assumed that they were used in the sense given to them by the English law. Furthermore, if an exception in a policy of insurance be capable of two interpretations equally reasonable, that one must be adopted which is most favorable to the insured. Insurance Co. v. Cropper, 32 Pa. St. 351; First Nat. Bank v. Hartford Fire Ins. Co., 95 U. S. 673, 679. In the latter case the court said in reference to the insurance company:

"It is its language which the court is invited to interpret, and it is both reasonable and just that its own words should be construed most strongly against itself."

From whatever point of view, then, the subject is regarded, we think that the court below was right in construing the particular average clause of the contract in accordance with the English doctrine.

Was, then, the Liscard "in collision," within the meaning of the contract of insurance? We think that she was. Undoubtedly, in an admiralty sense, there was a collision, notwithstanding the fact that the Liscard was at rest and moored when she was run into. The Granite State, 3 Wall. 310.

Now, with respect to stranding, Mr. Parsons (1 Mar. Ins. 632) says:

"Both in England and in this country it seems to be settled that, if the ship be literally stranded, that is enough, without much reference to the length of time that she remains on shore, or any regard to the effect of this stoppage."

Thus, in Harman v. Vaux, 3 Camp. 429, Lord Ellenborough, C. J., said:

"If the ship touches and runs, the circumstance is not to be regarded. There she is never in a quiescent state. But if she is forced ashore, or is driven on a bank, and remains for any time on the ground, this is a stranding, without reference to the degree of damage she thereby sustains."

Certainly, the same effect must be given to the particular average clause, whether the case before the court be one of stranding or of collision. The two casualties are alike, in that all the evil effects to a vessel from the disaster oftentimes are not at once evident. In this instance there was an actual collision, resulting in substantial injury to the vessel. True, the injury was not such as to affect the seaworthiness of the ship. She was still in a fit state to encounter the ordinary perils of the contemplated voyage. The particular average clause, however, is silent as to the extent of the injury to the vessel. The words "unless the vessel be * * * in collision" exclude other conditions. Therefore, also, it is immaterial whether or not the collision contributed to the ultimate partial loss to the cargo. The very purpose of the clause, all the adjudged cases declare, is to exclude such an inquiry, which always is attended with difficulties, and often must end in uncertainty. Upon this very point there is here a conflict of proof. There is some evidence tending to show that, during the tempestuous weather the Liscard encountered, some water did come on deck through the broken plates in the bulwark, and reached the cargo; and at least one seafaring witness, of great practical experience, expresses the opinion that a large quantity of water in a gale, accompanied by high seas, would go through the break in the ship's bulwark caused by the collision. But it is not necessary to determine the question whether any damage to the wheat was due to the break. The fact of collision, like the simple fact of stranding, fulfills the condition of the particular average clause, which then ceases to have any operation. The circumstance that the collision occurred before the Liscard actually started on her voyage is of no moment. The insurance had attached before the collision. That is the decisive fact. By the terms of the contract, the adventure with respect to the wheat began as soon as it was put

on board the vessel. The effect of the collision, then, under the particular average clause, was the same as if it had taken place in mid-ocean.

The views we have expressed are entirely harmonious with the rulings in Roux v. Salvador, 1 Bing. N. C. 526, and Insurance Co. v. Pitts [1893] 1 Q. B. 476, cited by the appellant. In the former of these cases the stranding did not occur until after the hides had been landed and sold, and the risk of the underwriters thereon had thus ceased, by the act of the insured. In the latter case, at the time of the stranding of the ship, the maize was not on her, nor at her risk at all. Indeed, the ship's voyage, with respect to the maize, began afterwards. In each of these cases the court recognized the binding authority of Burnett v. Kensington, supra.

In Insurance Co. v. Pitts, which was decided so late as the year 1893, Collins, J., said:

"If the stranding takes place within the time contemplated by the parties, the insured can recover in respect of a particular average loss, whether the damage can be traced to the particular stranding or not."

Nor do we think that our conclusion that the Liscard was "in collision," within the meaning of the contract in suit, is inconsistent with the ruling in the case of The Glenlivet, Prob. Div. (1893) 164; same case, on appeal, Prob. Div. (1894) 48. There the English court of appeal, in affirming the judgment of the trial judge, without approving his reasoning, decided merely that where slight fires occurred in the coal in the bunkers of an iron ship, which were put out by pumping water on the coal, and some injury was done by the heat to the ship's plating and otherwise, the ship was not "burnt," within the meaning of that term, as used in the memorandum in the policy.

We pass now to the consideration of the question of the adjustment of the loss. This matter is thus presented in the appellant's second specification of error, namely:

"(2) The commissioner reported that the voyage was broken up at Boston, for the benefit of all concerned, including the underwriters; that the libelant's adventure was practically frustrated, and therefore justifiably abandoned; that, if the cargo had been reshipped to Lisbon, the loss would have been much greater than it has proved, and the underwriters worse off than now, and that they would have been obliged to pay the difference between the price for which the damaged grain sold and the value of sound grain in Lisbon proportioned to the valuation in the policy; that the amount they would have been called upon to pay would have been greater than the difference between the value of the cargo, as stated in the policy, and the amount for which it was sold in Boston. And the commissioner reported that the respondent was liable for this difference, and adjusted the loss under the policy as a salvage loss, instead of as a particular average. The respondent excepted to these several findings, and to this adjustment of the loss, and to the commissioner's refusal to adjust the loss as a particular average, with Boston as the port of the destination, and the sales made there as determining the percentage of deterioration for which the underwriters were liable. The court overruled the exception, and the respondent specifies such action of the court as error."

We have carefully examined the evidence and the legal authorities cited, and are not convinced that the commissioner erred either in his findings of fact or in his method of estimating the loss on the cargo. The breaking up of the voyage and the sale of the cargo at the port of distress were not for the benefit of the insured solely. What was thus done was really for the advantage of all persons interested, including the underwriters. As we have already seen, the wheat was all more or less damaged. Now, it appears that the condition of affairs in Portugal with respect to the importation of wheat is peculiar, and that damaged grain is unsalable there. The finding of the commissioner is that the Liscard's wheat would have been almost valueless at Lisbon. The evidence certainly warrants the conclusion that the loss to the appellant would have been greater had the cargo gone on to Lisbon. We agree with the commissioner and the court below in the view that the adventure was practically frustrated, and, hence justifiably abandoned; and that, under the special circumstances, the sale of the wheat at Boston may fairly be considered to have been made from necessity for the benefit of all concerned.

Mr. Parsons (2 Mar. Ins. 411) says that, if a ship at an intermediate port finds a part of its cargo so injured by sea damage that it is unfit to be carried on, it may be sold at that port, and the loss adjusted as a salvage loss.

Mr. Phillips (2 Ins. § 1480) says, speaking of an adjustment as upon a salvage loss:

"The underwriter is liable for such an adjustment of a particular average only in cases where the sale at an intermediate port is obviously expedient, and made on account of damage by the perils insured against; where, if the subject were forwarded to the port of destination, it would be greatly diminished in value, or be of no value, on arriving there."

We think that the present case falls within the rule even as thus laid down, and that the appellant is justly chargeable with the difference between the valuation in the policy and the sum realized by the sale, and that the adjustment upon that basis was correct.

The specifications relating to some allowances under the sue and labor clause of the policy do not require extended discussion. We have looked into these matters, and our judgment is that the appellant has here no reasonable cause of complaint. Nor do we discover that any injustice was done to the appellant in the allowance of interest from December 15, 1891, on the libelants' claim.

We see no error in the conclusions of the district court, and therefore its decree is affirmed.

THE CARIB PRINCE.

WUPPERMANN v. THE CARIB PRINCE. MIDDLETON et al. v. SAME. CARDENAS et al. v. SAME. GILLESPIE et al. v. SAME.

(Circuit Court of Appeals, Second Circuit. May 28, 1895.)

1. SHIPPING — DAMAGE TO CARGO — SEAWORTHINESS — EXCEPTIONS IN BILL OF LADING.
   Exceptions in a bill of lading of injuries arising from "latent defects in hull," etc., include a latent and undiscovered defect in a rivet which existed at the commencement of the voyage, and therefore limits the implied warranty of seaworthiness, if due diligence has been exercised. 63 Fed. 266, affirmed.

2. SAME—VALIDITY OF EXCEPTIONS IN BILL OF LADING.
   The act which prohibits owners of vessels transporting merchandise to or from ports of the United States from limiting by bill of lading or otherwise their obligation to exercise "due diligence properly equip, man, provision, and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage" (Act Feb. 13, 1893, § 2; 27 Stat. 445), does not prevent the owner from relieving himself from the rigidity of the implied warranty of seaworthiness by stipulating against liability for loss by latent defects, provided he uses due diligence at the commencement of the voyage to make the vessel seaworthy.

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

These four libels against the steamship Carib Prince were filed respectively by Josephine W. Wupperman, Clifford L. Middleton and others, Manuel Cardenas and another, and William Gillespie and others, to recover for damage to cargo. The district court dismissed the libels. 63 Fed. 266. The libelants appeal.

George A. Black, for libelants.
J. Parker Kirlin, for respondents.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. These four actions were brought by cargo owners to recover from the British steamship Carib Prince the damages which a part of her cargo received on a voyage from Granada to New York, which commenced about August 31, 1893. The bills of lading, which were signed in Trinidad, a port governed by English law, excepted the ship from liability for injuries arising from "latent defects in hull, tackle, boilers, and machinery." The vessel was a new steel steamer, of 2,500 tons dead weight capacity, built in the spring of 1893, at Sunderland, England, by experienced builders. She was "constructed with a water tank of iron in her peak, one side of which was formed by a bulkhead. The tank, when she sailed from Granada, was empty, but during the voyage from Granada to New York it was filled with water one afternoon, in order to trim the vessel," and the next morning, or the morning after, the tank was found partially empty, and investigation showed that the head had come off from one of the rivets riveting the side of the bulkhead next to the hold, and leaving a hole through which

water had poured upon the libelants' merchandise stowed near the bulkhead. The rivet was the end rivet in a series which attached a transverse "knee tie" to the bulkhead on the inside of the tank. The testimony clearly showed that abundant diligence was used in the construction of the vessel, that the defect in the rivet was a latent one which occurred at the time of the vessel's construction, which was not discovered and was not discoverable, at that time or subsequently, by the exercise of all the known and customary tests and methods of examination, which were all employed; that it was a latent and undiscovered defect in the hull of the vessel at the commencement of the voyage from Trinidad; that, consequently, the vessel was not at said time seaworthy; and that the injury occurred solely through this unseaworthiness, and not by reason of filling the tank injudiciously.

The main question in the case is whether the bills of lading expressly or clearly limited the implied and absolute warranty of seaworthiness, which is that the ship was in fact seaworthy at the commencement of the voyage, and is a warranty against latent, unknown, and not discoverable defects. The Edwin I. Morrison, 153 U. S. 199, 14 Sup. Ct. 823; The Caledonia, 157 U. S. 124, 15 Sup. Ct. 537; The Glenfruin, 10 Prob. Div. 103. The recent case of The Caledonia, supra, declared that exemptions in bills of lading which limit the extent of this implied warranty must be expressed in clear terms, or they will be construed strongly against the shipowner, and consequently held that an exemption which excluded loss or damage from defects in steam boilers and machinery did not mean defects existing at the commencement of the voyage, and therefore did not protect the owner from liability for unseaworthiness. The bills of lading in these cases exclude losses arising from latent defects in the hull, and the question is whether this language does not necessarily mean defects existing at the time of shipment, and, therefore, whether it does not clearly, and even expressly, exclude unseaworthiness arising from such defects.

The only case in which the effect of an exemption of "latent defects" is discussed is The Laertes, 12 Prob. Div. 187, but in that case the language of the bill of lading was "latent defects * * * even existing at time of shipment," so that the intention of the parties to limit the implied warranty was manifest. In the cases at bar it is urged that latent defects must necessarily mean those existing at the time of shipment, and that any other construction is exceedingly strained. A defect, in order to be latent, must have been not discoverable at the time of the shipment. It could not, in its nature, have been capable of discovery then and have become capable of evading discovery subsequently. A construction which should say that latent defects meant those only which had become latent since the vessel left the wharf, and could not mean previously existing defects, savors of the distinctions of the schoolmen; and, if latent defects existing upon the voyage are exempted, those existing at the time of the shipment are included, for they are the same. We concur with the experienced district judge that the exception "limits the warranty which the law would otherwise im-

ply that the ship was seaworthy at the beginning of the voyage, and exempts the ship if due diligence is exercised by the owner."

It is insisted by the libelants that the second section of the act of Feb. 13, 1893 (27 Stat. 445), commonly known as the "Harter Act," prohibits any clause in a bill of lading which limits the implied warranty of seaworthiness. The section is as follows:

"Sec. 2. That it shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel to exercise due diligence properly equip, man, provision, and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and properly deliver the same, shall in any wise be lessened, weakened, or avoided."

Waiving the question whether this section applies to a foreign contract entered into by owners who are foreigners, the section does not bear the construction placed upon it by the libelants, which is that a comma shall be inserted after the word "diligence," and that the clause respecting seaworthiness shall be read as a prohibition of any covenant or agreement whereby the obligations of the owner of said vessel to make said vessel seaworthy, etc., shall in any wise be lessened. The language of the section, as passed by the house of representatives, permits this construction, but in the senate the words "exercise due diligence" were inserted prior to the words "properly equip," and the evident intent of the section as amended, and the effect of the amendment, were to prohibit covenants whereby the obligation of the owners to exercise due diligence to properly equip, man, provision, and outfit the vessel, and to make her seaworthy, should be lessened. A like amendment was inserted in the third section, which provided that, if the owner exercised due diligence to make the vessel seaworthy, he should not be responsible for damage resulting from subsequent faults in navigation. These amendments indicate the intent which ran through the act as it left the senate, and make it plain that one design of the act as amended was to permit the owner to relieve himself from the rigidity of the warranty of seaworthiness, but not to permit him to lessen his obligation to exercise due diligence in all respects at the inception of the voyage.

The claimant endeavored to show that the cause of the injury was an error of the master in filling the tank at sea, and that, therefore, the owner was protected by the third section of the Harter act; but, as the injury did not arise from an error in the management of the vessel, an examination of this section is unnecessary.

The decrees of the district court are affirmed, with costs.

PORTER v. DAVIDSON, Sheriff.

(Circuit Court of Appeals, Fourth Circuit. May 28, 1895.)

No. 109.

APPEAL—INTERLOCUTORY ORDER.

An order made in an action of claim and delivery, under the North Carolina Code, directing certain chattels which have been taken by the marshal from the possession of a sheriff, upon a requisition to replevy them, to be returned to such sheriff, is not a final order, and is not reviewable.

In Error to the Circuit Court of the United States for the Western District of North Carolina.

This was an action of claim and delivery by Henry Kirk Porter against L. W. Davidson, sheriff of Cherokee county, N. C. The circuit court made an order directing certain replevied chattels to be returned to the defendant. 62 Fed. 626. Plaintiff brings error. Affirmed.

Julius C. Martin, on brief for plaintiff in error.

R. L. Cooper and M. W. Bell appeared on record for defendant in error, but filed no brief, nor appeared to argue the case.

Before FULLER, Circuit Justice, GOFF, Circuit Judge, and SEYMOUR, District Judge.

SEYMOUR, District Judge. The plaintiff in error, who was also plaintiff below, is mortgagee of certain chattels in the possession of George Porter & Co., mortgagor, after condition broken. The defendant, the sheriff of Cherokee county in North Carolina, had seized and held the chattels under warrants of attachment issued out of the courts of North Carolina against the mortgagors. Pending the suits in which the attachments were issued, the plaintiffs in error brought their action of claim and delivery in the circuit court of the United States for the Western district of North Carolina, and, pursuing the state practice, they executed the proper undertaking; and the marshal of the circuit court took the chattels from the possession of the sheriff, and delivered them to the plaintiff. Thereupon the defendant below moved to dismiss the summons and complaint and the action. These motions the court denied, but ordered that the chattels taken by the marshal be returned to the defendant sheriff. Plaintiff, having duly excepted to this order, brings his writ of error to this court.

The learned judge who delivered the opinion of the circuit court assigned as the reason for his order the fact that the chattels in question had been seized by the sheriff by virtue of the process of the state court, and were therefore in the custody of that court, and not liable to be taken therefrom by process of the United States court. The order is evidently not a final decision of the cause, and is therefore not reviewable. As was stated in the opinion of the judge below:

"The proceeding of the plaintiff in this case, by which he took from the possession of the sheriff the chattels levied on, was ancillary,—not in any way

affecting the merits of the original case. That can go on without conflicting with any of the cases quoted above."

Appeal dismissed.

EVERSON v. EQUITABLE LIFE ASSUR. CO.

(Circuit Court, W. D. Pennsylvania. March 11, 1895.)

1. EQUITY JURISDICTION—BILL FOR DISCOVERY AND ACCOUNTING.
   Where a bill seeks both discovery and an accounting, the discovery must be regarded, prima facie, as incidental to the accounting, and, if there is no right to an accounting, the bill will be held bad upon demurrer.
2. LIFE INSURANCE—SEMI-TONTINE POLICY—BILL FOR ACCOUNTING.
   The relation between the holder of a matured semi-tontine policy and the insurance company is that of debtor and creditor merely, and involves no trust relation; and a policy holder who is dissatisfied with the amount of the surplus which is apportioned to him by the company, pursuant to the terms of the policy, cannot maintain a bill for accounting and discovery when there are no sufficient allegations of fraud.

This was a bill by T. Bissell Everson against the Equitable Life Assurance Company praying a discovery and accounting in respect to the amount due him under a matured semi-tontine life insurance policy. Defendant demurred to the bill.

Watson & McCleave, for complainant.
Willis F. McCook, for respondent.

BUFFINGTON, District Judge. On August 12, 1884, the respondent, the Equitable Life Assurance Company, a corporation created by the state of New York, issued a life insurance policy to the complainant, T. Bissell Everson, then and now a citizen and resident of Pennsylvania, for $10,000. Certain provisions were made part of said policy, the ones pertinent to the present question being:

"First. That this policy is issued under the semi-tontine plan, the particulars of which are as follows: Second. That the tontine dividend period for this policy shall be completed on the 28th day of May, in the year eighteen hundred and ninety-four. Third. That no dividends shall be allowed or paid upon this policy unless the person whose life is hereby assured shall survive the completion of its tontine dividend period as aforesaid, and unless this policy shall be then in force. Fourth. That all surplus or profits derived from such policies on the semi-tontine plan as shall not be in force at the date of their completion of their respective tontine dividend periods shall be apportioned equitably among such policies as shall complete their tontine dividend period. Fifth. That upon the completion of the tontine dividend period, on May 28, 1894, provided this policy shall not have been terminated previously by lapse or death, said T. Bissell Everson shall have the option either, first, to withdraw in cash this policy's entire share of the assets; i. e., the accumulated reserve, which shall be twelve hundred and thirty-one and ten one-hundredth dollars, and, in addition thereto, the surplus apportioned by this society to this policy; secondly," etc.

That by this contract of insurance the relation created between the parties was that of debtor and creditor is firmly established by numerous authorities. Uhlman v. Insurance Co., 109 N. Y. 421, 17 N. E. 363; Hunton v. Assurance Co., 45 Fed. 661; People v. Security Life Ins. & Annuity Co., 78 N. Y. 114; Bewley v. Society, 61 How. Prac. 344; Bogardus v. Insurance Co., 101 N. Y. 328, 4 N. E. 522;

Taylor v. Insurance Co., 9 Daly, 489. Mr. Everson paid his premiums for 10 years, amounting in all to $2,725, and then elected to avail himself of the first option, whereupon he was entitled to demand and the company became liable to pay to him "this policy's entire share of the assets; i. e. the accumulated reserve, which shall be twelve hundred and thirty-one and ten one-hundredth dollars, and, in addition thereto, the surplus apportioned by this society to this policy." Thereupon the society apportioned to him, as the policy's share of the assets, the sum of $2,051.80, being $1,231.10, the share of the accumulated reserve as fixed by the option, and $820.70, the policy's alleged share of the surplus. This apportionment, made by the person designated by mutual agreement to make it, is presumably correct. Uhlman v. Insurance Co., 109 N. Y. 432, 17 N. E. 363. "But," as was also said in that case, "the question is still left, has or has it not complied with its agreement to make an equitable apportionment? And the plaintiff, and all others similarly situated, have the right, upon proper allegations of fact showing that the apportionment made by the defendant is not equitable, or has been based upon erroneous principles, to have a trial and make proof of such allegations, and, if proved, the court will declare the proper principles upon which the apportionment is to be made, so as to become an equitable apportionment." The apportionment thus made Mr. Everson declined to accept, and subsequently filed the present bill in equity, in which he prayed for an accounting and discovery. To this bill the respondent has demurred—First, because the bill discloses no cause of action; secondly, because the complainant has an adequate remedy at law; thirdly, because the bill does not disclose sufficient facts to entitle him to the remedies prayed for; fourthly, because the court has not jurisdiction of the subject-matter; fifthly, because the court is without jurisdiction to enforce its decree against the respondent; sixthly, because the bill does not set forth in full the contract; and, lastly, because the other policy holders have not been made parties.

Assuming, for present purposes, that the bill as a whole shows the matter in dispute exceeds the sum of $2,000, does it disclose any cause of action? Two such grounds are alleged, viz. discovery and accounting. In passing on the question here raised, it is to be observed that in the federal courts the line between law and equity, and consequently between legal and equitable rights, has been strictly observed,—a principle so firmly established as to call for no citation of authority in its support. In Hare on Discovery (sections 6–8), it is in substance said that the prayer for an account renders a bill one for relief, and, where a bill prays for relief, the discovery, if material to the relief, is incident to it, and that, prima facie, it must be so intended. It would appear, therefore, that, upon demurrer to a bill seeking both discovery and relief, it is sufficient to show that the complainant is not entitled to the relief which he prays, and that the addition of a prayer for relief to a bill seeking discovery will render such discovery dependent upon the title to relief. "The bill" (discovery) "is commonly used," says Story's Equity Pleadings (section 331), "in aid of the jurisdic-

tion of some court of law, to enable the party who prosecutes or defends an action at law to obtain discovery of the facts which are material to the prosecution or defense thereof. If it can be used in any other cases, they are few, and under very special circumstances." It is quite clear that, upon the facts alleged in this bill, discovery is not an independent ground of relief, but is dependent upon complainant's right to an accounting. The case, therefore, resolves itself into the question whether, irrespective of the question of discovery, the right to an accounting exists. What such an accounting involves, in the present case, is well to understand. In effect, it is an examination of the respondent company's business for the past 10 years. Its magnitude is apparent from the interrogatories and prayers to the bill by which the complainant himself has measured the scope of inquiry necessary to such relief. They are therefore given in full, and are as follows:

"1. State definitely and in the following order the number of policy; the kind of policy; the amount of policy; the date of the application therefor; the date of policy; the age at issue; the annual premium charged; the number of premiums paid; how paid,—quarterly, semiannually, or annually; reserve or savings-bank value; and tontine surplus on all policies that were in force in the tontine class to which policy No. 281,864 became a part of on the 28th day of May, 1884. 2. State definitely and in the following order the number of policy; the kind of policy; the amount of policy; the date of application therefor; the date of the policy; the age at issue; the annual premium charged; the number of premiums paid; how paid,—quarterly, semiannually, or annually, and, if quarterly or semiannually, how many such payments were made; reserve or savings-bank value; and tontine surplus on all policies issued between the 28th day of May, 1884, and the 27th day of May, 1894, inclusive. 3. State definitely and in the following order the number of policy; the kind of policy; the amount of policy; the date of the application therefor; the date of policy; the age at issue; the annual premium charged; the number of premiums paid; how paid,—quarterly, semiannually, or annually, and, if quarterly or semiannually, how many such payments were made; reserve or savings-bank value; and tontine surplus unpaid on the same on all policies that have lapsed and become wholly or partially forfeited by the cessation of premium payments thereon, and the values of which have been wholly and absolutely forfeited to the tontine fund of the class to which policy No. 281,864 belonged. 4. State definitely and in the following order the number of policy; the amount of policy; the date of application therefor; the date of policy; the age at issue; the annual premium charged; the number of premiums paid; how paid,—quarterly, semiannually, or annually, and, if quarterly or semiannually, how many such payments made; reserve or savings-bank value; and the tontine surplus at the date of discontinuance of premium payments on all policies that have been so discontinued; the amount of paid-up participating or non participating insurance issued for each policy, and the net single premium on the same, or cash value paid for the same, between and including the dates of May 28, 1884, and May 27, 1894. 5. State definitely and in the following order the number of policy; the kind of policy; the amount of policy; the date of application therefor; the date of policy; the age at issue; the annual premium charged; the number of premiums paid; how paid,—quarterly, semiannually, or annually, and, if quarterly or semiannually, how many such payments made; reserve or savings-bank value; and tontine surplus on all policies in force on the 28th day of May, 1894. 6. State specifically the percentage of actual expense to actual premium income properly chargeable in each and every one of the years from May 28, 1884, to May 28, 1894. 7. State specifically the rate of interest received on the total admitted assets for each and every one of the years from May 28, 1884, to May 28, 1894. 8. State specifically the ratio of mortality per dollar of risk; that is to say, the ratio of mortality upon the

face of the policy less the reserve or savings-bank fund belonging to each policy in each and every one of the years from May 28, 1884, to May 28, 1894.

"First. And that the said defendant may be ordered, adjudged, and decreed to make and exhibit unto the plaintiff a full and particular account, showing unto him his proportionate share for each and every year of the tontine term of his policy; of the actual death losses, and his saving from the death losses, actually paid by the defendant to tontine members only in his class among the insured of the defendant; also, his proportionate share of the actual expenses and his savings from the assumed expenses of conducting the tontine business of the defendant society for each and every year of the ten years constituting the tontine term of your orator's policy; as well, also, your orator's true share of the interest received upon his savings-bank deposit in excess of four per cent. per annum compounded, as required by law, and the actual rate and amount of interest received by the defendant upon such savings-bank deposit; also, your orator's share of the forfeitures resulting from all policies by the failure of members in his class to pay their annual premiums.

"Second. And that your orator may order and decree that the defendant exhibit a full and particular statement showing the numbers, amounts, and kind of policies, and ages at which they were severally issued, upon which the values of all kinds have been forfeited, partly or entirely, to the tontine fund during the tontine term of your orator's policy; showing each policy issued by the defendant society lapsed or forfeited during the tontine term of your orator's contract aforesaid; and therein showing the number of the policy and name of the insured, the age of the insured at the time of the issuing of the policy, and form of the policy, and the amount for which the same was issued, the number of payments made upon such policy, and the total amount paid previous to forfeiture, and the share of the tontine fund belonging to such policy at the time or immediately previous to the lapsing or forfeiture thereof, showing particularly and in detail sources from which the accumulations of the tontine fund belonging to such lapsed policies were derived; and that the defendant may be required to show particularly what proportion of the value of such lapsed policy at the time of the lapse was derived from the share of such policy in previous forfeitures of the savings-bank fund or tontine profits belonging to such policies so previously forfeited.

"Third. And that the said defendant may be ordered and decreed to account to your orator for his savings-bank fund, and the accumulations thereon; his savings upon the assumed expenses paid in his annual premiums, and their accumulations; also, his savings upon the assumed mortality losses paid in his annual premiums, and their accumulations; his share in the tontine fund derived from all policies lapsed during the tontine term of his policy aforesaid; and that the aggregate of such sums be decreed as a cash value of your orator's said policy, and that the defendant be ordered and decreed to pay such sum so ascertained to your orator."

An alleged breach of contract obligations, and the ensuing accountability to answer in damages therefor, do not necessarily imply liability to an accounting by bill in equity. In other words, accountability does not imply liability to an accounting in equity. But prior liability to so account is the foundation upon which a bill in equity for an accounting rests. If such a duty exists,—to instance the present case,—it exists without reference to whether the respondent has equitably apportioned the surplus or has failed to do so. On the other hand, if such a duty does not exist,—if the respondent has simply contracted to equitably apportion the surplus, and pay the complainant on that basis, and has failed to do so,—its breach of that contract would not impose an obligation to account where none primarily rested, and its broken undertaking must be redressed by another proceeding and in another tribunal than the present one. The stipulations of the policy in question are the measure of the

respondent's obligations and the complainant's rights as well. Notwithstanding the very able argument of complainant's counsel, in which we have had the benefit of his thorough research and study of the subject of life insurance, we are unable to read into this contract any other relation between the parties than those of debtor and creditor. While the principles of honest and prudent corporate management may dictate, and the positive enactments of law in several states may enforce, the formation and maintenance of adequate reserve funds to insure the protection of policy holders and the liquidation of their claims as they mature, yet we cannot say, from the terms of the contract here entered into between the parties, that such reserve was to be the individual property of the policy holder, and that the company holds it for him as a trustee, with the consequent duty of accounting for it as a trust fund. As was said in a kindred case, "there is, in reality, no specific or separate fund, as it is made up simply by a system of debits and credits contained in the books of the company, which debits and credits are made during the running of the tontine period."

The underlying fallacy of complainant's bill is the assumption as a fact of a duty on the respondent, not to respond in damages for its breach of contract, if such there was, but to account; and, because it has not accounted, complainant claims the right to file his bill to compel such accounting and for discovery in aid thereof. But unless there was a duty to account, the complainant cannot base his bill on respondent's failure so to do, for such refusal was not a denial of what complainant was entitled to demand. If such right exists in one stockholder, it exists in all, and each, by virtue of the maturing of his policy, would have the right to demand an individual account of the kind here craved. If such is the case, the business of insurance companies would be largely diverted from their sphere of husbanding their resources to meet their contract obligations to those insured to that of preparing voluminous accounts for policy holders. In Hunton v. Assurance Co., 45 Fed. 662, the liability of the respondent to account in equity on a bill based on a policy similar to the one in suit arose. The court said:

"If this bill can be maintained, it must be on the ground that a trust relationship existed between the parties, or that the account was of such a character that equity jurisdiction attaches. That no trust exists between the insured and the insurance company has been held in Pierce v. Society, 145 Mass. 56, 12 N. E. 858, and Bewley v. Society, 61 How. Prac. 344, and I agree with the reasoning of the court in those cases. I am also of opinion that under the authority of Root v. Railroad Co., 105 U. S. 189, this being merely a suit for an account, and it not appearing that any other ground of equitable jurisdiction exists, a bill in equity cannot, upon general principles governing the jurisdiction of courts of equity, be maintained."

It is sought to distinguish that case, which is the latest federal decision on the question, from the present one by the fact that there accounting alone was sought, while here discovery is asked in addition. We have already seen that discovery is dependent upon the right to an accounting, so that, in effect, the question there involved was the same as here. It is true there are some allegations in the present bill that respondent has falsely and fraudulently valued

the complainant's equity, that circulars of estimated profits issued before Mr. Everson took out his policy were suppressed, and that complainant believes the reported value of the equity to be false, but these are accompanied by admissions that complainant does not know, and cannot state, its true value. The allegations are of such a vague and general nature, and there is such an absence of specific fact and detail that, as bearing on the question of fraud, we are justified in disregarding them (see 1 Beach, Mod. Eq. Prac. § 107; Ambler v. Choteau, 107 U. S. 590, 591, 1 Sup. Ct. 556), and in passing on the question purely as one of a right to an accounting by a bill in equity. After full consideration, we are of opinion that no cause of action, in the present form of procedure, is shown by the bill. The demurrer will therefore be sustained.

COMPTON v. JESUP et al.

(Circuit Court of Appeals, Sixth Circuit. April 2, 1895.)

No. 84.

1. UNITED STATES COURTS—JURISDICTION—ANCILLARY SUIT.
   A suit was brought in a federal court to foreclose one of several mortgages to which the W. railway system and its component parts were subject. The road was sold under decree of foreclosure, but the court did not order it turned over to the purchasers by the receivers who had been in possession. While the road was still in the possession of the receivers, the mortgagees under a prior mortgage commenced a suit in the same federal court to foreclose their mortgage, to which suit numerous persons having interests in or claims upon the road were made parties, and filed answers and cross bills, citizens of the same states appearing upon both sides of the controversy. *Held*, that the federal court which had possession of the property had inherent, ancillary jurisdiction to entertain the suit, because of such possession, without regard to the citizenship of the parties.
2. SAME—ANCILLARY AND COLLATERAL SUITS.
   Held, further, that the new foreclosure suit, while dependent on and ancillary to the original suit in which possession had been taken, was so far collateral to it as to prevent an examination of the correctness of the orders and decrees made in it.
3. FEDERAL AND STATE COURTS—JURISDICTION—POSSESSION OF RES.
   Held, further, that no objection to the possession of the court in the original suit could be sustained on the ground that when such possession was taken a suit was pending in a state court in the nature of a proceeding in rem against the property, actual possession of the property not having been taken in such suit in the state court.
4. PARTIES—ANCILLARY SUITS—DIVERSE CITIZENSHIP.
   Held, further, that in such dependent or ancillary suit the court had power to bring in, by compulsory process, any person claiming an interest in the property, whose presence was necessary to the relief sought by the complainants, although such person did not himself seek the establishment of his interest in the suit, and his citizenship was such that it would defeat the jurisdiction if it depended on diverse citizenship.
5. JUDGMENT—RES ADJUDICATA—CLASS SUIT.
   One of the holders of a class of securities brought a suit in a federal court in Indiana to establish such securities as a lien on certain property for the benefit of such of the security holders as should come in and contribute to the expenses of the suit. The relief sought was denied by a final decree, after appeal to the supreme court. Pending this suit, one C.,

a holder of the securities, but who had never taken part in or contributed to the Indiana suit, brought suit in a state court in Ohio for the same relief. Neither the pendency of the Indiana suit, nor the decree of the supreme court, was ever set up in the Ohio suit, in which a decree was made granting C. the relief sought. *Held*, that the Indiana decree did not bind C., nor estop him to set up afterwards the decree in his favor in the Ohio suit.

6. RAILROADS—MORTGAGE OF AFTER-ACQUIRED PROPERTY—OHIO STATUTES.
An Ohio railway corporation has power to mortgage its railroad, and any subsequent accessions or accretions properly appurtenant thereto, acquired either by itself or by any successor in title, whether the road be then maintained and the property acquired by virtue of the original franchise, or of similar franchises granted by the same sovereign.

7. RAILROAD FORECLOSURE—DECREE OF SALE—EFFECT OF SAVING CLAUSE.
The T. Ry. Co., of Ohio, and the W. Ry. Co., of Indiana, which had each issued two mortgages on their respective roads, the trustees in which were the same for both roads, were consolidated into the T. & W. Ry. Co., which issued certain so-called "equipment bonds." The T. & W. Ry. Co. was afterwards consolidated with other railroads, under an agreement, forming the T., W. & W. Ry. Co.; the effect of such agreement, and of the statutes under which the consolidation was made, being to fix upon the property of the T. & W. Ry. Co. a lien in favor of its creditors, including the holders of the equipment bonds. The T., W. & W. Ry. Co. made a mortgage to K. and J., trustees, to secure an issue of bonds. Subsequently other consolidations took place, and several other mortgages and series of bonds were issued. A suit was brought to foreclose a mortgage subsequent to the K. and J. mortgage, and the road was sold; but, before its delivery by the court to the purchaser, suits were brought by K. and J. in the various districts in which the road was situated, to which the trustees of all the mortgages, including the underlying first mortgages on the Ohio and Indiana Divisions, were made parties, and a decree was sought for a sale of the whole road, free from all liens. The suits in the several districts proceeded pari passu, and an identical decree was entered in all, directing the sale of the road. One C., a holder of equipment bonds issued by the T. & W. Ry. Co., had brought a suit in a state court in Ohio, before the institution of the K. and J. suit, making parties the T., W. & W. Ry. Co. and others, including all the corporations which succeeded to the ownership of the road after the T., W. & W. Ry. Co., and the mortgagees in mortgages subsequent to the consolidation, which created the lien of the equipment bonds, but not including the mortgagees in the underlying divisional mortgages on the Ohio and Indiana Lines; and in such suit a decree had been made by the Ohio court establishing C.'s lien on the property of the T. & W. Ry. Co., including the Ohio and Indiana Lines, and directing a sale of the Ohio Line, subject to the underlying divisional mortgages, to satisfy such lien. This decree was not executed, owing to the possession of the road by the federal court in the K. and J. suit. C. was made a party to the K. and J. suit, and the court was asked to enjoin him from asserting his lien under the Ohio decree. At the time of the decree of sale in the K. and J. suit, objections made by C. to the jurisdiction of the court had just been overruled, and he had been required to answer. A provision was inserted in the decree of sale, at C.'s request, reciting his objection and exception to its entry, and adjudging that the sale should be upon condition that if C.'s lien should be upheld the purchaser at the sale should pay him the amount due him, or, in default thereof, the court should resume possession of the property, and enforce its decree, by resale or otherwise, as it might direct; that C.'s lien, notwithstanding the sale, should proceed to a decree binding the purchaser, it being the intention to preserve the rights of C. in the relation in which he stood at the time of the decree towards the mortgagees, parties to the suit. *Held*, that such saving clause did not give to C., upon a decree establishing his lien, a right to an absolute decree for its payment by the purchaser of the road, but only to such relief as he would have been entitled to if not made a party to

the suit; his lien being, at all events, subject to the underlying mortgages on the railroads which were consolidated to form the T. & W. Ry. Co.

8. SAME—RELIEF OF UNFORECLOSED LIENOR.
Held, further, that as C.'s Ohio suit had not been brought for the benefit of others entitled to the same lien, and such others would be equally entitled with C. to enforce it, it would be inequitable, as against the holders of the prior divisional mortgages, to order a resale of the Ohio Division free from such mortgages, even if such a proceeding were authorized by the statutes and decisions of Ohio, and that the only remedy which C. could have was a redemption from the divisional mortgages prior to his lien.

9. JUDGMENT—RES ADJUDICATA.
Held, further, that the question whether or not C. had a right to a separate redemption of the Ohio Division should be certified to the supreme court.

10. MORTGAGES—REDEMPTION—NET EARNINGS OF PROPERTY.
Held, further, that the question whether or not, upon redemption, C. was entitled to have the amount of principal and interest of the mortgage debts reduced by the net earnings of the road or roads in the hands of the purchaser at the sale in the K. and J. suit, or his assignee, should be certified to the supreme court.

11. JUDGMENT—RES ADJUDICATA.
Held, further, that the question whether or not, upon an appeal from the decree rendered by the federal court in K. and J.'s Ohio suit, a decree rendered in the federal court in Indiana, in the ancillary suit of K. and J., upon the same questions, and not appealed from, was res adjudicata upon such questions, should be certified to the supreme court.

12. SAME.
It seems that, as against all parties to C.'s Ohio suit, the decree of the Ohio state court established conclusively that C. had a lien on the railroad of the T. & W. Ry. Co., which might be enforced against the Ohio Division alone, without regard to his remedies against the Indiana Division. Per Taft, Circuit Judge.

13. LIEN—REMEDIES.
It seems that, as against all parties to C.'s Ohio suit, he had the right to redeem the Ohio Division from the underlying mortgages without redeeming the Indiana Division, since such relief was incident to the relief by sale granted by the Ohio decree. Nor could the mortgagees in such mortgages object, since their debt would thereby be paid, and it was conclusively established by the Ohio decree that C. had an interest in the equity of redemption under their mortgages. Per Taft, Circuit Judge.

14. EQUITY—DECREE—RES ADJUDICATA.
It seems that the determination of the Ohio court that the Ohio Division only should be sold was equally res adjudicata with the determination as to the existence of the lien. Per Taft, Circuit Judge.

15. RAILROADS—CONSOLIDATION—EFFECT.
It seems that the lien impressed upon the property of the T. & W. Ry. Co. by its merger in the T., W. & W. Ry. Co. was a lien upon the separate equities of redemption owned by it in the property of the Indiana and Ohio Divisions, and that, as it might have redeemed separately, so might the lienor. Per Taft, Circuit Judge.

16. MORTGAGES—PARTIES—TRUSTEES.
It seems that the fact that the trustees in two several railway mortgages to secure bonds are the same does not make the mortgagees the same, in the absence of proof that the bondholders under the two mortgages are the same. Per Taft, Circuit Judge.

17. EQUITY PRACTICE—ANCILLARY SUITS—IDENTICAL DECREE.
It seems that the several suits instituted by K. and J. in the several districts in which the road lay were to be regarded as distinct, and the provisions of the identical decrees entered in such suits as separately applicable to the portions of the road within the several jurisdictions, and, accordingly, that the trustees of the divisional mortgages had no right, in

the suit in the Ohio district, to represent the interests of the Indiana mortgagees. Per Taft, Circuit Judge.

18. SAME—DEFENSES NOT INTERPOSED.
It seems that, even if the consolidation which fixed the lien of the equipment bonds on the property of the T. & W. Ry. Co. also fixed a lien on the Ohio Division in favor of the bonds issued under the Indiana mortgage, for which the T. & W. Ry. Co. was also liable, the trustees of the Indiana mortgage could not therefore object to a separate redemption of the Ohio Division by C., since they did not set up such lien, or seek foreclosure under it, in the K. and J. suit. Per Taft, Circuit Judge.

19. COLIENORS—SEPARATE SECURITIES.
It seems that the trustees of the Indiana mortgages, while themselves asserting the right to foreclose the Indiana Division, to the exclusion of C.'s right to resort to it, could not object to C.'s enforcing his lien upon the Ohio Division alone. Per Taft, Circuit Judge.

20. MORTGAGES—MORTGAGEE IN POSSESSION.
It seems that the assignee of the purchaser at the sale under the decree in the K. and J. suit, in which all the mortgages were foreclosed, should be regarded as mortgagee in possession under the divisional mortgages, and that C. was entitled to have the amount of principal and interest due upon the mortgages redeemed reduced by the amount of net earnings of the Ohio Division in the hands of such assignee. Per Taft, Circuit Judge.

21. JUDGMENT—RES ADJUDICATA.
It seems that a decree in the suit instituted by K. and J. in the federal court in Indiana, adjudging C. not entitled to appropriate the Indiana Division to the payment of his lien, though not appealed from, was not res adjudicata in the suit in the federal court in Ohio, as to his right to appropriate the Ohio Division. Per Taft, Circuit Judge.

22. SAME.
It seems that the determination of the Ohio state court that the Ohio Division only should be sold to satisfy C.'s lien was not an adjudication that C. had separable liens on the Indiana and Ohio Divisions, and did not make his right to separate sale or redemption res adjudicata. Per Lurton, Circuit Judge.

23. SAME—EQUITY PRACTICE.
C. having sought, after being made a party to the K. and J. suit, to have his Ohio decree, which had become ineffective through the seizure of the property by the federal court, enforced in the K. and J. suit, it seems that the doctrine of res adjudicata would not prevent the federal court from looking into the nature and character of the Ohio decree, and if found to be inequitable, under the circumstances, from refusing to award C. the remedy, by resort to the Ohio Division alone, which was awarded him by that decree. Per Lurton, Circuit Judge.

24. LIENS—SEPARATE SECURITIES—REDEMPTION.
It seems that as C. had not made parties the other holders of equipment bonds and creditors equally entitled with him to redeem, as he should have done for the protection of the mortgagees subsequent to this lien, it would be inequitable to permit him to complicate the situation further by a partial redemption of the property subject to such lien, leaving the Indiana Division still subject to redemption by him or other creditors. Per Lurton, Circuit Judge.

25. SAME—RIGHTS OF SURETY.
It seems that as upon the consolidation of the T. & W. Ry. Co., with others, in the T., W. & W. Ry. Co., the former became surety to the latter upon its undertaking, by agreement, and under the statutes authorizing the consolidation, to assume all the debts of the T. & W. Ry. Co., including all the divisional mortgages as well as the equipment bonds, the T. & W. Ry. Co. had a right to object to the release of any part of the property primarily liable for such debts, and accordingly to a separate redemption of the Ohio Division by C., leaving the Indiana Division the sole security for the remaining debts, and that such objection could not

be avoided by C. on the ground that he had not made the T. & W. Ry. Co. a party to the suit. Per Lurton, Circuit Judge.

26. MORTGAGES—REDEMPTION—TACKING.
It seems that, the trustees of the Indiana and Ohio divisional mortgages being the same, the mortgagees were to be regarded as the same; and all such mortgages having also been assumed by the same party, the T., W. & W. Ry. Co., neither that company, nor C., who derived his rights under it, could, in equity, be permitted to redeem one mortgage without redeeming the other. Per Lurton, Circuit Judge.

27. RAILROADS—DIVISION—PUBLIC POLICY.
It seems that it is the settled policy of courts to treat a railroad as an entirety, and prevent its severance, where possible to do so, in the exercise of discretion. Per Lurton, Circuit Judge.

28. EQUITY PRACTICE—ANCILLARY SUITS—IDENTICAL DECREE.
It seems that the identical decree entered in the suits in the several districts was not solely valid in each, as affecting the property within the several jurisdictions, but effected a unit sale of the whole property in the several jurisdictions, valid under each decree. Per Lurton, Circuit Judge.

29. COLIENORS—SEPARATE SECURITIES.
It seems that the lien created by the merger of the T. & W. Ry. Co. in the T., W. & W. Ry. Co. was for the benefit of the bondholders under the Indiana divisional mortgage for any deficiency in their mortgage security, as well as for the equipment bondholders and other creditors, and that such bondholders, through the trustees, as well in the Ohio as in the Indiana suit, or the purchaser at the foreclosure sale, as equitable assignee of the mortgage debt, had a right to object to a separate redemption of the Ohio Division by C. Per Lurton, Circuit Judge.

30. MORTGAGES—REDEMPTION—MORTGAGEE IN POSSESSION.
It seems that it did not appear that the assignee of the purchaser at the sale under the K. and J. decree was in possession of the railroad as mortgagee under a mortgage superior to C.'s lien, and that C. was not entitled to a deduction for net profits. Per Lurton, Circuit Judge.

31. JUDGMENT—RES ADJUDICATA.
It seems that the decree rendered in the Indiana suit instituted by K. and J., not having been appealed from, was conclusive upon an appeal from a like decree in the Ohio suit. Per Lurton, Circuit Judge.

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

This was a suit by James R. Jesup and Edward H. Dixon against the Wabash, St. Louis & Pacific Railway Company and others for the foreclosure of a mortgage. James Compton was made a party, to determine his rights under a lien asserted by him to part of the mortgaged property, and appealed from so much of the final decree as fixed his rights.

This is an appeal from that part of a decree in a railroad mortgage foreclosure suit rendered by the circuit court of the United States for the Northern district of Ohio which fixes the priority of a lien of the appellant, and prescribes the remedy for its enforcement. James Compton, the appellant, was a citizen of the District of Columbia. Holding equipment bonds issued by the Toledo & Wabash Railway Company, which subsequently became one of the constituent companies of the Wabash System, he obtained a decree from the Ohio supreme court (16 N. E. 110, and 18 N. E. 380) declaring them to be a valid lien on that part of the main line of the Wabash System reaching from Toledo west to the Illinois line, and awarding to him, as a means of enforcing the lien, an order for sale of the portion of the line lying in Ohio. Shortly after the entry of this decree by the Ohio supreme court, and before it was executed, upon the prayer of the complainant and a cross complainant in the foreclosure proceeding in the court below, and after the filing of the necessary affidavit, the court entered an order based on section 8 of the act of congress of March 3, 1875,

directing that Compton be served with subpoena in the District of Columbia, and required to appear and set up his lien in this cause. The order was complied with, and Compton, appearing only for the purpose of objecting to the validity of the service, moved the court to set the service aside, and to dismiss him from the case. The motion was overruled. He then demurred to the jurisdiction on the ground that citizens of the same state appeared on both sides of the controversy. His demurrer was overruled. The amendments to the bill and cross bills concerning Compton denied the validity of his lien, and asserted that he was estopped by matter of record to claim a lien, because of a decree of the supreme court of the United States, to which he was in law privy, in the case of Railway Co. v. Ham, 5 Sup. Ct. 1081, denying the existence of a lien in favor of the equipment bondholders. Compton, in his answers which he filed after his demurrer was overruled, set up his lien as declared by the Ohio supreme court decree, and his right thereunder to have the Ohio Division sold to satisfy it. Compton also claimed in his answer that his bonds were a first lien upon certain terminals of the defendant company at Toledo, on the ground that the Ohio divisional mortgage did not cover this property. The court below adjudged that Compton had a valid lien on the Ohio and Indiana Lines, by virtue of the Ohio decree, but denied his right to a first lien on the Toledo terminals, or to a separate sale of the Ohio Line, and declined to afford him any relief but that of redeeming the four divisional mortgages,—two on the Ohio Line, and two on the Indiana Line,—by the payment of about $8,000,000. The sale under the decrees of foreclosure in the court below, against Compton's objection, took place before the validity and character of his lien were determined, and a provision was inserted in the decree saving his rights. Compton contended that the language of this saving clause entitled him to the payment of his lien by the purchaser, or, in default thereof, a resale of the Ohio part of the railroad. At the hearing of the appeal a motion was made to dismiss on the ground that the same decree as that here appealed from was entered by the United States circuit court for Indiana in a case between the same parties. This appeal presents the questions: (1) Had the court jurisdiction of the original bill? (2) Had it power to make Compton party by substituted service? (3) Was Compton estopped to assert a lien for his bonds by a decree of the United States circuit court for Indiana denying it for bonds of the same kind, in what was claimed to be a representative suit? (4) Did the Ohio divisional mortgages not cover certain after-acquired terminal property at Toledo, so that Compton had a first lien thereon? (5) What was the effect of the proviso in the decree of sale upon Compton's rights and remedy? (6) What relief was he entitled to under the Ohio decree? (7) Is Compton estopped to prosecute this appeal by the fact that a decree identical in terms with the one here appealed from was entered in the United States circuit court for Indiana, and has not been appealed from? The facts of the case are quite complicated, and many of them must be stated, for a clear understanding of the issues.

The Wabash, St. Louis & Pacific Railway Company, usually known as the "Wabash System," comprised, as its main line, a railroad which ran from Toledo, Ohio, west, through Ohio, Indiana, Illinois, and Missouri, to Kansas City. It was the result of a consolidation of separate railroads,—one in Ohio, one in Indiana, three or four in Illinois, and one or more in Missouri. First the Ohio and Indiana companies were consolidated, then the companies east of the Mississippi river, and finally, in 1880, all of them were united in the Wabash, St. Louis & Pacific Company. Many of the constituent companies had issued bonds secured by mortgage upon their respective lines, and as consolidations took place the new companies assumed the obligation of the mortgage and bonded debts of their constituents. When the Ohio and Indiana companies were united, in 1858, under the name of the Toledo & Wabash Railway Company, there were two mortgages on the Ohio part,—one to the Farmers' Loan & Trust Company, trustee, to secure $900,000 of bonds, and a second to E. D. Morgan, trustee, to secure bonds amounting to $1,000,000. There were also two mortgages on the Indiana part,—one to the Farmers' Loan & Trust Company, trustee, for $2,500,000, and a second to E. D. Morgan, trustee, for $1,500,000. The

Toledo & Wabash Company, in 1862, issued equipment bonds to the amount of $600,000, but gave no mortgage to secure them. It is $150,000, par value, of the equipment bonds, which is the subject-matter of this appeal. In 1865 the Toledo & Wabash Railway Company united with several Illinois companies, and became the Toledo, Wabash & Western Company, with a line reaching from Toledo to the Mississippi river. It was this consolidation which the supreme court of Ohio held, by virtue of the Ohio statute authorizing it, to have the effect of fastening the equipment bonds as a lien on the property of the Toledo & Wabash Railway Company, which passed to the new company. The articles of agreement contained the following provisions:

"Now, therefore, the said companies, by their respective directors, agree to consolidate their said roads, property, and capital stock into one company, upon the basis and conditions hereinafter specified, to be submitted by the directors of each of said roads, to the stockholders thereof, for ratification, to wit:

"The Toledo and Wabash Railway Company enters into said consolidation on the following basis, viz.:

Its capital is.....		$ 10,000,000
Composed as follows:		
First mortgage bonds.....	$	3,400,000
Second mortgage bonds.....		2,500,000
Convertible equipment bonds.....		600,000
Convertible preferred stock.....		1,000,000
Common stock		2,500,000

* * * * * * * * * * * * * * * *

"It is further agreed that, on the terms and condition above specified, the four railroad companies hereto do agree, each for itself, severally, that the several companies named shall be, and they hereby are, consolidated into and form one corporation," etc. "* * * It is further agreed that the bonds and other debts hereinabove specified, in the manner and to the extent specified, and not otherwise provided for in this agreement, shall, as to the principal and interest thereof, as the same shall respectively fall due, be protected by the said consolidated company, according to the true meaning and effect of the instruments or bonds by which such indebtedness of the several consolidating companies may be evidenced."

The new company, the Toledo, Wabash & Western Railway Company, shortly after the consolidation, issued a mortgage to Knox and Jesup, trustees, upon its entire road, known as the "Consolidated Mortgage," with the purpose therein recited of using the proceeds of their sale to take up and refund all previous indebtedness, including the equipment bonds. The purpose was never carried out, but some $2,500,000 of bonds were issued, and the proceeds expended for the use of the company. In the foreclosure of a subsequent mortgage, called the "Gold-Bond Mortgage," and the consequent reorganization, the property of the Toledo, Wabash & Western Company passed, subject to all previous mortgages, to a consolidated company of the same three states, called the Wabash Railway Company, which issued bonds amounting to $2,000,000, secured by mortgage on its line, to Humphreys and Lindley, trustees. Then the Wabash Company united with a Missouri company to make the Wabash, St. Louis, & Pacific Company a consolidated company, of Ohio, Indiana, Illinois, and Missouri, with a line of railway extending from Toledo to Kansas City. This company issued bonds amounting to $17,000,000, and secured them by mortgage on its entire line to the Central Trust Company, and James Cheney, of Indiana, as trustees. In 1884 the Wabash, St. Louis & Pacific Railway Company filed a bill in the circuit court for the Eastern district of Missouri against the Central Trust Company, a citizen of New York, and James Cheney, a citizen of Indiana, trustees under the last mortgage, averring its insolvency, praying for the appointment of a receiver, the marshaling of liens upon it, the sale of its road, and a distribution of proceeds for the benefit of its creditors. A similar bill was filed in the circuit courts for the Northern district of Ohio, and for other districts. Receivers were appointed, who took possession of the railroad, and operated it. Shortly afterwards the Central Trust

Company and Cheney filed a bill to foreclose their mortgage in the state courts of the several states where the mortgaged property lay. These suits were removed to the proper federal courts, and were consolidated with the insolvency bills, so called, already referred to. The consolidated causes proceeded to decrees for sale in the various jurisdictions. The property was bid off in each court to James F. Joy and others, a purchasing committee under a plan of reorganization entered into by the foreclosing bondholders. The sales were confirmed, and deeds ordered to be executed. The committee took possession from the receivers of the part of the railroad west of the Mississippi river, but for some reason, not clearly disclosed in the record, the court did not order the receivers to deliver possession to the purchasers of the lines east of the Mississippi. The sale of Joy and associates in Ohio was expressly subject to the Humphreys and Lindley mortgage, the Knox and Jesup mortgage, the Compton lien, if any he had, and the Ohio divisional mortgages. While the railroad in Illinois, Indiana, and Ohio was still in the hands of the receivers, Knox and Jesup began the proceeding in which this appeal was taken, by filing a bill against the Wabash, St. Louis & Pacific Railway Company to foreclose their mortgage in the circuit courts of Northern Ohio, Indiana, and Illinois, and for the appointment of receivers, and made parties defendant those holding mortgages on the part of the road within each jurisdiction, as well as the purchasing committee at the former sale. Humphreys and Lindley and the Farmers' Loan & Trust Company filed answers, which, by stipulation, were taken as cross bills, setting up their mortgage liens on the Ohio property, and praying a foreclosure and sale. The bills and cross bills all averred that at the time of filing the same the road was in the possession of the receivers appointed by the court below in the previous foreclosure suit. Citizens of the same state appeared on both sides of the controversy thus presented. Compton was made a party, in the way already stated, both to the Indiana and Ohio bills and cross bills. The litigation in the courts of the three states proceeded together. Mr. Justice Jackson, then the circuit judge for the Sixth circuit, and Judge Gresham, the circuit judge for the Seventh circuit, sat together, heard the points in dispute argued, and made the same orders, in their respective jurisdictions. The pleadings in the court below are quite confusing, and do not seem to have been prepared or filed with much care to keep separate the jurisdictions of the circuit courts of the three districts in which the litigation was pending. The amended bill of Knox and Jesup recited that a similar bill had been filed in the Southern district of Illinois, and attached the same as an exhibit. Both bills made parties all persons having or claiming an interest in any part of the line in the three states. Among these defendants was James F. Joy, as substituted trustee under the second Ohio divisional mortgage, and also as substituted trustee under the second Indiana divisional mortgage. The cross bill of Humphreys and Lindley, trustees under the mortgage issued by the Wabash Railway Company on the entire line east of the Mississippi river, made the same parties as in the amended bill. The amended cross bill of the Farmers' Loan & Trust Company, seeking to foreclose that part of the railroad lying in Ohio, only made parties defendant those having a mortgage lien on the Ohio Division. Compton was made a party to this cross bill, as was also James F. Joy, as trustee under the second mortgage on the Ohio property. By some error, Joy, as an answer to the amended bill of complaint, and the cross bills of Humphreys and Lindley and of the Farmers' Loan & Trust Company, filed the same answer made by him in the Indiana suit, in which he only set up, and asked to be protected in, his rights as substituted trustee in the mortgage of the Wabash & Western Railway Company, and made no averment or prayer in regard to the mortgage on the Ohio part of the railroad, in which he had also been substituted as trustee in place of E. D. Morgan, trustee. Other answers were filed by parties defendant, and the cause proceeded in the three different courts in Ohio, Indiana, and Illinois as if the same questions were pending in each court, and the same issues were raised, without respect to the territorial jurisdiction of each court. Identically the same decree, foreclosing all the mortgages on all the railroad property east of the Mississippi river, divisional and otherwise, was entered in each district. The decree was entered March

23, 1889. Compton was not required to answer the bill and cross bills until April following, so that when the decree for sale was passed, the controversy over his claim was not at issue. This decree, though entered in the circuit court for the Northern district of Ohio, purports to foreclose divisional mortgages in Indiana and Illinois, and to order to a separate sale property without the territorial jurisdiction of the court, although there is no prayer for such relief, and there is nothing in the decree intended to operate upon the defendant mortgagor company to compel a conveyance of property in another jurisdiction. The decree provided that each division of the road covered by an underlying divisional mortgage should be offered separately, and then the whole road east of the Mississippi river should be offered as a unit. If the sum offered for the whole road exceeded the total of the separate bids, the road was to be struck off to the one making the unit bid, and the share of each division in the amount of the unit bid was to be determined in the proportion of the separate bids. The decree provided that no bid should be received on the Ohio bid which did not equal the sum due on both the Ohio divisional mortgages, and that no bid should be received on the Indiana Division which did not equal the amount due on the first Indiana divisional mortgage. Under this decree, Joy and his associates, the purchasing committee in the previous foreclosure proceedings, became the purchasers of the road, on their unit bid of $15,500,000. This exceeded by several thousand dollars the sum total of the bids on the separate divisions of the road. The separate bid on the Ohio property amounted to $2,840,595.68, or a little more than enough to pay the principal and interest of the two divisional mortgages. The separate bid on the Indiana Division was $3,650,000. This was about $1,300,000 less than would have been required to pay the second divisional mortgage on that division. The purchasing committee organized a new company, called the Wabash Railroad Company, to which they conveyed the railroad.

The new company was made a party below to contest Compton's lien, and his right to a resale or redemption of the Ohio property, and is a party to this appeal, to oppose the reversal or modification of the decree, claiming to assert the rights of all mortgagees whose interests passed to the purchaser by the foreclosure proceeding. Because of the discussion of the effect of the decree for sale on Compton's right, it is necessary to make a somewhat fuller reference to it. After finding the amount due upon each mortgage, and foreclosing each mortgage in default of the several payments directed to be made by the mortgagors, the decree ordered a sale at the city of Chicago, at which the mortgaged property should first be offered for sale separately, as described in each of the divisional mortgages. It was further provided that there should be deposited with the special master, as security for each bid, $100,000 in cash or in bonds; that after such bids had been made they should be accepted conditionally upon the result of the offer of the entire railway as a unit; that, if the highest bid for the railroad as an entirety exceeded the sum of the highest bids for the separate divisions, the entire property should be struck off to the highest bidder for the entire road; that in such case the court would distribute to each division its share of the unit bid, in proportion to the separate bids received for the separate divisions; and that in case of a sale of the property as a unit the purchaser must deposit, in cash or in bonds, $900,000, as a pledge that he would comply with his bid. The provision with reference to the payment was as follows: "There shall be paid in cash, of the price at which the said mortgaged premises and property shall be sold, in addition to the amount which may be paid at the time of sale, such further sums thereafter of the purchase money as the court may direct. The remainder of such purchase price may be paid either in cash or in bonds, with the overdue coupons thereto appertaining, at such proportion or value as the holders thereof would be entitled to receive thereon in case the said purchase price were paid by the purchasers in cash; and in all cases in which bonds shall be received by the said special masters, whether as a deposit at the time of said sale or sales, to bind the bids thereat, or in payment of the remainder of the purchase price at the time of the consummation of such sale or sales, the said bonds shall be so received at the rate or amount to which the holders thereof will be entitled to dividend thereon;

and, in case of the receipt of bonds for security at the time of sale, the said special masters shall at the time exercise their judgment in determining the probable amount of the dividend to which such bonds will be entitled."

The decree directed that upon the confirmation of the sale by the court, and the full payment of the entire purchase price, and the compliance by the purchaser with the condition of the sale and orders of the court in that behalf, the special masters should convey the property by good and sufficient deed to vest in the grantee "all the right, title, estate, interest, property, and equity of redemption, except as hereby reserved, of, in, and to all and singular the real estate, property, premises, and franchises therein described, in fee simple forever, and shall entitle the grantees to the possession thereof." All questions of account between the several different divisions of the railway as to earnings and expenses, as to payments made by the receivers on coupons or bonds secured by the mortgages upon the divisions, and all questions of the disposition of the proceeds arising from the sales under the decree, were reserved for future settlement and adjustment. The masters were required to pay the proceeds into court, to remain subject to the further order of the court. The decree then proceeded:

"All other questions arising under any of the pleadings or proceedings herein, not hereby disposed of or determined, are hereby reserved for future adjudication, including the claim for unearned interest on bonds not yet due. And the defendant James Compton having in open court, on the final hearing herein, objected to the rendering or entry of any decree in this cause at this time, on the ground that the issue raised by the amendment to the complainants' amended and supplemental ancillary bill, and to the cross bill of the cross complainants Solon Humphreys and Daniel A. Lindley, trustees, and the answers of the defendant James Compton to be filed herein, have not been tried and determined, the court overrules such objection; and the defendant James Compton duly excepts to such ruling, and the entry of this decree. But it is adjudged and decreed, in the premises, that the rendering and entry of this decree in advance of the trial and determination of such issues is upon and subject to the following condition, to wit: If, upon the determination of such issues, it shall be adjudged by this court that the decree rendered by the supreme court of the state of Ohio in the suit brought by said James Compton against the Wabash, St. Louis & Pacific Railway Company and others, referred to in the pleading herein, and the lien thereby declared and adjudicated in his favor, continue in full force and effect, then the purchaser or purchasers at any sale or sales had hereunder of that portion of the property sold, covered, and affected by said lien, or the successors in the title of said purchaser or purchasers, shall pay to said James Compton, or his solicitors herein, within ten days after the entry of the decree herein in favor of said James Compton, the sum of three hundred and thirty-nine thousand nine hundred and twenty dollars and forty cents, with interest thereon at six per cent. per annum from May 1, 1888, being the amount found due on the equipment bonds by him owned, by the supreme court of Ohio, in his said suit, upon the surrender by him of the bonds and coupons owned by him, referred to in his petition in such suit; and in default of such payment this court shall resume possession of the property covered and affected by the said lien of the defendant James Compton, and enforce such decree as it may render herein in his favor by a resale of such property, or otherwise, as this court may direct. And it is further ordered and adjudged that, notwithstanding the entry of this decree, the said issues concerning the claim and interest of said Compton shall proceed to a final determination and decree in accordance with the rules and practice of this court, and any decree rendered thereupon shall bind the purchaser or purchasers at any sale or sales had hereunder, and all persons and corporations deriving any title to or interest in the said property affected by such lien, from or through them, or any of them; and nothing in this decree contained shall be construed as an adjudication of any matter or thing, as against the said James Compton, or to prejudice, annul or abridge any right, claim, or interest or lien which the said James Compton may have in, to, or upon the premises hereby directed to be sold, or any part thereof, or in, to, or upon any property whatsoever embraced in this decree, it being the intention to hereby preserve the rights of said Compton in the relation in which he now stands towards the mort-

gagees, parties hereto." "Any sale, conveyance, or assignment of the railway and property hereinabove described, made under this decree, shall not have the effect of discharging any part of said property from the payment, or contribution to the payment, of claims or demands chargeable against the same, whether for costs and expenses, the expenses of the receivership of said property, and the full payment of all the debts and liabilities of the receivers of the Wabash, St. Louis & Pacific Railway Company, namely, Solon Humphreys and Thomas E. Tutt, Thomas M. Cooley and General John McNulta, or upon intervening claims and allowances that have been, or may hereafter be, charged against the property of the Wabash, St. Louis & Pacific Railway Company, or any part thereof, or said receivers, or either of them, or the adjustment of any equities arising out of the same between the parties thereto, or their successors, either by this court, or by the circuit court of the United States for the Eastern district of Missouri, or by any United States circuit court exercising either original or ancillary jurisdiction over said property of the Wabash, St. Louis & Pacific Railway Company, or any part thereof, or by any United States circuit court, to which any of the parties in the consolidated cause of the Central Trust Company of New York and others against the Wabash, St. Louis & Pacific Railway Company and others, in the circuit court of the United States for the Eastern district of Missouri, including the receivers, have been by said circuit court of the United States remitted in proceedings or actions ancillary to the jurisdiction of said last-named court, or otherwise. Nor shall any such sale, conveyance, transfer, or assignment made under and pursuant to this decree withdraw any of said railroad property or interests to be sold under this decree, as hereinbefore directed, from the jurisdiction of this and the other courts aforesaid; but the same shall remain in the custody of the receiver until such time as the court shall, on motion, direct said property, in whole, or, from time to time, in part, to be released to the purchaser or purchasers thereof, or any of them, and shall afterwards be subject to be retaken, and, if necessary, resold, if the sum so charged or to be charged against said property, or any part thereof, or said receivers, shall not be paid within a reasonable time after being required by order of this or said other courts. The conveyance and transfer of said property sold under this decree shall be subject to the powers and jurisdiction of the said courts, and the purchasers of the property sold under this decree, or any part thereof, and the parties hereto, or their successors, shall thereby become and remain subject to said jurisdiction of said courts, so far as necessary to the enforcement of this provision of this decree; and such jurisdiction shall continue until all the claims and demands that have been or may be allowed against said property of the Wabash, St. Louis & Pacific Railway Company, or any part thereof, or said receivers, by order of said courts, shall be fully paid and discharged. The provision aforesaid shall apply to the purchasers of the same under this decree, and all persons taking said property through or under them; but the foregoing provisions shall not, nor shall any reservation of this decree contained, have the effect or be construed, nor are they or any of them intended, to give to any claims that may exist any validity, character, or status superior to what they now have, nor to decide or imply that any such claims exist. The effect of said provisions and reservations shall be to prevent this decree operating as an additional defense to claims, if any there are, prior in right to the liens of the mortgages upon said property heretofore and hereby foreclosed, and to preserve the prior right and lien of such claims, and all allowances, if found and decreed to exist."

The masters reported the making of the sale in accordance with the decree, and the sale was confirmed May 18, 1889. On June 18th an order requiring the masters to execute a deed, and to deliver possession, was made. This order recited that the purchasers had on deposit a large number of the bonds under all the mortgages, giving the exact amount of each, and then proceeded: "And it further appearing that the said purchasers, by their said petition, offer to deposit, at such time and in such amounts as the court may direct, cash sufficient to pay the expenses that the court may require to be paid, and to pay such sum on first mortgage bonds and funded debt bonds not deposited in said trust company as the court may

direct to be paid in cash, and, as security for such payment, to deposit all or any part of the bonds held by said trust company as the court may direct, and to substitute cash for bonds at such time and in such amounts as the court may require cash payments, and, further, to hold the said purchased property subject to be retaken by the court in the event any cash payments directed by the court shall not be made in pursuance of the court's directions. The court, thereupon, having duly considered the premises, does order, adjudge, and decree that the prayer of said petition be granted; that the said purchasers shall forthwith transfer to the said special masters, Bluford Wilson and A. J. Ricks, the bonds deposited with the Central Trust Company of New York, and hereinbefore mentioned, to be held and disposed of by said special masters as the court may direct. Notwithstanding such transfers of said bonds to said masters, said purchasing committee shall pay all such sums as may be required from them in carrying out their purchase; and in case of their failure to comply with any orders of the court with respect thereto the court may retake the property, and all of it, conveyed by said deed, and annul the title of the purchasing committee with respect thereto, and hold the same for further disposition, and as security for the rights of the bondholders under the various mortgages foreclosed. Upon such transfer the said special masters shall forthwith make, execute, and deliver to said purchasers a deed or deeds conveying to them or their assigns, all and singular, the railways, premises, and property described in and covered by the said several mortgages foreclosed and sold as aforesaid under the decree in this cause, and all the right, title, interest, and estate of all the parties in said cause, of, in, and to the same, and each and every part thereof, except as particularly reserved in and by said decree of foreclosure and sale, by a good and sufficient deed therefor." Then followed an order to deliver possession, closing with these words: "This order is made subject in all respects to the provisions of said decree of March 23, 1889." On August 17, 1889, the court ordered "that the issues presented in this cause as to the lien and claim of James Compton, made by the various pleadings herein, upon and concerning said claim and lien, and reserved in the former decree herein, saving the rights of said Compton, be, and the same are hereby, referred to Bluford Wilson," etc. The special master reported that Compton's lien was a valid one, and that he was entitled, by the saving clause of the decree, to have the Ohio Division resold, if the purchaser did not pay off his bonds, principal and interest, in full. The court below sustained the master in holding Compton's lien valid, but decided, as already stated, that his only remedy was to redeem the four divisional mortgages,—two in Ohio, and two in Indiana. Compton's counsel filed affidavits at the final hearing below to show that their client was deterred from bidding by their advice that the saving clause in the decree made it unnecessary for him thus to protect his claim, because, if his lien was held to be valid, the purchaser was required to pay it off, or let the property go to a resale, and that, but for his reliance on the saving clause, Compton could easily and safely have made a bid high enough to secure the payment of his claim from the proceeds of sale.

The facts on which turned the issue as to whether the divisional mortgages were a first lien on the Toledo terminals were as follows: The first Ohio company was the Toledo & Illinois Railroad Company. Its charter of incorporation, dated April 20, 1853, provided for building a railroad from the city of Toledo, through the counties of Lucas, Henry, Fulton, Defiance, and Paulding, or parts of said counties, to the west boundary line of the state of Ohio, in the township of Harrison, in Paulding county. On September 8, 1853, it made a mortgage (known as the "First Ohio Mortgage") to the Farmers' Loan & Trust Company, to secure an issue of bonds amounting to $900,000. The property covered by that mortgage was described as follows, viz.: "Their road, made and to be made, including the right of way and the land occupied thereby, together with the superstructure and tracks thereon, and all rails and other materials and machinery used thereon or procured therefor, including the furniture and equipments of the road, and those to be purchased or paid for with the above-described bonds, and the bridges, viaducts, culverts, fences, depot grounds, and build-

ings erected or to be erected thereon, and all franchises, rights, or privileges of the said party of the first part of, in, to, or concerning the same." The habendum clause is: "To have and to hold the said premises, and every part thereof, with the appurtenances, unto the same party of the second part." In June, 1856, the Toledo & Illinois Railroad Company entered into an agreement of consolidation with the Lake Erie, Wabash & St. Louis Railroad Company, and the Toledo, Wabash & Western Railway Company was thereby formed. That agreement provided that "all mortgages given by either of the parties shall be as valid and binding upon the whole of the road, real estate, fixtures, and personal property which may be described in such mortgage as though the same had been originally executed by such consolidated corporation." The Toledo, Wabash & Western Railway Company made a mortgage, which was subsequently foreclosed. By the decree of sale the purchaser of the Ohio part, Boody, took subject to the first mortgage. Boody conveyed the Ohio Division to a new Ohio corporation, organized with power to construct, maintain, and operate a road from Toledo to the Indiana state line, and called the Toledo & Wabash Railroad Company. This company, on October 12, 1888, gave a bond to Edwin D. Morgan, trustee, for $900,000, and secured it by mortgage of its railroad, made and to be made, all right of way and all land occupied thereby, together with the superstructure, depots, depot grounds, and buildings erected thereon, and the rails, tracks, side tracks, bridges, fences, viaducts, culverts, rights, privileges, franchises, and accessions of the party of the first part, together with all its rolling stock, machinery, furniture, and equipments of its said road now and hereafter to be acquired; being the same property described in the deed of Matthew Johnson, marshal and commissioner, to A. Boody, Esq., and dated October 8, 1858, and by A. Boody conveyed to the party of the first part. The habendum clause was: "To have and to hold the premises, and every part and parcel thereof, and all its increase, accessions, and incidents, unto the said Morgan and his successors," etc. The condition of the mortgage and bond was that the Toledo & Wabash Railroad Company would pay the $900,000 of bonds issued by the Toledo & Illinois Railroad Company, and secured by the first mortgage. The mortgage recites that it is executed for the benefit of the bondholders under the first mortgage. On October 15, 1858, the Toledo & Wabash Railroad Company gave a second mortgage to E. D. Morgan, trustee, in which the description of the property conveyed is the same as above, as is also the habendum clause. The true intent and meaning of this mortgage is declared to be as follows: "First. That this mortgage attaches to the property above described, as subject to and subordinate to said bonds of the Toledo & Illinois Railroad Company, or said issue of nine hundred thousand dollars, whether evidenced by said bond of the party of the first part, made to Edwin D. Morgan, trustee," etc. "Second. That the party of the first part, or any railroad company into which it may become a component part by consolidation, shall be chargeable with said sum of nine hundred thousand dollars, as a prior lien and incumbrance to any other debt thereon." The Toledo & Wabash Railroad Company of Ohio, soon after executing the foregoing mortgages, entered into articles of consolidation with the Wabash & Western Railway Company, an Indiana corporation, thereby forming the Toledo & Wabash Railway Company. It was provided in that agreement that all mortgages given by either of the parties "shall be as valid and binding upon the whole of the road, real estate, fixtures, and personal property which may be described in such mortgage as though the same had been originally executed by such consolidated corporation." This company took possession of the property, and operated it. Later it acquired certain terminal property in Toledo. It issued the equipment bonds. It made no mortgage at any time. In 1865 the Toledo & Wabash Railway Company and various Illinois companies entered into an agreement of consolidation, whereby the Toledo, Wabash & Western Railway Company was formed. It was this agreement which created the lien in favor of the equipment bonds which was adjudicated in Compton's suit.

Another issue raised by the bill and cross bills and Compton's answers was the effect of a decree of the United States circuit court of Indiana denying

the existence of a lien in favor of equipment bonds of the same issue as those held by Compton, upon the Ohio decree in Compton's favor. It was contended by complainant below that Compton was a party to the Indiana decree, and was thereby estopped to plead the Ohio decree. The master and the court below decided in Compton's favor on this point. The facts in respect to this issue were as follows: In 1878 one Tysen brought suit on behalf of himself and such other owners of equipment bonds of this issue as might desire to come into said suit, and contribute to the expense thereof, to establish that the bonds entitled their owners to a lien on the part of the Wabash main line, extending from Toledo to the Illinois state line. The cause was removed to the federal circuit court, and resulted in a decree sustaining the lien. Railway Co. v. Ham, 114 U. S. 587, 5 Sup. Ct. 1081. It was appealed to the supreme court of the United States. The decree of the lower court was reversed, and the bill of complainant was dismissed. To this action Compton never became a party. His counsel did file a brief in the supreme court, but he paid no part of the expense of the suit. In 1880, pending the suit in the Indiana court, but prior to the rendition of the Indiana decree, Compton began a suit in the common pleas court of Lucas county to establish and enforce a lien on the railroad extending from Toledo to the Illinois state line, by virtue of his ownership of $150,000 of the par value of these equipment bonds. Compton made parties to this suit all the railway companies succeeding the Toledo & Wabash Railway Company (which issued the equipment bonds) in the ownership of the property, and all the mortgagees whose mortgages were executed, after the issuance of the bonds, except the Central Trust Company and Cheney, trustees, who took their mortgage pending the appeal from the common pleas decree. Neither the Farmers' Loan & Trust Company nor E. D. Morgan, trustees of the underlying Ohio divisional mortgages, were parties. In March, 1882, the common pleas court entered a decree sustaining the lien claimed, and ordered a sale of the part of the railroad in Ohio to pay the amount of the bonds found due, subject to the prior lien of the mortgages of the Farmers' Loan & Trust Company and E. D. Morgan, trustee, on the same property. The cause was appealed to the district court of the proper judicial district, and by that court reserved for decision to the supreme court of the state, which in 1888 sustained the ruling of the common pleas court (Compton v. Railway Co., 45 Ohio St. 592, 16 N. E. 110, and 18 N. E. 380), found that the amount due on Compton's bonds was $339,920.40 with interest from May 1, 1888, and that this amount was a lien on the railroad in Ohio and Indiana, and ordered that, on default in the payment of the amount due after 10 days, the Ohio part of the road should be sold to enforce the lien.

The finding and action of the supreme court of Ohio sufficiently appeared from the fifth and sixth paragraphs of its decree, as follows: "That upon the consummation of such consolidation said bonds issued as aforesaid by the Toledo & Wabash Railway Company, known as 'Equipment Bonds,' and all moneys due and to grow due thereon, and among them such of said bonds as are now owned as aforesaid by the plaintiff, and the moneys due and to grow due thereon, became an equitable lien upon all of the said railroad and real property, and the structures thereupon, and the fixtures and appurtenances thereto appertaining, which were owned by said Toledo & Wabash Railway Company at the time of said consolidation, and which, through said consolidation, passed to and vested in the said Toledo, Wabash & Western Railway Company, and which afterward passed to and vested in the defendant the Wabash, St. Louis & Pacific Railway Company, which last-named company was at the time of the commencement of this suit in possession of the same, being all of its railroad, and property connected therewith, commencing in the city of Toledo, in the state of Ohio, and extending therefrom, through the counties of Lucas, Henry, Fulton, Defiance, and Paulding, in said state, and through the counties of Allen, Huntington, Wabash, Miami, Cass, Carroll, Tippecanoe, Fountain, and Warren, in the state of Indiana, to and terminating at a point in the west line of State Line city, in said last-named county, and that said bonds are now a lien on such railroad and property, and the plaintiff is entitled to enforce the same. That the said lien of said bonds is prior and superior to

the rights, interests, estates, claims, and liens of the defendants in this action, and each of them, in and upon said railroad and property, upon which said lien is hereby declared, and is prior and superior to the rights, interests, estates, claims, and liens of all persons and corporations who have derived any such rights, estates, claims, and liens from, by, or through the said defendants, or any of them, since the commencement of this action, or otherwise. But, as to all that part of said railroad and property which is situate within the state of Ohio, such lien is inferior and subject, but inferior and subject only, to the two mortgages mentioned in the petition herein, one of which was executed by the Toledo & Illinois Railroad Company to the Farmers' Loan & Trust Company on the 8th day of September, 1853, for the security of the bonds of that company amounting to $900,000, due, as extended, August 1, 1890, and bearing interest at the rate of seven per cent. per annum, payable semiannually on the 1st day of February and August in each year, and the other of which was executed by the Toledo & Wabash Railroad Company to Edwin D. Morgan, trustee, on the 5th day of October, 1858, for the security of the bonds of that company amounting to $1,000,000, due on the 1st of November, 1878, and bearing interest at the rate of seven per cent. per annum, payable semiannually on the 1st day of May and November in each year. (6) That the said defendants, or any of them, pay to said plaintiff the said sum of $339,920.40 now due on said bonds owned by the plaintiff as aforesaid within ten days from the entry of this decree, and, if default shall be made in such payment, that an order of sale issue for the sale, as upon execution at law, of all said railroad and real property, together with the structures thereupon and the fixtures and appurtenances thereto appertaining, upon which the lien of said bonds known as 'Equipment Bonds' is hereby declared to exist, which is situated in the state of Ohio, and the jurisdiction of this court, subject, however, but subject only, to the lien of the two mortgages hereinbefore mentioned as executed by the Toledo & Illinois Railroad Company to the Farmers' Loan & Trust Company, and the Toledo & Wabash Railroad Company to Edwin D. Morgan, and to the indebtedness secured by each of said mortgages, and that from the proceeds of such sale the costs of this action, as taxed, to be paid, and the residue of such proceeds be brought into court, to abide its further order herein on the footing of this decree. That before offering the property, hereby directed to be sold, for sale, the officer conducting the same shall cause the same to be appraised according to law by three disinterested freeholders of either or any of the counties in which the same is situated, and such appraisal shall be of the value of said property, subject to the incumbrance and lien of the two mortgages hereinbefore mentioned, as executed, respectively, by the Toledo & Illinois Railroad Company and the Toledo & Wabash Railroad Company, subject to which it is directed to be sold, and over and above the lien of such mortgages, according to the amount of the indebtedness secured thereby, as the same shall be ascertained by the officer conducting such sale, with interest computed to the time of the sale."

After this case had been appealed to this court, and before the hearing, a motion was made by appellees to dismiss the appeal, or affirm the decree of the court below, on the ground that since the rendition of the decree herein a decree had been rendered in the United States circuit court for Indiana, on the same cause of action, limiting Compton's remedy to a redemption of the four senior mortgages,—two in Ohio, and two in Indiana,—and no appeal had been taken from that decree, and the record of the Indiana suit was filed to establish ground for the motion. The record shows that the Indiana decree was exactly like that from which this appeal was taken, and contained the same provision in respect to Compton's lien, requiring him to redeem the Ohio and Indiana Division by payment of the amount due on both the Ohio and the Indiana divisional mortgages within 10 days, or to be forever barred of claiming anything thereunder.

John H. Doyle, Judson Harmon, and John G. Milburn, for appellant.

Wager Swayne, Rush Taggart, and Henry Crawford, for Wabash R. Co.

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

TAFT, Circuit Judge, after stating the case, delivered the opinion of the court.

The first ground pressed on us by appellant's counsel for reversing the decree of the circuit court is that there was no jurisdiction to enter it. The contention is—First, that the circuit court had no power to entertain and grant relief on the bill of Knox and Jesup, because the parties to it had not the necessary diverse citizenship; and, second, that no power existed to bring in Compton, because, he being a citizen of the District of Columbia, his presence as a party would destroy the necessary diversity of citizenship, even if it before existed. It must be conceded that the circuit court had no jurisdiction to hear and determine the controversies presented by the Knox and Jesup bill, on the ground of diverse citizenship of the parties, for it did not exist. The jurisdiction was assumed on a very different ground. When the bill was filed in the court below, the property which it was thereby sought to sell on foreclosure was in the possession of receivers appointed by that court in a previous litigation instituted to foreclose mortgages junior to the Knox and Jesup mortgage, and to sell the road to pay all junior liens and floating indebtedness. It is true, the litigation had proceeded to foreclosure sale and final decree; but for some reason, not plainly disclosed, the court refused to deliver possession to the purchasers, and retained it in the custody of the court for the purpose of protecting the interests of all the parties to the original litigation. Knox and Jesup wished to foreclose their mortgage, to marshal all liens, to sell the road at the highest price, to preserve the road and its income from waste by the appointment of a receiver. It is manifest that no other court than that in which the receivers then in possession had been appointed could grant such relief. Whether other courts could decree foreclosure and marshal liens, or not, certainly no other court could take possession of and sell the road, and deliver an unclouded title to a purchaser. If Knox and Jesup could not file their bill in the court below, then the act of that court in maintaining possession of the mortgaged property through its receivers would result in great injustice to them, and would constitute an abuse of its process. To prevent this, the court below had inherent ancillary jurisdiction, pending its possession of the railroad, to hear and determine all petitions for relief presented to it in respect of the possession and control of the road. It is of no importance that the custody of the railroad was likely soon to be changed from the court to the intending purchaser under the previous foreclosure proceedings, at which time any tribunal of competent jurisdiction could give all the relief prayed by Knox and Jesup. Their mortgage was then due. They were not obliged to await the uncertain delays of other litigation before taking steps to assert their rights. They therefore properly appealed to the court below, as the only tribunal which could do so, to give them adequate relief at once; and this was properly accorded to them, without regard to the citizenship of the

parties to their bill. The foregoing reasoning is fully supported by many decisions of the supreme court. Necessity and comity both require that where, by its officers acting under color of its order or process, a court has taken into its custody property of any kind, another court, though of equal and co-ordinate jurisdiction, should not be permitted either to oust the possession of the first court, or in any way to interfere with its complete control and disposition of the property for the purpose of the cause in which its action has been invoked. This principle has been laid down by the supreme court of the United States in a long line of cases. Hagan v. Lucas, 10 Pet. 400; Williams v. Benedict, 8 How. 107; Wiswall v. Sampson, 14 How. 52; Peale v. Phipps, Id. 368; Bank v. Horn, 17 How. 151; Pulliam v. Osborn, Id. 471; Freeman v. Howe, 24 How. 450; Youley v. Lavender, 21 Wall. 276; Bank v. Calhoun, 102 U. S. 256; Barton v. Barbour, 104 U. S. 126; Krippendorf v. Hyde, 110 U. S. 276, 4 Sup. Ct. 27; Covell v. Heyman, 111 U. S. 176, 4 Sup. Ct. 355; Heidritter v. Oil-Cloth Co., 112 U. S. 294, 5 Sup. Ct. 135; Gumbel v. Pitkin, 124 U. S. 131, 8 Sup. Ct. 379; Railroad Co. v. Gomila, 132 U. S. 478, 10 Sup. Ct. 155; In re Tyler, 149 U. S. 181, 13 Sup. Ct. 785; Porter v. Sabin, 149 U. S. 473, 13 Sup. Ct. 1008; Byers v. McAuley, 149 U. S. 608, 13 Sup. Ct. 906. Again, every court has inherent equitable power to prevent its own process from working injustice to any one, and may entertain a petition by the aggrieved person, either in the form of a simple motion, or by intervention pro interesse suo in the cause in which the process issued, or by ancillary or dependent bill in equity, and may afford such relief as right and justice require. The existence of such a power, independent of statutory jurisdiction, is recognized by the supreme court in Freeman v. Howe, 24 How. 450; Minnesota Co. v. St. Paul Co., 2 Wall. 609–633; Railroad Co. v. Chamberlain, 6 Wall. 748; Krippendorf v. Hyde, 110 U. S. 276, 4 Sup. Ct. 27; Pacific R. Co. of Missouri v. Missouri Pac. Ry. Co., 111 U. S. 505, 4 Sup. Ct. 583; Stewart v. Dunham, 115 U. S. 61, 5 Sup. Ct. 1163; Phelps v. Oaks, 117 U. S. 236, 6 Sup. Ct. 714; Dewey v. Coal Co., 123 U. S. 329, 8 Sup. Ct. 148; Gumbel v. Pitkin, 124 U. S. 131, 8 Sup. Ct. 379; Johnson v. Christian, 125 U. S. 642–646, 8 Sup. Ct. 989, 1135; Morgan's L. & T. Railroad & Steamship Co. v. Texas Cent. Ry. Co., 137 U. S. 171, 11 Sup. Ct. 61.

Now, it frequently happens that under the process of the federal courts, exercising the original and lawful jurisdiction conferred expressly by the federal constitution and statutes, possession is taken and control exercised over property in which persons not indispensable parties to the suit have an interest, by lien, mortgage, and in other ways. In such cases there often is no diversity of citizenship between such persons and the plaintiff or defendant to the suit which would warrant the federal court in hearing an independent suit between them. But it may be essential, to preserve intact their rights in the property, that such third persons should be permitted, at once, to have specific relief, which can only be granted by a court having possession and control of the property. And yet, in accordance with the principle already stated, no court but the federal court can exercise possession and control over the property in its custody. Of

necessity, therefore, the federal courts exercise an ancillary jurisdiction in such cases; and third persons are permitted to come into the federal court, and set up their interest in the property, and secure the same full and adequate protection and relief to which they would be entitled in any court of competent jurisdiction, were the property not impounded in the federal court. In Freeman v. Howe, 24 How. 450, a sheriff, under a replevin from a state court sued out by mortgagees of a railroad company, ousted a United States marshal from possession of certain railroad cars attached by him under mesne process from a federal court. The act of the sheriff was held void, without respect to the merits of the conflicting claims of the plaintiffs in the two proceedings, because the cars were in the custody of the federal court, and beyond the reach of the sheriff, when he served the replevin. And it was answered, to the argument that in this way the replevying mortgagees were left remediless, because their citizenship prevented recourse to the federal court, that the federal court, to prevent such abuse of its process, had jurisdiction, ancillary to its original jurisdiction asserted in the attachment, to afford the mortgagees all the relief they could obtain in any court where the jurisdiction was not limited by citizenship. In Bank v. Calhoun, 102 U. S. 256, a federal court had taken possession, by its receiver, of the mortgaged railroad in a foreclosure suit. In an action between other parties, an attachment was sued out, and levied upon the road. It was held that the federal court, having drawn to itself the subject-matter of the litigation, had acquired the right and jurisdiction to decide upon all conflicting claims to the possession and control of the road, and that the attachment suit which had begun in the state court could be properly removed, by stipulation of the parties, to the federal court, because, in the language of Justice Miller:

"The parties did no more than what they could have been compelled to do by the injunction of the latter [that is, the federal court], and what would have been done by such compulsory order, if they had not submitted to it by agreement."

In Krippendorf v. Hyde, 110 U. S. 276, 4 Sup. Ct. 27, a marshal, on mesne process issuing out of the federal court, attached property, as the property of the defendant, in the possession of another, who claimed to own it. It was held that this other, although a citizen of the same state as the defendant, might seek redress in the federal court, either by a petition pro interesse suo, or by ancillary bill, or by summary motion, according to circumstances. In this case Mr. Justice Matthews reviews the decision and language of Mr. Justice Nelson in the case of Freeman v. Howe, and, speaking for the court, fully approves the same. He said:

"It has been sometimes said that this statement was obiter dictum, and not to be treated as the law of the case; but it was, in point of fact, a substantial part of the argument in support of the judgment, and, on consideration, we feel bound to confirm it, in substance, as logically necessary to it. For if we affirm, as that decision does, the exclusive right of the circuit court in such a case to maintain the custody of property seized and held under its process by its officers, and thus to take from owners wrongfully deprived of possession the ordinary means of redress by suits for restitu-

tion in state courts, where any one may sue, without regard to citizenship, it is but common justice to furnish them with an equal and adequate remedy in the court itself which maintains control of the property; and as this may not be done by original suits, on account of the nature of the jurisdiction, as limited by differences of citizenship, it can only be accomplished by the exercise of the inherent and equitable powers of the court in ancillary and dependent proceedings incidental to the cause in which the property is held, so as to give to the claimant from whose possession it has been taken the opportunity to assert and enforce his right."

In Gumbel v. Pitkin, 124 U. S. 132, 8 Sup. Ct. 379, a United States marshal, by invalid process issued from a federal court, took possession of property. A sheriff sought to levy on the property by virtue of a lawful attachment for a state court, and left it with the marshal as garnishee. Subsequently the marshal sold the property under a valid process coming to his hands after the sheriff's attempt at garnishment. It was held that the plaintiff in the state attachment proceedings might intervene in the federal court, and be awarded the priority to which he would have been entitled had the sheriff been permitted to make an actual levy under his writ. Said Mr. Justice Matthews, in summing up the conclusion of the court:

"The case, therefore, stands thus: For the reasons growing out of the peculiar relation between federal and state courts exercising co-ordinate jurisdiction over the same territory, the circuit court acquired the exclusive jurisdiction to dispose of the property brought into its custody under color of its authority, although by illegal means, and to decide all questions of conflicting right thereto. The plaintiff in error, having pursued his remedy by action against his debtor in the state court, to which alone, by reason of citizenship, he could resort, attempted the levy of his writ of attachment upon the goods in the possession of the marshal. Not being allowed to withdraw from the marshal the actual possession of the property sought to be attached, he served upon the marshal notice of his writ as garnishee. Not being able by this process to subject the marshal to answer personally to the state court, he made himself a party to the proceedings in the circuit court, by its leave, and proceeded in that tribunal against its officer and the creditors for whom he had acted. On a regular trial it appeared as a fact that at the time of the notice the marshal was in possession of the property wrongfully, as an officer, and therefore chargeable as an individual. It was competent for the circuit court, and, having the power, it was its duty, to hold the marshal liable as garnishee; and having in its custody the fund arising from the sale of the property, and all the parties interested in it before it, that court was bound to do complete justice between all the parties, on the footing of these rights, and give to the plaintiff in error the priority over all other creditors to which, by virtue of his proceedings, and as prayed for in his petition of intervention, he was entitled."

The case most like the case at bar is that of Morgan's L. & T. Railroad & Steamship Co. v. Texas Cent. Ry. Co., 137 U. S. 171, 11 Sup. Ct. 61. In this suit the complainant company, a citizen of Louisiana, filed a bill in a circuit court of the United States sitting in Texas against the Texas Central Railway Company, a citizen of Texas, against the Farmers' Loan & Trust Company, a citizen of New York, and the Metropolitan Trust Company, a citizen of New York, seeking to have certain debts owing by the Texas Central Railway Company to it declared a lien on the railroad of the railway company, prior in right to mortgages upon the same road held by the other

defendants the two trust companies. A receiver had been appointed in the original suit. Subsequently the Farmers' Loan & Trust Company filed its cross bill against the complainant and its codefendants, including the Metropolitan Trust Company. As the two trust companies were citizens of the same state,—New York,—the jurisdiction of the court could not be maintained to give relief on the cross bill, if it depended on diverse citizenship. Objection was taken to the action of the court in granting foreclosure upon the cross bill, but the objection was not sustained in the supreme court of the United States. Said the chief justice, on page 201, 137 U. S., and page 61, 11 Sup. Ct.:

"It may be that, so far as it sought the further aid of the court beyond the purposes of defense to the original bill, it was not a pure cross bill, but that is immaterial. The subject-matter was the same, although the complainant in the cross bill asserted rights to the property different from those allowed to it in the original bill, and claimed an affirmative decree upon those rights. A complete determination of the matters already in litigation could not have been obtained, except through a cross bill, and different relief from that prayed in the original bill would necessarily be sought. * * *. *And whether this bill be regarded as a pure cross bill, as an original bill in the nature of a cross bill, or as an original bill,* there is no error calling for the disturbance of the decree because the court proceeded upon it in connection with the other pleadings. The jurisdiction of the circuit court did not depend upon the citizenship of the parties, but on the subject-matter in litigation. The property was in the actual possession of that court, and this drew to it the right to decide upon the conflicting claims to its ultimate possession and control."

The clause in the foregoing which we have italicized shows clearly that the ancillary jurisdiction of the federal court growing out of its possession of property may be invoked by original bill as well as by intervening petition.

Other cases to the same point are Trust Co. v. Bridges, 6 C. C. A. 539, 57 Fed. 753; Conwell v. Canal Co., 4 Biss. 195, Fed. Cas. No. 3,148; Carey v. Railway Co., 52 Fed. 671.

The bill of Knox and Jesup was therefore cognizable by the court below, as ancillary to the litigation in which the mortgage of the Central Trust Company and Cheney, trustees, was foreclosed. That, it will be remembered, was a consolidation of the insolvency bill filed by the Wabash, St. Louis & Pacific Railway Company against the Central Trust Company and others, and of the foreclosure bills of the Central Trust Company removed from the state court. Some claim is made that the federal court had no jurisdiction to entertain the insolvency bill, because such a proceeding was without precedent. Whether precedents in equity practice and jurisprudence justified the bill was for the decision of the court in which the bill was filed. It cannot be reviewed in this proceeding, which, while dependent on that, and ancillary to it, is collateral to it, in so far as to prevent an examination of the correctness of the orders and decrees made in it. Railroad Co. v. Humphreys, 145 U. S. 82, 12 Sup. Ct. 787; Mellen v. Iron Works, 131 U. S. 352, 9 Sup. Ct. 781. The jurisdictional fact upon which the right of the court below to hear and determine the cause of action presented by Knox and Jesup's bill rested was the pending possession by that court's receivers of

the property sought to be sold in foreclosure. Johnson v. Christian, 125 U. S. 642–646, 8 Sup. Ct. 989, 1135. It was unnecessary to look further, for, even if the order under which that possession had been taken was irregular or erroneous, Gumbel v. Pitkin, Krippendorf v. Hyde, and Freeman v. Howe, cited above, all show that such possession would impose upon the court the duty, and would draw to it the jurisdictional power, of granting any relief requiring for its full measure the possession and control of the property.

It is further objected that the court below had no power to take possession of the railroad property by its receivers in 1884, pending the suit of Compton, in the common pleas court, to subject the property to the payment of his liens. The argument is that Compton's suit was in the nature of a proceeding in rem, which impounded the property, and excluded any other court from assuming actual possession of it. Heidritter v. Oil-Cloth Co., 112 U. S. 294, 5 Sup. Ct. 135, is cited in support of this proposition. That was an ejectment suit. The plaintiff claimed under a sheriff's deed executed to a purchaser at a judicial sale by order of a state court, in a proceeding to enforce a mechanic's lien against the premises in controversy. The defendant claimed under a marshal's deed executed to the purchaser at a judicial sale by order of a federal court, in a proceeding, under the internal revenue laws, to forfeit the premises, because used for illegal distilling. When claims for the mechanics' liens were filed, and suits were brought to enforce the same, in accordance with the New Jersey statute, the premises were in the actual custody of the United States marshal, who had taken possession under process of attachment issued on an information to enforce a forfeiture, which resulted subsequently in a sale, and the deed under which defendant claimed. The sale under the proceedings in the state court took place a few days after that by the United States marshal. It was held that proceedings begun in the state court in the nature of proceedings in rem to subject the premises to sale were ineffectual to confer any legal title on a purchaser, if at the time they were begun the property was in the actual custody of the federal court for the purpose of a judicial sale by the latter court. It was not decided, however, that the proceedings in the state court might not be valid to establish the lien. The holding was expressly limited to the point that a deed under the state proceeding vested no legal title, as against the title conferred by the court first having actual custody of the property. It was the actual custody of the premises in the federal court which excluded the right of another court to entertain jurisdiction of a proceeding to subject the property thus removed from its control and disposition to a sale for the purpose of vesting a title superior to that which might be conferred by the federal court. Mere constructive possession would not have been enough to exclude possession by another court. In a conflict of jurisdictions, it is manifest that there can be no constructive possession by one court, where it cannot take actual possession, but it by no means follows that the constructive possession of one court will exclude the actual taking possession by another. For this reason, even if the proceeding in

the Lucas common pleas to establish Compton's lien was a proceeding in rem, it did not involve the actual seizure of the property pending the suit, and did not, therefore, prevent the federal court from taking actual possession of the property, through its receivers, in a proceeding to foreclose mortgages and other liens than Compton's. This objection to the jurisdiction of the court below over the Knox and Jesup bill cannot, therefore, be sustained.

We come now to the objection that, even if the jurisdiction of the bill be conceded, the court had no power to bring Compton before it. The argument is that the right of the federal court to grant relief to persons claiming an interest in property in its custody, without regard to their citizenship, is founded on its duty to prevent an abuse of its process to the prejudice of strangers to the suit, and is dependent on the wish of such strangers to secure that relief, expressed in an affirmative and voluntary appeal for the aid of the court, and that no power exists in the court to compel such a stranger to come into court, against his will, simply because he claims an interest in the property impounded, if his citizenship would prevent the issue of such process against him in the original suit. Let it be conceded, for the purpose of the argument, that the distinction made is a sound one. It does not help Compton. He was not brought into court to prevent prejudice to him by the federal court's possession of the res. He was brought into court to prevent prejudice to Knox and Jesup, who, otherwise having no right to invoke the action of the federal court, did so on the ground that its possession of the res prevented their getting full and adequate relief in the state tribunals, and who were therefore entitled to bring into the case every one whose presence as a party was necessary to give them such relief. They had the right to have the railroad sold free from all liens, so that the purchaser should have an unclouded title, and this could not be done without Compton's presence. Compton was not a resident of the district in which the court's ordinary process ran, and he could not be brought in by subpoena. Knox and Jesup's bill was, however, a proceeding against property in the jurisdiction of the court. It was competent for congress, in such a case, to provide for constructive service, which would bind the person against whom it issued to the extent only of the res which lay within the territorial jurisdiction of the court. Pennoyer v. Neff, 95 U. S. 714; Heidritter v. Oil-Cloth Co., 112 U. S. 294, 300, 301, 5 Sup. Ct. 135. Statutory provision of this kind is found in section 8 of the act of March 3, 1875 (18 Stat. 470), which was not repealed by the jurisdiction act of March 3, 1887 (24 Stat. 552), or of August 13, 1888 (25 Stat. 433), and is still in force. It provides:

"That when in any suit, commenced in any circuit court of the United States, to enforce any legal or equitable lien upon or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of or found within, the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer, or demur, by a day certain to be designated which order shall be served on such absent defendant or defendants, if practica-

ble, wherever found, and also upon the person or persons in possession or charge of said property, if any there be; or where such personal service upon such absent defendant or defendants is not practicable, such order shall be published in such manner as the court may direct, not less than once a week for six consecutive weeks; and in case such absent defendant shall not appear, plead, answer or demur within the time so limited, or within some further time to be allowed by the court, in its discretion, and upon proof of the service or publication of said order, and of the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the said district; but said adjudication shall, as regards said absent defendant or defendants without appearance, affect only the property which shall have been the subject of the suit and under the jurisdiction of the court therein, within such district."

The meaning of this statute is not doubtful. It applies to every suit of the kind mentioned in the section provided, only, the circuit court of the United States in which the proceeding is taken has otherwise jurisdiction of it. Whether it be a suit arising under the laws and constitution of the United States, or a suit to which the United States is a party, or a suit in which there is a controversy between citizens of different states, or a suit like the one at bar, of which the circuit court has jurisdiction indispensable and ancillary to its original jurisdiction, if it also satisfies the description of the statute, the process therein provided is available. The case of Brigham v. Luddington, 12 Blatchf. 237, Fed. Cas. No. 1,874, has nothing in it to conflict with this conclusion. In that case, Circuit Judge Woodruff refused to make an order for substituted process against the owner of the property, because he was a citizen of the same state as the complainant, and his presence as a party would oust the jurisdiction of the court. The bill was an original one, and the jurisdiction could only rest on diverse citizenship. In the suit at bar, Compton's presence as party defendant would not oust the jurisdiction of the court, because, as already shown, it is not dependent on diverse citizenship. The circuit court had jurisdiction of the cause otherwise than by virtue of the section above quoted. The suit was brought to enforce a legal and equitable lien on real estate lying in the district, and to remove the cloud of Compton's lien from the title of the purchaser at the foreclosure sale. Compton was therefore properly brought into court by the substituted or constructive process provided in the section above quoted. Farmers' Loan & Trust Co. v. Houston & T. C. Ry. Co., 44 Fed. 115; Greeley v. Lowe, 155 U. S. 58, 15 Sup. Ct. 24.

Having disposed of the jurisdictional objections to the decree below, we now come to consider the merits of the case. We fully concur with the court below in its holding that the decree in the Tysen or Ham suit in Indiana did not bind Compton, or prevent his pursuing his remedy in the court of Ohio, if he chose to do so. The bill in the Tysen suit only made parties to it those equipment bondholders who chose to come in and contribute to the expenses of it. Compton did not do either. The Ham decree was no bar to Compton's prosecuting the Ohio decree in his favor, for the reasons which

we quote from the opinion of the learned circuit judge in the court below:

"First, because he was not a party to that proceeding, and did not appear therein; second, because the Ham suit was not, in its inception, or at the time Compton commenced his action in the state court, such a class suit, or so representative in its character, as to bind him without his being or becoming an actual party thereto (Pom. Rem. & Rem. Rights [2d Ed.] 396–399); and, third, because, if the Ham suit had been so representative in its character as that the decree of the supreme court therein could or would have concluded said Compton on the question of the lien of the equipment bonds, neither the pendency of said suit, nor the decree of the supreme court was ever interposed by the defendants to his suit in the state courts, either by way of abatement, or in bar thereof, although ample time and opportunity so to do was afforded them. Grant v. Ludlow, 8 Ohio St. 1; Matthews v. Davis, 39 Ohio St. 55; Dimock v. Copper Co., 117 U. S. 560, 6 Sup. Ct. 855."

We come next to the question whether the Ohio divisional mortgages cover the Toledo terminal property. The facts appear in the statement of the case at length. The propositions of Compton's counsel are as follows: First. No property can be included in an after-acquired property clause in a railroad mortgage, except that which is acquired by the mortgagor or its successor in title by virtue of the franchises under which the mortgagor issued the mortgage. Second. The Toledo terminals were acquired by the Toledo & Wabash Railway Company, which, being a consolidated company of Ohio and Indiana, took them under new franchises, received directly from the state, and not under old franchises, received by assignment from its predecessors in title to the railroad. Therefore the terminals are not included in the after-acquired property clauses of mortgages executed by such predecessors. The extent of the property included in the grant of a mortgage by a railroad company depends on two questions: First, what property had it the power to mortgage? and, second, what property did it intend to mortgage? Section 3287 of the Revised Statutes of Ohio, in force at the time of the issuance of the divisional mortgages, permitted railroad companies of Ohio to issue bonds and notes, and to secure them by a pledge of their property and income. It was held by the supreme court of Ohio that the power to mortgage property and income included power to mortgage after-acquired real and personal property. "The pledge is to be all the property and income. The income intended must have been the future income, and was to be produced by property in possession, and to be acquired. If the future product can be conveyed, why not that by which it is credited?" Coe v. Railroad Co., 10 Ohio St. 372–393; Pennock v. Coe, 23 How. 117. We have no doubt that under these two decisions a railroad company authorized by its charter to build and operate a railroad between two named points would have the power to mortgage its road then built, or to be built by itself or by any successor in title to the same railroad, whether exercising the mortgagor's franchises, or similar franchises granted by the same sovereign. What is mortgaged is the property, and all accretions to the property possible within the limitations of the then charter; and it does not seem to

us material whether the successor in title to the railroad acquires such accretions under the same franchises as those under which the road was first projected and constructed, or under new franchises of the same effect and character. It may be conceded that under the decision of Shields v. Ohio, 95 U. S. 319, and other cases, the consolidated corporation acquired its franchises anew from the state, and not from its predecessors in title; but the acquisition of terminal property at Toledo was as much permitted under the franchises enjoyed by the divisional mortgagors as under those under which it was actually acquired, and such terminal property would have been as properly appurtenant to the Ohio Division as to the consolidated line. The right to mortgage after-acquired property is not necessarily dependent on the right to mortgage franchises. There is nothing in the case of Coe v. Railroad Co., or of Pennock v. Coe, to justify such a view. The supreme court of Ohio, as we have seen, based its decision that power existed to mortgage after-acquired property on the provision of the statute that property and income might be pledged. Indeed, under the Ohio statute, it is doubtful whether the company had any right to mortgage its franchises. The decision of the supreme court of the United States in Pennock v. Coe does not deal with the question of franchises, and does not make its conclusion in the case depend thereon. We are of opinion, therefore, that an Ohio railway corporation has the power to mortgage its railroad, and any subsequent accessions or accretions properly appurtenant thereto, acquired either by itself or any successor in title, whether the road be then maintained by virtue of the original franchises, or of franchises newly acquired from the state.

The question remains, therefore, what did the mortgagors intend to mortgage? Did they intend to limit the effect of the after-acquired property clauses to that which was acquired under their own franchises, or did they intend to make the clauses cover every addition and accession to the same railroad which they were constructing and operating, whether that railroad passed into the hands of a new company, with new franchises, or continued in operation under the then franchises? There can be no doubt of the intention of the parties upon this point. It was the road of the two mortgagor companies, made and to be made together, with the necessary depot grounds and depot buildings, erected and to be erected. What was the road? It was the road running from Toledo to the west line of Paulding county. No question can be made of its identity. It is not disputed that the Toledo terminal property here in question is a proper part of this railroad which the original Toledo & Illinois Railroad Company and its successors in title had full charter powers to build and operate. It was obviously the intention of each of the mortgagor companies that whatever was added to the railroad at each of the terminal points named for use as part of it should be embraced by the mortgage. Every person or company acquiring the railroad thus described, or any interest in it, from the mortgagor companies, took title subject to the mortgages thus construed, and, in making additions or accessions within the terms of the mortgage, was estopped by privity of title with the mortgagor companies

to deny that such accretions were subject to the mortgage lien. Railroad Co. v. Cowdrey, 11 Wall. 459–481. The mortgage of the Toledo & Wabash Railroad Company, the Ohio constituent of the Toledo & Wabash Railway Company, expressly recognized that the Toledo & Illinois mortgage—the first Ohio divisional mortgage—was a lien prior in right upon its road, constructed and to be constructed, and its terminal property, acquired and to be acquired; and upon that same property it imposed the lien of its own mortgage, as a second or junior lien to that of the Toledo & Illinois Railroad Company. In this junior mortgage the mortgagor makes reference to the probability of its consolidation with another company, and a few days thereafter, really as part of the same transaction, it made the agreement of consolidation which resulted in the Toledo & Wabash Railway Company. It certainly could not have intended that the after-acquired property clause in its mortgage was to have no effect except during the few days before it should be consolidated into the Toledo & Wabash Railway Company. Manifestly it intended that its mortgage should cover all the property acquired by the newly-consolidated company which would have been a legitimate accession to the railroad it proposed to contribute to the new company, had no consolidation taken place. It is immaterial what construction would have been put upon the first divisional mortgage (that of the Toledo & Illinois Railroad Company), standing alone. The second divisional mortgage expressly recognizes the lien of the first mortgage as covering the same property, acquired and to be acquired, which the second divisional mortgage covers. As the second divisional mortgage was necessarily intended to cover property acquired by the Toledo & Wabash Railway Company, the successors in title to the railroad are estopped to deny, by the recitals of the second mortgage, that the first mortgage did not cover the same property as the second. Hence our conclusion is that both divisional mortgages were intended to cover the legitimate accretions to the railroad running from Toledo to the Indiana line, properly appurtenant thereto. It is conceded that the Toledo terminals come within this description.

We next come to the form of relief to which Compton's decree entitled him in the court below. Whether the decree established in his favor an indivisible lien on the railroad extending from Toledo to the Illinois state line, or a lien on the Ohio Division only, it is certain that it was junior to the Ohio divisional mortgages, and also to the Indiana divisional mortgages, if it extended to Indiana. As Compton was properly made a party to the action of foreclosure by the divisional mortgagees, a sale in such a proceeding would ordinarily pass to the purchaser a title clear from Compton's lien, which would be transferred to the proceeds of sale, and would be satisfied out of what should remain after the satisfaction of the prior divisional mortgages. If the amount realized by the sale was not sufficient to pay the prior mortgages, Compton's lien would entitle him to nothing, but the railroad in the hands of the purchaser would nevertheless be forever discharged from its incumbrance. The record discloses that the amount realized at the sale from the Ohio Division

was not more than enough to pay the divisional mortgages, while the Indiana Division did not bring enough to pay in full its second divisional mortgage. Unless there was something in the decree for sale which held the railroad in the hands of the purchaser still subject to Compton's lien, his lien was foreclosed, and his remedies were exhausted by the sale. This brings us to the proper construction of the so-called "saving clause" in the decree. At the time the mortgagees were pressing the court below to order a sale, in March, 1889, it had just decided that Compton was properly brought into court, and that he must answer. The averments of the bill and cross bills which he was required to answer attacked the validity of his Ohio decree and the lien thereby declared, and the prayer was that he might be forever barred from enforcing either. The proposed decree for sale fixed the amount due on, and the priority of, every mortgage set up in the cause. The purchasing committee of reorganizing bondholders had, we may infer from the schedule of bonds afterwards deposited by them, as well as from their purchase of the road under the previous foreclosure, bonds of every class to enable them safely to make bids of large amounts, and to protect the interests of those whom they represented. Compton was an outsider, and, presumably, was not in the scheme of reorganization. He had no mortgage bonds with which to pay a substantial part of the purchase price. He must raise at least $2,500,000 in cash before he could bid even on the Ohio Division, and he could not save his lien except by a bid of $350,000 more. If his lien was invalid, he would have involved himself to the extent of $3,000,000 for no especial or certain benefit to himself. The purchasing committee, representing nearly all the bonds, with a plan of reorganization in which all bonds, of every class, would be represented, might make its bid low enough to exclude any proceeds available for Compton, and yet not injure the bondholders under mortgages subsequent to Compton's lien. It was necessary for him to bid to save anything, and yet he did not know that he had anything to save. Considering the great disadvantage that he would have been under in bidding to protect himself against so powerful a combination of bondholders, without certainty as to the validity of his own lien, it is not surprising that his counsel vigorously objected to a sale before his rights in the property should be determined. On the other hand, it was, of course, greatly for the advantage of the bondholders to have the road sold, and the expenses of the litigation and receivership ended. The court overruled Compton's objection, and ordered the sale; but to prevent the palpable injustice to Compton, which the circumstances would otherwise cause, the court inserted in the decree the saving clause under discussion. It may be conceded that it was within the legal discretion of the court below to order a sale before fixing all priorities, or settling the validity and place of any particular lien, and that, too, without any saving clause such as the one we have here. Bank v. Shedd, 121 U. S. 74, 7 Sup. Ct. 807; Mellen v. Iron Works, 131 U. S. 352, 9 Sup. Ct. 781. But, looking to the hardship to which Compton would be subjected by such an early sale, the court, while

making the order, very properly attempted to put Compton in a position where he would not suffer from a sale in advance of the decision of his rights. That this was the motive and intention of the court may be clearly inferred from the circumstances already stated, and from the language of the following recital in the decree, by which the saving clause is introduced:

"And the defendant James Compton having in open court, on the final hearing, objected to the rendering or entry of any decree in this cause at this time, on the ground that the issues raised by the amendment to the complainant's amended and supplemental ancillary bill, and to the cross bill of the cross complainants Solon Humphreys and Daniel A. Lindley, trustees, and the answers of the defendant James Compton, to be filed herein, have not been tried and determined, the court overruled such objection; and the defendant James Compton duly excepts to such ruling, and the entry of this decree. *But it is adjudged and decreed in the premises that the rendering and entry of this decree in advance of the trial and determination of such issues is upon and subject to the following conditions.*"

Express language could hardly be plainer than the implication from the foregoing italicized words that the clause about to follow was intended by the court to be a means of relieving Compton from the great disadvantage to which an early sale would subject him. In this light is the saving clause to be construed. The court said, in effect, to the mortgagees pressing for a sale, "the sale will be ordered, but as a condition, and for the purpose of preventing injustice to Compton, its effect shall be limited." Shortly stated, the first paragraph of the condition provides that if Compton's Ohio supreme court decree, and the lien therein adjudicated in his favor, are found to be in full force and effect, then, within 10 days from the decree in his favor, the purchaser or his successor in title shall pay the full amount of the lien, and "in default of such payment this court shall resume possession of the property covered and affected by the said lien of the defendant James Compton, and enforce such decree as it may render herein in his favor by resale of such property, or otherwise, as this court may direct." If this paragraph stood alone, it might well mean that the purchaser should take the property burdened with the Compton lien, if adjudged valid as a first lien, and that, in default of his paying it, the property should be sold again to satisfy it,—in this way giving it precedence over even prior mortgages. But the second paragraph clarifies the meaning of the first, and shows that the resale, if ordered, was to be a sale like the first, the proceeds of which would be applied to the mortgage and liens in the order of their priority. It provides, first, that, notwithstanding the sale, Compton's lien shall proceed to a decree which shall bind the purchaser at the sale in respect of any property affected by the lien. It provides, second, that nothing in the decree of sale shall be construed to be an adjudication against Compton, or "to prejudice, annul, or abridge any right, claim, or interest, or lien which the said James Compton may have in, to, or upon the premises hereby directed to be sold, or any part thereof, or in, to, or upon any property whatsoever embraced in this decree; it being the intention to hereby preserve the rights of said Compton in the relation in which he now stands towards the mortgagees, parties hereto." The purpose which

is manifest in the first paragraph, and which is made to appear again in the second paragraph, is that the person affected by this condition inserted to save Compton's rights is the purchaser. It is he, or his successor in title, who is to pay the lien, or give up possession. It is he, or his successor in title, who is to be bound by the decree in Compton's favor. The inference is irresistible that Compton's lien was not to be transferred by the sale from the property to the proceeds of sale. Otherwise the purchaser could not be affected by the decree, for every obligation on his part would be discharged by paying and completing his bid. The further provision that nothing in the decree of sale was to be construed to prejudice, annul, or abridge any right or lien which Compton had in the property ordered sold is another assertion that the sale was not to disturb Compton's lien on the property. And the final clause only enforces the same purpose by declaring that Compton's rights were to be preserved in the relation in which he stood towards the mortgagees at the time the decree of sale was entered, and before the sale. Taking the two paragraphs together, it is reasonably clear that the court intended the purchaser to take the property subject to Compton's lien, and, in case the lien should be held valid, to have the option either of paying the lien off, or of permitting the court to resume possession, and enforce Compton's lien by such remedy as it should deem equitable, whether by resale or otherwise. If the purchaser should be of the opinion that a resale free from Compton's lien would bring enough more than the price at the first sale to pay the lien off, he would doubtless prefer to satisfy it, rather than to permit a resale, or even a redemption of the prior mortgages to which he would be subrogated. If, on the other hand, he should think that the price at a resale would not be increased over that at which he bought, in an amount sufficient to pay Compton's lien, he would doubtless exercise the option of permitting the court to resume possession, and to resell, or to decree a redemption. The purpose of the court was to give Compton the amount of his lien, or to restore to him the status quo ante, at the option of the purchaser. Compton's relation to the property covered by his lien was not intended to be changed by the early sale. If the lien was not paid, he was to have the same remedy against the purchaser which he would have had if he had not been a party to the suit. The purchaser would acquire all the rights of all the mortgagees whose mortgages were foreclosed, as well as those of the mortgagor, and Compton's remedy was to be such as equity would give him against the mortgagor and such mortgagees. The character of that remedy must be determined wholly apart from anything in the decree for sale, because the saving clause leaves it entirely in the judgment of the court. The enforcement of the lien is to be by resale or otherwise after the default and the resumption of possession by the court. It seems to be clear that the word "otherwise" is wide enough to include any other remedy than resale, suitable to the case. If redemption is such a remedy, the court was within the terms of the saving clause in granting it. Objection is made that it was not necessary, before decreeing redemption, for the court to resume possession of the property, and therefore that the

"otherwise" could not include such a remedy, because it must have referred to some remedy to afford which possession by the court was necessary. This is too narrow and literal a construction of the power reserved by the court. It would certainly not prevent a decree for redemption, if the court did take possession; and the provision that it should do so was not, therefore, inconsistent with a reservation of the power to make such a decree, if the court saw fit. In other words the saving clause simply remits us to the Ohio supreme court decree, to determine therefrom, by general rules of equity practice and jurisprudence, as they may be modified by local law, what relief should have been granted to Compton in the court below.

It is suggested for the first time in this court that the saving clause was not intended to prevent the transfer of Compton's lien from the property to the proceeds of sale, but that it was inserted merely to give the court power, in case Compton's lien should subsequently be held valid, to compel any purchaser who had paid his bid in bonds secured by subsequent and junior mortgages, as permitted by the decree, to replace the same with cash sufficient to pay Compton's lien, if the amount of the bid was large enough to leave a balance for application to that lien after satisfying prior mortgages. The decree for sale was approved by Judges Jackson and Gresham at Chicago, though it was formally signed by Judge Brown in the court below. Those judges certainly understood that Compton's lien remained on the property after the sale, and was not transferred to the proceeds, because otherwise they would have had no power to decree redemption in Compton's favor, as they subsequently did. The provision in the decree permitting payment of bids in bonds, at the option of the purchaser, was wholly inadequate as a reason for the insertion of so elaborate a saving clause. The provision was that there should be paid in cash, of the price at which the property should sell, in addition to an amount required as a deposit at the time of the sale, such further sum as the court might thereafter direct. "The remainder of such purchase price may be paid either in cash or in bonds, with overdue coupons thereto appertaining, at such proportion or value as the holders thereof would be entitled to receive thereon in case the purchase price were paid by the purchasers in cash." If the saving clause had been inserted in the decree to prevent injustice to Compton from this provision, it is impossible to explain why language was not used especially referring to the bond provision, and directing a substitution of cash for bonds by the purchaser. More than this, the purchaser was not obliged to pay in bonds. He was at liberty to pay cash, and yet the saving clause applies to every purchaser, whether he pays in cash or in bonds. Every purchaser was required to pay Compton's lien, or give up possession of the property to the court for a resale, or other remedy. If its purpose was as stated, why was not an exception introduced in favor of purchasers paying in cash? Take another instance, and the one which did occur, namely, that the bid should be paid partly by cash, and partly by first mortgage bonds conceded to be prior in right to Compton's lien. Compton, if remitted to the proceeds, could not

have complained of the use of such bonds to pay the purchase price, and yet the saving clause, in its terms, is just as applicable to such a purchaser as to one who deposited bonds secured by a mortgage junior to Compton's lien. More than this, there was ample provision for securing the payment in cash of so much of the proceeds as would belong to Compton in other parts of the decree, and the saving clause, as construed, was mere meaningless surplusage. All questions of the disposition of the proceeds arising from the sales under the decree were reserved for future adjustment. The jurisdiction of the court over the property sold, and its right to take possession of it, was continued, after delivery to the purchaser, until all claims allowed or to be allowed against the property of the defendant company should be paid. And, in the order directing execution of a deed and the delivery of possession, express provision was made for the substitution of cash for bonds deposited as the court might direct, and a retaking of possession on failure by the purchaser to comply. In fine, the reference of the saving clause to a possible injustice from the permission to pay in bonds is strained, and fails to satisfy its plain language. It wholly overlooks the plain purpose of the clause, so manifest in the recital, at its beginning, to save Compton from the very great hardships of a sale before his interest was judicially ascertained. The clause was a reservation of Compton's lien from the sale, and a retention of it on the property sold. The deed directed to be made by the masters conveyed all the title to the described railroad, of all the parties to the suit, "except as particularly reserved in and by said decree of foreclosure and sale."

Thus far, in this opinion, I have been expressing the views of the entire court. We are agreed that the saving clause of the decree secured to Compton the same right to enforce his lien as if he had not been a party to the proceedings. Judge LURTON and I are not able to agree upon the remedy which this construction of the saving clause of the decree should secure to Compton. Judge RICKS thinks that the questions upon which Judge LURTON and I differ are of sufficient importance and difficulty to require that they shall be certified to the supreme court, and therefore expresses no opinion upon them. In this conclusion the differing judges concur, and the questions will be certified. As it may be of some assistance to the supreme court to know the grounds of our difference, I now proceed to state my own views:

How may Compton enforce his lien in the court below? By resale of the Ohio Division, or by redemption of it, or by a redemption of the railroad from Toledo to the Illinois line, as decreed by the court below? These questions must be considered in three aspects: First, with respect to the rights of those who were parties to the Ohio decree; and, second, with respect to the rights of the Ohio divisional mortgagees; and, third, with respect to the rights of the Indiana divisional mortgagees. By virtue of the sale the assignee of the purchaser the Wabash Railroad Company acquired the rights of the Wabash, St. Louis & Pacific Railroad Company, and the mortgage rights of all the mortgagees whose mortgages were foreclosed in the

court below. And it may be conceded that the questions above suggested are to be treated exactly as if the parties were present in this cause, because the purchaser may assert the right of each.

As against those who were parties to the Ohio decree, Compton had the right to a sale of the Ohio property subject to the Ohio divisional mortgages. This was the relief accorded to him by the Ohio decree. I do not think they can be heard to object, after that decree, to Compton's working out his remedies against the Ohio Division. It is pressed upon us that to allow Compton to divide up the railroad, against which he has an indivisible lien, is most inequitable, and that no court of equity should lend its aid to accomplish such a result. The power of this court to withhold such relief, though secured by the Ohio decree, is asserted on the principle laid down in Lawrence Manuf'g Co. v. Janesville Cotton Mills, 138 U. S. 554, 11 Sup. Ct. 402, that, where the aid of a court of equity is invoked to enforce or "piece out" (as the phrase is) an incomplete decree of another or the same court, the court appealed to may examine the justice of the decree sought to be enforced, and refuse its aid, if it finds the decree inequitable, or may impose, as a condition of its granting relief, any variation or limitation with respect to the operation of the decree which justice and equity may require. The decision in the case cited seems to be rested chiefly on the fact that the previous decree therein sought to be enforced was a decree entered by consent of parties, and not by the adjudication of a court. But, conceding the soundness of the general principle, it has application only to bills in equity to carry a former decree into execution, where no ordinary process on such former decree will serve, because of the neglect of the parties to proceed on the decree promptly, and the embarrassment of their rights caused by subsequent events. Daniell, Ch. Prac. (4th Ed.) 1585. It is only the defendant in the new suit who can call the former decree in question. The plaintiff never can. Id. 1586; Robinson v. Robinson, 2 Ves. Sr. 225. The court exercises the power because the plaintiff is voluntarily seeking aid for a decree, and so it may impose its own conditions in granting it. But such a doctrine, it seems to me, has no application to a case like that of Compton, who was brought into the court below against his will, and compelled to set up his lien, and required to work out his rights in this jurisdiction on penalty of losing them. Under such circumstances, he is certainly entitled to rely on the full measure of his rights, as then defined and adjudged by the decree of a court, in enforcing which he did not voluntarily seek the court below to aid him, and which he would not have set up in the court below until required to do so on pain of forfeiting every benefit it secured him. Added to this, the mode by which the court below acquired jurisdiction of Compton and his claim suggests reasons of peculiar force for not abridging in the slightest degree the rights adjudged to be his in the Ohio decree. The jurisdiction, as already explained, is ancillary and unusual. It rests—First, on the necessity for avoiding conflicts between courts for possession and control of property; and, second, on the duty of courts to prevent an abuse of their process. When jurisdiction is thus assumed by federal courts over controversies

usually cognizable in state courts, there is a heavy obligation on the federal courts to secure to those thus deprived of the privilege of resorting to their ordinary state tribunals as near the same relief or remedy as they would have received in the state courts as circumstances permit. A striking recognition of this obligation by the supreme court of the United States may be found in the case of Gumbel v. Pitkin, 124 U. S. 132, 8 Sup. Ct. 379, the opinion in which, by Justice Matthews, has already been quoted from. It would be strange indeed if a jurisdiction asserted only because of the necessity of the case, and under extraordinary circumstances, could be used to bring in direct review before a circuit court of the United States a decree of the supreme court of a state. Had Compton never been made a party to the action below, he might have proceeded with execution of his decree, and bought in the interests of the parties to his action in the Ohio Division. He could not have taken possession of the property, because it was in the possession of the court below; but, having executed his decree in this wise, he might have then been made a party to the action below, or could have brought an independent action to redeem from the purchaser. In such a case certainly the other parties to his Ohio decree could not be heard to object to his enforcing a remedy against the Ohio Division alone. It is difficult to see why the execution of a decree fixing the rights of the parties should work any more of an estoppel than the decree itself.

It is next objected that the Ohio decree is not binding on the parties to it with reference to the appropriation of the Ohio Division to the payment of the equipment bonds, because in this respect the decree was not responsive to the issue raised between the parties. It is true that a decree or judgment is only res judicata in so far as it is responsive to the issues tendered by the pleadings, or to the matters which, by the record, appear to have been actually controverted. Reynolds v. Stockton, 140 U. S. 254, 11 Sup. Ct. 773. The Ohio decree is not open to this objection. The question at issue between the parties to the decree in the supreme court of Ohio was—First, whether Compton had a lien upon the property of the Toledo & Wabash Railroad Company, reaching from Toledo to the Illinois state line; and, secondly, how it could be enforced. The supreme court held that he had such a lien, and directed the Ohio property to be sold for its enforcement. The prayer of Compton was for the enforcement of his lien by the sale of the whole railroad. If he asked for a sale of the whole property, the court had the right to enforce in his favor that remedy, or any remedy less than that which it thought just and proper. It was therefore within its jurisdiction, as invoked by Compton's prayer, to take so much of the property on which it declared the lien to exist as, in equity, it thought it had the right to take. It took that over which it had territorial jurisdiction. See opinion of court in 45 Ohio St. 592, 623, 16 N. E. 110, and 18 N. E. 380. Whether it erred in this, neither the court below nor this court is vested with the power to decide. It is true that the record does not show that any formal issue was made with reference to the amount of property to be sold to pay the lien, but

this can make no difference. The court was bound, before it made an operative decree, to specify the property to be sold to pay the lien (Railroad Co. v. Swasey, 23 Wall. 405), and it was plainly within its power to subject less than that prayed for by the plaintiff to such a sale. The parties were present in court, and might have objected to this form of remedy. Whether they did so, or not, the granting of the remedy, being within the prayer of Compton, was a binding and conclusive adjudication upon the parties in court that such a remedy was proper. This is identically the same issue and cause of action which was in the supreme court of Ohio, and therefore no objection can be made or entertained by the court below, or by this court, to the form of relief there granted, which was or might have been made in the court entering the decree. In Cromwell v. County of Sac, 94 U. S. 351, Mr. Justice Field used this language:

"In considering the operation of this judgment, it should be borne in mind, as stated by counsel, that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. Thus, for example, a judgment rendered upon a promissory note is conclusive as to the validity of the instrument and the amount due upon it, although it be subsequently alleged that perfect defenses actually existed, of which no proof was offered, such as forgery, want of consideration, or payment. If such defenses were not presented in the action, and established by competent evidence, the subsequent allegation of their existence is of no legal consequence. The judgment is as conclusive, so far as future proceedings at law are concerned, as though the defenses never existed."

The same principle is laid down in many cases. Stout v. Lye, 103 U. S. 66; Dimock v. Copper Co., 117 U. S. 559, 6 Sup. Ct. 855.

It is further suggested that the order of sale against the Ohio property was mere process to carry out the decree, and was not an adjudication which, when the decree is pleaded in another court, can be used to secure the same remedy afforded in the Ohio court. Such a contention is untenable. The decree for sale was the operative part. It was the court's act. All previous to that was mere declaration or finding, upon which the justice of the court's act was founded. It was within the power of the court to compel a sale of the entire line affected by the lien. So far as the Indiana property was concerned, it might have enforced a sale by compelling the defendant company to convey to the purchaser at its judicial sale. Instead of doing this, it ordered a sale of the Ohio property alone. This required judicial action. In Hill v. Bank, 97 U. S. 450, a trustee under a power of sale sold real estate separate from water power and paper-mill machinery. A bill was filed by the debtor to set the sale aside. This was done on the ground that the realty, the water power, and paper-mill machinery should be sold as an entirety, and the sale was set aside. Thereupon a bill was filed against the debtor to enforce the payment of the amount in default, and the court below

directed that the property should be sold as an entirety. In the supreme court, error was assigned that the court sold as an entirety, and it was held that the error could not be sustained, because the point was res adjudicata. Said the court:

"The decree upon the points in issue, and decided, is as binding upon the parties as a judgment or decree would be in any other case."

It is manifest from this case that the question how large a part of the property involved shall be sold to pay a lien is as clearly the subject of res judicata as the decision of any other right. The amount of the property to be sold under a decree in equity is one of the essential adjudications of the court, and is conclusive on the parties. In Railroad Co. v. Swasey, 23 Wall. 405, the question was whether a decree was final, or not, so as to permit an appeal. The action was to subject stock pledged to secure bonds to the payment of unpaid interest; and the court entered the decree appealed from, declaring that the stock must be sold for the purpose, and referring to a master the question what proportion of the stock was equitably applicable. Chief Justice Waite said (page 409):

"An appeal may be taken from a decree of foreclosure and sale when the rights of the parties have all been settled, and nothing remains to be done by the court but to make the sale, and pay out the proceeds. This has long been settled. The sale is the execution of the decree. By means of it the rights of the parties, as settled, are enforced. But to justify such a sale, without consent, the amount due upon the debt must be determined, and the property to be sold ascertained and defined. Until this is done the rights of the parties are not all settled. Final process for the collection of money cannot issue until the amount to be paid or collected by the process, if not paid, has been adjudged. So, too, process for the sale of specific property cannot issue until the property to be sold has been judicially identified. Such adjudications require the action of the court. A reference to a master to ascertain and report the facts is not sufficient. A master's report settles no rights. Its office is to present the case to the court in such a manner that intelligent action may be there had, and it is this action by the court, not the report, that finally determines the rights of the parties."

In Winter v. Eckert, 93 N. Y. 367, in a suit to settle up a partnership, a judgment had been entered directing the sale of partnership property, consisting of the stock and good will of a brewery business, horses and wagons, etc., by public auction, at public auction rooms. The sale was made in accordance with the judgment, and the sale was confirmed. The order confirming the sale was appealed from, but not the judgment ordering it. In affirming the action of the court below, the court of appeals rested its decision on the binding effect of the provisions of the judgment with reference to the mode of conducting the sale. Ruger, C. J., said:

"This judgment remains in full force as a binding adjudication upon all parties to the action, and conclusively determines, as between them, not only the necessity and propriety of, but the place and manner of, a sale of the property, including the conjunctive sale of the real and personal property therein described at a place where the presence of the personal property on such sale was entirely impracticable."

It therefore follows that as against the Wabash, St. Louis & Pacific Railway Company, the defendant company below, the successor in title of the mortgagors in the various mortgages foreclosed

below, as well as against Humphreys and Lindley, trustees, and Knox and Jesup, trustees, and all other mortgagees whose liens are junior to that of Compton, the decree of the Ohio supreme court establishes conclusively that Compton has a lien on the railroad of the Toledo & Wabash Railway Company, which may be enforced against the Ohio Division alone, without regard to his remedy against the Indiana Division. But it is said that under the present circumstances a sale subject to the divisional mortgages is impossible, and that any relief which is granted must include a disposition of Compton's rights with reference to those mortgages. This may be true, but it does not destroy the force and effect of the judicial determination that, so far as the parties to the Ohio decree were concerned, Compton has the right to enforce his remedy by sale or redemption against the Ohio Division. The decree for sale of the Ohio Division subject to the divisional mortgages necessarily carried with it, so far, at least, as the parties to the suit were concerned, the right on Compton's part, or on the part of the purchaser at such a sale, to redeem the divisional mortgages. They, in any event, cannot be heard to urge that Compton should be compelled, in the enforcement of his lien, either by sale or redemption, to resort to the entire line.

It remains to consider, therefore, whether a resale can be decreed as against the Ohio divisional mortgagees. They were not parties to the Ohio decree, and are therefore not bound by it. The ordinary equitable rule is that the junior mortgagee cannot compel the sale of the premises free from the lien of the senior mortgage, against the consent of the senior mortgagee, but that his only remedy is to redeem the senior mortgage. It has been urged upon us, however, that in Ohio, by statute and decision, it has become a rule of property that a junior mortgagee of real estate need not redeem a senior mortgage, but may bring an action for foreclosure, make the senior mortgagee party, sell the premises free of all liens, and compel the senior mortgagee to look to the proceeds of sale for the payment of his debt. Stewart v. Johnson, 30 Ohio St. 24; section 5316, Rev. St. Ohio. Even if we concede that this rule has application to the foreclosure of railroads, and to liens other than mortgages, though the statute in terms applies to mortgages on real estate only, nevertheless I think that the peculiar circumstances of this case require that we shall not order a resale. Compton's lien, as it was decreed by the supreme court of Ohio, arose from the merger, by consolidation, of the Toledo & Wabash Railway Company in the Toledo, Wabash & Western Railway Company. The same Ohio decree declared a lien in favor of the holders of all the remaining equipment bonds not held by Compton, and the same reasoning would establish a lien in favor of every unpaid creditor of the constituent railroad company. These liens are of equal priority with Compton's, and depend on the same act of the original creditor. They can be equitably satisfied only by dividing the benefit of the security ratably between them. Justice both to others interested in the property, and to the co-lienholders themselves, would seem to require that all the co-lienholders should be parties to an action

to enforce the lien of any one of them, and that the decree should provide proper relief for all of them. The relation between the lien of Compton and that of the other bondholders and creditors of the Toledo & Wabash Railroad Company is not very different from that between those of the bondholders in the case of Canal Co. v. Beers, 2 Black, 448, or that between the liens of the creditors of the insolvent corporations in Sawyer v. Hoag, 17 Wall. 610, 622; Patterson v. Lynde, 106 U. S. 519, 1 Sup. Ct. 432; and Johnson v. Waters, 111 U. S. 640, 644, 4 Sup. Ct. 619,—and in all those cases, a suit for the benefit of the whole class of creditors was held to be necessary. See Handley v. Stutz, 137 U. S. 366, 369, 11 Sup. Ct. 117. Now, it is true that Compton's decree in the Ohio supreme court estops the parties to it from objecting to the relief which that decree gives him on the ground that he should have brought his suit as a class suit, and joined all his co-lienholders, but the Ohio divisional mortgagees were not parties to that decree. They may, therefore, properly be heard to object to a resale of the Ohio Division at their risk, if, on equitable grounds, it should not be permitted. From the cases cited above, I feel convinced that, even if the Ohio statute would otherwise apply, the relation of Compton's lien to those of his co-lienholders is such that a foreclosure and sale should not be had, except in a suit for the benefit of all, and that the prior mortgagees have a direct interest and right to make this objection. If a sale is ordered on Compton's lien without the presence of the other co-lienholders, then the title to be conveyed to the purchaser must be subject to their liens, of uncertain amount. This fact will, of course, impede the sale, and reduce the price bid. It was Compton's duty to have brought either a representative suit, or to have made his co-lienholders parties, if he wished a sale free from all liens. He did neither. It would be unjust to the assignee of the prior mortgages to send the case back for the purpose of bringing in other parties, or to permit Compton to change the form of his pleadings, when we can give him by redemption all the relief that he can equitably ask in the absence of his co-lienholders. Not being in a position where he can ask a foreclosure and sale against the mortgagees, we may, if Compton states a case for it, treat his prayer for general relief as a prayer for a decree for redemption. Hudnit v. Nash, 16 N. J. Eq. 550. It is well settled that the tenant in common of an equity of redemption has the right to redeem the mortgage to protect his own interest by paying the full amount due thereon. 1 Jones, Mortg. § 1063, and cases cited. Either before or after thus redeeming the entire mortgage, he may call on his cotenants to contribute to the expenses of redemption, and on their failure to do so he may foreclose and bar their liens. Young v. Williams, 17 Conn. 393; Seymour v. Davis, 35 Conn. 264; McLaughlin v. Curts, 27 Wis. 644; Crafts v. Crafts, 13 Gray, 260.

Though, for the reasons given, I do not think Compton may have a resale of the Ohio Division, it seems clear to me that he may redeem it by paying to the purchaser, the Wabash Railroad Company, the amount due on the Ohio divisional mortgages. As against all the parties to his Ohio suit, he may exercise this right, because it was incident

to the relief granted in the Ohio decree, to wit, the sale of the Ohio Division subject to those mortgages. This prevents objection from the purchaser as assignee of the rights either of the defendant corporation, the Wabash, St. Louis & Pacific Railway Company, or of all the mortgagees with liens junior to Compton's, or of the Wabash Railway Company, and the Toledo, Wabash & Western Railway Company, predecessors in title of the defendant, for these were all parties to the Ohio decree. As the assignee of the rights of what party to the cause below can the purchaser object to the redemption of the Ohio divisional mortgages? Have the Ohio mortgagees a right to object? It is difficult to see how they can complain if their debts are paid in full, as they must be if Compton shall redeem. All that they can require before submitting to redemption is that Compton shall have acquired an interest in the equity of redemption. The owner of the equity when this suit was brought was the Wabash, St. Louis & Pacific Railway Company. The Ohio decree established that, as against that company, Compton had obtained an interest in the equity from the Toledo & Wabash Railway Company, one of its predecessors in title, and the immediate grantee of the mortgagor Ohio companies. The Ohio mortgagees cannot dispute this transfer of an interest in the equity of redemption to Compton. When a mortgage is given, the mortgagor does not thereby restrict his right to convey or incumber the equity of redemption in him. 1 Jones, Mortg. 676; Hodson v. Treat, 7 Wis. 263; Flanagan v. Westcott, 11 N. J. Eq. 264. It therefore follows that conveyances or decrees binding upon the original mortgagor or his privies with reference to the ownership of the equity of redemption, or an interest in it, are, with reference to the mortgagee, res inter alios acta, which he has no right or concern to impeach or dispute. Barney v. Patterson, 6 Har. & J. 182, 203; Gregg v. Forsyth, 24 How. 179; Secrist v. Green, 3 Wall. 744; Baylor's Lessee v. Dejarnette, 13 Grat. 152; Taylor v. Phelps, 1 Har. & G. 492, 503. Other illustrations of the same principle may be found in Candee v. Lord, 2 N. Y. 269; Raymond v. Richmond, 78 N. Y. 351; Pray v. Hegeman, 98 N. Y. 351; Curtis v. Leavitt, 15 N. Y. 51; Hall v. Stryker, 27 N. Y. 596; Way v. Lewis, 115 Mass. 26; Swihart v. Shaum, 24 Ohio St. 432; Wingate v. Haywood, 40 N. H. 437; Inman v. Mead, 97 Mass. 310; Brigham v. Fayerweather, 140 Mass. 411, 413, 5 N. E. 265; Cincinnati v. Deikmeier, 31 Ohio St. 242. In other words, if the mortgagor railroad company had the right itself, at the time the lien of the equipment bondholders attached to its property, to redeem the Ohio divisional mortgages without redeeming the Indiana mortgages, it had the right to convey it to some one else; and whether, by the act of issuing the bonds and the consolidation, it did convey such right to the equipment bondholders, is a question to be settled between the mortgagor railroad company and its successor in title, on the one hand, and the equipment bondholders on the other, without regard to the wish or consent of the prior mortgagees. The Ohio decree is a conclusive settlement of the question, and cannot be disturbed or attacked by the divisional mortgagees.

It is strongly urged, against the views that the Ohio mortgagees may not object to a redemption of their mortgages alone, that the mortgagees in the Indiana divisional mortgages are the same as in the Ohio divisional mortgages, namely, the Farmers' Loan & Trust Company in the first two divisional mortgages, and E. D. Morgan in the second two, and that it is a general equitable principle that where two mortgages in default are held by the same party, as mortgagee or assignee, equity will not decree redemption of one unless it be accompanied by redemption of the other, on the same piece of property. I think that this principle no longer obtains in this country; that it is, in its last analysis, the basis for the English doctrine of tacking mortgages, which has been pronounced to be harsh, and unsuited to our jurisprudence. But I do not find it necessary to discuss the question whether this rule is sound, or not, because, in my view, it has no application whatever to the case at bar. It is true that the Farmers' Loan & Trust Company is the trustee in an Ohio divisional mortgage, and is also a trustee in an Indiana divisional mortgage, but it is not true that the mortgagee in those mortgages is the same. The Farmers' Loan & Trust Company, in each mortgage, is trustee for certain bondholders, but there is no evidence whatever to show that the bondholders under one mortgage are the same as the bondholders under the other. Therefore the real parties in interest in the two mortgages are not the same, and therefore even the strict and inequitable rule with reference to tacking mortgages in England would not apply to such a case. E. D. Morgan, as trustee for one set of bondholders, has no power to assert the rights of other bondholders, for whom, in another mortgage, he is also acting as trustee. It is not a union of the two securities and the two titles in the same person. John Smith, as trustee for John Jones, is not the same person, in law, as John Smith the trustee for John Robinson. The title conferred by the mortgage is held in two different capacities. The rights of the one cannot be made to inure to the other. It therefore follows that this case is to be treated exactly as if the mortgagees in both the Indiana divisional mortgages were different from those named in the Ohio mortgages.

A second ground most forcibly stated for denying the right of Compton to redeem the Ohio divisional mortgages without also redeeming the Indiana mortgages is based on a theory of suretyship. It is said that each company which acquired title to the road by assuming the mortgage obligations became, with reference to the debt under the divisional mortgages, the principal debtor, and, there being no novation of the debts, the grantor corporation remained bound as surety; that the succeeding corporation having promised to pay all the mortgages, as the consideration for the purchase, the grantor corporation had the right to object to a partial discharge of this obligation, and to insist, as surety, that after default the right of redemption could not be exercised, except by a redemption of all the mortgages, payment of which in a single promise had been assumed as a consideration for the purchase. In this wise it is said the Ohio divisional mortgages and the Indiana

divisional mortgages were so united by successive assumptions of the obligations declared on them that now a redemption of the former without the latter cannot be permitted. There are several reasons why the principle relied on, even if it be a sound one, has, in my opinion, no application to the case at bar. In the first place, the objection, if otherwise tenable, could only be made by one of the so-called surety corporations. Of these, the Toledo, Wabash & Western Railway Company and the Wabash Railway Company were parties to Compton's Ohio decree; and this, for reasons already given, prevents them from objecting to his enforcing his lien against the Ohio Division alone. Again, neither of them, nor the Toledo & Wabash Railway Company, the first consolidated company, is a party to this action, and it is difficult to see how the objecting purchaser, who never acquired anything but the rights of the Wabash, St. Louis & Pacific Railway Company, the defendant company below, can use the surety rights of predecessors in title to the Wabash, St. Louis & Pacific Railway Company, which that company never acquired, and could never assert. But let us suppose that the Toledo & Wabash Railway Company were a party objecting. Even by it the objection suggested could not be made. It was the first corporation which united the Ohio and Indiana roads. That was the consolidation of the Toledo & Wabash Railroad Company, of Ohio, and the Wabash & Western Railway Company, of Indiana. At the time of the consolidation the two Ohio divisional mortgages were the obligation of the Toledo & Wabash Railroad Company, of Ohio, while the Indiana divisional mortgages were the obligation of the Wabash & Western Railroad Company, of Indiana. The consideration for the consolidation was a guaranty made by the Toledo & Wabash Railway Company to the Toledo & Wabash Railroad Company, that it would pay the Ohio divisional mortgages, and another guaranty by the same consolidated company, moving to the Wabash & Western Railroad Company, that it would pay the Indiana divisional mortgages. The promises in these two guaranties were different, and it therefore, of course, was within the power of the Toledo & Wabash Railway Company, the consolidated corporation, to fulfill its promise to its Ohio constituent by redeeming the Ohio divisional mortgages, without regard to the Indiana divisional mortgages. The Toledo & Wabash Railway Company had made no promise to its Indiana constituent that it would pay the Ohio divisional mortgages, and therefore the Indiana constituent had no right to object to a redemption of the one without the other. The Ohio constituent was not a surety for the payment of the Indiana divisional mortgages, nor was the Indiana constituent a surety for the payment of the Ohio divisional mortgages. It seems to me clearly to follow, therefore, that the Toledo & Wabash Railway Company had the right, in equity, to redeem the Ohio divisional mortgages without redemption of the Indiana divisional mortgages, because by no single promise of it to the same promisee had it united its obligations to pay the four divisional mortgages. One of the authorities relied on to support this suretyship argument is Wells v. Tucker, 57 Vt. 223. The case is not very well reported, but, so far as its facts are stated, it appears to

have been an action by the successor in title of the purchaser of a farm to redeem the same from a mortgage on an undivided one-half of the farm, without redeeming a mortgage on the other half. The purchaser had stipulated, as part of the purchase price, to pay both mortgages. The vendor was a party to the action to redeem, and he objected to the redemption of one mortgage without the other. It was held that, as to the vendor, the agreement by the vendee to pay both mortgages to relieve the vendor from liability was single and indivisible, and that, in his position as surety for the payment of both mortgages, the vendor could insist that both should be discharged at the same time. Whether this case can be supported, or not, its ratio decidendi has no application to the question whether the Toledo & Wabash Railway Company, the first consolidated company, could redeem the mortgages on the Ohio Division without redeeming those on the Indiana Division, because there were two different vendors, and the assumption of the Ohio mortgages was a promise made to one of them, and that of the Indiana mortgages was a different promise made to the other. There was therefore no person to whom a single promise was made, involving the assumption of the entire debt under the four mortgages. The mortgages continued to be liens on those divisions which, by their terms, they respectively covered; and the agreements to assume were made to the two constituents respectively and separately, and not to them jointly and unitedly. If the Toledo & Wabash Railway Company had the right, therefore, to redeem the Ohio divisional mortgages separately from the Indiana divisional mortgages, without the violation of any promise made to its constituent companies, then it certainly had the right to transfer these separate equities of redemption in the two divisions to whomsoever it might choose. 1 Jones, Mortg. 676; Hodson v. Treat, 7 Wis. 263; Flanagan v. Westcott, 11 N. J. Eq. 264. The equipment bonds were issued by the Toledo & Wabash Railway Company. By reason of its act in transferring all its assets to the Toledo, Wabash & Western Railway, and the effect of the Ohio statute of consolidation, the debt created by the equipment bonds became a lien on the separate equities of redemption which the Toledo & Wabash Railway Company held under the Ohio and Indiana divisional mortgages. It is true that the Toledo, Wabash & Western Railway Company made a single promise, in the agreement of consolidation, to pay all the indebtedness owing by the Toledo & Wabash Railway Company, and this included the two Indiana divisional mortgages, the two Ohio divisional mortgages, and the equipment bonds, as well as all other debts which the Toledo & Wabash Railway Company had not paid. But it was not by virtue of this promise that a lien passed to the equipment bondholders. It was by virtue of the act of the Toledo & Wabash Railway Company in transferring all its assets to the consolidated company, and the lien arose by that act, without regard to the promise which the new consolidated company made as the basis of the new consolidation. The equities of redemption upon which the equipment bondholders obtained their lien were the

separable equities of redemption owned by the Toledo & Wabash Railway Company, and not the united or single equity of redemption which the Toledo, Wabash & Western Railway Company acquired by virtue of the consolidation. All the consolidated corporations, from the Toledo, Wabash & Western Railway Company down to the defendant below, the Wabash, St. Louis & Pacific Railway Company, were parties to the Ohio decree. That decree settled the right of Compton to resort for the satisfaction of his lien to the Ohio Division alone. Incident to that remedy and relief, and necessary to it, followed the right to redeem the Ohio divisional mortgages, and no party to the Ohio decree can now be heard to object to the enjoyment of that remedy by Compton.

But it is said that the same theory, upon which a lien attached in favor of the equipment bonds held by Compton, secured to the Indiana divisional bondholders a similar lien on the entire property of the Toledo & Wabash Railway Company, the constituent of the Toledo, Wabash & Western Railway Company, and therefore that the Indiana mortgagees have the right to object to a division of their security which covers the entire road. There are several reasons why this objection is untenable:

First. It was not by virtue of the sale in the court below that the purchaser became the equitable assignee of the rights of the Indiana bondholders under their mortgage and otherwise, and therefore he cannot represent them on this appeal. In the suit in the court below, the Farmers' Trust Company and James F. Joy were parties in a trust capacity, representing, not the Indiana bondholders, but the bondholders under the Ohio mortgages. Under the averments of the bills and cross bills, they were not proper parties to the Ohio suit, because, by virtue of the mortgages, they had no interest in the Ohio property. It is true that, by an error of his counsel in the court below, Joy filed in the court below the same answer as he did in the Indiana suit for the Indiana bondholders; but the error was a palpable one, and the subsequent act of the court, as well as the averments of the bills by which he was made a party below, show that he was only a party as trustee for the Ohio bondholders. It is true that an omnibus decree in the same language was entered in each of the three federal courts of Northern Ohio, Indiana, and Southern Illinois, but it was only operative in each court to foreclose and adjudicate liens on the property of the defendant company within the territorial jurisdiction of that court. No attempt was made by decree to compel conveyances from the mortgagor company to the purchaser of property lying outside the territorial jurisdiction of the court. That a court has the power, when it has personal jurisdiction over the mortgagor, to foreclose the mortgage on property lying outside of its territorial jurisdiction, is plain, and is fully established by the case of Muller v. Dows, 94 U. S. 444, but it must exercise this power by a decree against the person compelling the mortgagor to convey the equity of redemption. Otherwise the decree is inoperative. Carpenter v. Strange, 141 U. S. 87, 106, 11 Sup. Ct. 960. No such decree was

made by the court below, and no such relief was prayed by the parties. By the decree in each court, and the deed of the masters made in pursuance thereof, the purchaser took title to the part of the railroad in the territorial jurisdiction of that court. It is, of course, convenient to have foreclosure suits which involve a railroad traversing three states proceed together, and the different courts may make their decrees similar, and order a joint sale; but the suits are separate suits, and affect different pieces of property, and the parties to one suit do not, ipso facto, become parties to the other two. Mercantile Trust Co. v. Kanawha & O. Ry. Co., 39 Fed. 337; Toland v. Sprague, 12 Pet. 300, 327; Northern Indiana R. Co. v. Michigan Cent. R. Co., 15 How. 233, 242. Distributing, therefore, so much of the decree for sale, as it appears in the record, to each of the circuit courts where it belongs and is operative, it may properly be said that the mortgagees under the Indiana divisional mortgages were not parties to this suit in the court below, and are not parties to this appeal. Now, the purchaser at a judicial sale becomes a party to the record, for certain purposes; and he may appeal from a decree of the court below affecting his interests as purchaser, but he cannot dispute the correctness of the decree of sale under which he bought. That binds him conclusively. Blossom v. Railroad Co., 1 Wall. 655; Central Trust Co. v. Grant Locomotive Works, 135 U. S. 207, 10 Sup. Ct. 736; Kneeland v. Trust Co., 136 U. S. 89, 10 Sup. Ct. 950; Swann v. Wright's Ex'rs, 110 U. S. 590, 4 Sup. Ct. 235; Swann v. Clark, 110 U. S. 602, 4 Sup. Ct. 241. The only ground for giving him the position of a party is that he may protect his rights as a purchaser by the decree. If the Indiana mortgagees were not parties to the suit in the court below, it is perfectly obvious that the purchaser under the decree for sale and its confirmation acquired nothing of their rights, as mortgagees or otherwise. Therefore he cannot be heard to assert those rights on this appeal. It is wholly immaterial that in another suit in another court in another jurisdiction he has become the owner or equitable assignee of those Indiana mortgages. In his capacity as purchaser and quasi party in this suit, and on this appeal, he cannot be permitted to assert any rights under them.

Second. But suppose that it be admitted that the Indiana mortgagees were parties to the suit in the court below, and that the decree for sale did operate to foreclose their mortgages, so that the purchaser became by the sale the equitable assignee of those mortgages. It still does not follow that the purchaser may assert a different lien from that secured by the mortgage, and arising from an entirely different state of facts, extraneous to the mortgage. The purchaser at the sale below became the equitable assignee of every mortgage or other lien set up, and foreclosed by the decree for sale. Brobst v. Brock, 10 Wall. 519; Childs v. Childs, 10 Ohio St. 339; Stark v. Brown, 12 Wis. 638, 652; Johnson v. Sandhoff, 30 Minn. 197, 14 N. W. 889; Brewer v. Nash, 16 R. I. 462, 17 Atl. 857. The rule is generally applied in cases where, for some reason, the sale is ineffective to carry the whole title to the property. The

reason for it is best explained by the supreme court of Rhode Island in the opinion in the case last above cited, where, after a reference to all the authorities, the court says:

"The grounds of decision are not very fully developed in these cases, but it seems to us that the true ground is this: That while, ordinarily, a stranger to the estate, who voluntarily pays off a mortgage thereon, is not entitled to subrogation to the rights of the mortgagee, a purchaser at the mortgagee's sale, even when the sale is void, is not to be regarded as a mere stranger; but that having bid off the estate, in good faith, on the invitation of the mortgagee to do so, when, supposing his bid to have been effectual to invest him with the equitable or executory title, he pays the amount of his bid, and the same is applied to the mortgage debt, he has a most persuasive equity to be subrogated to at least the rights of the mortgagee who invited his confidence. In such a case the court does simply what the mortgagee would be bound to do himself, if he could, when it treats the purchaser as the assignee of the mortgagee."

The sole basis for giving effect to such an equitable assignment of liens in favor of a purchaser disappears in a case where a lien, though it exists in favor of a party, is neither set up in the pleadings, nor, by the terms of the decree, foreclosed. Of course, the purchase money paid could not be applied to the payment of such a lien, and in no way could the assignment by estoppel be worked out. It is true that if a party defendant, after being required by prayer of complainant to set up such lien as he claimed, failed to do so, he might be thereafter barred from ever again seeking to enforce it. Hefner v. Insurance Co., 123 U. S. 747, 8 Sup. Ct. 337. But this is quite a different result from a transfer to the purchaser of a right to assert affirmatively such a lien against a third person not a party to the suit. In the one case, the lienholder waives his lien; in the other, when he claims part of the purchase money he enforces it. The waiver is not more to the advantage of the purchaser than of every one else interested in the property. By sharing or claiming a share in the proceeds of sale, he does that which ought, in equity, to work an assignment of his lien to the purchaser who pays the purchase price. In the case at bar the mortgages of the Indiana mortgagees, of course, passed by equitable assignment in the Indiana suit to the purchaser, because they were there set up and foreclosed, and the purchase money was distributed to both of them. But those mortgagees never set up any lien on the Ohio property by virtue of the consolidation. If they had any such lien, they waived it, and the lien is as if it never was. The waiver is as much in Compton's behalf as in that of the purchaser. It is too late, therefore, for either the purchaser or the Indiana mortgagees, if they are to be considered parties to this appeal, to base on such a lien an objection to Compton's remedy against the Ohio Division for the enforcement of his lien.

Third. But, even if the Indiana mortgagees were present at the bar, they could present no valid objection to Compton's redemption of the Ohio Division. As already explained, the lien which inured to them and to Compton by the merger of the Toledo & Wabash Railway Company in the Toledo, Wabash & Western Railway Company was a lien on the separate and separable equities of redemption

held by that company; and, as it might have separately redeemed, so might they, or either of them, redeem for the benefit of themselves and others similarly situated.

Fourth. The Indiana mortgagees have a mortgage lien on the Indiana Division, which they do not waive, but have enforced, and propose to use as a defense against all comers. This is prior to their lien for the same debt on the Ohio and Indiana Divisions we are now considering. If the Indiana Division should sell for enough to pay the mortgage debt, then they could have no subsequent interest in how Compton should enforce his lien. If it should not, and there should be a deficiency, then there would be nothing left out of which to enforce their junior lien for the deficiency, except the Ohio Division. How can they, then, object to Compton's resort to the Ohio Division to enforce his lien, when that is all they propose to leave him by foreclosing their prior mortgage on the Indiana Division? Surely, they cannot prevent Compton from pursuing the only part left of the common security which they themselves divide by appropriation of the other part under a prior mortgage.

For these reasons, I think the suggestion that the Indiana mortgagees, or their alleged assignee, the purchaser, may object to this redemption without including the Indiana mortgages, has no weight. In my opinion, the decree of the court below should be modified so as to secure to Compton the right to redeem the Ohio Division alone from the purchaser of the Wabash Railroad Company by paying to it the amount due on the two Ohio divisional mortgages.

Finally, it is insisted that it is in conflict with public policy to permit a redemption of part of a consolidated and continuous line of railway. The decree of the court below permitted such a redemption for the consolidated railway extended from Toledo to St. Louis, and redemption was decreed of the road from Toledo to the Illinois state line. But it is said that this was because there was a separate lien on the road from Toledo to the Illinois line. That is true, and the same thing is true here. The divisional mortgages divide the line, by reason of their terms, and every succeeding company which embraced the Ohio Division in its line took subject to those mortgages. The only company which had any interest in the continuity of the line upon which an objection to a redemption of part could be based was the Wabash, St. Louis & Pacific Railway Company, and it is prevented from urging such an objection by the Ohio decree. Clearly, the divisional mortgagees, whose rights depend on the very division of which complaint is made, and who are to be paid in full, have no interest to preserve the continuity of the line. The decree of sale below provided for a separate sale of the Ohio Division, and had Compton been assured of the validity of his lien, as it was subsequently declared, and the decree had contained no saving clause, he could certainly have bid in the Ohio Division alone, by offering a sum exceeding the amount of the Ohio divisional mortgages. Why, then, can he now be prevented from doing what is substantially the equivalent of such a purchase?

It remains to inquire how the amount to be paid in redemption of the two divisional mortgages shall be estimated. Of course, the

mortgagees are entitled to the principal of their mortgages, with interest to the time of tender; but the more doubtful question is whether the amount thus to be calculated must be reduced by the net earnings of the mortgaged property, i. e. the Ohio Division, since the receivers turned over possession of the road to the purchaser. Compton secures his right to redemption through the original mortgagors. Whatever they would have had to pay to redeem the mortgages, he must pay,—no more, no less. It is the general rule that a mortgagee in possession, when his mortgage is redeemed, must account for the rents and profits during his tenancy. Russell v. Southard, 12 How. 139, 155. The Wabash Railroad Company, as the successor in title of the purchasers at the sale, is to be regarded as the first Ohio mortgagee in possession, and therefore liable to account for the rents and profits or net earnings of the mortgaged property, in ascertaining the amount required to redeem the principal and interest of the mortgages. Our view of the saving clause in the decree for sale makes Compton's attitude with respect to the foreclosure sale quite like that of a junior incumbrancer with respect to a sale in a foreclosure proceeding brought by a senior mortgagee, to which the former was not a party. In such a case the weight of authority is that the purchaser is, with reference to the junior incumbrancer, the assignee of a mortgage in possession, and therefore liable to account for the rents and profits. Jones, Mortg. (5th Ed.) § 1395; 2 Hil. Mortg. 158; Vanderkemp v. Skelton, 11 Paige, 28; Walsh v. Insurance Co., 13 Abb. Prac. 33; Van Duyne v. Shann, 39 N. J. Eq. 6; Bunce v. West, 62 Iowa, 80, 17 N. W. 179; Spurgin v. Adamson, 62 Iowa, 661, 18 N. W. 293; Ten Eyck v. Casad, 15 Iowa, 524; Murdock v. Ford, 17 Ind. 52. In two cases a different view has been taken. Catterlin v. Armstrong, 79 Ind. 514; Renard v. Brown, 7 Neb. 449; 2 Jones, Mortg. (5th Ed.) § 1118a. The theory upon which the last-mentioned cases go is that, by the defective sale, not only the mortgage passed to the purchaser by assignment, but also the equity of redemption, and the purchaser must be presumed to be holding the property as owner of the equity, rather than as mortgagee, and therefore not to be accountable for the rents and profits. If the purchaser becomes the possessor of the property by the payment of anything substantial over and above the foreclosed mortgage debt, the argument is a strong one that the rents and profits should be used to recompense him for such an outlay in securing the possession of the property. Gray v. Nelson, 77 Iowa, 63, 41 N. W. 566. But where, as in the case at bar, the purchase price is equal only to the amount due on the first two mortgages, it would not seem consistent with equity to permit such a purchaser to maintain, against a junior incumbrancer seeking to redeem, that he is receiving the rents and profits as the owner of the equity, rather than as the owner of the mortgages which are galvanized into life to meet and defeat the otherwise good claim of the junior incumbrancer to a first lien. When the sale in this case took place, the mortgaged property was in the hands of receivers,—that is, the mortgagees were in possession,—and the rents and profits were applicable to the mortgages in the order of their priority. Howell v. Ripley, 10 Paige, 43; Miltenberger

v. Railway Co., 106 U. S. 286, 1 Sup. Ct. 140. If, as to Compton, the sale merely operated as an assignment of the various interests of the parties, the purchaser, as the assignee of the prior mortgages in possession, would seem to have derived his possession, and to maintain it, through the mortgagees, rather than from the owner of the equity of redemption. For these reasons, I think that Compton is entitled to an account of the net earnings of the Ohio Division of the Wabash Railroad Company over and above all operating expenses, including reasonable and necessary repairs, and that this sum should be deducted from the principal and interest due on the two mortgages. Of course, the railroad company is entitled to credit for all taxes paid by it, and for the cash advanced by it, in lieu of the bonds under the first mortgages, to pay receiver's obligations and other expenses properly chargeable as liens against the corpus of the road prior in right to the mortgages.

The last point to be noticed in this long discussion of a troublesome and complicated case is that presented by the motion to dismiss on the ground that the same decree as that appealed from was entered in Indiana, and was not appealed from. This is said to estop appellant from proceeding here. The question in the Indiana case was what remedy Compton could have for the enforcement of his lien against the Indiana property, not the lien against the Ohio property. The prayer in the Indiana court was confined to Indiana property as the prayer in the Ohio court was confined to Ohio property. Obviously, the question whether, under that decree, Compton could appropriate the Ohio Division to pay his lien was very different from the point which he made in the Indiana suit, namely, that by virtue of the decree, and otherwise, he could appropriate the Indiana Division alone to the payment of his lien. The validity of Compton's lien was upheld in each court. The question was as to the remedy. Certainly, a decree of an Ohio court which directed the sale of Ohio property to satisfy a lien would not be conclusive, in an Indiana court, of the right of the same plaintiff, under Indiana law, to appropriate Indiana property to the satisfaction of the same lien. It follows that as the points decided in the two cases were not the same, and as the subject-matter was not the same, the decree in the one court does not work an estoppel in the other to prevent an appeal.

Judge LURTON and I differ upon the following questions, which will be certified to the supreme court on the statement of facts set forth at the beginning of this opinion: First. Had Compton the right, under the saving clause of the decree for sale, to a decree for the redemption of the Ohio Division only? Second. In fixing the amount to be paid in redemption, is he entitled to have the principal and interest of the mortgages to be redeemed reduced by the net earnings received by the purchaser? Third. Is the decree of the circuit court of the United States for the district of Indiana between the same parties, and unappealed from, res judicata upon the foregoing questions in this court? It is ordered that all proceedings of the cause be stayed until the instructions of the supreme court upon these questions shall be received by this court.

LURTON, Circuit Judge. The contention of Compton that the paragraph reserving his rights should be construed so as to entitle him to an absolute decree against the purchaser for the amount due him under his Ohio decree, when it was determined that he had a lien, and regardless of its rank, is not founded in reason or justice. Such a construction would operate to prefer his claim over all others, without regard to the place and rank of the other lienors. What the court meant to do was to leave Compton's claim undetermined by the decree of foreclosure, and to reserve power and jurisdiction over the purchaser to enforce his lien by appropriate remedy, under all the facts, if it should be found that he had one. This view is made manifest by the concluding sentence of the paragraph, which says, "It being the intention to hereby preserve the rights of said Compton in the relation in which he now stands towards the mortgagees, parties hereto."

To attribute to this decree a determination that Compton's lien, if he had one, should override all others, and entitle him to an absolute decree against the purchaser, would not be a preservation of the relation in which he stood to other lienors, some of whom were asserting priority over Compton, but to destroy that relation, and settle the rank of his lien, without a hearing upon that question. Such a clause should be interpreted in the light of the whole record preceding it, and of the other portions of the decree of which it was a part, and of the issues which might arise upon Compton's claim, for he had not then answered. Read in this light, the court adjudged nothing affecting Compton. The fact of a lien, and the rank thereof, was left undetermined. I was at first strongly inclined to the opinion that the effect of the whole decree was to sell the entire railroad, free from all liens, including Compton's, and that his lien, like all others, was transferred to the proceeds of sale. Inasmuch as the foreclosure decree provided for the payment of the purchase money chiefly in bonds and coupons secured under the several mortgages foreclosed, it was essential to the preservation of Compton's rights in the fund that there should be reserved a right to require the purchaser to pay off Compton's lien, if the rank of his lien was found to be such as to entitle him to payment out of the fund, and in advance of securities which had been paid in by the purchaser. I still think there is much room for this interpretation of the decree, in view of its language, and of the strenuous effort made by all the prior and subsequent mortgagees to offer the property free from all liens and incumbrances. This construction would operate to defeat any recovery by Compton, inasmuch as the two divisions covered by his lien did not sell for a sum sufficient to pay off the prior liens. I have come, however, to an appreciation of the injustice which this construction would do him. He was placed at some disadvantage by a sale in advance of the determination of his rank, the place of all others being fixed and known. This consideration, in the light of other parts of the decree lending support to the idea of a sale subject to any lien which Compton might successfully maintain, persuades me to adopt the view taken by the circuit court,—that his lien was not foreclosed,

and that the property was sold free from all lien, charge, or incumbrance, save that of Compton. His attitude is therefore precisely what it would have been, with respect to remedy, if he had not been a party to the foreclosure proceeding. Instead of dismissing the bill, as to him, without prejudice, the circuit court sold subject to his lien, and reserved jurisdiction to thereafter adjudge to him such relief, by sale or otherwise, as should be appropriate. What would be the proper remedy could not be foreseen, and nothing in the saving clause deals with the question of remedy, beyond a reservation of jurisdiction over the purchaser to enforce such remedy as, under established principles of equity, should be appropriate. It was not improbable that the biddings on the divisions embraced within Compton's lien would be sufficient to pay off the prior incumbrances, and Compton as well. If this had been so, it is clear that the remedy would have been neither sale nor redemption, but a payment out of proceeds of sale. This, unfortunately, proved not to be the case. The sale accepted was under a bid for the entire line. The unit bid aggregated but an insignificant sum over the aggregate of the separate bids on divisions. The bid on the Ohio Division was for barely enough to pay off the two Ohio divisional mortgages, while the bid on the Indiana Division was insufficient to pay off the second Indiana divisional mortgage, by more than a million of dollars. I quite agree with Judge TAFT in holding that under these circumstances the character of the remedy to which Compton was entitled must be determined "wholly apart from anything in the decree for sale, because the saving clause leaves it entirely in the judgment of the court." I also agree with him in the conclusion that, under existing circumstances, Compton is not entitled, either by force of the Ohio decree, or under the general principles of equitable practice, to a decree for a resale, and that the only relief which a court of equity should afford him is that of redemption. Compton must stand as an unforeclosed lienor, obliged, by change of circumstances, to apply to equity for relief upon the footing of a decree which is nonenforceable according to its terms. Though nominally a defendant, he is really and substantially a complainant. It would be clearly inequitable to grant a decree for a resale of the Ohio property, in view of the existing status. Such a decree now would be by no means the decree he obtained. If he had executed that decree before any obstacle arose, and obtained possession as a purchaser, he would have been obliged to have redeemed the senior mortgages. The remedy of a junior incumbrancer, both before and after foreclosure, is to redeem the senior mortgage. Without the consent of the prior mortgagee, a junior lienor could not enforce a sale of more than the mortgagor's equity of redemption. If he wished a sale free from the prior lien, and the prior lienor will not consent, the decree should be that he redeem, and then foreclose for the enforcement of his own lien, and that he had redeemed. 2 Jones, Mortg. §§ 1394–1396, 1431, 1439, 1580; Jerome v. McCarter, 94 U. S. 734; Woodworth v. Blair, 112 U. S. 8, 5 Sup. Ct. 6; McKernan v. Neff, 43 Ind. 503; Spurgin v. Adamson, 62 Iowa, 661, 18 N. W. 293. A judicial foreclosure sale is not void because one interested

in the equity of redemption, as a junior mortgagee, was not a party. "The sale vests the estate in the purchaser, subject to redemption by the owner of the equity, or other person interested in it, who was not a party to the proceedings. His only remedy, however, is to redeem." Jones, Mortg. § 1395. Martin v. Noble, 29 Ind. 216; Frische v. Kramer, 16 Ohio, 125; Rose v. Page, 2 Sim. 471; Fulghum v. Cotton, 3 Tenn. Ch. 299; Trayser v. Trustees, 39 Ind. 556; Bank v. Goldman, 75 N. Y. 127. I agree with him in the conclusion that Compton's only remedy is through redemption, not only for the reasons so forcibly stated by him, but upon other considerations which will hereafter be stated in connection with the question of entire or partial redemption. I am not at all in agreement with him as to the duty of the court to allow a separate redemption of the Ohio divisional mortgages.

1. If we are right in the agreement that the decree reserving Compton's lien from foreclosure, and his rights for future determination, leaves all questions concerning the validity, extent, and character of his lien, and all questions touching the remedy for the enforcement of his lien, as completely open as if he had never been a party to the foreclosure proceedings, then it must follow that his attitude now is that of a complainant. Neither should the court be moved to enlarge the remedy to which he would otherwise be limited by reason of the fact that he was made a defendant in the foreclosure suits, and that he came in unwillingly. He was not enjoined from enforcing a sale under his state decree, and might have proceeded with his sale, although made a defendant to the general foreclosure proceedings. Why did he elect to abandon the remedy the Ohio court had awarded him? The answer is obvious. So many obstacles had arisen, both pending his suit and after his decree, that his remedy by sale had become practically unavailable. Pending his suit the United States courts had taken possession of the entire line of railroad, of which the Ohio Division was but a part, first under the general insolvency bill filed by the Wabash, St. Louis & Pacific Company v. Central Trust Company and others, and finally under an extension of that receivership to the foreclosure suits out of which this controversy arose.

The pendency of his suit was no obstacle to the institution of these subsequent foreclosure proceedings, and none to the seizure of the property by the courts in which they were begun. If he had not been made a party to these subsequent foreclosure suits, and had proceeded with his sale under his decree, the purchaser would have been obliged to have intervened in order to have obtained possession, or to have waited until the receivers were discharged, and then, by an independent suit with the purchaser under the federal foreclosure decree, had his right and title determined. In either case, as the owner of a mere equity of redemption obtained under a foreclosure decree, to which senior mortgagees were not parties, he could have obtained no relief except through redemption of the prior liens. No injury was done him by making him a party to the subsequent suits, in which it was sought to sell the property free from all liens, and to marshal the assets according to priorities.

Indeed, he was a proper party to a simple foreclosure of the mortgages senior to his own lien, and a necessary party to any decree intended to convey to the purchaser a clear title. In such a suit his natural attitude would be that of an active, rather than a passive, party. Such, in fact, was the position which he at once assumed when he found that he could not escape the jurisdiction, for he availed himself of the decree which required that all answers theretofore or thereafter filed which stated matter that was proper foundation for affirmative relief should be deemed and taken as cross bills. By his answer he sought: First, the enforcement of his Ohio decree by a sale of the Ohio Division separately from all other parts of the road; second, to reach, and subject to his lien, certain terminal properties at Toledo, Ohio, of great value, which he claimed had been acquired after the Ohio divisional mortgages, and had not passed to the Ohio mortgagees; third, he claimed priority over the divisional mortgagees in all of the rolling stock and equipments acquired after the prior mortgages; fourth, he demanded an accounting as to the earnings of the Ohio Division, claiming that they were greatly in excess of its share of operating expenses, and that the surplus had been improperly applied to the support and improvement of other divisions of the consolidated line. From the filing of that pleading down to the final decree from which he has appealed, he was in the attitude of one seeking relief by a sale, or by redemption, if that was inadmissible. After the foreclosure decree his status was more than ever that of one applying to a court of equity for relief upon the footing of a former decree, which, by circumstances subsequently ensuing, could not be advantageously enforced without further aid. That the court did not foreclose his lien, along with those of the other lienors, was a matter of pure grace and indulgence to him. That the rank of his lien was undetermined was no obstacle to a foreclosure sale by which all liens would have been transferred to the proceeds of sale. Bank v. Shedd, 121 U. S. 74, 7 Sup. Ct. 807. Yet that indulgence is now made ground for complaint, and demand is made for a resale, or for granting him a separate redemption of the Ohio mortgages, even though otherwise unentitled. I see no merit in this claim for indulgence whatever.

2. In the determination of the question as to whether Compton may redeem the Ohio Division without also redeeming the Indiana mortgages, the remedy awarded him by the Ohio court should have no conclusive effect whatever. In permitting him to sell so much of the road as was within the state of Ohio, subject to the senior liens thereon, the court did not adjudge him to have a separable lien on the Ohio Division, and another on the Indiana property. It merely awarded him a sale as at law, under execution. Because the court limited the sale awarded to the property within its jurisdiction, it is not to be inferred that it thereby adjudged that Compton had one lien embracing two separable equities of redemption. No question as to whether, under his lien, he could redeem separately, was submitted, involved, or decided. The remedy awarded appears to me to pertain to process, and not to be within the principle of res

adjudicata, even as to the parties to his suit. Clearly, no estoppel exists, in consequence of the grant of that remedy, applicable either to the two original mortgagor companies, or any of their mortgagees, inasmuch as they were not parties to his case. If any legal or equitable reason existed before that decree which would enable them, or either of them, to require redemption of all the mortgages senior to his lien, or none, that right remained unaffected by a decree to which they were not parties. The Ohio court, in its statement of the case, described the suit, and the issues presented and the relief sought, by saying:

"This was an action commenced in the court of common pleas of Lucas county by James Compton, asking that certain bonds, of which he claimed to be the owner, with the unpaid interest coupons thereon, should be declared a lien upon so much of the road of the Wabash, St. Louis & Pacific Railway Company as formerly belonged to the Toledo & Wabash Railway Company, by whom the bonds had been issued, and for the finding of the amount due him thereon, and an order of sale of so much of its road as is within the jurisdiction of the court, subject to certain admitted prior liens, unless the amount found due him should be paid by the Wabash, St. Louis & Pacific Company in a short time, to be named, and for other relief." Compton v. Railroad Co., 45 Ohio St. 592, 16 N. E. 110, and 18 N. E. 380.

The only other reference to a remedy in the course of a very lengthy opinion is found near its conclusion, the court simply saying:

"The plaintiff is entitled to a finding of the amount due on the bonds held by him, and an order for the sale of so much of the road as is within the jurisdiction of the court."

I am utterly unable to agree that the limitation upon the order of sale to so much of the road as was within the state is an adjudication conclusive upon all the parties to that suit "that he has a lien which may be enforced against the Ohio Division alone, without regard to his remedy against the Indiana Division," "and that he may redeem it by paying to the purchaser, the Wabash, St. Louis & Pacific Railway Company, the amount due on the Ohio divisional mortgages." This conclusion that, because he was permitted to sell the Ohio Division separately, therefore he may redeem it separately, seems to me utterly unsupported by the premises; yet Judge TAFT seems to rest it upon the assumption "that, against all the parties to his Ohio suit, he may exercise this right, because it was incident to the relief granted in the Ohio decree."

3. But, if it be assumed that a right to separately sell the Ohio Division is within the estoppel of that decree, as to the parties, it is not incumbent on a court of equity, when a complainant applies to it for relief upon an ineffective decree, which cannot be enforced without further equitable aid, to extend him any assistance, unless he will do equity. In the determination of what relief he is entitled to, the court cannot escape a consideration of his rights with reference to the mortgages senior to his lien, as well as his rights in relation to the other titles, rights, and equities united in the purchaser from whom redemption is sought. If his decree is ineffective, for want of means to execute it; if the remedy awarded him by his decree is insufficient, and incapable of practical enforcement, —then the court will look into his decree, even as to its merits, and

refuse to enforce it, except in so far as it may deem just and equitable. The doctrine on this subject may be thus stated: When a decree is incomplete, or becomes ineffective for the want of means by which it may be executed, and application is made to a court of equity to render the decree effective, the doctrine of res adjudicata will not operate to prevent the court from looking into the nature and character of the decree for the purpose of determining whether it would be just and equitable that the complainant should be assisted, and his defective decree pieced out. If the decree be found unjust and inequitable, the court, under such circumstances, will not be moved to action, but leave the party to his remedy at law, or extend aid on condition that he do equity. 2 Daniell, Ch. Prac. (4th Ed.) 1586; Adams, Eq. 416; Gay v. Parpart, 106 U. S. 699, 1 Sup. Ct. 456; Lawrence Manuf'g Co. v. Janesville Cotton Mills, 138 U. S. 552, 11 Sup. Ct. 402. This doctrine, in its last analysis, rests upon the settled principle that he who seeks equity must do equity. Manifestly, this principle must apply to a case like the one in hand, when the question is purely one of remedy. This court ought not to grant any relief, except such as in equity and justice is appropriate, under all the circumstances. This doctrine would apply if the defendant, resisting partial redemption, united in itself only the rights of the mortgagor corporation and the mortgagees who were parties to the Ohio decree. If this doctrine goes so far as that the court may look into the merits of the decree which it is asked to piece out, a fortiori it is applicable when such a complainant demands a particular remedy because it is supposed to be an "incident" of the remedy which has become impracticable, or because it is supposed to be most analagous. Before a court of equity will be moved to lend its aid to an ineffective decree, it will inquire into all the circumstances calculated to enlighten the conscience of the court, and grant its aid only upon such terms and conditions as are just.

4. Among the matters which the court should take cognizance of when Compton asks to be allowed a separate redemption of the Ohio property, is an inquiry as to his right to redeem at all, for want of proper parties. The lien which he asserts is not one for his exclusive benefit. All of the unpaid creditors of the Toledo & Wabash Railway Company are equally entitled to share in the security which he is undertaking to appropriate to the satisfaction of his own claims. The Ohio decree made no disposition of the proceeds to arise from the sale awarded him, but directed that the proceeds should be paid into court, and held subject to further orders to be made on the footing of the decree. The decree itself only declared the lien. The lien is the creature of statute, and arose upon the consummation of the consolidation of 1865, by force of the statute, and his decree adds nothing to its efficiency, aside from the finding that he was a creditor. Compton's Ohio suit ought to have been a suit for the equal benefit of all entitled to share in the benefits of the lien asserted. It was not. His present suit should have been a suit for the benefit of the whole class, and so brought as to quiet the title of the present owner of the property. It is not. His decree amounts to nothing more than a declaration of a valid and

unsatisfied lien, superior in rank to all mortgages subsequent to the consolidation of 1865, and inferior to all antecedent to that date. That the defendants to the suit in which the statute was construed and the lien declared did not demur because his suit was not a class suit is no answer to the objection now interposed, when he asks for a different remedy in aid of an otherwise ineffective decree. But if the Toledo & Wabash Railway Company be regarded as cut off from interposing such an objection, in so far as it is the assignee and representative of the mortgagors and mortgagees who were parties to his Ohio suit, yet, in so far as it is the assignee of the mortgagees who were not parties, it is not estopped. The objection lies at the very foundation of his right to a partial redemption, because it will leave the defendant corporation holding the remainder of the estate embraced within the lien subject to future redemption by the appellant, or any other creditor interested in the class lien. But, more than this, the appellee, as the equitable assignee of mortgages junior to the Compton lien, has the unquestioned right to redeem from the creditors entitled to the benefit of the lien. They are, perhaps, hundreds in number, and the aggregate of their claims is wholly unknown. If it redeem from Compton by paying off his debt, it will continue subject to a like liability for an unknown amount, and to an unknown number of people. It may be said that this is an objection which applies to any redemption at all by him. This may be admitted, for, undoubtedly, Compton should have so brought his case as to bring all interested in the lien before the court, that the purchaser under junior liens might have the option of redeeming this lien and quieting its title, or submitting to redemption, and surrendering its title to the property covered by this lien. Not having done this, he ought not to be allowed to further aggravate the situation by compelling the appellee to submit to partial redemption.

5. There are other objections which are peculiarly applicable when a complainant seeks relief through equitable redemption. The senior mortgages upon the Indiana and Ohio Divisions operated to vest in the mortgagees the legal title, subject to divestiture upon payment of the debts secured within the time limited by the contract. The failure to pay on the pay day made the title at law absolute. There was no statutory right of redemption, and no redemption or buying back was admissible, except through application to a court of equity. Chancery courts, to relieve against the forfeiture which at law was absolute, have created an equitable right of redemption, which it allows upon equitable principles, and subject to the equitable maxim that "he who seeks equity must do equity." Of course, a court of chancery does not, through this maxim, obtain authority to impose arbitrary conditions, not warranted by settled principles of equity jurisprudence. The boundaries within which it may be applied are well defined by Mr. Pomeroy, who says:

"The meaning is that whatever be the nature of the controversy between two definite parties, and whatever be the nature of the remedy demanded, the court will not confer its equitable relief upon the party seeking its inter-

position and aid, unless he has acknowledged and conceded, or will admit and provide for, all the equitable rights, claims, and demands justly belonging to the adversary party, and growing out of, or necessarily involved in, the subject-matter of the controversy. It says, in effect, that the court will give the plaintiff the relief to which he is entitled only upon condition that he has given, or consents to give, the defendant such corresponding rights as he also may be entitled to in respect of the subject-matter of the suit." Pom. Eq. Jur. § 385.

The first objection which has been urged to a partial redemption grows out of the relation of principal and surety which exists between the Toledo, Wabash & Western Railway Company and the Toledo & Wabash Railway Company. In November, 1858, the Ohio and Indiana mortgagor companies consolidated their properties, and were merged into a new consolidated company, entitled the Toledo & Wabash Railway Company, which new company subsequently issued the bonds called "Equipment Bonds," of which Compton holds 150. The result of this consolidation is very tersely stated by Mr. Justice Gray, when considering the effect of this very consolidation, who said the result was a new corporation, "which took their places, succeeded to their property, and assumed their liabilities." Railway Co. v. Ham, 114 U. S. 595, 5 Sup. Ct. 1081; Shields v. Ohio, 95 U. S. 319; Compton v. Railroad Co., 45 Ohio St. 623, 16 N. E. 110, and 18 N. E. 380.

The Ohio consolidation statute, under which the successive consolidations occurred, was passed April 10, 1856, and expressly provided that:

"All debts, liabilities and duties of either of said companies shall henceforth attach to said new corporation and be enforced against it to the same extent as if said debts, liabilities and duties had been contracted by it."

The Indiana act of February 23, 1853, authorized the consolidation of railroad companies which might connect at the state line with a road of another state constructed to the state line, "upon such terms as may be by them mutually agreed upon in accordance with the laws of the adjoining state with whose road or roads connections are thus formed." 1 Gavin & H. St. 526. The consolidation agreement, among other things, provided:

"That the said consolidated company shall assume, and be liable for, all outstanding bonds, indebtedness, and other liabilities of each of the parties to this agreement; and all mortgages given by either of the parties shall be as valid and binding upon the whole of the road, real estate, fixtures, and personal property which may be described in such mortgage as though the same had been originally executed by such consolidated corporation."

The undoubted and undisputed effect of this consolidation was that the Toledo, Wabash & Western Railway Company became obligated to pay off and discharge each one of the four mortgage debts which existed at the date of this consolidation, in 1858. Its liability was not merely that of one buying property subject to an existing incumbrance, for it personally assumed, and by the statute became personally liable for, the entire indebtedness of its constituent companies. This much is expressly decided by the Ham Case and the Compton Case, heretofore cited. Precisely the same liability was imposed upon each of the successor consolidated com-

panies, who by subsequent consolidations succeeded to the property of the original mortgagor companies. This is very clearly recognized in the opinion of Judge TAFT, when he says, in his statement of the case, that "many of the constituent companies had issued bonds secured by mortgages upon their respective lines, and as consolidations took place the new companies assumed the obligations of the bonded and other debts of their constituents."

The successive assumptions of these prior mortgage debts did not operate to release or discharge the liability of the original mortgage debtors, or that of any obligor by assumption precedent to the last consolidation. The original mortgage debtors, and each succeeding obligor, were liable to the creditors as joint and several principals, and for deficiency in value of mortgaged property the creditors might have judgment against any or all who were thus liable as principals. The Ohio statute authorizing consolidations for the purpose of preserving the rights of creditors, provided that "the respective corporations may be deemed to be in existence to preserve the same." "A purchaser who assumes the mortgage becomes, as to the mortgagor, the principal debtor, and the mortgagor a surety; but the mortgagee, unless he has assented to such an arrangement, may treat both as principal debtors, and may have a personal decree against both. The mere assignment by the mortgagor of his interest in the mortgaged premises to a third person, who agrees to pay off the mortgaged debt, does not release the mortgagor. There is no novation, unless there is something to show that the mortgagee has released the mortgagor, and has agreed to look solely to the purchaser for payment of the mortgage debt." Jones, Mortg. § 741; Shepherd v. May, 115 U. S. 510, 6 Sup. Ct. 119; Burr v. Beers, 24 N. Y. 178; Ellis v. Johnson, 96 Ind. 377; Insurance Co. v. Hanford, 27 Fed. 588. As between the mortgagor and his successor in the title, who assumes the payment of the debts charged thereon by prior lien and the mortgagee, the land is the primary fund for the payment of the debt. Wells v. Tucker, 57 Vt. 223; Jones, Mortg. §§ 678a, 740–743; Bank v. Thayer, 136 Mass. 459. Thus, the property which the Toledo, Wabash & Western Railway Company acquired by consolidation of the constituent companies was, as between those companies and their mortgage creditors, the primary fund for the discharge of the mortgage debts. If mortgage creditors release this property without the consent of the original debtor companies, it thereby discharges them, to the extent of the value of the security thus abandoned. Paine v. Jones, 14 Hun, 577; Remsen v. Beekman, 25 N. Y. 552; Bowne v. Lynde, 91 N. Y. 92.

This right of the surety companies to have the property which became a primary fund applied in exoneration of their relations as sureties for the new consolidated company is not a right which can be affected or waived by any successor company which occupied the relation of principal towards such surety. The surety entitled to such exoneration might waive it, and so could the creditor; but, as we have seen, a creditor would thereby release the obligation of the surety, to the extent of the value of the property released. This principle has no application, as a consequence of the original con-

solidation by which the Toledo & Wabash Railway Company was formed in 1858. Its constituent companies were not sureties for each other, and the promise of the consolidated company was a separate promise to each of its constituents. The obligation of the Toledo & Wabash Railway Company, so far as it rested upon the consolidation agreement, to pay the debts of its Indiana constituent, was to that constituent alone; and the Ohio constituent could not object to a separate sale of the Ohio Division, or its separate redemption, for no obligation to it would be violated. But quite a new state of affairs arose so soon as the second consolidation occurred, in 1865. The consideration for the consolidation which moved to the Toledo & Wabash Railway Company was that, in consideration of all its property, the new consolidated company, the Toledo, Wabash & Western Railway Company, would pay all its obligations and liabilities, of every kind and character. This, of course, included its obligations to pay off the two Indiana divisional mortgages and the two Ohio divisional mortgages, all four of which had been assumed as a condition of the consolidation in 1858. Upon the consummation of this act of consolidation, there arose the relation of principal and surety between the Toledo, Wabash & Western Railway Company and the Toledo & Wabash Railway Company, which relation resulted in an obligation of the former company to apply all of the property of the latter company in discharge of its debts, and in exoneration of its liabilities. The consolidation agreement by which the Toledo, Wabash & Western Railway Company was formed, in 1865, set out the indebtedness of the Toledo & Wabash Railway Company, and made no distinction between the mortgages on its Indiana and Ohio Divisions. Its bonded debts were described as:

First mortgage bonds	$3,400,000
Second " "	2,500,000
Equipment bonds	600,000

It provided that all its rights, franchises, property, debts, and choses in action should vest in the consolidated company, and that the consolidated company should "protect" all of its indebtedness as it should fall due. Thus, the Toledo, Wabash & Western Railway Company assumed the relation of principal obligor, as to all the debts and obligations of its constituents, the Toledo & Wabash Railway Company. The latter company continued bound to the creditor, but, as between it and the Toledo, Wabash & Western, it was a mere surety. Out of this relation originates the right of the Toledo & Wabash Railway Company to object to partial redemption,—a redemption by which the Ohio Division, which is worth more than the mortgage debts secured specifically thereon, may be redeemed separately, leaving the Indiana mortgage debts unpaid and inadequately secured, to the extent of $1,300,000, as demonstrated by the bids on that division under the foreclosure decree. Such a redemption would leave the Toledo & Wabash Railway Company liable on the Indiana bonds to the extent of this deficiency. It would have the right to insist that the whole of its property conveyed to the Toledo, Wabash & Western Railway Company shall be applied in its exoneration;

and if that corporation was to-day seeking to redeem that part of the property which was of greater value than the mortgage debts specifically secured thereon, without also redeeming the Indiana mortgage debts which were inadequately secured, its objection in a court of equity would be potential, and the Toledo, Wabash & Western Railway Company would be required to redeem all, or none, on the principle that it must do equity, as a condition of equitable redemption.

It may be urged that this right of the Toledo & Wabash Railway Company to object to separate redemption upon the ground of its surety relation to the Toledo, Wabash & Western Railway Company is one which can only be made by it, and that it has never been a party to any of these foreclosure suits. Compton did not bring that corporation before the court in his Ohio suit, and he has not chosen to make it defendant to his present effort to obtain separate redemption. It was not a necessary party to either suit, in so far as the establishing of his debt and lien were concerned. He might bring his suit against the corporation which had succeeded to the title and ownership of the property, and which had assumed a primary obligation for his debt. But he cannot escape the effect of any defense to a separate redemption which any of the predecessors in the title might make, by omitting to bring such predecessors before the court. When he asks for partial redemption, and the court can see that that relief would be inequitable and unjust to one of the obligors of his debt, in its relation as surety to other parties jointly liable as to him, it will either refuse to proceed with the suit until he brings the absent corporation before the court, or grant him only such relief as is consistent with the equities and rights of all affected by the remedy he asks. But it seems to me, on careful consideration, that the purchaser at foreclosure sale unites in itself the legal title and the equities, rights, and defenses which pertained to each of its predecessors in title, and may interpose any defense to the demand for separate redemption which any one of its predecessors could make if they were called upon to submit to such redemption. If this is not so, then the absent predecessor corporations to be affected by the special relief sought are necessary parties to any proceeding which seeks such relief. If I am right in the proposition that the Toledo, Wabash & Western Railway Company could not redeem the Ohio Division separately, by reason of the surety relation of which I have spoken, then, for the same reason, Compton cannot. His lien arose as the result of the consolidation of 1865. The lien did not attach as a lien on property of the Toledo & Wabash Railway Company, but as a lien on so much of the property of the Toledo, Wabash & Western Railway Company as had been acquired from the Toledo & Wabash Railway Company. The language of the consolidation statute, which imposed a liability on the consolidated company for the debts of the constituent companies, was that:

"All debts, liabilities and duties of said companies shall henceforth attach to said new corporation and be enforced against it to the same extent as if said debts, liabilities and duties had been contracted by it." Act April 10, 1856, § 5.

This was the language which the supreme court of Ohio, in Compton's Case, construed as attaching an equitable lien upon the property of the Toledo, Wabash & Western Railway Company which it had received from the Toledo & Wabash Railway Company. The decree upon which Compton predicates his suit recites:

"That, upon the consummation of such consolidation, said bonds issued as aforesaid by the Toledo & Wabash Railway Company * * * became an equitable lien upon all of the said railroad and real property * * * which were owned by said Toledo & Wabash Railway Company, at the time of said consolidation passed to and vested in the said Toledo, Wabash & Western Railway Company, and which afterwards passed to and vested in the defendant the Wabash, St. Louis & Pacific Railway Company."

The lien did not exist before the consolidation, but arose as a result of the act transferring the property. To say that a lien which originated only as a result of the passage of the title is a lien against the company whose act transferred it to another, would be as inexact as to say that a vendor's lien rests upon the property of the vendor, when in fact it originates as a result of the passage of the title, and must be a lien on the estate of the vendee in the property. The distinction is a nice one, but it is an obvious one, when we look closely into it. It is also an important fact, in its consequences, for if a lien imposed on the property of the Toledo & Wabash Railway Company, while owned by that company, would, as urged by Judge TAFT, be a lien upon the separable equities of redemption owned by that company, a lien imposed after the transfer of the title of the Toledo & Wabash Railway Company to the Toledo, Wabash & Western Railway Company, which took under a single engagement or promise to pay off the debts of the Toledo & Wabash Railway Company, would bring into operation the principle that such single promise required a single redemption. Compton's right of redemption cannot be other or different than that of the corporation upon whose property the lien rested, whether imposed by law, or arising out of contract. It must therefore follow that, if the Toledo, Wabash & Western Railway Company could not redeem part without redeeming all, Compton, with a lien which rests on its estate, can exercise no higher right of redemption. There seems to me to be still another principle applicable, where equitable redemption is sought, which reinforces what has already been said. That principle is that where several mortgage debts have become consolidated, so that the obligor in each is the same, and the mortgagee the same, though secured on distinct estates, there can be no separate redemption, against the will of the mortgagee. The principle that a creditor will not be deprived of a legal advantage by a court of equity, except upon equitable conditions, is of wide application. It was imbedded in the civil law; and a mortgagor was not permitted to redeem or buy back the legal title to realty, or the possession of a pledge, until he did equity, by paying, not only the debt secured by the mortgage or pledge, but any other debt subsequently created. Story, Eq. Jur. §§ 415, 1010, and note; Jarvis v. Rogers, 15 Mass. 389. There is some doubt as to whether a purchaser of the mortgaged land, or a subsequent incumbrancer, was affected by this equity between mortgagor and mortgagee. Judge

Story thinks that under the civil law the doctrine was limited to cases where no subsequent incumbrance was involved, while Chancellor Kent takes the contrary view. Story, Eq. Jur. § 1010, note; 4 Kent, Comm. Lect. 58, p. 136. Almost contemporaneously with the earliest announcement of the doctrine that equity would relieve against the forfeiture of the legal estate, and permit redemption after default, there was announced a condition upon which such equitable redemption would be accorded. That condition was that when there were two distinct mortgages upon distinct parts of the same mortgagor's estate, to secure distinct debts due to same mortgagee, the mortgagor would not be permitted to redeem one of his estates without at the same time redeeming the other, where it appeared that one of the debts was insufficiently secured. This was the simple rule as announced and applied in the early cases. Purefoy v. Purefoy, 1 Vern. 29; Shuttleworth v. Laycock, Id. 245; Margrave v. Le Hooke, 2 Vern. 207; Pope v. Onslow, Id. 286; Willie v. Lugg, 2 Eden, 78; Jones v. Smith, 2 Ves. Jr. 376. In Willie v. Lugg, cited above, the lord chancellor stated the rule, and the reason on which it stands, as follows:

"This bill is brought to redeem the East Dales, and to leave Dixon's farm, now reduced, in point of value, by the mortgagees selling a part for the benefit of the plaintiff, who had the inheritance. The question is whether she can come into this court for such an equity. Every mortgagee, when the mortgage is forfeited, has acquired an absolute legal estate. Upon what terms can this court proceed to a redemption? By giving the mortgagee the value of his money, its fruits, and his costs, and upon those terms only, for it is obvious injustice to help to the restitution of the pledge without a full restitution of what it is first pledged for. If a person makes two different mortgages of two different estates, the equity reserved is distinct in each, and the contracts are separate; yet, if the mortgagor would redeem one, he cannot, because, if you come for equity, you must do equity; and, the general estate being liable to both mortgagees, this court will not be an instrument to take illegally from a mortgagee that by which he will be defrauded of a part of his debt."

The editor of the second edition of Eden's Reports, in a note concerning the modern extension of the rule as stated in Willie v. Lugg, says:

"That a mortgagor of two distinct estates, upon distinct transactions, to the same mortgagee, cannot redeem one without redeeming the other, seems, by modern decisions, to have been extended to a purchaser of the equity of redemption of one of the mortgaged estates without notice of the other mortgage."

The cases of Watts v. Symes, 1 De Gex, M. & G. 240; Selby v. Pomfret, 1 Johns. & H. 336; Neve v. Pennell, 2 Hem. & M. 170, are applications of the rule of the old cases in suits for foreclosure, as well as redemption. Beevor v. Luck, L. R. 4 Eq. 537; Tassell v. Smith, 2 De Gex & J. 713; Vint v. Padget, Id. 611; Mills v. Jennings, 13 Ch. Div. 639; Cummins v. Fletcher, 14 Ch. Div. 699,—are all cases involving extensions of the old rule to subsequent purchasers or mortgagees, many of them involving the technical doctrine of tacking, as developed from the early cases of Brace v. Duchess of Marlborough, 2 P. Wms. 491, and Marsh v. Lee, 2 Vent. 337. That doctrine, in brief terms, was bottomed on the maxim of

noninterference between equal equities. Adams, Eq. 162. Through that maxim, if a third mortgagee advanced his money without notice of a second mortgage, he was permitted to buy in the first mortgage, thereby obtaining the legal estate, and then tack the third mortgage to the first, and require the second mortgagee to redeem both. This enabled the third mortgagee to squeeze out the intermediate incumbrancer by buying up a first mortgage, even when the second mortgagee's bill for foreclosure was pending. And this rule Lord Chief Justice Hale, with whom the rule, in a large measure, originated, called a "plank" gained by the third mortgagee, or tabula in naufragio. In Jones v. Smith, 2 Ves. Jr. 376, and Mills v. Jennings, cited above, the old rule, in its simple form, is stated, as well as the ground on which it stood. In Mills v. Jennings, Cotton, L. J. so well states the original doctrine, and the grounds upon which it has been extended, that I deem it best to make a liberal quotation:

"The rule as to consolidation of mortgages, in its simplest form, is this: That where one person has vested in himself, by way of mortgage, two estates, the property of the same mortgagor, one of these cannot be redeemed without the other; and this is so whether the two mortgages were originally granted to the same mortgagee, or, having been originally vested in different persons, have, by assignment, become vested in the same person. This was on the equitable principle that a court of equity would not assist a mortgagor in getting back one of his estates, unless he paid all that was due, though secured on a different estate. The mortgagor was coming into a court of equity to obtain its assistance in getting back an estate which at law belonged to the mortgagee, and it was held to be inequitable to allow him to get back an estate of more value than the debt charged on it, and to leave the mortgagee with an estate charged with a debt due by the mortgagor which might be of a larger amount than the value of the estate. But even the rule in this its simplest form was doubted by Lord Hardwicke in the year 1750, as appears by the report of Ex parte King (1), though he afterwards recognized and adopted it. Moreover, as a mortgagor cannot be allowed to prejudice the rights of his mortgagee by any dealings with the equity of redemption of the estate in mortgage, it has been held that a purchaser or mortgagee of one of two estates already in mortgage is, as regards the consolidation of the mortgages, in the same position as the original mortgagor; that is to say, the purchaser of an equity takes subject to all the equities affecting the person through whom he claims. * * * It is the circumstance of the mortgagor having created two mortgages on two different estates which gives the mortgagee of either estate, as soon as the second mortgage is created, a right to get both the mortgages into his hands; and to hold both until the debt due on each is paid. The principle which allows, as against a subsequent purchaser or mortgagee, the right of consolidation, is that the mortgagor cannot, by any dealing with the equity of redemption, prejudice the rights of his mortgagee. This can only apply to rights already given, or arising from acts already done, by the mortgagor. The same principle will prevent the mortgagor from throwing a greater burden on the purchaser of his equity of redemption by any act done subsequent to the sale or mortgage of this estate. It is true that a mortgagee of one estate may get in and consolidate the mortgages on another estate against a purchaser of the equity of redemption of one of the estates, even though at the time of the purchase the two mortgages were vested in different persons, provided both the mortgages existed previously to the sale of the equity of redemption of one of the estates. But this equity arises out of acts done by the vendor of the equity of redemption previously to the sale; and the act after sale necessary to give effect to the right of consolidation—namely, the union of the mortgages on both estates in one person—is an act of persons who are no parties to the sale of the equity of redemption, and not bound to the purchaser by any contract

inconsistent with the claim to consolidate. In our opinion, the purchaser of an equity of redemption takes subject to such equities as arise from acts previously done by his vendor. He is subject to these equities, though acts of persons other than the vendor may be necessary to give rise to the equity." Mills v. Jennings, 13 Ch. Div. 639.

The doctrine established by the tacking cases proper—that a third mortgagee, without notice, may buy in a first mortgage, and thereby exclude a second mortgage—is not enforced in the courts of this country, in consequence of the effect of our registration system, which gives effect to conveyances in the order of registration. The policy underlying registration is that a mortgage shall not be a security for more than is expressed therein, as against subsequent purchasers or mortgagees. I quite agree with what was said by the Virginia supreme court, through Baldwin, J., in Siter v. McClanachan, 2 Grat. 304, that:

"The elements of the doctrine, it will be seen, are the possession by the preferred mortgagee of the legal title, and the pre-existence or accession of a distinct equity, without notice of mesne incumbrance. Hence it is obvious that it could never have been introduced into a country enjoying the benefits of a general registry, intended to give notice to the whole world of all conveyances and incumbrances, and to supply the place of actual notice. * * * In nearly all the states of this Union, the registry is held to be notice to subsequent purchasers and mortgagees, provided the deed has been duly proved or acknowledged. * * * It is easy to perceive that the operation of the registry laws of Virginia, and of other states of the Union, is to cut up by the roots the English doctrine of tacking, so far as it affects intermediate purchasers and incumbrancers."

It is equally clear that our registration system renders inoperative many of the principles upon which the rule now involved was extended so as to affect subsequent purchasers and incumbrancers. But registration laws manifestly have no effect upon the rule, as between mortgagor and mortgagee, or the application of the maxim upon which the doctrine rests, whenever a plaintiff resorts to equity to redeem or to recover the legal title to lands, or the possession of a pledge. If he seeks equity, he must do equity; and equity will not assist a debtor to deprive a creditor of a security which at law he may hold, until he has done equity, by discharging any just liability which exists between them. Great care must be observed in examining American cases touching this species of tacking, to see that they do not turn on the rule which makes the registration of a deed notice. Whenever they do so turn, they are not in point. Where the question arises between unregistered equities, or when the registry acts are, from any cause, inapplicable, there "seems to be nothing to prevent the holder of a third mortgage from obtaining priority over a second, of which he was ignorant at the time of taking his own, and which has not been placed on record, by buying in the first, or obtaining a conveyance of the legal title in any other way, although the question is of little practical importance, because it cannot arise unless both mortgages are unrecorded, when it will be easier to record the third than to resort to the expedient of purchasing the first." 1 White & T. Lead. Cas. Eq. 856. There are many American cases illustrative of the application of this equitable maxim to bills seeking to recover a legal title, or to re-

deem a mortgage, where the interests of third persons had not intervened. Baggarly v. Gaither, 2 Jones, Eq. 80; Carroll v. Johnston, Id. 120; Chase v. McDonald, 7 Har. & J. 196, 197; Coombs v. Jordan, 3 Bland, 284; Lee v. Stone, 5 Gill & J. 22; Downing v. Palmateer, 1 T. B. Mon. 70; Hughes v. Worley, 1 Bibb, 200; Colquhoun v. Atkinsons, 6 Munf. 550; Siter v. McClanachan, 2 Grat. 299; Walling v. Aiken, 1 McMul. Eq. 2; Chamberlain v. Thompson, 10 Conn. 251; Phelps v. Ellsworth, 3 Day, 397; Rowan v. Rifle Co., 29 Conn. 324; Scripture v. Johnson, 3 Conn. 211; Bank v. Rose, 1 Strob. Eq. 257; Anthony v. Anthony, 23 Ark. 479; Williams v. Love, 2 Head, 80; McGoldrick v. McGoldrick, 2 Coop. Ch. 543; Evans v. Land Co., 92 Tenn. 348, 21 S. W. 670. I am quite aware that some of the state courts have abandoned every vestige of the doctrine concerning even this species of tacking. In some this has been attributable to the abandonment of equity procedure altogether. In others, like New York and Michigan, where the courts hold that the mortgagor retains the legal title, the mortgagee being a mere lienor, there was, as a consequence, no necessity for equitable aid in recovering the legal title. In courts of the United States the holding, where, by the local law of the state, a different ruling has not been required, has consistently been in accord with the English common-law and equity cases as to the title of the mortgagor. When the jurisdiction of the United States courts is invoked by a mortgagor or a junior lienor, to allow equitable redemption, it seems to me that we are not warranted in according it without annexing those equitable conditions which have been announced by the courts whose decisions lie at the very foundation of our jurisdiction, and which accord with justice and conscience. So far as the American system of registration conflicts with these rules, they are no longer entitled to our allegiance; but, so far as that system of statutes has left play for the fundamental condition that "he who seeks equity must do equity," we should accord to the old cases full weight.

My conclusion is that the Toledo, Wabash & Western Railway Company, having assumed both sets of mortgage debts at the time it acquired the mortgaged estate, could not redeem one part of the estate without redeeming the other, the mortgagees being the same. Does Compton occupy any better position? Clearly not. He is not an incumbrancer by a single instrument on one of the mortgaged estates. Neither is he a purchaser for value of the mortgagor's interest in one or both. By force of the Ohio statute the debts due from his debtor became, under the Ohio construction of that statute, an equitable charge on all the property of the Toledo & Wabash Railway Company in the hands of the Toledo, Wabash & Western. This general unit lien is the one asserted now by Compton, as affording him a right, in equity, to redeem a part of the property embraced by the lien. The very least that can be said is that he can stand, with respect to redemption, in no better situation than did the Toledo, Wabash & Western Railway Company. If that company, as a principal obligor, had a right, as their mortgaged debts matured, to pay them off, that right terminated when the pay day passed, and nothing remained but an equitable right to be

relieved from the forfeiture by resort to the equitable right of redemption. But payment would have extinguished the debts and the mortgage, and he does not propose to pay off these mortgage debts. He wishes, on the contrary, to redeem and keep them alive for his own benefit, and will seek, in turn, to be redeemed by subsequent lienors. His extreme right is to exercise the right of redemption which the Toledo, Wabash & Western Railway Company might do if it were seeking redemption. That right, in its most favorable statement for him, was to pay and extinguish these mortgages on the pay day, or, in default, pray to have accorded him that equity of redemption which, under the facts, might be exercised by the Toledo, Wabash & Western. There is nothing in the Ohio consolidating statute which indicates any purpose to in any way impair or affect any right, in law or equity, which any creditor of a constituent company had. Upon the contrary, the act expressly provides "that all rights of creditors, and all liens upon the property of either of said corporations, shall be preserved unimpaired, and the respective corporations may be deemed to be in existence to preserve the same." But it is said that the mortgagees are not the same, and that this doctrine has, therefore, no application. The trustee in each of the two first mortgages was the same corporation, and the trustee in the two second mortgages was the same person. What is meant by this objection is that the present holders of the bonds are not, or may not be, the same persons, and that the doctrine applies only where the beneficiaries in the consolidated mortgages are the same persons. That the beneficiaries are not the same persons under each mortgage is an assumption. The only information which the court has about the subject is that the bonds secured by each mortgage were made payable to the mortgagee named therein, or bearer, and that S. Fisher, Edmond Pepper, and J. H. Purdy were made defendants, "as a committee representing certain holders of first mortgage bonds of the Toledo & Illinois Railway Company, and Lake Erie, Wabash & St. Louis Railroad Company," these being the original mortgagor companies. But it seems to me that it is not essential to the application of this doctrine that the beneficiaries under such mortgages as these—mortgages intended to secure negotiable bonds—should be identically the same persons. Such mortgages are in many respects peculiar, and are quite modern in development. The legal title is in the trustee. He alone can sue and be sued in a court of law. He must perform all the duties of the holder of a legal estate, and is bound to protect, defend, and enforce the trust. His negligence or laches affects the beneficiary. He may enforce the trust without the presence of any beneficiary. So a bill to redeem will lie against the trustee alone, or he may redeem a senior lien on his own suit. It seems to me that, under such peculiar trusts, the union of the securities in the same trustee gives operation to the equity arising from consolidation. If this be not so, then the doctrine can never be applicable to such mortgagees, for the beneficiaries are never likely to be the same persons on any two days of the life of the bonds.

6. Another objection to separate redemption, applicable if the court has any discretion, lies in the injurious consequences resulting from the unnecessary severing of a line of railway. The property on which he has a lien is a railroad lying partly in two states. From its construction, in 1852, by two independent companies, it has been managed and operated as a unit, and since 1858 has been owned as one property, and run by one corporation. If it cannot be owned, held, and operated as an entirety, it will manifestly be most disastrous to all persons concerned. As observed in Muller v. Dows, 94 U. S. 449, "a part of a railroad may be of little value when its ownership is severed from the ownership of another part, and the franchise is incapable of division." It has been the settled policy of courts to treat a railroad as an entirety, and to prevent its severance, even though subject to partial mortgages. Muller v. Dows, 94 U. S. 449; Union Trust Co. v. Illinois M. R. Co., 117 U. S. 466, 6 Sup. Ct. 809; Bank v. Shedd, 121 U. S. 87, 7 Sup. Ct. 807. No court has expressed more decided views on this subject than the supreme court of Ohio. Railroad Co. v. Lewton, 20 Ohio St. 401. In Columbia Finance & Trust Co. v. Kentucky Union Ry. Co., 9 C. C. A. 265, 60 Fed. 794, this court held that a railroad was not subject to redemption after foreclosure sale under a statute of Kentucky which provided that all real estate sold under any order or judgment of a court should be appraised, and subject to redemption after the sale if sold for less than two-thirds of its appraised value. This decision was in accord with that of Hammock v. Trust Co., 105 U. S. 77, and both proceeded upon the idea that a railroad was an entire thing, incapable of severance without great destruction in its value, which consisted, in a large degree, in its maintenance as a unit. To allow the separate redemption of the Ohio part of the line is to sever ownership and management, and destroy the unity of the line. It is idle to say that this will not affect the holders of the Indiana mortgage debts. A road thus severed into two independent portions may be of little value to the owners of either. The state of Ohio encouraged the consolidation of connecting lines by very liberal statutory provisions. The same statute the Ohio court has construed as conferring a unit lien on the whole of said road, in favor of Compton. Now, should that statute be construed so as to permit Compton to ignore the unit character of his lien, and thus bring about a severance of the roads which were united by the same act which conferred the lien? Under such a lien, upon property of the description of that involved, the lienor should be held to an entire redemption of all the property on which his lien rests.

7. But it may finally be said that the same act of consolidation which gave rise to the lien asserted by Compton gave to the Indiana divisional bondholders a similar lien on the entire property of the Toledo & Wabash Railway Company which had been transferred by the consolidation to the Toledo, Wabash & Western Railway Company, and that, therefore, they have the right to object to any redemption which does not provide for their payment, or does not admit them to a participation in the benefits of the lien. This has not been answered, except by an insistence that the purchaser

cannot on this appeal represent those bondholders, and is not the equitable assignee of the rights of the Indiana bondholders by virtue of the Ohio decree of foreclosure; and by the further suggestion that, if the Indiana mortgagees were parties at all to the Ohio foreclosure suit, they are estopped to set up any such lien, having neglected to assert it in the foreclosure case. It is a mistake to say that the Indiana mortgagees were not parties to this cause. The amended and supplemental bill filed by Jesup and Knox set out each of the four prior mortgages, and made the trustees parties thereto, "in order that a decree might be made herein settling the rights and equities of the said several classes of bondholders, and ordering a sale of said property and equipments free and clear of all liens of said underlying mortgages." The property covered by the Knox and Jesup mortgage included the entire line in the three states of Ohio, Indiana, and Illinois; and the sale sought was a unit sale of the entire line, and such was the final decree of foreclosure. Like bills were filed in each jurisdiction, and the Ohio decree is identical with the Indiana decree. That bill also made S. Fisher, Edmond Pepper, and J. H. Purdy defendants, "as a committee representing certain holders of first mortgage bonds of the Toledo & Illinois Railway Company and Lake Erie, Wabash & St. Louis Railroad Company," these being the original mortgagor companies. The cross bill of Humphreys and Lindley, trustees under a blanket mortgage subsequent to that of Jesup and Knox, likewise made the Farmers' Loan & Trust Company and James F. Joy, as trustees under both the Ohio and Indiana mortgages, defendants. It is true that neither of the trustees under the Indiana mortgages filed original or cross bills praying foreclosure of the Indiana mortgage by the Ohio court. That is immaterial, for the other complainants and cross complainants did bring them before the court, in their character as trustees under both sets of mortgages, and did obtain a decree foreclosing both the Indiana and Ohio mortgages, as well as every other mortgage on the entire line, extending through three states. That decree of the circuit court of the United States for the Northern district of Ohio was executed, and the entire line of railroad then owned by the Wabash, St. Louis & Pacific Railway Company was sold as a unit, and the commissioner directed to make a conveyance accordingly. It is said that this Ohio decree, selling the road as a unit, is valid only to the extent of the property within the jurisdiction. In other words, the insistence is that the decree of foreclosure, although confirmed by being subsequently entered within every other jurisdiction, was valid in each only so far as the mortgaged property was within the jurisdiction. Having thus divided and distributed the decree, it is said that it must follow that the purchaser's title involved on this appeal is the title which he obtained under the Ohio decree to the Ohio Division, and nothing in this controversy involves its title to the Indiana bonds, as equitable assignee. If this be so, with all of its inferences, it would seem that the court had been engaged in a wholly fictitious controversy. How is the court to determine the extent to which Compton must redeem, if that is his only remedy, unless the parties interested in that question are before the court

in propria persona, or by representation? The Wabash Railway Company was not the purchaser at foreclosure sale, but is the assignee of the purchasers. It was regularly admitted, on its own application, as a defendant, with leave "to take advantage of, and use as its own, all the allegations in the original, amended, or supplemental pleadings of complainants filed in this cause, or in the pleadings of the Farmers' Loan & Trust Company and James F. Joy, relating to or bearing on the claims of said Compton." Thus, it is before the court, not by reason alone of its attitude as assignee of the purchasers, but as a full and formal party, admitted for the express purpose of contesting the relief sought by Compton. It is true that he sought for a sale of the Ohio Division only, and had no prayer for redemption, entire or partial. The court, however, construed its power, under the saving clause in the decree of foreclosure, as reserving jurisdiction over him and his lien, so that it might give him such relief as he should show himself equitably entitled to. His prayer for general relief has also been construed as including redemption, and to this I agree. Being a formal defendant, the Wabash Railway Company may rely upon any defense which goes to Compton's right to a separate redemption. As the owner of the Indiana Division under an imperfect foreclosure, only because Compton's lien is unforeclosed, it is the equitable assignee of the Indiana mortgage debts. Whether it became so under the Ohio decree, or under the Indiana foreclosure only, is absolutely immaterial. If, for any of the reasons which I have before stated, Compton should not be accorded separate redemption of the Ohio mortgages, it, as the owner of the Indiana Division under such defective foreclosure, and of the Indiana bonds, as a consequence, is entitled to resist a partial redemption, both as successor to the successive mortgagor corporations, and equitable assignee of the Indiana bonds. But I utterly dissent from the conclusion of Judge TAFT that the foreclosure sale was in form a unit sale, but in fact a sale by fragments. The bids on separate divisions were never accepted, and the bid reported and confirmed was one for the line as an entirety. By what authority were the fragmentary bids rejected, and the bid for the property as a unit accepted, if the decree of sale was invalid, except so far as the property was within the territorial jurisdiction of the Ohio court? If that theory be sound, there has been no sale at all of any part of the road. On that theory, what has become of the franchise? That was a unit, incapable of being split up and distributed among the fragments. Who has obtained the rolling stock and personal property,—the purchaser of the Indiana Division, or the purchaser of the Ohio Division? Under which decree did it pass? Or if it, too, was transferred in fragments, on what basis was the division made? The doctrine of Muller v. Dows, 94 U. S. 444–449, lends no support to the idea of distributing the decree of sale. The Ohio court had before it the mortgagor corporations, or those who had succeeded to their title and rights of redemption, as well as every trustee under both divisional and blanket mortgages. It could have required all the parties to join in a conveyance of the entire line, and thus confirm its decree for a unit sale; and this would, confessedly, have

passed the entire title, though the suit had been filed in a single jurisdiction. A modern method of accomplishing the same end has grown into favor, and that is to have identical decrees entered in each jurisdiction. The legal effect of this is to confirm the decree ordering the sale of the line within each jurisdiction as one entire line. The result of such confirmation is to make a unit instead of a fragmentary sale, and the title of the purchaser to the whole property is complete under each identical decree. The same end is reached that would have resulted from a decree requiring a deed from all having any interest in any part of the line. This method of selling a railroad lying within two or more states obviates many of the objections to the plan adopted in Muller v. Dows, and makes it possible to make a unit sale where either the mortgagor or some trustee has not personally appeared, and could not be required to make a deed. It is believed to be a plan now generally adopted, the operativeness of which I have never before heard questioned.

It is next said that the Indiana mortgagees have waived the benefit of the Ohio statutory lien on the Ohio Division by failing to set it up in the foreclosure cases. By this must be meant that this additional security was not asserted in the original pleadings, for its assertion now is an assertion of the claim in the foreclosure proceedings, so soon as it became material to claim the benefit of it. The question as to the existence of any such lien had been decided adversely to the lienors by the supreme court of the United States in the case of Railway Co. v. Ham, reported in 114 U. S. 587, 5 Sup. Ct. 1081, and decided in 1885. That was supposed to be a class suit, and to be conclusive upon all who might have asserted such a lien. The foreclosure proceedings were begun in February, 1887. During the pendency of these suits the Ohio supreme court decided the Compton Case, and refused to follow the Ham decision in the construction of the Ohio statute. This decision was made in 1888. Subsequently, Compton was made a defendant, as a person claiming some interest or lien upon the property sought to be sold free from all incumbrance. He had not answered or filed any pleadings when the foreclosure decree was made, and a sale ordered reserving his rights. When he did plead, and asserted this lien, it was found not to be a lien exclusively for his benefit, but one which inured to the equal benefit of all who are unpaid creditors of the Toledo & Wabash Railway Company. Though he sought to avail himself of it for his exclusive benefit, yet this court is agreed in holding that the lien must inure in behalf of all within the benefits of the statute. The contention that the Indiana bondholders are entitled to share in the benefits of this lien and of Compton's redemption is presented, not in a new or subsequent suit, nor in a collateral proceeding, but in the very suit in which the existence of a class lien is declared, and a remedy for its enforcement is to be awarded. When the circuit court refrained from deciding any question involved in Compton's assertion of this lien, and reserved jurisdiction to thereafter adjudge his rights in their relation to all the other parties to the proceeding, it necessarily operated as a reservation of the rights of all others who were defendants, who might have

an interest under the class lien asserted by him. If, when the foreclosure sale had been made, it had appeared that in the pro rata of the unit price assignable to the Indiana Division there was a deficiency in the fund applicable to the Indiana divisional bonds, and an excess in the fund assignable to the Ohio Division, after paying the Ohio bonds, the question would have arisen as to the rights of the unpaid Indiana mortgagees in this excess. No such excess appeared, and no such question was therefore material. But if the Ohio Division is to be separately redeemed by Compton, for the benefit of all entitled to share therein, the question of who are the beneficiaries under the lien does become relevant. No redemption, entire or partial, can be had that does not involve—First, an adjudication that the foreclosure was defective, and the purchaser's title subject to redemption; second, a determination of the rank and rights of the statutory lienors in relation to the rank and rights of mortgagees, both junior and senior, to the lien under which redemption is to be had; and, finally, an ascertainment of the beneficiaries under the redemption. Now, if the purchaser's title is defective, it is entitled to stand as the equitable assignee of the debts secured under the mortgages foreclosed, as well as of the security for those debts. If Compton succeeds in establishing that the Indiana bonds have a double security, the second being a result of the successful assertion of a lien upon the Ohio Division subordinate only to the Ohio divisional mortgages, then the equitable assignee of the Indiana bonds is entitled to the benefit of this second security. It may be accountable to the mortgagees for all it shall realize after reimbursing its own expenditure, but that is a matter which does not concern Compton. In any view of the case, I am clearly of opinion that, if Compton is accorded a separate redemption of the Ohio property, it must inure to the equal benefit of the unpaid second Indiana mortgagees.

8. If I am right in regarding Compton's remedy as redemption, and that in determining what he shall redeem the remedy accorded him by the Ohio court cuts no figure, then I think it must follow that the Indiana decree, disallowing separate redemption, and requiring him to redeem all or none, is a conclusive adjudication of the question, and may be relied upon to sustain the motion to dismiss or affirm. The parties and the subject-matter were the same. That court had jurisdiction over both, through the power reserved by the Indiana decree over Compton and the purchaser. If this court, reviewing the decree of the circuit court for the Northern district of Ohio, has the authority to consider the question involved in the insistence for an entire redemption, then the Indiana circuit court could, under like pleadings, and a like reservation of jurisdiction over Compton's lien, grant him proper equitable relief. This failure to appeal from the decree requiring him to redeem all or none is conclusive as an estoppel.

Finally, I think that whether Compton redeems the entire road covered by his lien, or a part thereof, the purchaser is not subject to an accounting for rents and profits. The liability to an account depends upon whether the purchaser was in possession as first mort-

gagee. "In order," says Mr. Pomeroy, "that these special rights and liabilities may arise from his possession, it must be a possession taken and held by him as mortgagee." Pom. Eq. Jur. § 1215; Jones, Mortg. §§ 1114–1121. The liability for an accounting is only to the mortgagor, or a subsequent mortgagee; and it proceeds upon the theory that the possession was as trustee for the mortgagor, and therefore accountable for rents in equity. Pom. Eq. Jur. § 1218; Jones, Mortg. § 1115. The mortgagor in possession is therefore not accountable while suffered to remain in possession by a mortgagee. Neither would a mortgagee who entered under a purchase of the mortgagor's equity of redemption be accountable to a junior mortgagee. Gray v. Nelson, 77 Iowa, 63, 41 N. W. 566. Nor could a senior mortgagee call a junior mortgagee to an accounting, for he has no right to redeem the junior incumbrancer, and therefore no right to hold him to an accounting. A junior mortgagee in possession would be responsible alone to the mortgagor, or to a lienor junior in rank. Jones, Mortg. § 1116. If, therefore, the purchaser's possession was as purchaser or assignee of the mortgagor, or as a junior incumbrancer, it is not liable to an accounting to Compton. In fact, its possession was under a judicial foreclosure which operated to bar and foreclose mortgages both junior and senior to the lien of Compton, and to forever bar the mortgagor's equity of redemption. That decree was not void, for it expressly foreclosed all those rights, titles, and equities, subject to the lien of Compton, if any he had. Where the purchaser's title and possession depend on a void decree, they have been held to operate as an assignment of the mortgage sought to be foreclosed; and in such case the purchaser's possession is that of a mortgagee by assignment, in possession, and accountable to one entitled to redeem. Id. § 1118. Most of the cases in which a senior mortgagee has been held liable to an accounting have either been because possession was taken before foreclosure, or where the mortgagor had not been barred. If the purchaser in possession has failed to obtain the mortgagor's title, for any reason, he is liable to account to the mortgagor, when he seeks redemption, or to a junior incumbrancer. All that is said in Russell v. Southard, 12 How. 153, concerned an accounting to the mortgagor, and a redemption by him. The purchaser's title is perfect, save in so far as Compton's lien is to be regarded as unforeclosed. Holding such a title, it cannot be said that the foreclosure sale operated only as an assignment of the mortgages foreclosed. Its effect was to confer an absolute legal title, subject to an intermediate lien, the place of which was to be determined with regard to its relation to other lienors. Jones, Mortg. § 1395. The cases of Catterlin v. Armstrong, 79 Ind. 514, and Renard v. Brown, 7 Neb. 449, are upon the very point now considered. The reasoning is sound, and entirely meets my approval. The decree on this point should be affirmed, as well as in all other respects, save only as so modified as to hold that Compton's redemption must inure to the benefit of all other creditors of the same class.

SOUTHERN PAC. R. CO. v. BROWN et al.

SAME v. BRAY et al.

(Circuit Court, S. D. California. May 13, 1895.)

PUBLIC LANDS—RAILROAD LAND GRANTS—RESERVATIONS—MEXICAN GRANTS.

In cases of Mexican grants by specific boundaries, lands claimed by the grantees to be within those boundaries are not public lands, within the operation of a railroad land grant, if, at the date of the latter, the question of the true location of the boundaries of the private grant is pending and undetermined.

Actions by the Southern Pacific Railroad Company against David R. Brown and others, and Nathaniel Bray and others, to determine the title to land.

Joseph D. Redding, for plaintiff.
Byron Waters, for defendants.

ROSS, Circuit Judge. There is but a single question in these cases, which have been submitted together and upon the same briefs, and that is whether the lands which have been patented to the defendants Brown and Bray, respectively, passed by or were excluded from the grant made by congress to the complainant company March 3, 1871 (16 Stat. p. 573). Confessedly, they are parts of odd sections, and are situated within the primary or 20-mile limits of that line of complainant's road, as located, built, and accepted, that the grant of March 3, 1871, was made to aid; and, if they were public lands at the time that grant took effect, they undoubtedly passed to the railroad company, and complainant is entitled to the relief sought. But, on the part of the respective defendants, it is claimed that they were not then public lands, because then included within the claimed limits of a Mexican grant called "Jurupa." The evidence shows that the grant of that rancho was made on September 28, 1839, by the then governor of California, to Juan Bandini, to whom juridical possession was given by the proper officer on December 5th following. The grant was one by specific boundaries, and the claim to it was presented to the board of land commissioners created by act of congress for the settlement of private land claims in California, and by that board confirmed October 17, 1854, and afterwards, on appeal, by the United States district court. That decree of confirmation became final by dismissal of the appeal from it, and a survey of the grant, under the instructions of the United States surveyor general for California, followed in June and July, 1869. It was made by Deputy United States Surveyor Reynolds, and included the lands here in controversy. It was made under and by virtue of the provisions of the act of congress of July 2, 1864 (13 Stat. 356), which directed the surveyor general, in surveying claims of the character mentioned, to follow as closely as practicable the decree of confirmation, where such decree designated the specific boundaries of the grant. Reynolds' survey was approved by the United States surveyor general for California, February 26, 1872, but on May 13, 1876, was rejected by the commissioner of the gen-

eral land office, whose action in that particular was approved by the secretary of the interior February 21, 1877, and a new survey of the grant ordered. That new survey was made in November, 1878, by William Minto, whose survey met with the approval of the department of the interior, and upon it a patent was issued by the government May 23, 1879. As surveyed by Minto and patented, the lands in controversy were excluded from the grant, but the evidence shows that, not only at the time the complainant's grant took effect, these lands were embraced by the survey of Reynolds, which then stood approved by the United States surveyor general for California, but that, for years before, they were claimed by those holding under the Mexican grant title to be within the boundaries of the rancho. Moreover, the evidence shows that another and adjoining tract of land, called El Rincon, was granted by the same governor to Bandini on the 28th day of April, 1839, which grant, having been confirmed by the United States board of land commissioners, was, on appeal to the United States district court, at its December term, 1856, confirmed, as an addition to the Rancho Jurupa, and in the decree of confirmation was described as bounded on the east by that rancho. It is true that, as finally surveyed and patented by the government of the United States, the two ranchos do not join, and that it was determined by the officers of the land department that there was some public land lying between them, part of which public land, after being surveyed, the defendants, Brown and Bray, respectively, were allowed to enter as pre-emptors. But this determination of the officers of the land department respecting the true boundaries of the Mexican grants, while conclusive upon those holding under them, did not become final until long after the grant to the complainant railroad company made by the United States took effect. At that time the lands here in controversy were not only claimed by the holders under the Mexican grant Jurupa to be within the boundaries of that rancho, but they were then included within those boundaries by a survey made under the sanction of the government of the United States, which survey had met the approval of its surveyor general for the state of California. They were not, therefore, "public lands," within the meaning of the grant to the complainant railroad company.

My views in respect to this point were fully expressed in the case of U. S. v. Southern Pac. R. Co., 45 Fed. 604–609, and subsequent reflection has but confirmed me in them. In brief, they are these: While the final result of the proceedings respecting the Jurupa grant was a conclusive determination that, as a matter of fact, none of the lands in controversy ever were within the true lines of that grant, they also show beyond doubt that they were claimed by the grant claimants to be within its boundaries, and that such claim was made and maintained at the time of the congressional grant to the Southern Pacific Railroad Company of March 3, 1871. That fact is determinative of the question as to whether the lands in controversy were embraced by the grant to the complainant. It is not the validity of such claim, but the fact that it was made, that excludes the lands embraced by it from the category of public lands,

within the meaning of the railroad land grants. Doolan v. Carr, 125 U. S. 632, 8 Sup. Ct. 1228.

In the case of U. S. v. McLaughlin, 127 U. S. 428, 8 Sup. Ct. 1177, it was held that as in the case of a floating grant the Mexican government retained the right to locate the quantity granted in such part of the larger tract described as it saw fit, and as the government of the United States succeeded to the same right, the latter government might dispose of any specific tracts within the exterior limits of the grant, provided a sufficient quantity was left therein to satisfy the private grant; and, accordingly, that, in cases of floats, the railroad land grants might attach to lands within such exterior boundaries, provided a sufficient quantity of land was left therein to satisfy the private grant. But while thus modifying what was generally understood to have been the effect of the decision in Newhall v. Sanger, 92 U. S. 761, the court, in U. S. v. McLaughlin, proceeded to declare (127 U. S. 455, 8 Sup. Ct. 1177) that "the reasoning of the court in Newhall v. Sanger is entirely conclusive as to all definite grants which identified the land granted, such as the case before it then appeared to be," but went on to show that it was not fairly applicable to floats. I do not see how there can well be a decision more directly to the point that, in cases of Mexican grants by specific boundaries, lands which are claimed by the grantees to be within those boundaries are excluded from the category of public lands to which the railroad land grants apply, if, at the date of the latter, the question of the true location of the boundaries of the private grant is pending and undetermined. If in such a case the doctrine of Newhall v. Sanger, and the other cases approving it, does not apply, it does not apply to any case; for it does not apply to floats, as was pointed out in U. S. v. McLaughlin, and grants by specific boundaries and by name manifestly stand upon the same footing.

The records of the land department put in evidence in these cases clearly show that the contest over the survey of the Jurupa grant was in relation to the identity of the specific boundaries of the grant. If the contention of the holders under that grant that those boundaries included the lands here in controversy was well founded, undoubtedly the lands so included would not be public lands of the United States. It would seem plain enough, therefore, that, until that question was finally decided, it could not be known whether the lands so claimed were public lands or not. Under the laws of the United States, the duty of deciding that question devolved upon the officers of the land department. Its ultimate determination was vested in the secretary of the interior. Had he decided that the lines as represented by the Reynolds survey were the true boundaries of the grant, such decision would, of course, have been equally conclusive as the one that was made, and the patent following it would have been a conclusive determination that all the lands embraced within those lines were within the boundaries of the Mexican grant Jurupa, and therefore not public lands to which the railroad grant only could attach. It would seem plain, therefore, that, until the contested question of survey was decided, it could not be

known whether the lands involved in the contest were public or private lands; and, until such decision became final, lands so involved were sub judice, and not public lands, within the meaning of the railroad grant act, according to the rulings of the supreme court in the cases referred to, as I understand them.

It results from these views that there must be a decree for the defendants in each case, with costs; and it is so ordered.

ROBINSON et al. v. DEWHURST et al.

(Circuit Court of Appeals, Fourth Circuit. May 28, 1895.)

No. 100.

1. EVIDENCE—DECLARATIONS OF DECEASED PERSONS—ANCIENT BOUNDARIES.
In West Virginia, in an action of ejectment, the declaration of a deceased person, who had owned and lived upon a part of the land in controversy, made to his son while hunting over such land, long before the controversy had arisen, is competent to prove the location of a boundary of the land which was pointed out by the declarant at the time of making the declaration.

2. SAME—PRACTICE—SUFFICIENCY OF OBJECTION.
An objection to deeds offered in evidence, on the ground that there is nothing in such deeds to identify, and show title in the plaintiff to the lands described in the declaration, is too general to sustain an exception to the evidence, where the deeds appear to show a legal title to lands claimed by the plaintiff, and the question of boundary has been passed on by a jury.

3. PRACTICE—QUESTIONS REVIEWABLE ON ERROR.
Where the question of the boundaries of land in controversy in an action of ejectment has been passed upon by the jury, a claim that the verdict and judgment take from the defendant land outside the controversy,—and not described in the declaration, such claim having been presented by affidavit on a motion for a new trial, which has been denied,—does not present a question which can be reviewed on error by an appellate court.

4. PLEADING—FORM OF GENERAL ISSUE—WEST VIRGINIA CODE.
Under the West Virginia Code (chapter 90, § 13, and chapter 134, § 3), a defendant cannot object to a judgment against him in an action of ejectment because he has entered a plea of "not guilty," simply, or because no similiter was filed before the impaneling of the jury, when the parties have gone to trial without objection to such informalities.

5. PRACTICE—QUESTION FIRST RAISED ON APPEAL.
The objection that a certified copy of a patent, which has been received in evidence, bears no representation of a seal, cannot be first raised in an appellate court.

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

This was an action of ejectment by John S. Robinson and others against James B. Dewhurst and others. The plaintiffs recovered judgment in the circuit court. Defendants bring error. Affirmed.

John A. Hutchinson and B. M. Ambler, for plaintiffs in error.

George H. Umstead and Thomas J. Stealey, for defendants in error.

Before GOFF and SIMONTON, Circuit Judges, and SEYMOUR, District Judge.

SEYMOUR, District Judge. This is an action in ejectment, and has been brought to this court by the defendants below, who are here plaintiffs in error.

The first error assigned is the refusal in the circuit court of a motion to exclude the evidence of the witness Morgan, which is set out in exception No. 1, in the following words:

"The plaintiffs, to sustain the issue upon their part, and after the jury was sworn, offered William Morgan as a witness, who testified that he was sixty years of age; that he had lived upon the 6,000-acre survey; that he was well acquainted with both the 21,000-acre and the 6,000-acre surveys of Woods, upon which the plaintiffs offered grants under which they claimed; that his father claimed to own a piece of land inside of the 6,000-acre tract, built a house upon it, and lived upon it for many years; that, when he was a boy about 16 years of age, he was out deer hunting with his father, or was watching deer licks in the woods; that his father is now dead; that when they were out hunting they passed by a white-oak corner, which his father pointed out to him as a corner of both the 21,000-acre and 6,000-acre surveys of Woods; that at the time the corner was down, but the tree was lying there close to the corner, and that one pointer, marked as a witness to the corner, was standing; that the corner was known and claimed by the old people living in the neighborhood as the corner of those surveys; that the plaintiffs claim that the corner described by the witness is at the point D on the verdict map filed in this cause, but the witness stated that he was not familiar with plats, and could not point out the corner himself on the plat; that his father told him that he was a chain carrier many years before, when the line from B to D was run, by a surveyor whose name he does not now recollect, which is known and called the 'Randolph line'; that his father told him that afterwards he was a chain carrier with a man by the name of Wyatt, when a surveyor by the name of Tucker run the same line."

The exception raises a question regarding that exception to the general rule excluding hearsay evidence which permits such evidence to be given, under certain limitations, in cases of ancient boundaries. The exception, as it originated in the English courts, was confined to such boundaries as were matters of public concern, and was part of a larger exception to the rule. On questions respecting the existence of manors; manorial customs; customs of mining in particular districts; a parochial modus; a boundary between counties, parishes, or manors; the limits of a town; a right of common; a prescriptive liability to repair bridges; the jurisdiction of certain courts,—matters in which the public is concerned, as having a community of interest, from residing in one neighborhood, or being entitled to the same privileges, or subject to the same liabilities,—common reputation and the declarations of deceased persons are received, if made, ante litem motam, by persons in a position to be properly cognizant of the facts. But common reputation and declarations of deceased persons are not admissible to prove private boundaries. In many of our states, including Virginia and West Virginia, the exception has been extended. The reasons for this extension, as well as the limitations annexed to it, are very clearly stated by Judge Daniel of the supreme court of North Carolina, in Mendenhall v. Cassells, 3 Dev. & B. 51:

"In a country recently—and, of course, thinly—settled, and where the muniments of boundaries are neither so extensively known nor so permanent as in the country of our ancestors, we have, from necessity, departed somewhat from the English rule as to traditionary evidence. We receive it in regard

to private boundaries, but we require that it should either have something definite, to which it can adhere, or that it should be supported by proof of correspondent enjoyment or acquiescence. A tree line water course may be shown to have been pointed out by persons of a bygone generation as the water course called for in an old deed or grant. A field, house, meadow, or wood may be shown to have been reputed the property of a particular man or family, or to have been claimed, occupied, or enjoyed as such."

The person whose declarations as to private boundaries are offered in evidence must be one who had knowledge of the matter; and the declarations must have been made while pointing out or making the boundary, or at least, must not be a mere recital of a past transaction. Hunnicutt v. Peyton, 102 U. S. 333–364. The declarant must be shown, or from lapse of time, with some certainty, be presumed, to be deceased, and he must not be liable to the bias of interest. But the fact that the declarant was the owner of an adjacent tract, and that the boundary pointed out was, or had been, one of his own boundaries, does not exclude his declaration. The rule, as laid down in Hutchinson's Land Titles, is as follows:

"The rule stands thus in Virginia: 'Evidence is admissible to prove declarations as to the identity of a particular corner, tree, or boundary made by a person who is dead, and had peculiar means of knowing the fact, as, for instance, the surveyor or chain carrier upon the original survey, or the owner of the tract, of an adjoining tract calling for the same boundary, and also tenants, processioners, and others whose interest or duty would lead them to diligent inquiry and accurate information as to the fact, always excluding those declarations obnoxious to the suspicion of bias from interest.' Harriman v. Brown, 8 Leigh, 697." Hutch. Land Titles, p. 283, § 525.

In Corbleys v. Ripley, 22 W. Va. 154, it is held that the declarations of a deceased person as to the courses of land owned by himself when the declarations were made, are admissible as evidence, if at the time he was not interested to misrepresent them, but that, if the circumstances and his situation at the time show that he had an interest to make false representations, the declarations are inadmissible. In the case at bar, Morgan, the declarant, pointed out to the witness, his son, the corner in controversy while hunting with him on the land. This was more than 40 years before the trial. The marked corner was in sight. This was evidently within the requirement that the declaration should have something definite to which it could adhere. It was not a narrative of a past transaction. The declarant was dead at the time of the trial. He had, as his son testifies, lived upon the 6,000-acre survey, and had claimed to own a piece of land inside of its boundaries, and built a house thereon, so that it appears that he must be presumed to have had knowledge concerning the matter. There is nothing that indicates that at the time of the declaration there was any controversy about the boundaries of the 2,000-acre or the 6,000-acre tracts. Although declarant lived upon the 6,000-acre tract, it does not appear that he had claimed ownership up to its boundaries. Had that, however, been the fact, and had the white-oak corner now in dispute been a corner of his own land, his declaration would not for that reason merely, be incompetent. Declarant was not seeking to point out his own corner. His declaration is not offered to prove the boundary of any one claiming under him. There is nothing

to indicate any reason why he should make a false statement with regard to it, or that it was in any way to his interest to fix upon that particular point as a corner of the two tracts. Such a declaration is not incompetent, though the corner pointed out may happen to be coincident with one of declarant's own boundaries. Bethea v. Byrd, 95 N. C. 309. It is not necessary to consider whether or not the declaration of the elder Morgan that he had been a chain carrier when the line B D was run is competent to prove that fact. It seems to be merely the recital of a past fact, and therefore not evidence of the fact said to have been asserted. But declarant's peculiar means of knowledge regarding the disputed boundaries, growing out of his residence, make his declaration competent, irrespectively of whether or not he assisted in running the line. That fact is therefore immaterial. If it were, the exception, which is to the refusal of the judge below to strike out Morgan's evidence as a whole, must be overruled, because the material part of the evidence which we have discussed was competent. The same remark applies to the evidence of Morgan with respect to the opinions of old people living in the neighborhood. The declaration of the elder Morgan, given by his son, is, in our opinion, clearly competent; and, that being the case, we hold that the circuit court did not err in refusing to exclude the evidence of the witness.

The second and third exceptions relate to the refusal of a new trial,—a matter clearly not reviewable. Van Stone v. Manuf'g Co., 142 U. S. 134, 12 Sup. Ct. 181; Railway Co. v. Heck, 102 U. S. 120.

The fourth assignment of error is the court's refusal to exclude from the jury "all and each of the several deeds and muniments of title that had been offered by the plaintiffs, and to which objection had been made, on the ground that there was nothing in the title papers and deeds so produced by the plaintiffs to identify, and to show title in the plaintiffs to the lands described in the declaration." The objection is too general to assist the court in discovering what is the alleged want of correspondence between the descriptions in the deeds and the declaration. The title papers appear to show a legal title granted by the state to lands claimed by plaintiffs, and mesne conveyances to plaintiffs. Whether the boundaries correspond with those set forth in the declaration was matter for evidence, and has been passed on by the jury.

The defendant also assigns as error that the verdict and judgment take from the defendant over 100 acres of land lying entirely outside of the controversy, and not described in the declaration, "as is shown by the affidavit of John L. Robinson." The affidavit in question was offered by defendants in support of their motion for a new trial, as appears in exception 3, and the new trial was refused. What were the lands in controversy, and described in the complaint, are questions depending upon evidence, and have been passed upon by the jury. As far as this court is concerned, the matter is concluded.

The plaintiff in error raises in the appellate court two points not taken below:

(1) That no issue was joined. The record shows that plaintiff in error, who was defendant below, entered a plea of not guilty at the December rules, 1891. The statute provides that, in ejectment, "the defendant shall plead the general issue only, which shall be that the defendant is not guilty of unlawfully withholding the premises claimed by the plaintiff in the declaration." Code W. Va. c. 90, § 13. The words "not guilty" constituted a plea, and tendered an issue. If wanting in formality, no objection was made by plaintiff, and defendant chose to go to trial on it. He cannot be heard to object here to the insufficiency of his plea. In the case of Hill v. Ruffner, 21 W. Va. 152, cited by counsel, neither a formal nor informal plea was entered. No similiter was filed before the impaneling of the jury; nor, as we are informed, is this customary. If, however, it were otherwise material, the want of form is cured by statute:

"No judgment or decree shall be stayed or reversed for the appearance of either party, being under the age of twenty-one years, by attorney, if the verdict (when there is one) or judgment, or decree be for him and not to his prejudice, or for want of warrant of attorney; or for want of a similiter or any misjoining of issue; or for any informality in the entry of the judgment or decree by the clerk; or for the omission of the name of any juror; or because it may not appear that the verdict was rendered by the number of jurors required by law; or for any defect, imperfection or omission in the pleadings which could not be regarded on demurrer; or for any other defect, imperfection or omission which might have been taken advantage of on a demurrer or answer, but was not so taken advantage of." Section 3, c. 134, p. 846, Code W. Va., 1891.

(2) That the grant from the commonwealth to Archibald Wood, offered in evidence, is void because it does not bear the seal of the state. The original grant was not produced, but, without objection to the manner of proof, a certified copy was introduced from the land office. This mode of proof seems to be authorized by the Code of West Virginia. If there be any objection to it, it should have been taken at the time. The objection now urged by counsel seems to be that no scroll representing a seal is annexed in the copy to the name of James Wood, the then governor, whose signature is appended to the patent. If the point had been taken in time, it might have been met by showing that the seal is never attached to the register, but is always in wax, with a fastening of ribbon passed through the seal before the impress is made. The point that no seal is affixed to the copy of the register is immaterial, and the certified copy states that James Wood, governor of the commonwealth of Virginia, not only set his hand to the patent, but caused the lesser seal of the commonwealth to be affixed to it on the 25th day of May, 1797, the date of the issuance of the grant. It is to be presumed that this statement is true, and that the grant bears the seal. This question is so evidently one which cannot be originated in an appellate court as to require no discussion. We can find no error, and the judgment of the circuit court is affirmed, with costs.

BOARD OF COM'RS OF CUSTER COUNTY v. ANDERSON.

(Circuit Court of Appeals, Ninth Circuit. April 29, 1895.)

No. 162.

1. STATUTES—INTERPRETATION—TAXATION.
A construction will not be put upon a statute concerning the imposition and collection of taxes which would enable taxpayers, for whom no purpose of exemption is expressed, to escape taxation, if the act is reasonably susceptible of any other construction, whereby a revenue is secured.

2. SAME—MONTANA STATUTES.
The act of Montana of September 14, 1887, relating to taxation, which required the assessor to assess all the property, subject to taxation, in his county, provided, in section 14, that the assessor should demand of each taxpayer a list of his taxable property, and, if such list were not furnished, that he should list such person's property himself, according to his best information, and add 20 per cent. to such valuation; and, in section 18, that on the assessment roll he should enter, opposite the name of each taxpayer, "By the assessor," when listed by himself. In 1889 an act was passed (Act March 14, 1889; St. Mont. 1889, p. 219), amending certain sections of the act of 1887, which omitted from section 14 the provisions relative to listing by the assessor and adding a penalty, but left the other provisions, above recited, unchanged. *Held*, that it was not the intention of the legislature to leave the essential function of assessment optional with the taxpayer, and that the assessor had still the right, under the amended act, to assess the property of taxpayers who failed to file lists of their property.

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

This was an action by the board of county commissioners of Custer county, Mont., against W. J. Anderson, to recover the amount of taxes assessed against him. Defendant demurred to the complaint and the circuit court sustained the demurrer. Plaintiff brings error. Reversed.

J. W. Strevell, C. H. Loud, and T. J. Porter, for plaintiff in error.
E. C. Day, for defendant in error.

Before McKENNA and GILBERT, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge. The decision in this case depends upon the proper construction to be given to the act "to amend an act entitled an act to provide for the levy of taxes and assessment of property, approved September 14th, 1887," approved March 14, 1889 (St. Mont. 1889, p. 219). The act approved September 14, 1887, after providing that the assessor should demand of each taxpayer in his county a list of his taxable property, contained these words:

"And if the said list be not rendered, under oath at the time such demand be made, the assessor shall proceed to list and assess the property of any such taxpayer, according to his best knowledge and information, and shall add twenty per cent. to the value thereof."

In section 14 of the act of 1889, the words quoted are omitted, and there is no direct provision made for the assessment of personal property belonging to individuals, where the taxpayer refuses to

give a list of his property to the assessor upon demand being made therefor. The complaint, among other things, avers that the assessor—

"Duly demanded from defendant a sworn list of his property subject to taxation; * * * that defendant, notwithstanding such demand, wholly refused and neglected to render to said assessor any list of his property * * * at any time or at all; that subsequent to such demand, and by reason of such refusal, the said assessor did make diligent inquiry concerning the property of the said defendant subject to taxation, * * * and did after such inquiry, and by reason of the refusal of the defendant to furnish any property list, himself, as such assessor * * *, list the property of the said defendant * * * for taxation and subject to taxation * * * according to his best judgment and information."

The circuit court sustained a demurrer to the complaint upon the ground that it fails to show that any legal assessment had been made. The logical result of the argument made by defendant, in favor of this ruling, is that it was the intention of the legislature of 1889, by omitting the clause quoted from the act of 1887, to leave the question of the payment of taxes in the state of Montana entirely within the discretion of the individual taxpayers; that, if they wished to avoid the payment of any tax, all they had to do was to refuse to deliver any list of their property to the assessor, and the assessor was then without warrant of law to make any assessment. By a strict and literal interpretation of the provisions of section 14, without any reference to other sections, the act may be subject to this interpretation. Is the act in its entirety reasonably subject to any other construction? It is the duty of the legislature to provide the mode of assessing property for the purposes of taxation. An assessment is usually the most important step to be provided for. Unless an assessment is made, as provided by law, no foundation is laid for the collection of the tax. The officers charged by the law, and clothed with the duty of assessing, levying, and collecting the taxes, in the absence of constitutional power in this respect, derive their authority from the statute.

Ordinarily, the statutory provisions concerning the assessment of property, the levying and collecting of taxes thereon, are so positive and direct as to make it unnecessary for the courts in determining the intent of the legislature—which is always the guiding star and controlling principle of all statutory interpretation—to look beyond the words employed to express it. The general rule is that the legislature must be understood to intend what is plainly expressed; that nothing then remains but to give this intent effect. It is only in cases where the words used are of doubtful import, ambiguous, or susceptible of different constructions that the courts are authorized to look beyond the words of the statute in order to ascertain what was within the contemplation of the legislature at the time the statute was enacted. In such cases courts will seek for the meaning by looking at the occasion and necessity of the law, the object and purpose had in view, the scope and extent of the entire act, etc.

The whole purpose, object, and intent of the act in question is to provide a system of revenue for the state and county govern-

ments. It is not reasonable to believe that any legislature invested with the power, and charged with the duty, to impose taxes upon the citizens of the state or territory, would naturally intend to insert provisions in the statute which would make it totally inoperative, or to leave it subject to the will and voluntary action of each taxpayer whether it should be enforced or not. Such a construction appeals with no favor to the judicial mind, and should not be followed, unless the terms of the statute are such as to imperatively demand it. Before such a condition of affairs should be sanctioned by the courts, the intent of the legislature to authorize it must be clear beyond a reasonable doubt. Nothing, in this regard, can be taken against the state by presumption or inference. There could be no safety to the public interests in the adoption of any other rule. The power of taxation is, as has been often said, an attribute of sovereignty, and is absolutely essential to the existence of every government,—national, state, and municipal. The entire community is directly interested in retaining and preserving it undiminished and unrestrained, and have the right to insist that its abandonment ought not to be presumed in any case wherein the deliberate purpose of the state or legislature to abandon it does not affirmatively appear. In the Delaware Railroad Tax Case, 18 Wall. 206, 226, Mr. Justice Field, speaking for the court, said:

"If the point were not already adjudged, it would admit of grave consideration whether the legislature of a state can surrender this power, * * * any more than it can surrender its police power or its right of eminent domain. But, the point being adjudged, the surrender, when claimed, must be shown by clear, unambiguous language, which will admit of no reasonable construction consistent with the reservation of the power. If a doubt arise as to the intent of the legislature, that doubt must be solved in favor of the state."

Revenue laws are not to be construed from the standpoint of the taxpayer alone, nor of the government alone. Both must be considered. But from either standpoint the statute should never be construed in such a manner as to defeat the right of the government "by any subtle device or ingenious sophism whatsoever." Cooley, Tax'n, 272–274.

It is always a consistent and safe rule, under the circumstances and conditions of the given case, to put such a construction upon the statute as will best answer and subserve the intention which the legislature had in view at the time of its enactment; and whenever this intention can be discovered, by any of the ordinary and recognized rules of interpretation, it should be followed by the courts with reason and discretion, even if such construction may, at times, seem contrary to its letter, and in opposition to the very words of an act. Sedg. St. Const. 195; Potter, Dwar. St. 128, 140; 2 Blackw. Tax Titles, §§ 1220, 1222; Gibson v. Mason, 5 Nev. 285. In harmony with this rule, the courts have held that a construction will not be put upon a statute concerning the imposition and collection of taxes which would enable the taxpayers, for whom no purpose of exemption from liability is expressed, to escape taxation, if the act is reasonably susceptible of any other construction, whereby a revenue is secured. In City of Philadelphia v. Ridge Ave. Passenger Ry.

Co., 102 Pa. St. 190, 196, where there was an ambiguity in the statute, and the court resorted to the reason and spirit of the law, its object and purpose, in order to ascertain the intention of the legislature, the court said:

"The intent of the legislature was without doubt to establish a source of revenue to the city, payable out of the annual dividends of the company, and for that revenue the city was not to be dependent upon the mere generosity of the company. It is an old rule of construction that if one interpretation would lead to absurdity, the other not, we must adopt the latter; so that interpretation which leads to the more complete effect, which the legislature had in view, is preferable to another. When language is elliptical, the necessary words supplied must be such, and so construed, as to have some force, ut res magis valeat. Sedg. St. Const. 196; Nichols v. Halliday, 27 Wis. 406."

In construing both the original and amendatory acts in question, it does not necessarily follow that the legislature, by leaving out the clause authorizing the assessor to list the property, if the taxpayer failed to furnish a list, intended to deprive the assessor of that right or duty. There is not in any of the sections of the act, as amended, any denial of the right of the assessor to perform this duty. The assessor is required by the act to assess all the property, subject to taxation, within his county. It is a rule of construction that when anything is required to be done the usual means may be adopted for performing it. The entire act, as amended, must be considered in order to arrive at the true intent of the legislature. The original act of 1887 contains 60 sections, only 9 of which were changed by the amendatory act of 1889. There were several imperfections, or crudities, in the old act, and an inspection of both acts clearly indicates that at least one of the objects of the legislature in making the amendments was to perfect the statute in this respect. Section 14, which is the real bone of contention, was materially revised. In the original section it was left optional with the taxpayer whether to make a list of his property or to allow the assessor to do so. The amended section is so worded as to make it mandatory upon the taxpayer to make a list of his property, and, non constat, the legislature may have thought that by such change it was unnecessary to leave in the clause omitted. This view is strengthened by reference to other sections of the act which were not amended. Section 18 provides when, and in what manner, the assessor shall make an assessment roll. It requires him to write the words "By the assessor," when the list was made by himself; and the words "Absent," or "Sick," or "Refused to list," or "Refused to swear," or such other words "as will express the cause why the person refused to make the list did not make it, and neglect shall be taken as a refusal." The language of this section is broad enough to make it apply to all cases where the taxpayer has failed to make out a list, and certainly implies that it is the duty of the assessor to make the list if the taxpayer fails or refuses to do so.

It cannot consistently be said that this section only has reference to the provisions of section 6 of the amended act, which relates solely to the assessment of the property of corporations, and provides "that in case the secretary, clerk or other proper officer shall fail, refuse or neglect to furnish the assessor such list under oath, it shall be the

duty of the assessor to list such property and value the same according to his best judgment and information and add twenty per cent. thereto on account of such failure, refusal or neglect." It is reasonable to presume that if it had been the intention of the legislature, in making the amendments, to leave it optional with the private individuals to avoid the payment of any tax by simply refusing to make a list, section 18 would also have been amended so as to make it apply only to cases provided for in section 6, viz. to the assessment of the property of corporations. The reading of the entire act as amended implies, in the absence of any direct provision to the contrary, that it is the duty of the assessor to make the list in the event that the taxpayer fails to do so from any cause. All the property within the county, not exempted by the statute, "is subject to taxation," and "shall be listed and assessed." Sections 3, 4. It is unnecessary to cite other sections. It is well settled that "what is implied in a statute is as much a part of it as what is expressed." U. S. v. Hodson, 10 Wall. 395, 406; Potter, Dwar. St. 145, rule 14. No authorities have been cited which go to the extent claimed by defendant, that the assessor could not make a valid assessment because no property was listed by the taxpayer, and after a somewhat diligent search none have been found. In Kentucky the right of the assessor to list property for taxation is denied by the courts; but the reason for such denial is based upon the ground that the statute of that state makes it the duty of other officers to act in making the assessment in cases where the taxpayer fails to furnish the list. Louisville & N. R. Co. v. Com., 85 Ky. 199, 3 S. W. 139; Clark v. Belknap (Ky.) 13 S. W. 212. But, under the statute of Montana, the right to assess all property situate within his county, subject to taxation, is vested in the assessor. As before stated, it is made the positive duty of the taxpayer to make out the list, and, as was said by the supreme court of California in City and County of San Francisco v. Flood, 64 Cal. 509, 2 Pac. 264: "If he fails to do so, and any loss should result to him in consequence of such failure, his complaints on such score should meet with no favor in a court of justice." It is a self-evident proposition that the defendant cannot take any advantage of his direct violation of the provisions of the statute, and by his own wrong avoid the payment of taxes justly due under the law. It is also evident, from a careful reading of the entire act, that the legislature did not intend that the performance of the taxpayer's duty to the government should be left merely to his willingness or caprice. We are of opinion that the complaint is sufficient to show that a legal assessment of the defendant's property has been made. The demurrer thereto, in so far as it affects that question, should have been overruled. The judgment of the circuit court is reversed, and the cause remanded for further proceedings, in accordance with the views expressed in this opinion.

BRODERICK v. BROWN.

(Circuit Court, S. D. California. May 13, 1895.)

No. 644.

UNITED STATES MARSHALS—MANNER OF EXECUTING WRITS—CONTROL BY COURT.

Where the marshal levies an attachment on a tin box and contents, but is unable to return an inventory of its contents, because defendant refuses to unlock the box, the marshal will not be ordered to open the box and return an inventory of its contents, as the responsibility of lawfully executing the attachment rests on him, and he must be permitted to determine for himself the manner of discharging his duty.

Attachment by William J. Broderick, receiver of the First National Bank of San Bernardino, against Joseph Brown. Plaintiff moved for an order to compel the marshal to return an inventory of a box on which he had levied the writ.

Curtis, Oster & Curtis, for complainant.
Rolfe & Rolfe, for defendant.

WELLBORN, District Judge. In this case, the marshal, in his return upon a writ of attachment issued herein, states, among other things, that the attachment was levied on one tin box and contents, and that he requested the defendant to unlock the same, which defendant refused to do, claiming the property to be exempt from execution, and that, therefore, he (the marshal) is unable to return an inventory of the contents of said box. Plaintiff now moves ex parte for an order directing the marshal to open the box, and return an inventory of its contents. I have not been able to find any authority or precedent for such an order. The responsibility of lawfully executing an attachment, including its return, unquestionably rests upon the marshal, and it seems logical and right that he should be permitted to determine for himself the manner of discharging a duty, for the neglect or improper performance of which he would be answerable to any party injured thereby.

Sections 787 and 788 of the Revised Statutes prescribe the duties and powers of marshals, and the latter section enacts that marshals shall have in each state the same powers in executing the laws of the United States as the sheriffs and their deputies in such state have by law in executing the laws thereof. It has been decided by the supreme court of California that a court has no power to order a sheriff to enforce an execution by levying on a particular piece of property. Fraser v. Thrift, 50 Cal. 476. In that case the court said:

"On motion of the plaintiff in execution, the court ordered the sheriff holding the writ to levy it upon a particular tract of land, claimed by the defendant in the writ to be exempt from forced sale on the ground that it was his homestead. The sheriff having refused to levy the execution on the land for this reason, the court, finding that the land was not exempt as a homestead, made an order directing the sheriff to proceed with the levy, from which order the sheriff appeals. Counsel have failed to produce any precedent for such an order, and it is easy to see that, if such practice prevailed, it might in many cases result in serious perplexities. If so great an innovation in practice is to be introduced, it should be done by the legislature, and not by the courts."

The ground of said decision, although not expressly stated therein, must be the principle I have already enunciated,—that, where responsibility grows out of an official duty, the manner and measure of performance must be left to the determination of the officer upon whom the responsibility rests. Therefore, while the court, under suitable circumstances, may allow the amendment of a return, it cannot in any case direct what the return shall be. Motion denied.

UNITED STATES v. HARRIS et al.

(District Court, S. D. California. Nov. 30, 1894.)

No. 628.

USING THE MAILS TO DEFRAUD—INDICTMENT.

An indictment under Rev. St. § 5480, for using the mails as a means to defraud, must directly allege that the fraudulent scheme itself included the intended use of the United States mail in its execution.

Emil Harris and C. D. Platt were indicted for using the mails as a means to defraud. The court directed a verdict of not guilty, for defects in the indictment.

George J. Denis, U. S. Atty.
Henry T. Gage and Stephen M. White, for defendant Harris.
W. T. Williams and W. A. Cheney, for defendant Platt.

ROSS, District Judge. One of the constituent elements of the offense denounced by the statute upon which the indictment in this case is based is the intended use of the United States mail in aid or furtherance of the fraudulent scheme. It is therefore essential that the indictment allege directly, and not inferentially or by way of recital, that the scheme included the intended use of the mail. U. S. v. Hess, 124 U. S. 483, 8 Sup. Ct. 571; Brand v. U. S., 4 Fed. 394; U. S. v. Flemming, 18 Fed. 908; U. S. v. Wootten, 29 Fed. 703; U. S. v. Finney, 45 Fed. 42; U. S. v. Smith, 45 Fed. 562; Weeber v. U. S., 62 Fed. 740. From a careful examination of the indictment, I am unable to find any direct allegation that the fraudulent scheme that the defendants are therein alleged to have devised included the use of the post office of the United States in its aid or furtherance. It is alleged in more than one place in the indictment that, in pursuance of the alleged scheme to defraud, the defendants placed and caused to be placed in the United States post office at Los Angeles the letter set out in the indictment, and also that the letter so deposited was to further and effect the object of the conspiracy, which is alleged to be "to misuse the post-office establishment of the United States by devising a scheme to defraud." In all of this there is no allegation that the fraudulent scheme itself included the intended use of the United States mail, which element, as has been said, is an essential constituent of the statutory offense. For this reason the court is obliged to instruct the jury to render a verdict of not guilty.

UNITED STATES v. LONG.

(District Court, S. D. California. May 20, 1895.)

No. 721.

USING MAILS TO DEFRAUD—INDICTMENT.

An indictment under Rev. St. § 5480, alleging that defendant devised a fraudulent scheme "to be effected by opening correspondence * * * by means of the post office establishment," though following the language of the statute, is defective, as failing to directly allege that defendant, as a part of his fraudulent scheme, designed its accomplishment through the instrumentality of the post office.

Benedict Long was indicted under Rev. St. § 5480, for using the United States postal establishment as a means to defraud. Defendant demurred to the indictment.

George J. Denis, U. S. Atty.
J. V. Hannon, for defendant.

WELLBORN, District Judge. There are three counts in the indictment, but, so far as concerns the demurrer, they are alike, and may be considered together. The objections urged to the indictment are that the averment as to the devising of the fraudulent scheme alleged against the defendant is by way of recital, not direct statement, and that there is no charge whatever, unless it be by implication or inference, that the defendant intended, as a part of such scheme, to effect the same by opening correspondence through the postal establishment of the United States. The averment in question is as follows:

"That Benedict Long, late of the Southern district of California, heretofore, to wit, on the 1st day of January, in the year of our Lord one thousand eight hundred and ninety-five, having devised a scheme to defraud one J. W. Strickler, to be effected by opening correspondence and communication with said Strickler by means of the post-office establishment of the United States, * * * in the furtherance and execution of said scheme, did knowingly, willfully, unlawfully, and feloniously place and cause to be placed in the post office of the United States at Vista, San Diego county, California, a certain letter," etc.

Section 5480 of the Revised Statutes provides as follows:

"If any person, having devised any scheme or artifice to defraud to be effected by either opening or intending to open correspondence or communication with any person * * * by means of the post office establishment of the United States, shall, in and for executing such scheme or artifice, place or cause to be placed any letter * * * in any post office of the United States to be sent or delivered by the said post office establishment, or shall take or receive any such therefrom, such person so misusing the post office establishment shall, upon conviction, be punishable," etc.

Under this section the courts have repeatedly held that, to constitute the offense therein defined, three things are necessary: First, a scheme to defraud; second, as an essential part of the scheme, an intention to effect the same by opening correspondence through the mail; third, the depositing of a letter in the mail or taking one therefrom, in execution of such scheme. Stokes v. U. S., 15 Sup. Ct. 617; U. S. v. Smith, 45 Fed. 561; U. S. v. Wootten, 29 Fed. 702.

In the case of U. S. v. Harris, 15 Sup. Ct. 347, tried in this court last November, Judge Ross held that one of the elements of said offense was the intended use of the mail in furtherance or execution of the fraudulent scheme; and, because the indictment did not allege directly that the scheme included such intended use of the mail, he instructed the jury to return a verdict of acquittal. In the case of Weeber v. U. S., 62 Fed. 740, the precise point here involved was not discussed, or even referred to in terms, but the objections there urged seem to have been that, under the facts of that case, there was no likelihood that the use of the mail would effect the fraudulent purpose charged, and that such use was only one step in a series of acts intended to accomplish said purpose, and that, therefore, the indictment was bad. Against these objections the court held the indictment good. I do not, however, consider this last-named case as an authority in opposition to the rulings in the other cases above cited. Indeed, Judge Ross cites the Weeber Case, among other authorities, in support of his ruling in the Harris Case.

It is unnecessary, however, to further review this line of authorities, since the supreme court of the United States, in the late case of Stokes v. U. S., above cited, has authoritatively declared that:

"Three matters of fact must be charged in the indictment and established by the evidence: (1) That the persons charged must have devised a scheme or artifice to defraud; (2) that they must have intended to effect this scheme, by opening or intending to open correspondence with some other person through the post-office establishment, or by inciting such other person to open communication with them; (3) and that, in carrying out such scheme, such person must have either deposited a letter or packet in the post office, or taken or received one therefrom."

The requirement is elementary that an indictment should allege with directness all the constituents of the crime it purports to charge. On this subject the supreme court of the United States has spoken in emphatic and unequivocal language, as shown by the following quotation:

"The general, and, with few exceptions, of which the present case is not one, the universal, rule on this subject, is that all the material facts and circumstances embraced in the definition of the offense must be stated, or the indictment will be defective. No essential element of the crime can be omitted without destroying the whole pleading. The omission cannot be supplied by intendment or implication, and the charge must be made directly, and not inferentially or by way of recital." U. S. v. Hess, 124 U. S. 486, 8 Sup. Ct. 571.

The averment here that the defendant, "having devised a scheme to defraud one J. W. Strickler, to be effected by opening correspondence and communication with said Strickler by means of the post-office establishment of the United States," seems to be more in the nature of a recital than a positive allegation, and therefore, according to the authorities, is at least open to criticism. Assuming, however, without deciding, that this defect is one of form, and not fatal, the more serious objection remains that the indictment fails to allege that it was defendant's intention, as a part of his

fraudulent scheme, to open correspondence through the mail. Nor is it any answer to this objection to say that the language of the indictment is the same as that employed in the act of congress creating the offense, for the obvious reason that the rules of construction applicable to an indictment are different from those which control the interpretation of a statute. To illustrate: Section 5480, already quoted, provides "that if any person, having devised * * * any scheme or artifice to defraud, to be effected by * * * opening * * * correspondence * * * with any other person * * * by means of the post office establishment of the United States," etc. This provision does not in terms require that the person devising the fraudulent scheme must intend, as a part of the same, that it shall be effected by opening correspondence through the mail, but the implication is strongly that way, and the courts have accordingly and uniformly held such intention to be a material element of the offense; and the decisions to this effect do no violence to any requirement of statutory construction, but are in harmony with the well-recognized principle that, where a statute creating a penalty is susceptible of two meanings, that meaning which operates in favor of life or liberty is to be adopted. With reference, however, to indictments, the rule of construction, although approved by the same favorable disposition to life and liberty, is inexorable that the essential constituents of the offense sought to be charged must be expressly and positively averred. In the language of the supreme court, quoted above, "no essential element of the crime can be omitted without destroying the whole pleading. The omission cannot be supplied by intendment or implication, and the charge must be made directly, and not inferentially or by way of recital." Applying this rule to the present case, and remembering that one of the constituents of the crime sought to be charged is that the defendant intended, as a part of his fraudulent scheme, to open correspondence through the mail, the insufficiency of the indictment becomes clearly manifest. The averment, assuming it positive and direct, that the fraudulent scheme was "to be effected by opening correspondence, * * * by means of the post office establishment," is merely a designation of the instrumentality by which the scheme was, in point of fact, to be accomplished, and, unaided by implication or inference, certainly falls far short of charging that the defendant, as a part of his fraudulent scheme, designed its accomplishment through the instrumentality named. For fuller illustration and support of this point, I refer again and specially to the case of U. S. v. Smith, supra.

In the case of Stokes v. U. S., supra, the indictment, which was held to be sufficient, alleged as follows:

"That the post-office establishment of the United States was to be used for the purpose of executing such scheme and artifice to defraud, as aforesaid, pursuant to said conspiracy, by opening correspondence with said persons, firms, and companies, unknown to the grand jurors, and by inciting said persons, firms, and companies and others, as aforesaid, to open correspondence with the said defendants by means of the post-office establishment of the United States."

This, it will be observed, is an averment, not only that the post-office establishment was to be used in executing the fraudulent scheme, but, furthermore, that such use was a part of the scheme, or, in the phraseology of the indictment, was "pursuant to said conspiracy." The allegation, however, of the indictment in the present case, is simply that the fraudulent scheme was to be effected by the use of the postal establishment, without any averment that such use was designed as a part of the scheme.

My conclusion is that the indictment does not charge expressly and with directness, if at all, that the fraudulent scheme comprehended an intention that the same should be effected by opening correspondence through the postal establishment of the United States, and, for that reason, is defective. Demurrer sustained.

SAN FRANCISCO BRIDGE CO. v. KEATING.

(Circuit Court of Appeals, Ninth Circuit. April 29, 1895.)

No. 165.

1. PATENTS — ACTION AT LAW FOR INFRINGEMENT — PROVINCE OF COURT AND JURY.
   In an action at law for infringement, where the question whether the patent sued on discloses any invention is a doubtful one, it is proper for the court to submit the same to the jury under proper instructions as to what constitutes invention.
2. SAME—EXCAVATORS.
   The Keating patent, No. 180,718, for an improvement in excavators, *held* valid in respect to the fourth claim. (Sustaining the verdict of the jury upon the question of invention.)

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

This was an action at law by Dennis Keating against the San Franciso Bridge Company for infringement of a patent relating to excavators. In the circuit court there was a verdict for plaintiff upon the first and fourth claims of the patent, and judgment was entered accordingly. Defendant brings error.

R. Percy Wright, for plaintiff in error.

J. J. Scrivner, for defendant in error.

Before GILBERT, Circuit Judge, and HANFORD and HAWLEY, District Judges.

HAWLEY, District Judge. This is an action to recover damages for an infringement of letters patent No. 180,718, issued to Dennis Keating, the defendant in error, August 8, 1876, for an "improvement in excavators." There are eleven claims in the patent, only four of which—1, 4, 7, and 9—were claimed at the trial to have been infringed by the plaintiff in error. The court withdrew from the jury any consideration of the seventh and ninth claims, and, under proper instructions, submitted to the jury the question as to whether there was any invention in the first and fourth claims. The jury found the fourth claim to be valid; that it had been infringed; and

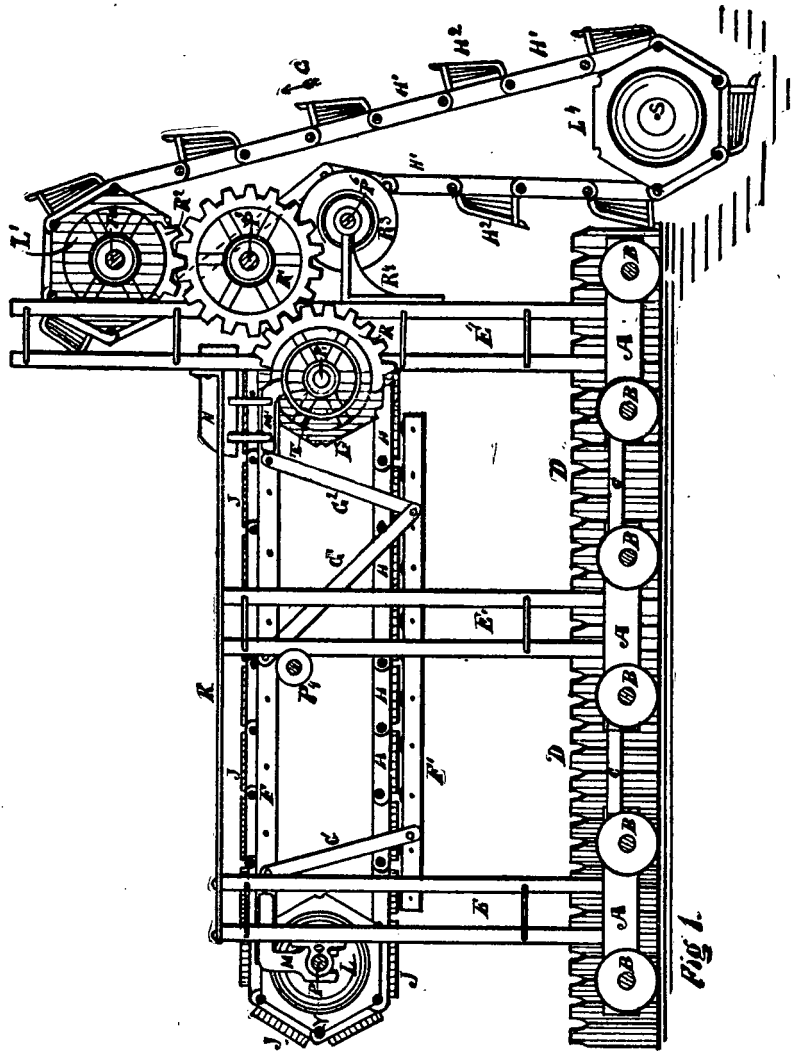


Fig 1.

assessed the damages at $250. It is claimed by the plaintiff in error that the fourth claim, upon which the verdict and judgment are based, is void, because it does not disclose any patentable invention. This claim reads as follows:

"(4) In combination with the tramway, F, and support, M', the earth guides, N, N, arranged as shown, for the purposes specified."

All that is stated in the specifications with reference to the elements embraced in this claim is as follows:

"The tramway, F, extends from shaft, P, to shaft, P', and is supported on said shafts by forked bearings, M, M', in the manner shown. * * * When

any considerable length is required of the endless chain and buckets, H, J, more buckets and sections of chain are added, and extra sections of tramways and extra standards, E', introduced between the wheels, L, and L^3, and extra supports are added to the tramway by the addition of shafts, P^4, which are attached to such extra standards, E', of Fig. 1. The lower tramway, F', is supported by means of the stay braces, G, G', G^2, as shown, and the lower tramway, F', is provided with rollers to support and allow the buckets, J, to pass freely over them. To the front end of the upper tramway is attached two side boards, N, with suitable standards. These side boards are designed to catch the earth as it falls from the buckets, H^2, and guide the earth into the buckets, J."

The position of the tramway, F, of the supports, M, M', and the earth guides, N, are shown in the drawings annexed to the patent. The contention of the plaintiff in error is that the fourth claim is for a mere aggregation, and not for a patentable combination; that there is nothing in the claim beyond a mere grouping together of separate portions of a machine, which do not co-operate to produce any new result, and the combination of which does not change or affect in any degree the action of any of the portions separately; that it was the duty of the court to pass upon the validity of the claim, and determine whether it described a patentable invention as matter of law; and that the court erred in refusing to instruct the jury, as requested by the plaintiff in error, to find a verdict for the defendant on the fourth claim, because the elements described therein did not constitute a patentable invention. There is no testimony in the record except the patent, but it affirmatively appears that other testimony was introduced.

The court instructed the jury, among other things:

"Invention is that which brings out of the realms of the mind something that never existed before. It may consist in the combination of old elements, the invention being in the combination. To make it so, there must be a joint action or operation of the elements,—i. e. the elements must co-operate or act jointly to produce the result or object of the combination,—or else the assembled elements is a mere aggregation, and is not patentable. It is not necessary, however, that their action should be simultaneous. They may be successive."

This instruction is admitted to be correct. Did the court err in submitting this question to the jury?

In Standard Oil Co. v. Southern Pac. R. Co., the court said:

"The dividing line between mere aggregation and patentable combinations is well established. Every case must fall upon one side or the other. No case stands directly on the pivotal line. But the facts are often of such a character as to make it difficult to determine upon which side of the border line the case should be classed. This difficulty arises in the application of the facts to the principles of law so frequently announced by the supreme court of the United States. If the question is considered doubtful, the court should overrule a demurrer to the bill, in order to have the question fully presented upon the final hearing." 48 Fed. 110.

See, also, Engraving Co. v. Hoke, 30 Fed. 444; Blessing v. Copper Works, 34 Fed. 753; Root v. Sontag, 47 Fed. 309.

In Manufacturing Co. v. Brill, 4 C. C. A. 374, 54 Fed. 383, the court of appeals said:

"It may be conceded that the plaintiff's combination approaches very closely the line which separates that which is patentable from that which is not, and

that the amount of invention involved in it is small. The patent, however, was prima facie evidence of its own validity, and the burden of proof was upon the defendant to establish its want of novelty." Smith v. Goodyear Co., 93 U. S. 486; Lehnbeuter v. Holthaus, 105 U. S. 94; Cantrell v. Wallick, 117 U. S. 690, 6 Sup. Ct. 970; 3 Rob. Pat. § 1016.

In National Cash-Register Co. v. American Cash-Register Co., 3 C. C. A. 559, 53 Fed. 371, the court of appeals (Third circuit) said:

"We have not overlooked the suggestion of appellee's counsel that Campbell's conception and arrangement were merely of an aggregation of known elements, not amounting to a true combination, and that, therefore, he was not entitled to a patent for anything. This suggestion is based upon the allegation that each of the elements associated by Campbell does not qualify every other of them; but this is true only in the sense that each does not modify or change the characteristic mode of action or method of operation of the others. In doing its appointed share towards effecting the single result achieved by the co-operation of all, each element acts, of course, according to the law of its own being; but, though of necessity so acting, it is still none the less combined with the others, and does 'qualify' each and all of them (not their distinctive methods of operation), in the sense that each is, by the co-operation of the others, capacitated to contribute, by acting in its own peculiar way, to the common end, which, without the co-operation of each and every other of the co-ordinated elements, it would be powerless to accomplish or advance."

In the light of the principles announced in the foregoing cases, we are not disposed to disturb the judgment in this case. The validity of the fourth claim may be conceded to be doubtful and close. But we cannot say, as matter of law, that it appears, from the face of the patent, that this claim is so plainly void for want of invention that it could not be aided by evidence. The court did not err in submitting the question to the jury. The judgment of the circuit court is affirmed, with costs.

LOWREY v. COWLES ELECTRIC SMELTING & ALUMINUM CO. et al.

(Circuit Court, N. D. Ohio, E. D. April 23, 1895.)

No. 4,982.

1. PATENTS—REDUCTION OF ORES—"ELECTROLYSIS."
"Electrolysis," as used in connection with metallurgical operations, takes place whenever a current of electricity of sufficient quantity and intensity is passed through a chemical compound in a fluid condition as to cause a chemical disruption thereof, the result being that one of the elements will go to the anode, or the place by which the current enters the fluid mass, and the other will go to the cathode, or place where the current leaves it. If the compound treated is metallic, the metal element will gather at the cathode, while the other will go to the anode.

2. SAME—"SMELTING."
The word "smelting," though by derivation synonymous with "melting," has come to have a more contracted meaning, when used in connection with metallurgical operations, and, in that connection, it usually means a melting of ores in the presence of some reagent which operates to separate the metallic element, by combining with the nonmetallic element.

3. ASSIGNMENT OF PATENTS—CONSTRUCTION.
A contract of assignment, by which the parties intend to convey a certain class of discoveries, applications, and patents, which class is described in general terms, will pass title to an application previously made

by the assignor if the same in fact falls within the class, although the pendency of such application was known to both parties, and was not specifically mentioned in the contract, and although neither party at that time believed that it fell within the class; but the fact that neither party thought it was in the class may be a pregnant circumstance to show in what sense the words describing the class were used, if those words are capable of more than one meaning.

4. SAME.

By a contract of assignment, certain inventors conveyed to their assignees "any and all discoveries and inventions relating to electric smelting processes and furnaces, and all patents they have obtained therefor, and all applications now pending, and caveats on file in the United States patent office relating to electric smelting processes and furnaces, which do or may interfere with any applications for patents made by [the assignors], now pending in the United States patent office." *Held*, that the words, "which do or may interfere with," qualify not only the phrase immediately preceding, namely, "caveats on file," etc., but also the words, "discoveries," "patents," and "applications," and that the interference referred to was either a declared interference in the patent office, or the total defeat or narrowing of any of the otherwise valid claims of the patents issued to the assignees.

5. SAME.

Eugene and Alfred H. Cowles, after long investigation, made certain discoveries and inventions relating to the reduction of the more refractory ores, especially aluminum ore. Their process consisted substantially in the use of granulated carbon distributed through the mass of the ore in the furnace to carry the electric current from one electrode to the other, whereby intense heat was produced which fused the ore, and enabled the carbon, by its chemical action upon the nonmetallic elements in the ore, to separate the metallic element therefrom. This process they designated as an "electric smelting process." In 1885, having applied for certain patents, and being about to apply for others, they learned that C. S. Bradley and Francis V. Crocker had made similar inventions, and that an application filed by them was about to be thrown into interference with the principal application of the Cowles brothers. They thereupon secured from Bradley and Crocker, for a large money consideration, a contract of assignment, which, after reciting that the Cowles brothers had made certain discoveries and inventions relating to "electric smelting processes and furnaces," and had applied for patents therefor, conveyed all the interest of said Bradley and Crocker in "any and all discoveries and inventions relating to electric smelting processes and furnaces, and all patents they have obtained therefor, and all applications now pending and caveats on file in the United States patent office, relating to electric smelting processes and furnaces, which do or may interfere with any applications for patents made by Eugene and Alfred H. Cowles, of Cleveland, Ohio, now pending in the United States patent office." At the date of the contract, Bradley, individually, had pending an application for a process of reducing ores by electrolysis, which application, after long delay, was divided, and three patents issued thereon, the main one (No. 468,148) being restricted to a combination of three steps, namely: (1) The initial fusion of the ore mass by the use of an electric arc; (2) maintenance of the fusion by the heat of resistance to the current in the fused ore, and the consequent progressive melting of the rest of the ore; (3) electrolysis by the current. The pendency of this application was known to the Cowles brothers, but it was not specifically referred to in the contract. *Held*, that this Bradley application did not pass by the assignment: First, because the phrase "electric smelting process," as used in the contract, meant a smelting process as ordinarily understood, including the use of a chemical reducing agent; and, second, because, even if these words were broad enough to include electrolysis, yet the Cowles inventions were not "interfered with" by the Bradley application for the reason that they did not effect initial fusion by means of an electric arc, which was an essential step in the Bradley process.

The bill in this case was filed by Grosvenor P. Lowrey, a citizen of New York. He has since died, and the case has been revived in the name of his executrix.

The bill averred that Lowrey was the owner by assignment of two patents issued to Charles S. Bradley for a process of separating metals from their ores by the use of the electric current both to fuse and to electrolyze the ore. The bill charged that the defendant the Cowles Electric Smelting & Aluminum Company, a corporation of Ohio, had executed and recorded in the patent office an assignment of the same patents, in which it purported to convey them to its codefendant, Alanson T. Osborn, a citizen of Ohio; that the Cowles Company asserted title to the patents, and the right to convey them by virtue of an assignment to it made by Bradley and one Crocker, on May 8, 1885; that the assignment relied on did not cover the patents in question at all; and that the assignment of the Cowles Company to Osborn was a cloud upon complainant's title. He prayed that the defendants might be enjoined from further asserting any claim to the patents in question, and be ordered to cancel the assignment already made and recorded.

The answer of the defendant asserted its ownership of the two patents by virtue of the assignment of May 8, 1885. By a cross bill, it prays for a decree enjoining complainant from claiming title to the patents by virtue of Bradley's assignment to him. In answer to the cross bill complainant sets up that he was a purchaser for value without notice of the patents, and that defendant's conduct in not claiming title to the Bradley inventions for 10 years estops it from now asserting it. The case was argued to the court, and decided on a plea to the bill. The plea was held insufficient, and leave given to answer. 56 Fed. 488. Evidence upon the issues presented by the pleadings has been taken, and the case is now before the court on its merits.

The main question in the case is whether the assignment of Bradley and Crocker to the Cowles Company, dated May 8, 1885, of certain patents, applications, and inventions, covered and included the patents title to which is here in controversy. The assignment was as follows:

"This agreement entered into this 8th day of May, 1885, between F. B. Crocker, of New York City, N. Y., and C. S. Bradley, of Yonkers, N. Y., constituting the first party, and the Cowles Electric Smelting and Aluminum Company, of Cleveland, Ohio, a corporation organized under the laws of the state of Ohio, constituting the second party, witnesseth that whereas, the first party have made certain discoveries and inventions relating to electric smelting processes and furnaces, and have made some applications for patents therefor in the United States patent office; and whereas, second party is desirous of becoming the owner of all such discoveries and inventions: It is therefore agreed between the parties as follows: (1) For the consideration hereinafter mentioned, the receipt of which, to our full satisfaction, is hereby acknowledged, the said party does hereby sell, assign, and set over to the said second party all interest in any and all discoveries and inventions relating to electric smelting processes and furnaces, and all patents they have obtained therefor, and all applications now pending, and caveats on file, in the United States patent office, relating to electric smelting processes and furnaces, which do or may interfere with any applications for patents made by Eugene H. and Alfred H. Cowles, of Cleveland, Ohio, now pending in the United States patent office. It is understood and agreed between the parties that this clause also includes the application of the first party, now pending in the United States patent office, and designated serial number 158,805, and filed March 14, 1885. (2) Said first party also sells, assigns, and sets over to said second party their entire interest in all inventions, patents, and applications for patents, in all foreign countries, for the discoveries and inventions mentioned in the preceding clause of this agreement. (3) Said first party hereby authorizes and requests the commissioner of patents to issue to the said second party patents for said discoveries and inventions mentioned in the first clause of this agreement. (4) Said first party, for said consideration, further agrees to sign and execute all papers necessary to perfecting applications for said inventions, and obtaining patents therefor. (5) In consideration

of the preceding, said second party hereby pays in hand to said first party the sum of five thousand dollars. In testimony whereof said parties have hereunto set their hands the day and year first above written.

"Francis B. Crocker.
"Charles S. Bradley."

This assignment was recorded in the patent office a short time after its execution. At the hearing of the plea, this court held that, from an examination of the Bradley patents and of the Cowles patents, referred to in the foregoing assignment, and their file wrappers and contents, it did not appear that the Bradley patents interfered with the Cowles patents, but that the introduction of expert evidence might show that they necessarily covered the same ground; that the issue thus raised was not an issue proper to be raised upon a plea, but should be raised in an answer, and heard upon full evidence, expert and otherwise. The evidence which has now been taken discloses quite fully the circumstances surrounding the execution of the assignment.

Eugene Cowles and Alfred H. Cowles, sons of Edwin Cowles, of Cleveland, Ohio, had given much time and study to the investigation of processes and apparatus for the winning of the rarer metals from their refractory ores by the use of electricity. They had experimented much in the Brush laboratory in Cleveland, and had made several important discoveries and inventions, for which they had applied, or were about to apply, for patents in the years 1884 and 1885. Early in 1885 they were informed by some means that their principal application for a patent for an electric furnace and smelting process was about to be declared in interference in the patent office with an application for a similar furnace and process of C. S. Bradley and Francis B. Crocker. Through Colgate Hoyt, a lawyer of New York City who acted for them, the Cowles brothers obtained the following option from Bradley, then living at Yonkers, N. Y.

"New York, April 8, 1885.

"By and between Charles S. Bradley and Colgate Hoyt, both of Yonkers, in the state of New York, it is agreed as follows: Said Bradley shall, upon demand of said Hoyt, made at any time within 90 days from the date hereof, assign to said Hoyt, or his order, for the consideration of ten thousand dollars cash, an undivided ¼ interest in all inventions which he had hitherto made in electric furnaces, and in the reduction of ores by electricity, and of all patents to be granted therefor, whether applications for such patents have already been filed, or shall hereafter be filed, in the patent office of the United States; and, in consideration of the option being granted, said Hoyt, or the party to whom he may have assigned the same, shall pay to said Bradley, at the date hereof, the sum of five hundred dollars. Charles S. Bradley."

During the life of the option thus secured, the Cowles brothers, with their father, Edwin Cowles, organized the defendant corporation under the laws of Ohio, and a correspondence was begun between the company and Bradley and Crocker, with reference to the purchase of the latter's application, which was then declared in interference with theirs. The result of the correspondence was that Bradley and Crocker visited Cleveland, and had a conference with the Cowleses, father and sons. The conference was upon Saturday afternoon and evening, and an adjournment was had until Monday morning for the drawing up of the contract. On Monday morning, Crocker and Bradley produced their application, which had been declared to be an interference with the Cowles applications. It contained the following reference to the application by Bradley alone, upon which the two patents which are here the subject of litigation were subsequently issued: "In an application for letters patent of the United States now pending (filed February 23, 1883, serial number 85,957), Charles S. Bradley, one of the present inventors, has described an electro metallurgical process in which an electric current is employed to perform two functions: First, to effect the electrolytic decomposition of the materials treated; and, second, to supply the heat necessary to maintain said materials in the fused state while they are being electrolyzed. The present invention resembles the above to a certain extent, but in the present invention the electric current which we employ performs no electrolytic action, the reaction which takes place being solely to develop the heat which is a necessary condition of the reaction. For this reason, our invention does

not require the use of a continuous current of electricity. An alternating current may be employed, if desired, which is an advantage, since large alternating current dynamos may be constructed more cheaply than the continuous current machines, and it is also less trouble and expense to run them."

This reference to the application of Bradley, of 1883, was brought to the attention of both Eugene and Alfred Cowles, and was the subject of discussion between them and Bradley and Crocker before the contract was finally drawn and signed. The option of April 8, 1885, was surrendered to Bradley. At the time the contract was signed, Bradley and Crocker had no other application than the one then declared to be in interference by the patent office authorities with the Cowles application. They owned no patent of the United States for any invention. They had no application pending in any European country, and owned no patent issued by any European government. Bradley at that time had pending only one application in addition to the Crocker and Bradley application in terms assigned by the contract, and that was the application for the patents here in controversy. Upon the execution of the contract, the question was submitted to Gen. M. D. Leggett, counselor in patent cases at Cleveland, who supervised and revised the contract as agreed upon between the parties, whether it would be better to have the patent for the entire process and discovery issued on the application of the Cowles brothers or upon the application of Bradley and Crocker. He decided, on the evidence adduced, that the stronger case was with the Cowles brothers, and that it was better for them to have Bradley and Crocker concede priority of invention, so that the patent might be issued upon the Cowles application. This was done, but the Cowles brothers proceeded with the Bradley and Crocker application, omitting the general claims which interfered with the Cowles application, and obtained a patent for the particular apparatus described by Bradley and Crocker in their application which might prove to be an improvement on or useful variation from, the Cowles patent. This patent was issued to the Cowles brothers as the assignors of Bradley and Crocker. No claim of title to the Bradley application of 1883 was ever made by the Cowles brothers nor did they ever attempt to prosecute it to a patent. As a matter of fact, although it was not then known to the Cowles brothers, at the time of the execution of the contract of assignment in May, 1885, the application of Bradley of 1883 stood rejected, as not involving a patentable process. The application lingered along in the patent office, retained there by the filing of amendments until 1891. It was divided into three applications. The main application was finally rejected by the examiner, and was then carried on appeal to the board of review in the patent office, which reversed the decision of the examiner, and allowed the issuance of a patent in 1892. After their issuance the patents were assigned by Bradley to Grosvenor P. Lowrey, the original complainant in this action.

To render the issues clear, it is necessary to describe at some length the various Cowles patents referred to in the assignment, the Bradley and Crocker application referred to therein, and the Bradley patents, which are the subject of this litigation.

The first and most important of the Cowles patents, the one between which and the Crocker and Bradley patent an interference was declared, was entitled "A Process for Smelting Ores by the Electric Current." The description taken from the specifications was as follows: "The present invention relates to the class of smelting furnaces which employ an electric current solely as a source of heat. Heretofore it has been attempted to reduce ores and perform metallurgical operations by means of an electric arc, the material to be treated being brought within the field of the arc or passed or fed through it; but numerous experiments have demonstrated that the arc system is not adapted for long and continuous operations on a scale of any considerable magnitude. The difficulties attending the regulation of the arc and the preservation of a constant resistance are very great, and the heat generated, though intense, is localized and difficult to control. The object of this invention is to provide a process by which electricity can be practically employed for metallurgical operations, and for this purpose to secure a distribution of the intense heat which it is well known electricity is capable of generating over a large area or through a large mass, in such manner that a high temperature can be sustained for a long time and controlled. To this end the in-

vention consists, essentially, in the use for metallurgical purposes of a body of granular material of high resistance or low conductivity, interposed within the circuit in such a manner as to form a continuous and unbroken part of the same, which granular body, by reason of its resistance, is made incandescent, and generates all the heat required. The ore or light material to be reduced—as, for example, the hydrated oxide of aluminium, alum, chloride of sodium, oxide of calcium, or sulphate of strontium—is usually mixed with the body of granular resistance material, and is thus brought directly in contact with the heat at the points of generation at the same time the heat is distributed through the mass of granular material, being generated by the resistance of all the granules, and is not localized at one point or along a single line. The material best adapted for this purpose is electric light carbon, as it possesses the necessary amount of electrical resistance, and is capable of enduring any known degree of heat when protected from oxygen, without disintegrating or fusing; but crystalline silicon or other equivalent of carbon can be employed for the same purpose. This is pulverized or granulated, the degree of granulation depending upon the size of the furnace. Coarse granulated carbon works better than finely pulverized carbon, and gives more even results. The electrical energy is more evenly distributed, and the current cannot so readily form a path of highest temperature, and consequently of least resistance, through the mass along which the entire current, or the bulk of the current, can pass. * * * The operation must necessarily be conducted within an airtight chamber, or in a nonoxidizing atmosphere, as otherwise the carbon will be consumed and act as fuel. The carbon acts as a deoxidizing agent for the ore or metalliferous material treated, and to this extent it is consumed, but otherwise than from this cause it remains unimpaired."

The patentees illustrate their process by describing a zinc furnace, which consists of a cylinder made of silica or other nonconducting material, imbedded in powdered charcoal, mineral wool, or some other nonconductor of heat. One end of the cylinder is closed by means of a carbon plate forming the positive electrode. The other end is closed by means of an inverted graphite crucible, forming the negative electrode, and, through a hole communicating with the furnace, forms a condensing chamber for the zinc fumes. The patent proceeds: "The circuit between the electrodes, so called, is continuous, being established by means of and through the body of broken carbon. * * * The zinc ore is mixed with the pulverized or granular carbon, and the retort charged nearly full through the front end with the mixture, the plug D being removed for this purpose. After the plug has been inserted, and the joint properly luted, the electric circuit is closed, and the current allowed to pass through the retort, traversing its entire length through the body of mixed ore and carbon. The carbon constituents of the mass become incandescent, generating a very high degree of heat, and, being in direct contact with the ore, the latter is rapidly and effectually reduced and distilled. The heat evolved distills the zinc, and the zinc fumes are condensed in the condensing chamber precisely as in the present method of zinc making, with this important exception: that, aside from the reaction produced by heating carbon in the presence of zinc oxide, the electric current, in passing through the zinc oxide, has a decomposing and disintegrating action upon it, not unlike the effect produced by an electric current in a solution. This action accelerates the distillation, and promotes economy in the process. * * * We have found in practice that a mixture of about one part of carbon with * * * one and a half parts of zinc ore, by weight, gives most satisfactory results with the particular ore which we have treated; but the proportions to be used will depend upon the character of the ore and the degree of heat required to reduce it, and the degree of heat evolved will be determined by the resistance or conductivity of the mass and the strength of the current employed. * * * In the reduction of an ore composed of a nonvolatile metal, or a metal which is not volatilized at the heat generated in the furnace, the metal remains in the furnace mixed with the carbon, filling the interstices between the grains, while the gases produced pass off. In the reduction of rare metals, where a pure product is desired, it is necessary to use a pure carbon, or a carbon free from iron or other foreign ingredient; otherwise the iron or other substance will go into the product."

The claims of the patentee are as follows: "(1) The method of generating heat for metallurgical operations herein described, which consists in passing an electric current through a body of broken or pulverized resistance material that forms a continuous part of the electric circuit, the ore to be treated by the process being brought into contact with the broken or pulverized resistance material, whereby the heat is generated by the resistance of the broken or pulverized body throughout its mass, and the operation can be performed solely by means of electrical energy. (2) The method of smelting or reducing ores or metalliferous compounds herein described, which consists in subjecting the ore, in the presence of carbon, to the action of heat generated by passing an electric current through a body of broken or pulverized resistance material that forms a continuous part of the electric circuit, the ore being in contact with the broken or pulverized resistance material, whereby the ore is reduced by the combined action of the carbon and of the heat generated solely by the resistance of the broken or pulverized body throughout its mass. (3) The method of smelting or reducing ores or metalliferous compounds herein described, which consists in pulverizing the ore, and mixing with it pulverized or broken carbon or like material, then introducing the mixed ore and carbon within an electric circuit, of which it forms a continuous part, the said circuit being established through the carbon constituents of the mass, whereby the heat is generated by the electrical resistance of the carbon throughout the mass, and the operation can be performed entirely by means of the carbon reagent and the electrical energy. (4) The method of smelting or reducing ores or metalliferous compounds herein described, which consists in subjecting the ore, in the presence of a reducing agent, to the action of heat generated by passing an electric current through a body of broken or pulverized resistance material that forms a continuous part of the electric circuit, the ore being in contact with the broken or pulverized resistance material, whereby the ore is reduced by the combined action of the reducing agent, and of the heat generated solely by the resistance of the broken or pulverized body throughout its mass." Patent No. 319,945, to the same patentees, dated June 9, 1885, is a patent for the apparatus by which the process just described was carried on. In the specifications it is said that "there is no deposit made on either plate of the decomposed constituents of the material reduced." The plates referred to are those which formed the anode and the cathode. Again it is said: "The reduced metal is found, at the close of the operation, filling the interstices between the particles of carbon mixed with it and plated, as it were, onto the same; and, when the carbon is very coarse, it works down through it, and collects in the bottom of the charge on the charcoal floor."

In patent No. 324,658, also issued to the Cowles brothers, a process is described of smelting ore for the production of alloys, bronzes, and metallic compounds. Patentees say: "In a prior application we have described an important process of smelting ores and reducing the salts of refractory metals by means of electricity, which consists, briefly, in the use of a body of broken or pulverized carbon made incandescent by the passage of an electric current through the same; and in carrying out our present invention we preferably use said process as being best adapted for the purpose. This invention consists in mixing or imbedding in the body of broken carbon pieces of the metal which is to constitute the base of the alloy, whereby it is melted by the incandescent carbon, and takes up the other metal, whatever it may be, that is being smelted or reduced. This produces an alloy rich in the rare metal, sometimes to the point of saturation, and the alloy is afterwards brought down to the proper percentage by the remelting of the alloy and the addition of the necessary amount of base metal, by any ordinary process."

The patentee describes the application of the invention to the Siemens electric arc thus: "For example, in that we would either mix the ores or metals to be reduced together or alloyed in the arc furnace or crucible, or we would use an electrode of copper, tin, nickel, iron, or other metal, as the case might be, depending on the heat and force of the current at the arc to smelt and carry over, to the mixture of ore, carbon, or metals, the metal of the electrode, and thus incorporating the same together into an alloy, carbide, silicide, or boride, as desired, the operation being performed entirely by electrical energy and the reducing effect of carbon; and we further assert that results in

alloying and compounding may be obtained that cannot be otherwise performed, on account of the intensity of the temperature attainable by this means, and above all by the intermixing, incorporating, and merging power of the current. * * * We are aware that alloys have been produced by electrolysis, the current being made to pass through plates of platinum and carbon placed in contact with a base metal and with the compound to be reduced, and therefore we do not claim the same broadly."

The claims of the patentee are as follows: "(1) The process of producing alloys, which consists in passing an electric current through a mixture of broken resistance material,—ore to be reduced and pieces of the base metal of the alloy,—so that said mixture is rendered incandescent, and the alloy formed, substantially as hereinbefore described and set forth. (2) The process of producing alloys, which consists in passing an electric current through a mixture of broken resistance material and ore to be reduced, into which wires or rods of the base metal of the alloy have been inserted transversely to the path of the current, substantially as and for the purpose set forth. (3) The process of producing alloys hereinbefore described, which consists in mixing together ore of one of the metals of the alloy, broken or pulverized carbon, inserting wires or rods of the other metal of the alloy into the said mixture, and then passing an electric current through the mixture in a transverse direction to the wires or rods, so that the said mixture is rendered incandescent, and an alloy formed, substantially as set forth."

Patent No. 335,058, to Alfred H. Cowles, is a patent for an electric furnace and method of operating the same. "This invention," says the patentee, "consists in the improved method of operating incandescent electric furnaces herein described, and in the combination, with a furnace containing a charge of electrical resistance material, of two movable electrodes situated at opposite ends of the furnace, and projecting into the body of the charge contained within it, so that the said electrodes may, when the resistance runs down, be drawn apart, thereby increasing the amount of the charge between the electrodes, and consequently increasing the resistance, and thus preserving a uniform resistance within the furnace. * * *"

After describing the furnace, the patentee goes on: "This invention relates to electrical smelting furnaces operating on the incandescent principle, in which metallurgical operations requiring an intense heat are carried on, with electricity as the heat-producing agent. D is the charge. This consists, ordinarily, of electrical resistance material, such as electric light carbon and the ore to be reduced. Both of these are previously pulverized and intimately mixed together before being placed in the furnace; but in some cases pulverized ore alone is used when it is a sufficient conductor of electricity. * * * The current of electricity flows from the sides and ends of the said electrodes through the charge, and causes the electrical resistance material in the charge to become incandescent. The intense heat of the said incandescent material reduces the ore. When the furnace is employed for the reduction of ore, the metal is found at the close of the operation filling the interstices between the particles of carbon, mixed with it, and at the bottom of the furnace, where it collects upon the charcoal floor after having worked down through the charge. When the furnace is started, the electrodes are near together in the positions indicated by dotted lines, the resistance at the start being very great. After the furnace has been running for a while, and this portion of the charge between the electrodes has become heated, the resistance falls, and the electrodes are then drawn out a little, increasing the length of the charge between them, and bringing into the active part of the electrical field additional parts of the charge. In this manner, by successive withdrawings of the electrodes, a uniform resistance is preserved until the entire charge is brought into action. * * * I am aware that it is not new to make the electrodes of an electric furnace automatically adjustable, so that, as the resistance diminishes, they are drawn apart, and I do not claim the same broadly; but all such attempts and experiments have relation to furnaces in which the electric arc is employed, and, the electrodes being subject to rapid wear, the loss must be compensated for. * * * A continuous body of material is preserved between the electrodes, and the distance between them varies, gradually widening from the beginning of the operation until the whole of the charge is brought into action."

The first and second claims of this patent are as follows: "The method of smelting ores and other substances by the incandescence of an electrical resistance material contained in said substances or mixed therewith, which consists in first bringing a limited quantity of the material to be treated between a pair of electrodes, and then gradually increasing the quantity of such material by causing the electrodes to recede from each other, substantially as herein set forth. (2) In the art of smelting ores and other substances by the direct heating action of the electric current, the method of obtaining a uniform action of said electric current upon the mass or charge to be treated, herein described, which consists in introducing into the charge electrodes which are normally in proximity to each other, and then gradually causing said electrodes to recede from each other, the contact with the charge still being preserved until the mass of the charge is contained between the said electrodes, substantially as set forth."

Patent No. 324,659, issued to Cowles, Mabery, and Cowles, is for a process of obtaining aluminium. In this patent the patentees refer to the fact that aluminium can be produced under the patents Nos. 319,945 and 317,795, already described, and continues: "Ores are reduced in said furnace by mixing them with broken or granular carbon, and passing an electric current through a charge of the mixed ore and carbon; but the product thereby obtained, when an ore of aluminium is reduced, contains a considerable percentage of carbon, which is taken up both chemically and mechanically by the aluminium; and the object of the present invention is to provide a process whereby the aluminium can be obtained free from carbon and in a pure metallic state. This we accomplish by reducing the ore of aluminium, in company with tin, copper, manganese, or other metal which will alloy with the aluminium, and then subsequently separating the alloying metal from the aluminium by amalgamation, lixiviation, or equivalent process, leaving the residue aluminium in the form of an amorphous powder or state, which can be melted down into an ingot. When aluminum is alloyed with either of the metals above named, it takes up very little, if any, of the carbon; whereas the pure aluminium will, as above stated, absorb a very considerable percentage of carbon, more even than iron or any of the other metals. * * * We are aware that it has been heretofore proposed to reduce aluminium ores by smelting them with zinc ores, and then separating the two metals, and that the alkaline earths have been reduced by electrolysis in contact with an alloying metal and plates of carbon or platinum, and the alloyed metals thus produced subsequently separated. We do not, therefore, claim the same broadly, but what we do claim as our invention, and desire to secure by letters patent, is: (1) The method of producing aluminium which consists in reducing an ore or compound of aluminium, in company with an amalgamating metal, by means of electricity and in the presence of carbon, substantially as described, and then separating the two metals of the alloy by amalgamation. (2) The method of producing aluminium which consists of mixing the aluminium ore with carbon and with a metal, reducing the said ore by means of electricity, so that the aluminium forms an alloy with the said metal, and finally separating the two metals of the alloy, substantially as set forth. (3) The method of producing aluminium which consists of mixing the aluminium ore with broken carbon and with a metal, reducing the said ore by means of electricity, so that the aluminium forms an alloy with the metal, and finally separating the aluminium from the alloy by amalgamating the said metal, substantially as set forth."

As already stated, three patents were issued to Bradley on his original application, No. 85,957, of February 23, 1883. One was for heating by a blow pipe, and has no relation to this controversy. The main patent was No. 468,148. His invention is described in his specifications as follows: "My invention relates to a process of effecting by the electric current the separation or disassociation of aluminium from its ores or compounds, or the decomposition in a similar manner of other like highly refractory metallic compounds, of which aluminium may be considered a type, and which have been classed together by reason of the great difficulty in their reduction. Hitherto this process has been carried on by subjecting the fused ore to the action of the current in a crucible or other refractory vessel placed in a heating furnace, where the temperature is sufficiently high to keep the ore in a melted con-

dition ; but the greatest difficulty is encountered in preventing the destruction of the crucible with this mode of working the process, for it has been found that, in the case of cryolite especially, which is a double fluoride of aluminium and sodium, the fused ore unites or fluxes with the crucible itself, and that the gas liberated in the process of reduction (fluorine gas) attacks the material of which the crucible is composed, and the consequence is that the crucible is quickly destroyed. This destructive fluxing action takes place to a greater or less extent in treating almost any material, and is greatly aggravated by the fact that the crucible is subjected to heat from without; but, even in the case of materials which do not exert a fluxing action, the mere mechanical action of the external heat is sufficient to make it almost impossible to prevent the cracking of the crucibles. The main object of my invention, therefore, is to dispense with the external application of heat to the ore in order to keep it fused. In order to accomplish this object, I employ an electric current of greater strength or intensity than what would be required to produce the electrolytic decomposition alone, and I maintain the ore or other substance in a state of fusion by the heat developed by the passage of the current through the melted mass, so that by my invention the electric current is employed to perform two distinct functions, one of these being to keep the ore melted by having a portion of its electrical energy converted into heat, by the electrical resistance offered by the fused ore, and the other being to effect the desired electrolytic decomposition, by which means the heat, being produced in the ore itself, is concentrated at exactly the point where it is required to keep the ore in a state of fusion. Another feature of my invention consists in dispensing with the crucible for holding the ore, and in employing a body or heap of the ore itself to constitute the vessel or cell in which the reduction takes place, which is not destroyed by the chemical action of the fused ore and the gas liberated, and which, therefore, admits of the process being perfectly continuous, nothing being required but the charging of fresh ore as fast as the reduction goes on, either from without or from the sides or walls of the heap itself."

The process he describes is as follows: "Upon a hearth of brick or other suitable material is piled a heap or body of the ore, more or less pulverized, in the shape of a truncated cone, and a cavity or basin is excavated in the top of the heap to contain the fused portion of the ore which is to be treated electrolytically. In order to fuse the ore at the start, I take two electrodes of a suitable material, such as already used in like processes where fusion has been effected by an external furnace, and connected, respectively, to the two poles of a dynamo-electric machine or other source of current, bring the said electrodes into contact, separate them sufficiently to produce an electric arc, and then thrust them into the ore lying at the bottom of the cavity or basin, where the ore soon fuses by the heat of the arc, and becomes a conducting electrolyte, through which the current from the electrodes continues to flow. The arc of course ceases to exist as soon as there is a conducting liquid—the fused ore—between the electrodes, and the passage of the current then takes place through the fused ore by conduction, and the heat is produced as it is in an incandescent lamp. The arc is merely used to melt the ore in the beginning, and the ore is kept melted by incandescence, so to speak; the metallic aluminium being gradually deposited at the cathode, and the fluorine gas being set free at the anode, so long as the ore is maintained in a state of fusion. As soon as the action is properly started, the electrodes should be moved a little further apart, in order that the metals set free at the cathode shall not form a short circuit between the electrodes, or be attacked by the fluorine set free at the anode. I have found that, by using an electric current twice as strong as would be employed to perform a given amount of electrolytic work in the ordinary way in externally heated crucibles, I am enabled to keep the ore fused according to my invention, without the application of any external heat whatever. * * * I have described my process as preferably carried on by employing a body of the ore itself to form the basin or receptacle in which the electrodes are situated, between which the current flows through the ore for heating and electrolyzing the same. That specific invention, however, is not claimed herein, since it forms the subject-matter of Patent No. 464,933, dated December 8, 1891. My present invention is not limited to the specific character of the receptacle nor the spe-

cific arrangements of the electrodes. What I claim as my invention is as follows: (1) The process of separating or dissociating metals from their highly refractory ores or compounds, nonconductors in an unfused state, of which the ores and compounds of aluminium are a type, which consists in fusing the refractory ore or compound progressively by a source of heat concentrated directly upon it, rather than by an external furnace, and as it becomes fused, effecting electrolysis by passing an electric current therethrough between terminals which are maintained in circuit with the fused bath, whereby the process is rendered continuous, substantially as set forth. (2) The continuous process of separating or dissociating metals from aluminous or like highly refractory ores or compounds, nonconductors in an unfused state, which consists in progressively fusing the refractory ore or compound, and as it becomes fused electrolyzing it by passing an electric current therethrough of sufficient volume to continue and maintain the fusion and effect electrolysis, and adding fresh metal from time to time to preserve the bath constant, as set forth. (3) The process of reducing metals from that class of highly refractory ores and compounds, nonconductors in an unfused state, of which the ores and compounds of aluminium are a type, which consists in fusing a portion of the refractory or compound to be treated, in establishing an electric current through said fused portion, and by such current producing simultaneously progressive fusion of such ore or compound, and continuous electrolysis of the same as fused. (4) The process of separating or dissociating aluminium from its ores or compounds, consisting in fusing and maintaining the fusion, and electrolytically decomposing the ore or compound by the passage of the electric current therethrough, substantially as set forth. (5) The continuous process of separating or dissociating aluminium from its ores or compounds, consisting in fusing and maintaining the fusion, and electrolytically decomposing the ore or compound by the passage of the electric current therethrough, and charging the bath as the reduction proceeds, substantially as set forth. (6) The process of separating or dissociating aluminium from its ores or compounds, consisting in fusing and maintaining the fusion, and electrolytically decomposing the ore or compound by the passage of the electric current therethrough, and regulating the strength of said current in accordance with the requirements of the fused mass, substantially as set forth."

A reference to the file wrapper and contents shows that from 1883 until 1890 the claims of the patent were a number of times rejected by the examiners of the patent office on the ground that the use of an electric current for the combined purpose of heating and electrolyzing a metallic compound was shown by the published reports of Sir Humphrey Davy's experiments in the electrolysis of soda and potash, as far back as 1807. Among the claims contained in the first application was this: (4) "In the electrolysis of materials, or other chemical compounds, in the fused state, the method of maintaining them in a fused state by the heating effect of the electrolytic current itself." The case was appealed to the board of examiners in chief at a time when, among the claims, were the following: (1) "The process of obtaining metals from their ores or compounds consisting in maintaining the ore or compound in a fused or molten condition by the direct passage of an electric current therethrough, simultaneously electrolytically decomposing the ore or compound, and regulating the strength of the said current in accordance with the requirements of the fused mass, substantially as set forth." (2) "The process of obtaining aluminium from its ore or compounds consisting in maintaining the aluminium ore or compound in a fused or molten condition by the direct passage of an electric current therethrough, simultaneously electrolytically decomposing the aluminium ore or compound, and regulating the strength of said current, in accordance with the requirements of the fused mass, substantially as set forth."

The result of the appeal and subsequent proceedings was the issuance of the patent and allowance of claims above stated. Patent No. 464,933, issued to Bradley, referred to in the specifications of his main patent, was, shortly stated, a patent for the method of fusing and electrolyzing ore by the use of a pile of the unfused ore as the basin or receptacle in which the fused ore was to be contained.

The application of Bradley and Crocker, declared to be an interference with that of the Cowles brothers, was for a useful process for reducing and heating ores by electricity. The invention is thus generally described: "In a large number of chemical and metallurgical processes, in which high temperatures are required, and in which it is impossible, on account of the nature of the operation, to heat the materials by the direct action of fire in a reverberatory or blast furnace, it is customary to treat such materials in closed, externally heated crucibles or retorts. For example, the reduction of sodium, potassium, and zinc, and the manufacture of aluminium chloride, are carried on in this way. That this method is very troublesome and expensive. The crucibles or retorts are rapidly destroyed, and, being necessarily small in order that it shall not require too long to heat them through, the labor of charging and managing a large number of small retorts becomes very great. The object of our invention is to overcome these and other difficulties, and to obtain the heat necessary to carry on such operations in a convenient and efficient manner, and to concentrate the heat exactly where it is needed; and, furthermore, our invention has for its object the attainment in commercial processes of temperatures very much higher than have ever been reached before. Primarily, our invention consists in carrying on chemical and metallurgical operations or processes in chambers or furnaces, preferably constructed of or inclosed in nonconductors of heat, in which furnaces the necessary heat is produced and maintained by passing a powerful electric current either through the materials themselves, or through separate conductors near or in contact with said materials, the energy of the electric current being converted into heat by the electrical resistance of the materials or conductors through which it passes. Our invention is applicable to a large number of chemical and metallurgical processes, but, in order to enable others to use the invention, we shall describe in detail two or three of its most typical applications." After describing one means of carrying the current along the sides of the furnace, and developing the heat by the resistance there, the patentee proceeds: "Another form of furnace which we have devised for carrying out our invention is shown in figures 1 and 2, in which A and B are plates of carbon set in refractory brickwork, and covered by an arch, D. This chamber is inclosed in an outer chamber, J, J, J, which may also be of brickwork, or of some porous nonconductor of heat, such as the material known as 'terra cotta lumber.' Between the inner and outer chambers there is a space, as shown, which is filled with asbestos, mineral wool, or other suitable nonconductor. S is a tap hole for withdrawing residue, slag, etc. G is a conduit for taking off the gases or vapors produced. The door, H, is so arranged that the whole of it may be removed in order to remove the carbon plates, etc., or only a plug may be taken out for charging the furnace. Electrical connection is made to the two carbon plates, A and B, by two heavy copper strips or bars, E and F. This furnace may be employed for the reduction of the same metals as we have described in the case of the first form of apparatus (that is, potassium, sodium, and zinc), and the same materials may be used; but instead of the heat being produced by an electric current, in which conductors surround or are in contact with the materials undergoing treatment, the current is caused to pass through the materials themselves, and the heat is produced in said materials. For example, in employing this furnace for the reduction of zinc, we take the ordinary mixture of roasted zinc ore (zinc oxide) and carbon, and charge the furnace, as indicated in the drawings. This material rests upon the carbon plates, A and B, as shown, and the copper strips, E and F, being now connected, respectively, to the poles of a suitable dynamo-electric machine or other source of electrical energy, a current will pass from one carbon plate to the other, through the material resting upon and between them, it being conducted by the carbon contained in the mixture. * * * The zinc, as fast as it is reduced, distills over through the conduit, G, and is collected in the usual manner. Sodium and potassium may be reduced in a similar way. * * * We believe that the metal aluminium can be reduced by our process from its oxide (alumina) by mixing the oxide with carbon, and subjecting the mixture to an intense heat in our furnace. This reduction of alumina by carbon directly has often been attempted, but a high enough temperature cannot be attained in the ordinary way by combustion. By our proc-

ess, however, an almost unlimited temperature can be produced, and it is probable that in this way we can accomplish this important result. * * * In an application for letters patent of the United States now pending (filed February 23, 1883, serial number 85,957), Charles S. Bradley, one of the present inventors, has described an electro-metallurgical process in which an electric current is employed to perform two functions: First, to effect the electrolytic decomposition of the materials treated; and, second, to supply the heat necessary to maintain said materials in the fused state while they are being electrolyzed. The present invention resembles the above to a certain extent, but in the present invention the electric current which we employ performs no electrolytic actions, the reaction which takes place being purely chemical, and the function of the current being solely to develop the heat which is a necessary condition of the reaction. For this reason, our invention does not require the use of a continuous current of electricity. An alternating current may be employed if desired, which is an advantage, since large alternating current dynamos may be constructed more cheaply than the continuous current machines, and it is also less trouble and expense to run them."

Among the 10 claims made in the applications just before the interference was declared with the Cowles process were the following: "(2) The herein-described process, which consists in mixing together in a finely-divided state two or more materials at least one of which is a conductor of electricity, and in heating said materials or maintaining them at a high temperature by passing an electric current through them, in order to cause them to act or be acted upon chemically." "(9) The herein-described electrical heating process, in which the material to be treated is mixed with carbon, both being in a finely-divided state, and the mixture is heated or maintained at a high temperature by passing through it an electric current. (10) The herein-described process of obtaining aluminium from alumina, which consists in mixing the alumina with carbon, and in heating the mixture or maintaining it at a high temperature by means of an electric current."

The subject-matter of the interference in the patent office was as follows: "The process of reducing ores which consists in mixing the ore with carbon, and subjecting the charge to the action of heat generated by passing an electric current through the same, the ore being kept in contact with the carbon, which forms a continuous part of the electric circuit, substantially as set forth in applicant's 2d, 5th, 9th, and 10th claims, and in the four claims presented in the application of E. H. and A. H. Cowles, of Cleveland, Ohio, entitled 'Electric Furnaces.'"

After the assignment of May 18, 1885, the features of the Bradley and Crocker invention, to which reference has been made, were eliminated therefrom, including the claims declared to be in interference.

R. S. Taylor, for complainant.

Betts, Hyde & Betts, and Loren Prentiss, for respondents.

TAFT, Circuit Judge (after stating the facts). We have in this case to deal with the use of the electric current to perform two functions in metallurgical operations. Whenever a current of sufficient quantity and intensity is passed through a chemical compound in a fluid condition, it will cause a chemical disruption, and one of the elements will go to the anode, or the place at which the current enters the fluid mass, and the other will go to the cathode, or place where the current leaves it. This chemical dissolution by the current is called "electrolysis." If the compound to be treated is metallic, the metal element will gather at the cathode, while the other will go to the anode. If the other element is a gas, as it is when the ores are oxides, the oxygen or other gas will bubble out of the bath at the anode. The effort that the electric current has to make in order to pass through any body or matter produces heat. The greater the resistance, or, what is the same thing, the lower

the conductivity of a material, the more heat will be generated by forcing a current through it. Heat can thus be produced of great intensity. The highest heat known is that caused by the electric arc, where the current forces its way through the air and completes the circuit. The usual way of reducing metals from their ores has been to fuse the ores by the heat of combustion in the presence of what is called a reagent. The reagent is a substance with a stronger chemical affinity for the nonmetallic element of the ore when the ore is melted than the metal sought. The result of the melting and reaction is that the metal is left pure. Whenever the ore is an oxide, carbon will serve as a reagent, because the affinity of carbon for oxygen is very strong. Carbon is a conductor of electricity in which there is sufficient resistance to the passage of the current to generate a very great heat. The Cowles brothers conceived the idea of a furnace for reducing ores by the use of electricity in which granulated ore should be mixed with granulated carbon, so that the carbon should form a continuous conductor from anode to cathode. The passage of the current would generate heat in every particle of carbon throughout the furnace, and would soon fuse the ore, when the carbon, acting as a reagent, would take the oxygen from the fused compound, and leave the ore pure. Whether electrolysis necessarily took place in the furnace I shall discuss later.

Bradley's process of 1883 was a fusion of the ore, unmixed with carbon by the electric arc, an electrolysis of the fused ore, and a maintenance of the fusion from the heat generated by the passage of the current and the electrolytic action. There was no reagent in the Bradley process. The only agent of dissolution, except the fusion, was the current. In 1885, the Cowles brothers were convinced that they had made a great discovery,—one which would revolutionize the art of winning the rarer metals, like aluminium, from their usually refractory ores. As they were forming their company, they learned that some one else had made a similar discovery. They wished to buy peace, as their counsel says, and so they proposed to buy from Bradley and Crocker the invention which threatened to destroy the value of their own, and, to make themselves perfectly secure, they secured the assignment of all other inventions or discoveries of the assignors which would tend to interfere with the monopoly they hoped to enjoy from their own. They were seeking insurance from invasion by the assignors, and so the assignment was made to cover patents, applications, and discoveries which never were, and which the assignors, of course, knew had no existence. Bradley and Crocker were willing to make the language thus broad, because, as it could convey nothing, it did them no injury. The intention of the Cowles brothers was not only to secure the application which had interfered, but also to have a most sweeping guaranty from Bradley and Crocker that they had no other discovery which would interfere with the Cowles discoveries. This is the only explanation possible of the assignment of European patents and applications, and of the reference to inventions, applications, and patents all in the plural, in addition to

the application specifically assigned. It is not claimed that Bradley and Crocker represented that they had other inventions and discoveries which would satisfy the words of the assignment. It is manifest that the general and indefinite language was used only to secure the Cowles Company against possible and undisclosed inventions, and not for the purpose of including inventions known to both parties to be in existence.

With the general purpose of the parties in the framing of the contract well understood, we come to the question whether they intended to include in the assignment Bradley's electrolytic process of 1883. The evidence establishes beyond controversy that when the assignment was drawn and executed the Cowles brothers knew that Bradley had applied for a patent for a process of reducing metals by electrolysis in which the current also effected the necessary fusion. They knew this from the Bradley and Crocker application which they were buying, in which the Bradley process was not only described, but the patent office number was given. It was discussed by them. Had the Cowles Company then intended that it should pass by the assignment, it is not possible that it would not have been specifically mentioned therein. The Bradley and Crocker application was identified in the assignment by number and otherwise. Why not Bradley's? On its face, the assignment purported to convey Bradley and Crocker's applications, patents, and discoveries. This was the stronger reason, if an individual application of Bradley was to pass, to make the reference to it free from doubt. The Cowles Company was using general terms to describe patents and applications in the assignment for fear that the assignors might have others undisclosed. But here was one brought to its attention while the contract was being drafted. Surely the failure to mention it specifically is strong evidence that it did not intend or wish to acquire it. Otherwise, why did not the Cowles Company at once take steps to prosecute the application to a patent as it did in the case of the Bradley and Crocker application? For eight years it made no claim of title to the Bradley application. It is suggested that, at the time of the assignment, it stood rejected. But the Cowles Company did not know this, and, even if it had, rejections are not final in the patent office, as the many rejections of this very application abundantly show. It is fair also to infer that Bradley did not suppose he had included his application of 1883 in the assignment, because from 1885 until the issuance of the patent, in 1892, Bradley pressed for its allowance.

The circumstances present convincing evidence that neither of the parties to the assignment thought that the Bradley application of 1883 was within its terms. But this conclusion does not dispose of the case. It was the purpose of the parties to this assignment that a certain class of discoveries, applications, and patents, if owned by the assignors, should pass to the assignee. The description of them ex industria was made general, so that it might include individuals of the class whose existence was not known. If, now, it appears that there was an application which must be included within the general description to effect the purpose of the

assignment, can the court exclude it from the operation of the grant, because both parties at the time of the assignment knew of its existence, but were ignorant that it was within the description of the class to be conveyed? It does not seem so. The question of construction is, what did the assignors intend to convey? If a class, then all the individuals fairly within it must be included in the assignment. The very object in a class description is to avoid the necessity of mentioning individuals, and to include individuals which might otherwise be omitted. It follows that the mistake of the parties in thinking that a certain individual is not of the class conveyed will not exclude it from the grant. But the fact that both parties do not think the individual to be in the class described may be a pregnant circumstance to show in what sense the words describing the class are used, if those words are capable of several meanings. This, then, brings us to the question whether the Bradley application of 1883 is fairly included within the words of the grant. The important words are:

"Any and all discoveries and inventions relating to electric smelting processes and furnaces, and all patents they have obtained therefor, and all applications now pending and caveats on file in the United States patent office relating to electric smelting processes and furnaces, which do or may interfere with any applications for patents made by Eugene and Alfred H. Cowles, of Cleveland, Ohio, now pending in the United States patent office."

It is clear that Bradley's application of 1883 was not included in the grant, unless it related to electric smelting processes and furnaces, i. e. unless the process described therein was an "electric smelting process," as that term might reasonably have been understood by the parties when the assignment was executed. The meaning of terms often changes from time to time, and the words of a contract are to be construed as of the time when it was entered into. "Smelting," by its derivation, is synonymous with "melting," but in metallurgy and the commercial manufacture it has come to have a more contracted meaning. Thus Prof. Morton, the expert for the defendant, quotes, from a treatise on metallurgy by Frederick Overman, this distinction between "melting" and "smelting":

"When metallic ores are exposed to heat, and such reagents as develop the metal, we call it 'smelting,' in contradistinction from the mere application of heat, causing the ore to become fluid, which is called 'melting.'"

Prof. Morton, however, is of the opinion that "smelting" really means nothing more then "melting apart," and that any process in which the melting apart or separation of a metal from its ore is effected by the use of electricity is correctly described as electric smelting, and therefore that the Bradley process was electric smelting.

Prof. Langley, the expert for the complainant, thus defines "smelt":

"The word 'smelt' is customarily applied to that class of metallurgical operations in which a metal results, said metal being in a metallic condition, and obtained from an ore or mixture in which the metal originally existed in the form of a chemical compound. In all instances the operation of smelting results in producing something different from the body operated upon, and this change is brought about by the action of heat and chemical force. Usually the chemical action involved is between carbon, on the one hand, and

the oxygen of the ore, on the other; as, for example, in the smelting of iron, the ore, which in this case is always an oxide of iron, is introduced into a furnace where it comes in contact with hot carbon, which removes the carbon chemically by combining with it and setting the iron free. 'Smelting,' then, may be said generally to indicate the melting of something by heat, accompanied by a chemical change induced by the substances present in contact with the ore. The two exceptions just alluded to in this definition are—First, the case of bismuth, in which the bismuth exists in a metallic condition; and, secondly, the Lake Superior ores of copper, where the copper also exists in a metallic condition. In both of these instances it is sufficient merely to raise these ores to a temperature sufficient to melt the contained metal, and chemical action is not, therefore, necessarily present, but, even in these cases, chemical action is resorted to practically to render the earthy materials of the ore fusible, and thus render the separation of the metal more perfect. The substance added to bring about a chemical change in the earthy matters of the ore are called 'fluxes,' and they generally consist of limestone or of limestone and clay, so that, in the practical sense of the word, one may say the term 'smelting' always involves melting by heat and the concomitant presence of a chemical change."

On cross-examination, Prof. Morton was asked this question:

"Can you refer me to any instance of the use of the word 'smelt' or 'smelting' to signify the decomposition of a compound by the action of the electric current by any writer of recognized accuracy or authority? Ans. Not without the addition of the word 'electric.' As far as I am aware, the use of this compound word was first introduced into literature by the Messrs. Cowles in connection with their process, in which they described the operation which took place as electric smelting."

The first application of the Cowles brothers was filed December 24, 1884, and the patent was issued in June, 1885. This described the process, and was termed the "Process of Smelting Ore by the Current." On February 24, 1885, their second application was made for the apparatus by which this process might be successfully and commercially carried on. This was termed "An Electric Smelting Furnace." The most general claim describing the process in the first patent was as follows:

"The method of smelting or reducing ores or metalliferous compounds herein described, which consists in subjecting the ore in the presence of a reducing agent to the action of heat generated by passing an electric current through a body of broken or pulverized resistance material that forms a continuous part of the electric circuit, the ore being in contact with the broken or pulverized resistance material, whereby the ore is reduced by the combined action of the reducing agent and of the heat generated solely by the resistance of the broken or pulverized body through its mass."

It seems clear to me that the reason why the Cowles brothers called this an "electric smelting process" was because its main feature was like that of any smelting process as ordinarily understood, namely, the use of high heat and a chemical reducing agent, and because the heat was produced by electricity. The use of the carbon to attract the oxygen of the fused ore by chemical affinity most naturally suggested the smelting of iron and other metals by the same reagent. Before that time ores had been fused, and then subjected to electrolysis. If "smelting" meant only "melting apart," then this was smelting by means of electricity, but it was never so called. Even the Siemens arc furnace of 1877 was not described as an electric smelting furnace. It remained for the Cowles brothers to invent

the term to distinguish their discovery, and we may gain some idea of the sense in which they used it at the time of the assignment by reference to their idea of what their discovery was. Its important and main features, in their judgment, were the intense heat of the current made available by distributed carbon and the chemical reaction caused by the same agent. The many articles written by the Cowles brothers, and by disinterested scientists, together with the evidence of Alfred Cowles in an interference proceeding between the Cowles application and that of one Faure, are all quite convincing that, in 1885, they thought that, though electrolysis might play some part in the process, the main success of it was due to the smelting effect of the high heat, and the chemical reaction between the carbon and the nonmetallic element of the ores, and that a process which was purely and solely electrolytic was not embraced within the meaning of the term "electric smelting process" as they used it. This conclusion is still further borne out by the circumstance, already commented on, that though the parties to the contract of 1885 had before them and under discussion this very Bradley process, so described as to bring it clearly within the definition of "electric smelting" now contended for by the defendant and given by its witnesses, yet no specific words were used in the contract either to include the process in, or exclude it from, the operation of the assignment as would have been most natural, had the process been an electric smelting process, as it was then understood by the parties. There can be no doubt either of the distinction which the assignors in the assignment made between such a smelting process and one of electrolysis, for in the very application which the Cowles Company bought by this assignment of May 8, 1885, Bradley and Crocker distinguished the Bradley process of 1883 from the equivalent of the Cowles process, as follows:

"The present invention (i. e. their carbon smelting process) resembles the above (i. e. the Bradley process of 1883) to a certain extent; but in the present invention the electric current which we employ performs no electrolytic action, the reaction which takes place being purely chemical, and the function of the current being solely to develop the heat which is a necessary condition of the reaction. For this reason our invention does not require the use of a continuous current of electricity. An alternating current may be employed if desired, which is an advantage, since large alternating current dynamos may be constructed more cheaply than the continuous current machines, and it is also less trouble and expense to return them."

The Cowles Company took this application, and pressed it to a patent, which was issued to it as assignees, and, though the claim for the fundamental process was waived, that for an improvement thereon was retained, and the foregoing explicit declaration of a radical distinction between the carbon electric smelting process and the Bradley electrolytic process still appears in the specifications of the patent, and is, in effect, a formal admission by the Cowles Company, without which it may be presumed the patent would not have issued to it. From the whole record, I feel sure that the parties to the assignment of 1885 did not use the term "electric smelting processes" in the wide sense claimed on defendant's behalf, and that, in their minds, processes solely electrolytic were not embraced within

it. Therefore the Bradley process of 1883 was not conveyed to the Cowles Company by the assignment, and it never acquired title.

But suppose that I am wrong in thus limiting the meaning of the words "electric smelting process," and that even in 1885 it did include any process in which by the use of the current ores were melted and separated, even if there was no chemical reaction at all. The discoveries, patents, applications, and caveats relating to electric smelting processes and furnaces assigned by Bradley and Crocker are only those "which do or may interfere with" the Cowles patents. It has been pressed upon the court that these words modify only the phrase immediately preceding, namely, "caveats on file," etc., and do not qualify the terms "discoveries," "patents," and "applications." This is much too narrow a construction. The Cowles Company was buying peace, and the clause in question was expressive of the intention which pervaded the entire document, and should be given its effect in construing every sentence and clause in it. We have found that neither of the parties thought that the Bradley process of 1883 was included in the assignment. We are now considering the question whether the general language of the assignment describing a class carried the process in spite of this common view of the parties. Certainly the court will lean to the construction of the general language used which may be reconciled with the common thought of the parties as to the particular process, and if, therefore, as I shall attempt to show, the construction, by which the discoveries, patents, and applications assigned are limited to those which did or might interfere with the Cowles patents, excludes from the grant the Bradley process of 1883, then it is the court's duty to place that construction upon the assignment. Moreover, the reference of the clause, "which do or may interfere," to all preceding subjects of the assignment, is a reasonable and grammatical interpretation of the language, for the relative pronoun "which" often has more than one antecedent, and there would seem to be no reason for thus limiting the caveats assigned without also limiting the more important words, "discoveries, patents, and applications." The words, "do or may interfere," are plainly to be construed with reference to the atmosphere in which the parties then were. They were in the atmosphere of the patent office. They were considering the question of applications, caveats, and patents,—all technical terms to describe different steps in the securing of a monopoly by government grant. The word "interfere" has a technical meaning in that connection. It is used in the statutes of the United States. Strictly speaking, an interference is declared to exist by the patent office whenever it is decided by the properly constituted authority in that bureau that two pending applications, or that a patent and a pending application, in their claims or essence cover the same discovery or invention, so as to require an investigation into the question of the priority of invention between the two applications or the application and the patent.

In the strictest technical sense, therefore, the fact that the Bradley application of 1883 was not declared to be an interference with

any of the Cowles patents, and that the Cowles patents were issued, and as issued were not modified or affected, by the Bradley application of 1883, would exclude the Bradley application from the effect of the assignment. But it may be conceded that this is too strict an interpretation, and does not square with what appears to have been the manifest intention of the Cowles Company in securing this assignment. The interference referred to was either a declared interference in the patent office, or the total defeat or the narrowing of any of the otherwise valid claims of the Cowles patents, after issuance, in a court of competent jurisdiction, by the use of an application or invention of Bradley and Crocker or either of them. If, therefore, it appears that the otherwise valid claims of the Cowles patents are not narrowed or defeated by the specifications of the Bradley patents which are the subject of this litigation, then the Bradley patents did not pass by the assignment. The question is not to be determined by what the Cowles brothers may have claimed in any application, nor by what might have been claimed under their specifications and drawings, had Bradley never made his invention or application in 1883. It is whether the claims allowed to the Cowles brothers by the patent office are restricted or invalidated by the really new inventions of Bradley, as disclosed by his application of 1883.

If the patent office allowed Bradley any claims which the history of the art shows he should not have been allowed, then those claims can play no part in this discussion. If invalid, they are invalid because anticipated by some other patent, or by the discoveries in the prior art, and it certainly cannot be held that claims thus narrowed or defeated interfere, in the sense of the contract, with any of the otherwise valid claims of the Cowles patents. The questions remaining, therefore, for consideration, are: (1) What was the real invention of the Bradley patents? and (2) what are the valid claims of the Cowles patents, excluding consideration of the Bradley patent? and (3) are they interfered with by Bradley's discovery of 1883?

For eight years, from 1883 to 1891, the claims of the Bradley patent were rejected by the patent office, the examiners ruling that the use of a current of electricity to fuse a metallic compound, and to maintain the fusion, and to electrolyze the fused compound, was old in the art, because Sir Humphrey Davy had reported, as a contribution to science, his use of the electric current first to fuse, and then to electrolyze, potash and soda, securing a deposit at the cathode of the metal potassium and the metal sodium, respectively. In the collected works of Sir Humphrey Davy, reported in 1840, occurs this statement:

"I tried several experiments on the electrization of potash rendered fluid by heat, with the hopes of being able to collect the combustible matter, but without success; and I only attained my object by employing electricity as the common agent for fusion and decomposition. Though potash, perfectly dried by ignition, is a nonconductor, yet it is rendered a conductor by a very slight addition of moisture, which does not perceptibly destroy its aggregation, and in this state it readily fuses and decomposes by strong electrical powers."

Sir Humphrey Davy also tried the experiment with alumina or other refractory ores or oxides, and did not succeed in fusing them, because the current would not pass through them in their dry state. It was known that these ores, if fused, could be subjected to the electrolytic action of the current, but it seems never to have occurred to any one but Bradley how the current might be used to effect the fusion of the metal in its nonconducting state, as part of the electrolytic process. He secured it by putting the anode and cathode so close together that an electric arc was formed by the passage of the current through the air. This, as was well known, produced the highest possible heat, and quickly fused the ore between or near the anode and the cathode. The power of fused ore thus produced became at once a medium for the conduction of the current. Thereafter the resistance to the current in the fused ore caused heat, which could be easily increased to effect the progressive melting of the rest of the ore, by adding to the voltage or intensity of the current.

The history of the Bradley patent shows, as disclosed above, in the statement of facts, that Bradley attempted to secure the allowance by the patent office of one claim or more for the process of maintaining fusion and electrolysis by the electric current simultaneously in the treatment of metallic compounds. But it will be observed that even on appeal, and by the decision of the board of review in the patent office, his claims in this regard were very much narrowed. He was required by the board of appeal to make, as an essential part of the process described in his specifications and claims, the initial fusing of the metal as therein set forth, and, as the only initial fusing suggested was that described in the patent to be by the electric arc, it became an essential part of the process patented.

The acceptance by the patentee after he had made the claim for merely maintaining the fusion, and simultaneously electrolyzing the fused mass, and it had been rejected, estopped him from ever afterwards asserting monopoly to such a process, when the initial fusion described in his patent was not included in it, and showed with reasonable certainty that he was entitled to nothing more. Bradley's discovery, therefore, was of a combination of steps, each one of which was old. The steps were, first, the initial fusion by the electric arc between the carbon anode and cathode. The electric arc was certainly old. Second, the maintenance of the fusion by the heat of resistance to the current in the fused ore, and the consequent progressive melting of the rest of the ore. This step was plainly shown by Sir Humphrey Davy. And, third, electrolysis by the current, which was equally well known. Whether Bradley is really entitled to the monopoly of this combination or not may be questioned when the validity of his process is directly in issue. Both parties to this cause, in contending for the possession of it, have a motive not to diminish its scope more than is absolutely necessary to the establishment of his or its title, but sufficient appears in the record to justify the limitation of it as above. The other patent of

Bradley's involved here is for the use of a pile of ore as a containing vessel for the bath to be electrolyzed, in accordance with the directions of the main patent. It does not seem to me, except as it involves the process described in the main patent, to have any bearing on the question of interference with the Cowles patents. Having thus considered the scope and extent of the Bradley process of 1883, we come now to consider what is the real essence of the Cowles patents. The gist of the Cowles invention is the use of granular carbon or other equivalent resistance material distributed through the mass of granulated ore to carry the current from one electrode to the other, and by its low conductivity or resistance to produce intense heat, not at a single point or in a single line, but throughout the ore, and by the heat thus generated to fuse the ore, and to separate the metal element by the chemical action of the carbon upon the nonmetallic element of the ore, just as iron and other like ores are smelted in a furnace.

The claims of the first or main patent of the Cowles brothers relate, the first one to the fusion of the ore by the process described, the second to its smelting or reduction by the reagency of the same carbon used to generate the heat, and the third and fourth claims are but variations from the second. This Cowles patent was not intended to disrupt the metallic compounds by electrolysis. There is a suggestion in the patent that the current has a disrupting or disintegrating effect of assistance in the reduction and distillation of zinc ores in accordance with the specifications of the patent, like the disrupting effect of the current in the solution. Whether this obscure statement is a blind intimation that electrolysis takes place or not is somewhat difficult to determine. But, even if it is, certainly the main purpose of the Cowles brothers in their patent was to accomplish the reduction of the ores therein mentioned by the chemical reaction of the carbon, and not by the electrolytical disrupting of the ore. It is confidently claimed, however, on behalf of the defendant, and the claim is rested on elaborate expert evidence, that the main agent in reducing metals from their ores by the Cowles process is the electrolytic action of the current after the ore is fused by the heating contact of the incandescent carbon distributed through its pulverized mass. In my opinion, it is immaterial whether this theory be true or not, for, even if electrolysis is necessarily present in the Cowles process as the main and leading agent for its successful carrying on, the claims of the Cowles patents are not at all affected by anything disclosed in the Bradley process of 1883, either in the specifications or in the claims allowed by the department. The only valid claims of novelty in the Bradley process, as we have shown, are of a combination which must have, as part of it, the initial fusion of the dry ore by the electric arc. This was the difficulty which Sir Humphrey Davy seems not to have been able to overcome in the process of electrolysis with internal heating, and this difficulty, if the Cowles process is an electrolytic process, was overcome in it, not by the use of the electric arc, but by the establishment of a continuous current through granulated carbon placed between the anode

and the cathode. In other words, the Bradley process and the Cowles process, if they both involve electrolysis, and thus cover common ground, do not interfere with each other, because the common ground covered was well known in the history of the art, and was not subject to the monopoly of either.

But much has been said concerning the suggestion in one of the Cowles patents (the one to Alfred Cowles, No. 319,945) that in some cases pulverized ore might alone be used where it is a sufficient conductor of electricity without carbon. This is the only suggestion of the kind in all the five patents belonging to the Cowles Company. It is said that, in furnaces operated with the granulated ore alone without the carbon, we should necessarily have a reproduction of the Bradley process, and therefore that the Bradley process would interfere with the Alfred Cowles patent to that extent. The argument is untenable, first because the evidence shows that the suggestion of the Alfred Cowles patent is wholly impracticable. There is no ore disclosed in the record which in its dry state is a sufficient conductor to permit the passage of a current, and, unless the current can pass through the resistance material which is to generate the heat, the process must be a failure. Again, the suggestion of the patent was never embodied in any of the claims allowed. Therefore the Cowles Company, without regard to the Bradley process, would have no monopoly on it, and their patents could not be said to be interfered with in respect of the process which they did not own.

Finally, I do not think that it is by any means clear that electrolysis in the Cowles patents, as they are described in the specifications of the patents, plays any considerable part in the reduction of metals. In the first place, in one of the Cowles patents it is stated that there is no deposit of metal upon the carbon plate which makes the cathode. There has been no evidence introduced to show that this statement is a mistake. If there were any electrolysis between the electrodes, the metal must be deposited at the cathode. Prof. Morton, the chief expert for the defendants, on his examination in chief developed and illustrated a theory by which every two pieces of the granulated carbon lying next to each other in the fused ore constitute an electrolytic pair, and electrolysis goes on everywhere in the bath, wherever two such adjacent granules of carbon could be found. Out of the mouth of this same witness, by the cross-examination of counsel for the complainant, who proved himself both on examination and in the argument to be a learned expert himself, the elaborate and convincing theory developed by Prof. Morton was shown to have but limited application to the Cowles furnaces. His statement in chief gave the impression that the melted ore would find its way and form a film between every two adjacent grains of carbon in the furnace, and that between each two grains thus separated by the film an electric cell would form, and electrolysis would go on; but when counsel for the complainant brought out from the witness the fact that the counter electro motive force needed in each electrolytic cell for the work of electrolysis would require to produce electrolysis in the number of cells which must thus occur in a

Cowles furnace of ordinary dimensions a voltage three or four times that actually used in the Cowles furnaces, he was obliged to admit that the number of cells in the furnace would be much less than that which his answers in chief would have led a nonexpert to suppose. When his attention was called to the statement in the Alfred Cowles patent that there was no deposit on the cathode of metal, he immediately supposed an aggregation of carbon granules there, so closely united as to prevent the fused ore from finding its way to the cathode, departing thereby from the principal hypothesis of his theory, as originally stated, that the fused ore would necessarily thread its way in between all the loose particles of carbon in the furnace. The effect of his answers on cross-examination was to weaken much the probative force of his general statement that the chief agent in reducing metals under the Cowles patents was electrolysis. Prof. Morton did demonstrate that some electrolysis must go on in the Cowles furnace, and this, indeed, was not denied on behalf of the complainant. He demonstrated it by electrolyzing a solution of sulphate of copper with carbon, in which the result of electrolysis was seen in the particles of copper distributed all over the bottom of the glass disk in which the experiment was performed, and not confined to the cathode. While these show that electrolysis must go on to some extent in the Cowles furnaces, they do not show that the smelting effect of the high heat and the carbon reagent is not the important and principal means of reducing the metal in the Cowles process.

In one of the papers published in connection with the Cowles process, a Mr. Darrow reports an experiment by the Cowles Company for the purpose of determining whether electrolysis played any considerable part in the Cowles furnaces. His experiment consisted in the operation of the furnaces with a continuous current, and then with an alternating current. It was conceded, at that time, that electrolysis was impossible in an alternating current. Prof. Morton and others question this, but there is no substantial evidence that the theory is unsound. Mr. Darrow's announced result was that there was substantially no difference in the product of the Cowles furnace from an alternating current and from a continuous current. Prof. Morton, from the figures of Mr. Darrow, thinks that there is a wide difference demonstrated. If such a difference could be shown, it would go far to prove the claim now made on behalf of the Cowles Company that electrolysis played a great part in their furnaces, but no such experiment has been attempted since Darrow's, or, if attempted, has not been shown in evidence. On the whole, from the entire record, including the evidence of Prof. Langley and Prof. Haynes, and of Prof. Morton on cross-examination, I conclude that there is electrolysis present as an incidental feature in the Cowles furnaces, but that the presence of carbon, instead of aiding the electrolysis, interferes with it, and that it is by no means an important feature in the reduction of metals under the Cowles patent.

Evidence appears in the record of the operation of the Cowles furnaces at Lockport, N. Y., and these are used to show that electrolysis

must go on. One of the chief evidences is said to be the bubbling of the gas at the anode. But on cross-examination of the witnesses it was developed that the operation of the furnaces was a departure from the Cowles method, in that the carbon was only about 10 per cent. of the mixture, and would hardly form a continuous conductor; that the fusion was begun by the electric arc; and that in fact the process described in the Bradley patent was the one which was used.

For the reasons given I am satisfied that the Bradley patent was not intended to be conveyed by the assignment of May 8, 1885, and that it was not, in any view, included within the general terms of that assignment. The finding of the court will be that the valid title of United States patents Nos. 464,933 and 468,148, issued to Charles S. Bradley and mentioned in the bill, is now in the complainant by lawful assignment; that neither the defendant the Cowles Electric Smelting & Aluminum Company nor Alanson T. Osborn has any title to these patents; and that the assignment of them, executed by the Cowles Company to Osborn, and placed upon the record in the patent office, had no effect to carry title to them, and constitutes a cloud upon the title of the complainant. The decree of the court will be that the defendants shall cancel the record of the said assignment by the Cowles Company to Osborn in the patent office, and that the defendants, and each of them, shall be perpetually enjoined from asserting any title or claim of title to the patents described in the bill. The cross-bill of the defendant the Cowles Company will be dismissed, and the costs of the cause taxed to it.

CARTER-CRUME CO. v. ASHLEY et al.

(Circuit Court, N. D. New York. June 26, 1895.)

PATENTS—SALESMEN'S CHECK BOOKS—INJUNCTION PENDENTE LITE.

Injunction pendente lite against infringement of the Carter reissue patent (No. 10,359), for improvement in salesmen's check books, will be granted, the patent having but 3½ years to run, complainant having built up a large business employing many men and much capital, defendants being small users, the manufacturer who sold to them being a small and recently organized corporation; a decision sustaining the patent having been rendered six years ago, in a case in which substantially the same defenses now relied upon were presented, there having, since such time, been general acquiescence in complainant's rights, and there being little doubt that defendants' book is an infringement.

Suit by the Carter-Crume Company against John W. Ashley and others for infringement of patent. Complainant moves for preliminary injunction.

C. H. Duell, for complainant.
George B. Selden, for defendants.

COXE, District Judge. The complainant, as owner of reissued letters patent, No. 10,359, asks for an injunction restraining the defendants from infringing pendente lite. The patent was granted

to John R. Carter for improvements in check books used by salesmen. It is dated July 24, 1883. The original patent is dated January 24, 1882. The application for the reissue was filed May 17, 1883. The reasons that induce the court to issue the writ may be briefly stated as follows:

First. The patent will expire in about three and a half years. During the long period that it has been in existence its owners have built up a large and flourishing business under it employing many men and several hundred thousand dollars of capital.

Second. The defendants are small users. The amount involved so far as they are concerned is less than $25. To cease infringing during the pendency of the suit can cause them little inconvenience. On the contrary, should infringement continue it will result in serious if not irreparable loss to the complainant.

Third. The manufacturer who sold the books to the defendants is the American Counter Check Book Company, a West Virginia corporation recently incorporated with very little actual capital and no good will behind it. Little harm can be done by requiring it to desist from infringing until the final hearing.

Fourth. The complainant's patent has been in existence 13½ years. During that time various attempts have been made to evade the patent but usually without success. The acquiescence in the rights of complainant during the last four years has been general.

Fifth. In 1889 the then owner of the patent brought a suit in the Eastern district of Michigan against Charles A. Hurlburt and others, and moved for a preliminary injunction before Judge Brown, now Mr. Justice Brown. The answer alleged the invalidity of the patent as a reissue and, substantially, all the defenses which are now relied upon. The court decided that the patent was valid and infringed and would have granted an injunction outright but for the fact that the complainant was guilty of laches in bringing the suit. The order was for an injunction unless the defendants filed a bond within thirty days. It is manifest that the complainant's case is much stronger than it was five years ago. Then, with no previous adjudication of any kind and a much weaker case of acquiescence, Judge Brown thought the patent sufficiently strong to warrant an alternative writ. The complainant to-day presents the case of 1889 plus the weight of Judge Brown's decision and five years of peaceful enjoyment.

Sixth. There can be little doubt that the defendants' book infringes the first and second claims of the patent unless they are to be confined to the exact structure described and shown. The court in the Michigan case saw no necessity for a construction so limited. The defendants' book may be an improvement, but nevertheless, it has all the features of the claims. The transfer leaf is not attached, as is the leaf of the patent, but it is "bound in the book" in the same sense that the Carter leaf is so bound. The manner of the binding is not the essence of the invention.

The foregoing considerations present a strong case for an injunction. This is manifest. The defendants seek to avoid the force of

the Michigan decision by the assertion that the question of the invalidity of the reissue, as such, was not presented to the court. It is true that nothing was said by the court on the subject in the oral opinion delivered, but to argue from this that the defense was not urged is to proceed without sufficient foundation. If presumption is to be indulged in it would seem to lead to a contrary conclusion.

As before stated the defense was pleaded in the answer in the Michigan case. The struggle there was genuine and bitter. The defendants' case was conducted by an able patent lawyer thoroughly conversant with the doctrine of the supreme court regarding reissues. To assert that the attention of the court was not called to the point that the claims relied upon did not appear at all in the original patent, is, in the circumstances, to assert an almost unthinkable proposition. The other defenses were before the court in the Michigan case and were there overruled.

There are some new features in the proof, but as now presented there is too much doubt about the new evidence both on the facts and the law to justify the court in refusing relief to the complainant. The equities are strongly with the complainant. The injury done to the defendants by granting the writ will be as nothing compared to the injury done the complainant by withholding it. Motion granted.

THE HATTIE PALMER.

HAWKINS v. DAVIS.

(Circuit Court of Appeals, Second Circuit. May 28, 1895.)

SHIPPING—NONDELIVERY OF FREIGHT—CONVERSION.

A steamer making daily trips between New York and New Rochelle took some barrels of freight for delivery at City Island. On touching there, no person was in readiness to receive the same or pay the charges, and the steamer retained the goods on board, sending word to the consignee, whose place was about 200 yards from the landing, to have some one ready to receive the goods on the following day. This notice was received, but no one appearing on the steamer's return the next day, the goods were still retained on board. The next day the consignee arrested her on the libel for conversion. The wharf was not a safe place to leave the goods, and the vessel was all ready to deliver them on payment of the freight. *Held*, that there was no conversion, and the libel was properly dismissed with costs. 63 Fed. 1015, affirmed.

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

This was a libel by John P. Hawkins against the steamboat Hattie Palmer (Charles W. Davis, claimant) to recover damages for the alleged conversion of three barrels of kerosene, one barrel of gasoline, and two cases of copper paint. The Hattie Palmer was a small passenger and freight steamboat plying between New York and New Rochelle, and the articles in question were shipped on her for delivery at City Island. On touching there, no one was on hand to receive the goods or pay the freight, and the goods were retained

on board; the master sending word to the consignee, whose place of business was but a short distance from the wharf, to have some one ready to receive the articles on the next day. On that day there was still no one to receive the goods, and they remained on board for still another day. The next day the consignee filed this libel, and caused the arrest of the steamboat, alleging a conversion of the goods. The district court dismissed the libel (63 Fed. 1015), and the libelant appeals.

George A. Black, for appellant.
Convers & Kirlin (J. Parker Kirlin, of counsel), for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. The facts of this case are essentially as stated in the opinion of the district judge. In his haste to punish the appellee, the libelant brought his suit before there had been any conversion of the goods by the carrier. Robinson v. Austin, 2 Gray, 564; Clark v. Masters, 1 Bosw. 177, 185; One Thousand Two Hundred and Sixty-Five Vitrified Pipes, 14 Blatchf. 274, Fed. Cas. No. 10,536; Everett v. Coffin, 6 Wend. 603; Ang. Carr. § 400. Under the averments of the libel, it may be that at the time when the suit was actually commenced, although not when the libel was verified, there was a cause of action for trivial damages, in favor of the libelant, for breach of contract by the carrier to deliver the goods within a reasonable time; but no damages were proved, and the cause was tried in the court below, as it has been argued in this court, upon the theory of a conversion. Had nominal damages been awarded, costs should have been, as they were, imposed upon the libelant. Courts of admiralty, like courts of equity, should visit costs upon suitors who resort to their jurisdiction merely to gratify a taste for vexatious litigation. Chapman v. Publishing Co., 128 Mass. 478; Allen v. Demarest, 41 N. J. Eq. 162, 2 Atl. 655; Moore v. Lyttle, 4 Johns. Ch. 183; Ben. Adm. (3d Ed.) § 550. The decree of the district court should be affirmed, with costs, and it is so ordered.

THE CENTURION.

BREGARO v. THE CENTURION.

AMERICAN SUGAR REFINING CO. v. SAME.

(Circuit Court of Appeals, Second Circuit. May 28, 1895.)

1. SHIPPING—DAMAGE TO CARGO—STOWAGE OF MOLASSES.
The between decks, when perfectly tight and strong, is not an improper place for the stowage of liquids, such as molasses.

2. SAME.
A steamship bound from West India ports to New York had sugar stowed in her hold, with hogsheads of molasses in the between decks above it. The between decks were of steel, and perfectly tight and strong, and the cargo was stowed by an experienced stevedore under the supervision of the supercargo. On the voyage severe squalls were encountered, heaving the ship temporarily at an angle of 45 deg., washing the deck cargo adrift, and giving her a list to starboard of over three feet. Some of the casks of molasses were broken, and their contents ran down the scupper pipes into the bilges of the hold beneath, and the bilges and sluiceways became choked with molasses, so that it flowed over the bottom of the hold, and caused the sugar in the hogsheads to be dissolved. *Held*, upon the evidence, that the cargo was properly stowed; that the peril encountered by the ship was sufficient to create damage to a properly stowed cargo; and that the ship and her owners were exempt from liability under an exception in the bill of lading of damage arising from perils of the sea. 57 Fed. 412, reversed.

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

These were libels by Jose Bregaro and by the American Sugar Refining Company against the steamship Centurion, John Blumer & Co. claimants, to recover for damage to cargo. On petition of the claimants, the New York & Porto Rico Steamship Company, to which the ship was under charter at the time of the damage, was cited in to answer therefor. The district court found that the loss was caused by negligent stowage, and entered a decree against both the ship and the charterers, to be collected in the first instance from the latter, as they were bound by the charter to indemnify the owners. 57 Fed. 412. The charterers and owners appeal.

J. Parker Kirlin, for the Centurion, appellant.

Geo. A. Black, for the New York & Porto Rico Steamship Company, appellant.

Wm. W. MacFarland, for appellees.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. Jose Bregaro shipped on board the steamship Centurion, at Ponce, Porto Rico, 250 casks of molasses, and his agent shipped on the same steamer, at Arroyo, 465 hogsheads of sugar, for transportation to New York. The bills of lading excepted the ship and its owners from liability for damage arising from perils of the sea. When the cargo was discharged in New York,

on March 3, 1893, 88 casks of molasses were broken and empty, and others were partially empty from leakage. The sugar in the lower tiers of the hogsheads was partially dissolved by its mixture with the molasses which accumulated at the bottom of the hold. Bregaro brought a libel in rem against the Centurion for the damage to the molasses, alleging that it was caused by the negligent and improper manner in which the merchandise was stowed. Bregaro and the American Sugar Refining Company also libeled the steamship to recover damages for the injury to the sugar, alleging improper stowage, and that, through the defective condition of the scuppers, bilges, and sluiceways of the ship, and the neglect of the officers to properly pump the vessel, the drainage from the sugar and the molasses collected in the lower hold, and washed out the sugar from the hogsheads. John Blumer & Co., the owners of the Centurion, answered the libels, alleging that the injuries happened through perils of the seas, and denied that there was any defect in the stowage, but, if there was, they alleged that it was the fault of the New York & Porto Rico Steamship Company, the time charterer, which had the management and control of the stowage. The owners also filed petitions praying that the charterer might be cited in to answer the allegations of the petitions, which repeated, in substance, the averments of the answer in regard to the negligence, if any, of the charterer. The steamship company was cited in and appeared and answered the petitions. In regard to the injury to the molasses, it averred that the stowage was under the supervision of the officers of the vessel, was approved by them, was well done, and that the damage happened through perils of the seas. In regard to the injury to the sugar, its answer contained the same averments in regard to stowage, and also averred that the damage was caused by the defects of the steamship's equipment and management, whereby the drainage from the sugar and the molasses accumulated and dissolved the sugar. The causes went to trial under the issues as thus made, and were heard upon depositions.

The Centurion was a steel ship, built in May, 1886, 270 feet long, with a depth of hold 26 feet and 1 inch, having two steel decks, the upper deck and the between decks, which were perfectly tight, except the closely covered feeder holes. Whether these holes were caulked at the time in question need not be determined, as it is manifest that they had nothing to do with any injury to this cargo. She was chartered by the steamship company under a charter of demise, the captain was under its orders and directions, and, as between shipowners and charterer, no claim was to be made against the owners for loss of cargo. A supercargo could be appointed by the charterer who was to see that the voyages were prosecuted with the utmost dispatch. When she started upon this particular voyage, she was clean, in good condition throughout, and was entirely seaworthy. She took a general cargo in New York in January, 1893, for ten Porto Rico ports, and discharged and took in cargo at each port, when required. She reached San Juan on January 31st, and there-

after visited nine other ports, of which Ponce was the third, where she took in the molasses on or about February 9th, and discharged all her cargo. She received the sugar at Arroyo on February 13th, returned to San Juan on February 18th, and sailed for New York on February 19th. The molasses was stowed in No. 2 "between decks," the sugar was stowed beneath in No. 2 hold, and the stowage was made by an experienced stevedore under the supercargo's supervision and control, and in the places of his selection. In the afternoon of February 22d there was a strong gale, with heavy squalls, and at half past 5 o'clock a heavy sea struck the ship, heaving her temporarily at an angle of 45 deg., washing the deck cargo adrift, and giving the ship a list to starboard of three and one half feet, which she retained during the voyage. The next morning it was discovered that the molasses was adrift in the between decks. The supercargo and the crew went down, found that part of the casks in both tiers were broken, that some of them were empty, and that they were generally out of position. They were shored up and secured as well as practicable. The bad weather continued, and on February 24th the sea swept the deck cargo overboard, broke some rails, and did some other damage. She anchored at Staten Island in the evening of February 26th. On arrival at New York the cargo was unloaded, and the extent of the damage was ascertained. The leaking molasses had run down the scupper pipes into the bilges in hold No. 2 beneath; the bilges and the sluiceways in the bulkheads which separate the bilges became filled and choked with the accumulation of molasses; it flowed over upon the bottom of the hold; mixed with the leakage from the sugar hogsheads; caused more sugar to be dissolved; and soon the limbers were full of a thick mixture of sugar and molasses, which could not flow away. The sluiceways were left open, but were clogged with wet and soft sugar and molasses. It appears that the hogsheads in which Muscorado sugar is packed are intentionally not tight, but have four or five holes, through which the hogsheads may be "purged"; that the staves are loose; and that the drainings settle in the bottom of the hogsheads. Molasses casks are not full when they are put on board, but five or six inches are left for fermentation, and each cask has two small holes, one on each side of the bung, to permit an escape of the fermenting molasses, which flows out through the holes, and makes the casks very slippery and easily movable.

The issue of fact which was before the district court was whether the shifting of the molasses casks which created, first, the damage to the molasses, and, next, the damage to the sugar, as the result of the drainage of the molasses, was caused by the perils of the sea, the defects of the ship, or by negligent and improper stowage. Numerous criticisms were made by the charterer upon the alleged defects of the ship as to sluiceways, bilges, pumps, and the negligence of the crew in pumping, but we are satisfied that these criticisms were groundless, and may be eliminated from the case. The district judge was of opinion that the shifting of the cargo arose "from the

place and mode of stowage, and that the stowage was not reasonably sufficient to meet ordinary rough weather, such as to be reasonably anticipated and provided for"; and was further of opinion that "the weather was not extraordinary, and that, before any rough weather was encountered, the movement of the casks in No. 2 between decks was observed, which the supercargo sought to check." The conclusion was that the damage was the result of bad stowage, and, inasmuch as between cargo owners and the ship, the latter is liable for pecuniary loss from that cause, the decree in each libel ran against the ship owners; but inasmuch as, between charterer and ship owners, the charterer was liable to the owners, the decrees provided that the charterer should pay the amounts therein named. The ship owners and also the steamship company appealed from each decree, but upon different grounds. Our examination of the record has led us to conclusions of fact which differ from those of the district judge.

In the original depositions which were given by the officers of the Centurion, the good character of the stowage was unanimously supported, and there was no attack or outspoken criticism upon the place of the stowage. It was not until the supercargo had testified that the place was selected by him after making inquiries of the captain and the mates as to the tightness of the between decks that any fault was found with his selection. The officers denied that this conversation took place, and the captain, after testifying that he did not give the supercargo to understand that the between decks were slack or likely to injure molasses, said that after and before the stowage he told the supercargo that, if he (the captain) had been stowing the cargo, he should not have put molasses in the between decks, and gave him to understand that between decks was not the proper way, by which he evidently meant place, to stow cargo. The captain's narrative of this conversation is so vague and general that the utterance of his objections to the place of the stowage, at the time when utterance was important, must have been feeble, and the tardiness with which these conversations were brought into the case shows that they were not deemed of importance in its early preparation. We cannot concur in the full extent of the finding of the district judge that the supercargo insisted upon stowing the molasses in the between decks, contrary to the advice of the officers, for the preferences of the officers could not have been outspoken or positive. Furthermore, the positive testimony on the trial adverse to the suitableness of the place was also feeble. If the between decks are tight, and in this vessel they were both tight and strong, the character of this part of the ship was not condemned by sailors or stevedores as a place for the stowage of liquids. A day or two after the vessel left Ponce, and was on its way to another port, and before the cargo was all taken on board, the molasses casks moved, and were examined and secured. This fact does not seem of especial significance, for there was no more trouble until the heavy storm of February 22d. This storm appears both from the account given at the time, before the extent of damage to the cargo was known, and from

the effect upon the vessel itself, to have been sufficiently severe and violent to create the injury to cargo, although sufficiently chocked and fastened to resist storms which might reasonably be anticipated. If this case had been between the shipowners and charterer alone, and founded upon the liability of the charterer to indemnify the owners against loss to cargo resulting from its negligence, the testimony on the part of the ship would be most convincing against the theory of the charterer's negligence. It must be recollected that the case against the charterer derives no additional strength from the fact that the controversy is tripartite. The burden of proof is still upon the cargo owner or the shipowner to establish the fact that the injury was caused by improper stowage, and this burden has been, in our opinion, imperfectly borne. If the ship owners presented, in reply to the charterer, testimony of importance showing that the injury happened by reason of negligent stowage, their witnesses had been, in their testimony in chief, so unanimous and harmonious in favor of the charterer, and had been so silent in regard to the impropriety of the location of the stowage, as to prevent a finding upon their testimony that there was a defect in either. The case then rests upon the conclusion to which the trier may come as to the extent of the peril. The district court was of opinion that it was insufficient to cause properly stowed cargo to break loose, and therefore the stowage must have been insufficient. We are constrained to the opinion that the stowage was affirmatively proved to have been proper, that the peril was sufficient to create and did create the damage to a properly stowed cargo, and that, therefore, the liability of the ship and her owners was within an exception in the bill of lading. The decrees of the district court are reversed, with costs of this court to be equally divided between the two appellants.

THE PETERSBURG.

WEYANT v. THE PETERSBURG.

(District Court, E. D. Virginia. May 15, 1895.)

SHIPPING—LIABILITY OF VESSEL FOR TORT—ARREST OF VESSEL WITHOUT PROCESS.

A vessel employed and used, with malicious intent, for the purpose of arresting, without process, another vessel, and bringing her forcibly into port, is responsible for the act, and a participant, whether wittingly or not, in the malice which incited it, and she is therefore liable to the owner of the vessel so arrested for the damages and expenses occasioned thereby.

This was a libel by Charles Weyant against the steam tug Petersburg to recover damages for the alleged unlawful arrest of the schooner Coral by the aid of the said tug.

J. W. Mallet and Whitehurst & Hughes, for libelant.
Sharp & Hughes, for respondent.

HUGHES, District Judge. Charles Weyant is the owner of the schooner Coral, of New London, Conn. The schooner had been engaged in conveying bricks from near Smithfield, Va., on the James river, to Norfolk, for several months, with Daniel Weyant, father of Charles Weyant, as master, when, on the 8th of March last, Charles Weyant came to Norfolk from New London, and, producing proper evidence, registered her in the customhouse at Norfolk as owned by himself, and took out the usual papers for the Coral, showing his ownership. He exhibited these papers to Daniel Weyant, who had been master, and who surrendered to him the possession of the schooner. He took a young man named Benjamin Burrows on board with him, and made him master of the schooner. Charles Weyant and Benjamin Burrows were young men. On the afternoon of the 8th of March they left Norfolk, under sail, and proceeded down Elizabeth river, on what they say was a return voyage of the schooner to New London, intending to go by way of the Chesapeake Bay and the canals, to New York. They anchored on the evening of the 8th between Lambert's Point and Craney Island, close in to the southern shore, behind the vessels usually anchored in those waters. The night was dark and rainy. They had up no anchor light, but were out of the channel; the Coral being of light draft, of only 34 tons, and 54 feet length. It seems from the evidence that the Coral had on board, down below decks, some half-dozen wheelbarrows, which she had brought from the brick yard to be repaired in Norfolk, but which had not been put off when Daniel Weyant relinquished the schooner to Charles Weyant. It cannot be pretended that the two young men had any design, in leaving port with the schooner, to purloin these barrows. It is not certain that they knew the barrows were on board. After nightfall of the 8th, Daniel Weyant applied to the master of the tug Petersburg, the respondent in this case, to go in pursuit of the Coral; alleging that she had been

stolen, and that the thieves were making away with her, down towards Hampton Roads and the bay. The master of the tug, Alexander, agreed to go at once in pursuit with Daniel Weyant, and some three or four other men were taken on board to give help in the enterprise. In the search thus begun the tug and its party passed considerably beyond the Craney Island light, into the waters of the roads and bay below. But, not finding the schooner, they finally turned upon their course, and came back into Elizabeth river, where they found the Coral, anchored as has been described, about half past 1 o'clock. The answer of the respondent says, among other things, that the tug went alongside the schooner, and Daniel Weyant and S. F. Walker went aboard of her, and fastened lines of the tug to her; that the parties on the schooner engaged in a conversation, rather disagreeable in character, with Daniel Weyant; that when the tug had proceeded about a quarter of a mile towards Norfolk, with the schooner in tow, one of the men on board came forward, and asked the master, Alexander, by what authority he was bringing the vessel back, saying that he was master, but on that occasion showing no papers, and making no claim of ownership. But this allegation as to ownership is denied, and, I think, was unfounded in fact. The tug brought the schooner up to Norfolk, took her to Roanoke dock, docked her there, and left her. The two men who had been on board left the schooner as soon as she was docked, and the tug left the schooner in the possession of Daniel Weyant, who had employed her to go after the Coral and bring her into port. Early on the morning of the 9th of March, Hudgins & Hurst, sailmakers of Norfolk, filed a libel for sails, most of which had not been furnished, against the schooner; and the respondent, a few minutes afterwards, filed a petition in the form of a libel for searching for her, and bringing her into port as described. The circumstances tend strongly to show that the libel of Hudgins & Hurst had been preconcerted on the 8th between them and Daniel Weyant.

On the hearing of the libel of Hudgins & Hurst and the petition of the respondent, just mentioned, when the cause matured for trial I refused to entertain either, on the ground that the schooner had been unlawfully arrested and brought into port. This action was based on the evidence of Daniel Weyant himself. My decree dismissing the cases was made on the 27th of March. In consequence of the libel and petition just mentioned, the schooner had been detained in this port from the 9th to the 27th of March, or 18 days. The libel claims damages for the detention. There is no doubt of the jurisdiction of the court to entertain this libel. There is no doubt that, when a tort is committed upon a vessel by persons using another vessel for the purpose, this vessel and its owners may be libeled for the tort. In the case at bar, Daniel Weyant willfully and maliciously committed a tort upon the schooner Coral, by arresting her and bringing her forcibly into port. In committing this tort, he made use of the tug Petersburg, and she became responsible for the act, and a participant, whether wittingly or not, in the malice which

incited it. It is not permissible or tolerable to allow vessels to be pursued and arrested without authority or process of law. If it were countenanced, such a practice would speedily run into the most gross abuses. Nor is it allowable, when the foremost agent in such a proceeding is actuated by passion and malice, to hold those whom he uses and employs to commit the wrongful and malicious act to plead innocence of malicious motive on their part. It is the duty of those who lend themselves to the evil actions of tort feasors to make themselves acquainted with the character of the work which they engage in. No master of a vessel has a right to arrest another vessel without express legal authority, and thus to take her in charge and in tow, without first calling for and examining her ship's papers. When he is acting without process, it is his duty to call for these papers, and make himself acquainted with the true ownership of the vessel, before venturing to take her in charge. If the Coral had been at anchor, without any one on board, on the occasion of her seizure, the act of taking hold of her and towing her away without a warrant of arrest, and without inquiry as to the true ownership, would have been tortious. Ignorance of ownership cannot justify a tortious act of the sort, nor can innocence of evil motive exonerate the tort-feasing vessel, if she is acting as the immediate agent of a willful and malicious tort feasor. In the interest of public policy, I must hold the tug Petersburg responsible for the acts and the motives of her employer, Daniel Weyant, in this matter, and decree accordingly. I will assess the damages for delay of the Coral in port here, and for the expenses incident to it and in this litigation, at $250. Punitive damages are not embraced in this award.

THE TRAVE.

LAW et al. v. NORTH GERMAN LLOYD.

(Circuit Court of Appeals, Second Circuit. May 28, 1895.)

No. 111.

1. COLLISION BETWEEN STEAMER AND SAIL—EXCESSIVE SPEED IN FOG.
A steamship which collided with a sailing vessel in the Atlantic Ocean, about five minutes after entering a fog bank, *held* in fault because she had only reduced the rate of her engines by half a dozen revolutions, which brought her speed down to about 15 knots an hour. 55 Fed. 117, affirmed.

2. SAME—SAILING VESSELS—FOG HORNS.
A sailing vessel which was provided at the commencement of her voyage across the Atlantic with an efficient mechanical fog horn, in good order, and with a good mouth horn, *held* to have complied both with the requirements of prudence and of sailing article 12; and where, after sailing several days in a fog, her mechanical horn became disabled by injury to the valve, *held* that she was not in fault for a collision, it appearing that the mouth horn was being properly sounded. 55 Fed. 117, reversed; The Chilian, 4 Asp. 473, followed.

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

This was a libel by William Law and others against the steamship Trave, to recover damages for the sinking of their sailing ship, Fred B. Taylor, as the result of a collision with the steamship. The district court found both vessels in fault, and entered a decree for divided damages. 55 Fed. 117. The libelants appeal.

Eugene P. Carver, for libelants.

Wm. D. Shipman and Ernest Luce, for the Trave.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. The appeal presents but a single question of law. The undisputed facts in regard to the collision are stated by the district judge as follows:

"The above libel was filed by the owners of the British ship Fred B. Taylor to recover their damages arising from collision with the North German Lloyd steamship Trave, in a dense fog some 240 miles to the eastward of Sandy Hook, at about half past six in the morning, steamer's time, June 22, 1892, whereby the ship was cut in two and sunk. The steamer was outward bound, and on her usual course, going about due east. The ship was bound from Havre to New York. The wind was moderate from the west-southwest, and the ship was sailing upon her port tack, heading about northwest. She had been sailing for several days in fog, so as to be unable to take observations. The steamer, until about five minutes before collision, had clear weather, and was going at about full speed. A few minutes before the collision the sky began to grow hazy. Fog was evidently apprehended. Two of the lookouts were called down from the crow's nest, and stationed at the bow, as required in thick weather. Orders were given to close the compartments, and to the engineer to stand by, and a reduction of half a dozen revolutions of the engine was made, bringing the speed of the Trave to about 15 knots. The sun, from an hour and a half to two hours high, was still visible. The fog suddenly became dense. Within two or three minutes afterwards the loom of the ship's sails was seen by the starboard lookout a couple of points

on the starboard bow, and he immediately reported to the officer on the bridge, who answered the lookout's report with a wave of the hand, and a little afterwards the ship's horn was heard. The steamer's engines were reversed as soon as possible, and her helm was put hard a-port, but without avail. Her stem struck the port side of the ship at an angle of about 80 degrees between the main and mizzen chains, cut her in two, and passed between the two parts of the wreck, and disappeared in the fog. Some of the ship's crew were drowned, but most, including the master, were recovered from the wreck."

Upon this state of facts the district judge was of opinion that it was impossible to acquit the Trave of the charge of running at nearly full speed in thick fog, and that she must be held to have been in fault. The Pennsylvania, 19 Wall. 125; The Nacoochee, 137 U. S. 330, 11 Sup. Ct. 122; The Bolivia, 1 U. S. App. 26, 1 C. C. A. 221, 49 Fed. 169. His decision is conceded to be a correct exposition of the law as declared by the supreme court. The second set of facts upon which the question arises is as follows: The ship Fred B. Taylor, a large wooden ship of 1,800 tons register, left Havre, May 12, 1892, with an efficient mechanical fog horn on board, in good order, and as efficient for producing sound as those ordinarily in use. It was from $2\frac{1}{2}$ to 3 feet high; was fastened to the deck; was operated by pumping with a handle like that of a pump. The vessel had also on board a good mouth horn. She encountered almost continuous foggy weather. The mechanical horn was used for about 10 days in the English channel, and thereafter for about 14 days, when the valve got out of order, about 4 days before the collision, and the captain was unable to ascertain or remove the cause of the difficulty. It did not thereafter make a proper noise, and the captain used the mouth horn, which was being properly blown before and at the time of the collision. The inference can fairly be drawn from the facts that the injury to the valve resulted from the constant and necessary use upon that voyage, and not from want of proper care and attention on the part of the navigators. Article 12 of the international sailing rules of 1885 provides that:

"A steamship shall be provided with a steam whistle, or other efficient steam sound signals * * * and with an efficient fog horn, to be sounded by a bellows or other mechanical means, and also with an efficient bell. A sailing ship shall be provided with a similar fog horn and bell."

The statutory obligation upon a sailing vessel to have a fog horn in a state of efficiency and readiness is imperative, but a temporary inability to furnish such a horn may be excused, if a sufficient reason can be given for such inability. The district judge was of opinion that an accidental injury to the horn during the voyage, without fault of the crew, was not a sufficient excuse, because the obligation of reasonable prudence required, "in a matter so essential to safe navigation upon the Atlantic as a fog horn for use during a fog, that a spare horn should be provided to meet the liability to loss or derangement that may happen, from various causes, during the voyage." It is a part of prudence that a ship should be provided with a mouth horn as well as a mechanical horn, because the latter

must, as a rule, be fastened or secured to the deck, and oftentimes, in heavy weather, such a horn could not be used; but if the vessel is provided, at the outset of a voyage across the Atlantic, with an efficient mechanical horn, which is in good order, and also has an ordinary horn for use when, through stress of weather, or accident not caused by negligence, the other device cannot be employed, we think that the requirements both of the statute and of prudence have been complied with, and that there is a sufficient excuse for the accidental incompetency of the mechanical horn. It is not desirable to construe a statute for the protection of property and life in such a manner that its requirements can be evaded or easily avoided, but we think that a construction which imposes upon the owners the necessity of providing a supply of mechanical fog horns, so that their efficiency shall be in a measure guarantied, partakes of severity. The Chilian, 4 Asp. 473, decided by Sir Robert Phillimore in 1881, is a case very much in point. The Chilian, a screw steamship belonging to the port of Liverpool, of 1,306 tons register, collided in a fog in the Irish Channel, upon a voyage from Baltimore to Liverpool, with a Norwegian vessel. Article 12 of the British regulations for preventing collisions at sea is in the language of the article under discussion. The seventeenth section of the merchants' shipping act of 1873 provided that in cases of collision the vessel which infringes any of the regulations shall be deemed in fault, "unless it is shown to the satisfaction of the court that the circumstances of the case made departure from the regulations necessary." The Chilian had a mechanical fog horn, which was bought at Rotterdam, and found to be satisfactory, but had not been tried upon this voyage, until the day before the collision, when it was found to be out of repair. A powerful mouth horn was thereupon used. Sir Robert Phillimore, after consultation with the trinity masters, was of opinion that the circumstances did make a departure from the rule necessary; that an accident had befallen the fog horn, which was in itself a proper instrument; and that it would be a severe construction of the act to hold that the vessel was in fault. We are of opinion that international article 12 is not more absolute in its requirements than the same British rule had been construed to be in 1881, and that the libelants' vessel presented an adequate excuse for her inability to use a mechanical fog horn at the time of the collision. The decree of the district court is reversed, with costs of this court, and the cause is remanded to that court, with instructions to enter a decree that the libelants recover the entire damages sustained by them by reason of the collision in the libel mentioned, with costs.

THE CITY OF ST. AUGUSTINE.

HENDERSON et al. v. THE CITY OF ST. AUGUSTINE.

ST. AUGUSTINE STEAMSHIP CO. v. HENDERSON et al.

(Circuit Court of Appeals, Second Circuit. May 28, 1895.)

COLLISION—STEAMER AND SAIL.

A steamer meeting a schooner in the open sea, at night, on nearly opposite courses, *held* in fault because, on perceiving the schooner's green light nearly straight ahead, she did not allow sufficient margin for passing, or for the usual and necessary variation in the schooner's course through yawing or leeway. 52 Fed. 237, affirmed.

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

This was a libel by William Henderson and others, claimants of the schooner Norman, against the steamer the City of St. Augustine, to recover damages for collision. The St. Augustine Steamship Company, claimant of the steamer, filed a cross libel against the schooner. The district court entered a decree in favor of the libelants against the steamer, and dismissing the cross libel. 52 Fed. 237. The claimants of the steamship appeal.

Geo. Bethune Adams, for appellants.

Harrington Putnam, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. The facts in the case which seem manifest, and which are stated for the most part in the language of the district judge, are as follows: At about half past 1 o'clock in the morning of November 25, 1891, the schooner Norman, of 367 tons, loaded with a cargo of lumber, bound from Savannah to Baltimore, and then heading about N. E., came in collision off the coast of North Carolina with the steamer City of St. Augustine, of 390 tons, bound southward upon a course S. W. $\frac{3}{4}$ W. The stem of the City of St. Augustine came in contact with the schooner's bowsprit, which, being broken at the knightheads, and carried away, their bows came in collision. The hull of the steamer was injured on her port side, 14 or 15 feet abaft the stem. The schooner's port bow was crushed in, the blow being from port to starboard. The schooner was so damaged that she filled, but did not sink, and was towed to Wilmington. The above libel and cross libel were filed to recover the respective damages.

The night was dark, but clear, with starlight. The wind was moderate, about N. N. W. The lights of both were properly set and burning. The steamer was going from eight to nine knots; the schooner, from four to five knots. About 14 minutes before the collision the green light of each was seen by the other a little on the starboard bow of each. "It is evident, therefore, that the schooner was at that time to the westward of the line of the steamer's course,

which was then also directed astern of the schooner; otherwise the steamer's red light must have been visible. But the schooner was making, doubtless, a half-point leeway, so that her actual course was very nearly opposite to that of the steamer. It was the duty of the steamer to keep out of the way of the sailing vessel. The excuse of the steamer for not doing so is that the schooner did not keep her course; but that, after having first turned to the eastward sufficiently to show her red light to the steamer (upon seeing which the steamer changed her course a point and a half to the westward, so as to bring the schooner's red light well upon the steamer's port bow), the schooner again changed her course to the westward, so as again to show her green light, whereupon the steamer put her course still more to the westward, until, at collision, she was heading about due west; and that the collision happened solely in consequence of the improper changes of course by the schooner. Such changes are denied by the schooner's witnesses."

The question upon whom the responsibility for this collision must rest is a most puzzling one. The mate, lookout, and wheelsman of the Norman were the persons on deck before and at the time of the collision. The mate gave his testimony orally, and the two others, both colored men, and not apparently of much intelligence, gave their depositions. Fowler, the second officer of the St. Augustine, and the lookout and wheelsman, both Swedes, were the persons in control of the navigation of the steamer just before the collision, and testified orally. The testimony of the Norman's witnesses is definite and positive that there was no change of course on her part, until a final one, in extremis, under a port wheel, just before the collision, and it is difficult to see why she should intentionally, and without apparent reason, have changed her course. On the other hand, Fowler, the second mate of the steamship, whose testimony forcibly suggests that he intended to act both with discretion and with caution, and his cowitnesses, who were intelligent men of their class, testify that when the red light of the schooner came into view the course of the steamer was altered from S. W. ½ W. to W. S. W., and subsequently to W. by S., and subsequently to W., which was followed instantly by the order hard a-port; and that thus the officer in charge continually attempted to get away from the schooner. The last order the wheelsman does not recollect. The announcement of these successive orders was heard by one of the sailors who were below deck, and that they were given and obeyed cannot reasonably be doubted; but the question whether they were given to meet a continuous and material change of course on the part of the schooner is not settled thereby. The appellants relied before the district court, and still rely, as corroborative of their theory, upon the alleged fact that the angle of collision was a right angle. If this was true, it would go far to show that the schooner had changed her course at least 3½ points to the westward, and thus had continuously baffled the attempt of the steamer to keep out of her way. But we concur with the district court that the appearance of the wounds on each vessel does not sustain the theory of

a right-angled collision. The testimony of the Wilmington port wardens, which was used before the commissioner, was to the effect that the blow upon the schooner was on the port bow, nearly head on. The injury to the steamer, about 14 feet abaft her stem on the port side, and the scraping of the schooner along the same side, are inconsistent with a right-angled blow. Apparently the bows of the two vessels came together at an angle of two or three points. It is manifest from the concurrent testimony from each vessel that the green light of the schooner was at first nearly straight ahead of the steamer. Our conclusion is that subsequently there was no substantial change in the course of the schooner, but that the red light made its appearance through her yawing or leeway. The original fault which created the calamity was that when the vessels were approaching each other the schooner's green light being nearly straight ahead, the steamer, in the language of the district judge, "did not in her maneuvers allow a sufficient margin for passing the schooner, nor for the usual and necessary variation in her course" through yawing or leeway.. The vessels were on nearly opposite courses. The steamer was eastward of the schooner, and proceeded too closely, upon the supposition that the sailing vessel would continue to run with precision. The decrees of the district court are affirmed, but without costs of either court.

THE VICTORY.

THE PLYMOTHEAN.

CANTON INS. CO., Limited, et al. v. CLAIMANTS OF THE VICTORY et al.

CLAIMANTS OF THE VICTORY v. CANTON INS. CO., Limited, et al.

(Circuit Court of Appeals, Fourth Circuit. May 28, 1895.)

No. 113.

1. COLLISION BETWEEN STEAMERS IN CHANNEL—ARTICLE 21, WHERE APPLICABLE—COAST WATERS.

   Article 21 of the international rules of 1885, requiring steamships to keep to the starboard side in narrow channels, as well as the corresponding provision in Rev. St. § 4233, applies to harbors and other navigable coast waters communicating directly with the ocean, and hence governs in the navigation of Elizabeth river leading to Norfolk harbor. 63 Fed. 631, affirmed. The Britannia, 14 Sup. Ct. 795, 153 U. S. 130, and the John King, 1 C. C. A. 323, 49 Fed. 469, followed.

2. SAME.

   Two steamers colliding in the Elizabeth river below Norfolk in the daytime, when each had the other in full view, as they approached from opposite directions, *held* both in fault,—one for insisting on keeping to the side of the channel lying on her port hand, in violation of international article 21, and refusing to change her course or reverse until collision was inevitable, and the other for obstinately pursuing her course, though on the proper side of the channel, and failing to reverse after the other refused to assent to her signals; the fault of the other, however, being regarded as much the graver. 63 Fed. 631, modified.

3. SAME—RIGHTS OF CARGO OWNERS—MUTUAL FAULT.
The faults of the vessels are not chargeable to cargo owners, and, in cases of mutual fault, they are entitled to complete indemnity.

4. SAME—DEGREES OF FAULT.
Where both vessels are held in fault, but the fault of one is much graver than that of the other, the liability of each may be measured by the degree of its fault. *Held*, therefore, that, where there was great damage to cargo, the entire proceeds of the vessel most in fault would be applied to making it good, and that any deficiency should be supplied by the other vessel.

Appeals from the District Court of the United States for the Eastern District of Virginia.

These are appeals from the district court of the United States for the Eastern district of Virginia, sitting in admiralty.

On the 12th November, 1891, the British steamer Victory, in ballast, was proceeding up Elizabeth river on her way from Hampton Roads to Norfolk. The steamship Plymothean, on the same day, had left the pier at Lambert's point, and was proceeding to sea down Elizabeth river. She had a cargo of cotton. The Victory was an iron steamship, 338 feet in length, 38½ in breadth, drawing 17 feet aft and 13 feet forward. In officers and crew she had 31 men. The Plymothean was 216 feet long, 1,016 net tonnage, her cargo of 3,682 bales of cotton. Her officers and crew numbered 21. Each ship was in charge of a local pilot. The master of each steamship was on the bridge with the pilot, acting as lookout, and seeing that the pilot's orders were executed. Neither of the steamships had any other lookout. The channel from the pier at Lambert's point runs to the channel of Elizabeth river at an angle of about 45 degrees. At black buoy No. 9 in Elizabeth river, the channel of the river becomes nearly, if not entirely, straight, and runs due north from that buoy on a line to and beyond Craney Island light; the distance between the buoy and the light being 1⅛ miles. The uniform depth of the channel between these two points is 25 feet. At Craney Island the channel is 250 yards in width. At buoy No. 9 the channel is 400 yards in width. Outside of the channel on both sides thereof there are large spaces of water; that to the west side being 8 or 10 feet in depth, and on the east side of the channel more shallow. The Plymothean, coming from Lambert's point, had reached the angle of the channel at buoy No. 9, and, straightening out again, proceeded to sea under a ported helm, keeping to the starboard side of the channel. This was at 4 p. m. At the same time the Victory was seen in the channel of the same river opposite to Craney Island light, a mile and one-eighth off, under a starboard helm. She was about mid-channel, or perhaps to the eastward of mid-channel, and moving with the tide about six or seven miles an hour. The Plymothean was steaming against the tide at the rate of four miles an hour. They kept their respective courses without change until collision became imminent,—indeed, inevitable,—when each reversed engines and backed with all speed, but without avail. At 4:14 p. m. the stem of the Victory penetrated the port side of the Plymothean at her main bridge, inflicting so deep a wound that she had to be beached on the bank of the channel east of buoy No. 7. The owners of each of the steamships instituted proceedings seeking limitation of liability. The Victory has been appraised at $67,500. She claims to have sustained injury from the collision to the amount of $14,000. The Plymothean has been appraised at $33,000; her freight is valued at $11,871,—in all $45,000, and upward. The actual amount reduced by her proportionate amount of salvage expenses is $40,000. She claims damages arising from the collision to the amount of $42,000. The damage to the cargo is proved to be $72,000. Each steamship intervenes in the proceedings of the other, and claims damages for the collision. The owners of the cargo intervene in both proceedings, seeking to hold both vessels responsible. The district court held the Victory to be solely in fault, and rendered a decree against her, appor-

tioning the sum for which stipulation was given for her pro rata between the Plymothean and her cargo. 63 Fed. 631. Each party comes up to this court on appeal.

Wilhelmus Mynderse, of Butler, Stillman & Hubbard, for Canton Ins. Co.

Robert M. Hughes, of Sharp & Hughes, for the Victory.

Floyd Hughes, of Whitehurst & Hughes, for the Plymothean.

Before FULLER, Chief Justice, and GOFF and SIMONTON, Circuit Judges.

SIMONTON, Circuit Judge (after stating the facts). The experienced and learned judge who heard the case below, after a clear and full statement of the facts, held the Victory liable for the collision, because she violated the great rule of the road, "Keep to the right." He applied to her that rule as embodied in article 21 in the revised international rules and regulations for preventing collisions at sea, adopted and made the law of the United States by an act of congress March 3, 1885 (23 Stat. 438). The Victory, being in a comparatively narrow but deep channel, up which she was proceeding in full view of the Plymothean, coming down the same channel, and on the east side thereof, continued her course without change, notwithstanding the failure of the Plymothean to respond to her signals, thus making a collision inevitable.

Article 21 is in these words: "In narrow channels every steamship shall, when safe and practicable, keep to that side of the fair way or mid-channel which lies on the starboard side of such ship." The proctor of the Victory contends that this rule does not apply to the navigation of Elizabeth river, as it is not included in the term "upon the high seas or coast waters of the United States." But in the case of The Britannia, 153 U. S. 130, 14 Sup. Ct. 795, the supreme court of the United States held this rule 21 binding upon vessels in the harbor of New York at the entrance of East river; and in The John King, 1 C. C. A. 323, 49 Fed. 469, the circuit court of appeals of the Second circuit reached the same conclusion, notwithstanding that article 23 of the navigation act appeared to be in conflict with the rule of the supervising inspectors in regard to navigation in New York harbor. The rules of navigation in the act of 1885 control all vessels on the high seas and coast waters of the United States. The cases above quoted evidently construe these words "coast waters" to mean harbors and other waters upon the coast communicating directly with the ocean. We would be led to the same conclusion, comparing the language used in the act of August 19, 1890 (26 Stat. 320). This act has not yet gone into effect, but it is in pari materia with the act of 1885, and is intended to modify and improve it. It also has an article 25, containing the exact provisions of this article 21, and it declares that the regulations must be followed by "all public and private vessels of the United States, upon the high seas and in all waters connected therewith, navigable by sea-going vessels." The act of 1885 excludes

from its provisions the harbors, lakes, and inland waters of the United States. It is not unreasonable to construe these words "harbors," "lakes," and "inland waters" of the United States as meaning the Great Lakes and their harbors and inland waters connected therewith, and such rivers as flow in the interior of the country at long distances from the sea. But whatever construction we may give to these words, if we conclude that the Victory, in Elizabeth river, was governed, not by the regulations of the act of 1885, but by the regulations theretofore in force, embraced in section 4233 of the Revised Statutes, we will find in those regulations the same rule prescribed which the learned judge enforced here, "Keep to the right." Not only so, but these regulations in article 21 prescribe that every steam vessel when approaching another vessel, so as to involve risk of collision, shall slacken her speed, or, if necessary, stop and reverse. There can be no doubt that these two vessels were approaching each other, each stubbornly adhering to the same side of the channel, and that their movements involved the risk of collision.

It is contended that the Victory, in Elizabeth river, was under no special regulation requiring her to proceed on that side of the river channel to her right. But if she were not controlled by the regulation of the act of 1885, or by the regulation set forth in the Revised Statutes, she must have been under some rule established by custom. See The Vanderbilt, 6 Wall. 225. The record discloses no custom which authorizes a vessel in this river, proceeding down the channel, to select either side she pleases. We are of the opinion that the court below did not err in the conclusion as to the error committed by the Victory. But, in considering the right of the owners of the cargo to damages, we cannot reach the same conclusion which he did, exempting the Plymothean from all responsibility.

The record shows that the two steamships, at 4 o'clock, on a bright afternoon, came into collision in Elizabeth river, a broad and deep stream, with ample sea room for each vessel, each having seen the other in full and uninterrupted view when over a mile and an eighth apart. The Plymothean, it is true, was on that side of the river where she should be, and the Victory was on the wrong side of the channel. Yet, although the steamers were surely approaching each other, it was manifest that each doggedly kept her course without taking any precaution whatever until too late and when the pending collision became inevitable. The slightest change in the course of each or of either of them would have prevented the collision. It is true that the Victory committed a very grave error, and her fault is the greater, but this will not excuse the Plymothean. 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 the approaching steamer. He must use them. "Notwithstanding the error committed by one of the two

vessels approaching each other from opposite directions, it did not excuse the other from adopting every proper precaution required by the special circumstances of the case to prevent the collision." Article 24, The Maria Martin, 12 Wall. 31; The Scotia, 14 Wall. 181. "If there be any uncertainty as to the intention of the approaching vessels, this of itself calls for the closest watch and the highest degree of diligence on the part of the other vessel in reference to her movements. It behooves those in charge to be prompt in availing themselves of every resource to avoid not only collision, but the risk of such a catastrophe." The Louise, 3 C. C. A. 330, 52 Fed. 885. As was said by Brett, M. R. (The Beryl, 9 Prob. Div. 137): "The basis of the regulations for preventing collisions at sea is for their instruction to those in charge of ships as to their conduct, and the legislature has not thought it enough to say, 'We have given you rules which will prevent a collision;' they have gone further, and said, 'For the safety of navigation, we will give you rules which will prevent risk of collision. It is not enough if you do only that which will prevent collision; we will give you rules which will regulate your conduct for the purpose of preventing even the risk of collision.' The words are not, 'if two ships are crossing with the risk of collision,' but 'are crossing so as to involve risk of collision.'" The Eleanora, 17 Blatchf. 88, Fed. Cas. No. 4,335.

We cannot find anything in this record which shows any precaution taken by the Plymothean when she saw the Victory disregarding her signals and obstinately pursuing her course. The only thing which she did was simply to repeat the disregarded signal. Even that was not done until it became too late to avoid a collision. Under these circumstances it is impossible to say that the Plymothean is free from fault. It certainly would not be equitable to allow her to go in and share on equal terms in the fund in this court with the cargo, which certainly was in no fault whatever.

The rights of the cargo owners differ entirely from those of the two steamships. They in no way shared in the faults committed, and they are entitled to complete indemnity, restitutio ad integrum. The Atlas, 93 U. S. 302; The Alabama & The Game Cock, 92 U. S. 695; The Virginia Ehrman & The Agnese, 97 U. S. 316. In this instance before the court, the cargo must be paid for in full by both vessels. This leads to the embarrassing question, how shall these damages be apportioned between these two vessels? Each of them, as has been seen, was in fault. But the judge who heard the case, and with his usual care and ability examined and weighed the testimony, came to the conclusion that the Victory was grossly in fault, so much so as to be the sole cause of the disaster. While not going to this length with him, this court fully concurs in his conclusion that the Victory was grossly in fault. The Plymothean was guilty of an act of omission. The course of the Victory seems almost willful. The Victory, no doubt, was the chief cause of the disaster. If the Plymothean had taken the precautions which she should

have taken, the disaster might have been prevented. Under these circumstances, it would seem to be manifestly inequitable to assess upon her one-half of the entire loss.

The loss to the cargo was	$71,000
The damage to the Plymothean	33,000
The damage to the Victory	14,000
	$118,000
Of which one-half is	$59,000
The value of the Plymothean is	$40,000

The rule unquestionably is that, when both vessels are in fault, both must contribute to make good the damages. The Washington & The Gregory, 9 Wall. 513; The Connecticut, 103 U. S. 710; The Potomac, 105 U. S. 630. And the general rule, almost universal, is to divide the loss equally among the guilty parties, with this qualification: that, if one party is exhausted before the person injured is fully indemnified, the deficiency must be made up by the other party. The North Star, 106 U. S. 17, 1 Sup. Ct. 41; The Max Morris, 137 U. S. 1, 11 Sup. Ct. 29; The Washington & The Gregory, supra; The Alabama & The Game Cock, supra. But this rule cannot be said to be inflexible.

In The Max Morris, 137 U. S. 1, 11 Sup. Ct. 29, the question was suggested before the supreme court, but it was not necessary to pass upon it. The court says:

"Whether in a case like this [mutual fault] the decree should be for exactly one-half of the damages sustained, or might, in the discretion of the court, be for a greater or less proportion of such damages, is a question not presented for our determination on this record, and we express no opinion on it."

The application of an equal division of damages is said to be the "rusticum jus." Chancellor Kent applies to it that term. 3 Kent, Comm. § 231; Mars. Mar. Coll. (2d Ed.) p. 133. That is to say, it is an application of that sense of fair dealing and of justice imbedded in our nature, the conclusions of common sense, of a mind "abnormis sapiens." If the spirit of the rule be adopted, and the liability of each vessel be measured by its degree of fault, exact justice will be done by applying the stipulated value of the Victory to the loss sustained by the cargo, and by requiring the Plymothean to make up any deficiency, so that the cargo owners obtain complete indemnity.

The cause is remanded to the district court, with instructions to modify its decree in accordance with this opinion.

VILLAGE OF CELINA v. EASTPORT SAVINGS BANK.

(Circuit Court of Appeals, Sixth Circuit. June 4, 1895.)

No. 248.

1. EQUITY—SETTING ASIDE JUDGMENT—MISTAKE.
Equity has jurisdiction of a bill to set aside a judgment which has been suffered by a mistake, but much clearer and stronger proof of freedom from fault or negligence, in the party seeking such relief, is required, than upon an application for a new trial in the original action.

2. SAME—DILIGENCE.
In June, 1890, an action was commenced against the village of C., by service of process upon the mayor. Shortly afterwards, the mayor called upon a firm of attorneys, and inquired if they could attend to the suit, to which they replied that they could. Thereafter neither the mayor nor the village paid any further attention to the suit, never knew whether an answer was filed or not, or made any inquiry about the case. In December, 1890, judgment was entered against the village, by default, upon which no proceedings were taken until September, 1891, when the plaintiff's attorney wrote to the village requesting payment. In October, 1891, the village filed a bill to set aside the judgment. *Held*, that no case was made out for the relief sought.

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

This was a suit by the village of Celina against the Eastport Savings Bank to set aside a judgment. The circuit court dismissed the bill. Complainant appeals.

On the 2d day of December, 1890, the Eastport Savings Bank recovered a judgment by default against the village of Celina, the present appellant, for the sum of $3,611.56, besides costs, in an action brought on the 7th day of June preceding, in which there was due personal service of process upon the mayor of the village. After the judgment was entered in December, 1890, no further proceedings were had in the case during that term, nor until the 28th day of October, 1891, when the present suit was instituted by the village of Celina, the defendant in the suit in which the judgment was obtained, against the plaintiff therein, the Eastport Savings Bank.

The character of the pleadings and practice in the court below is anomalous in the extreme. The proceedings were commenced by a petition, and not by bill. The petition is addressed to the court as a court of law, sets up the recovery of the judgment against the petitioner, stating that it remains in full force and unsatisfied; that it was taken by default without the knowledge of "this plaintiff"; that the plaintiff had reason to believe, and did believe, that it had employed attorneys to defend the case; that a proper answer had been made for it in the cause, and that the mayor of the village, after having been served with process, and on the 27th day of June, 1890, being authorized and directed by a resolution passed by the common council to employ an attorney to represent the village in the cause, visited a firm of attorneys in the village, and inquired of them if they could represent it in the said action, and that the said firm of attorneys informed the mayor that they could represent the village; and that the mayor, after some further conversation with said firm about the action, the particulars of which are not stated, left the attorneys' office "under the definite and positive impression and belief" that he had engaged the attorneys to represent the village in the said action, and that the attorneys had agreed to do it; that the mayor, relying upon such understanding, gave no further time or attention to the interests of said village in said action; that it did not discover that the judgment had been taken during the term of the court at which it was rendered, nor until the 1st day of September, 1891, when it learned of it by a letter from the attorney for the Eastport Savings Bank, mentioning the judgment and inquiring what action

the village expected to take in reference to it; and concludes this part of the statement of its case with the allegation, "nor could this plaintiff with reasonable diligence have discovered the facts hereinbefore mentioned and stated." The petitioner then proceeds to make a statement of what is the defense which it conceives it was entitled to make, the substance of which is that the judgment was rendered for a sum due upon the coupons of bonds of the village which had been issued by it in aid of a railroad enterprise under a statute which purported to authorize the issuance of such bonds, but which statute it alleges was unconstitutional, for reasons set out at length in the statement of the proposed defense. It appears that the bonds were of the same class of bonds as those which were held void by this court in Aetna Life Ins. Co. v. Pleasant Tp., 10 C. C. A. 611, 62 Fed. 718, and subject to the same defense as was therein sustained. The petitioner concludes by praying for an order enjoining the enforcement of the judgment during the pendency of this action, and that the said judgment be set aside and held for naught; that its said defense may be allowed to be set up, and for any other relief to which the petitioner may be entitled. There was no prayer for process in the petition; nevertheless process appears to have been issued in the form of a subpoena, and a temporary restraining order was issued as prayed in the petition.

The bank appeared and answered the petition, and for its first defense, after admitting that the bank had recovered the judgment as stated in the petition, and that the attorney for the bank informed the mayor of the village of the recovery of the judgment as stated, denied all the other allegations of the petition respecting the circumstances of the supposed employment of an attorney to look after the defense of the village, the reliance upon the supposed arrangement made for that purpose, and the understanding of the attorneys who were expected to defend, except such other of the allegations of the petition as were admissions of fact. For its second defense, the bank set forth that for eight years previously the village had duly levied and collected a sufficient sum of money for the special purpose of paying the coupons upon these bonds, and that the money so collected was then in the treasury of the village devoted to the payment, among other things, of the bank's claim.

The case was tried by the court below upon an agreed statement of facts, substantially as alleged in the pleadings, and the finding was that the plaintiff is not entitled to the relief prayed for in its said bill, and thereupon the court ordered that the bill should be dismissed, and that the defendant recover its costs. Thereupon the village of Celina filed its motion for a new trial, which was overruled. A bill of exceptions was settled and signed, in which it is stated that the petitioner excepted to the judgment of the court and the order refusing a new trial. From the action of the court below the petitioner appeals.

Doyle, Scott & Lewis, for appellant.

James L. Price, for appellee.

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

SEVERENS, District Judge, having stated the facts as above stated, delivered the opinion of the court.

The proceedings in this case appear to have taken on much of the form and character of Code practice and pleading, at one time having the characteristics of a proceeding in a court of law, and at another that of a proceeding in a court of equity. The court appears to have treated the petition as a bill in equity, and in the subsequent proceedings, except in the settlement of a bill of exceptions, seems to have acted in the case upon the theory of its being a bill in equity to set aside a judgment upon the ground of a mistake. As the proceedings finally ended in a decree dismissing what is therein called "the bill," and as no objection has been taken

in this court to the peculiar procedure in the case, we have considered the subject upon its merits.

The ground upon which the village of Celina seeks relief from the judgment which it has suffered to pass by default, is that it failed to take the necessary steps to contest the bank's right of recovery upon the cause of action sued on, in consequence of a mistake or misapprehension of the mayor of the village in supposing that he had employed attorneys to look after the case and interpose the proper defense. A court of chancery has jurisdiction upon a bill filed for the purpose of setting aside a judgment and furnishing an opportunity for another trial where the judgment has been suffered by a clear mistake into which the party against whom the judgment was rendered has fallen without any fault on his part. But in such case "a litigant is required to have exercised the greatest degree of watchfulness over the progress of his suit in court." 1 Black Judgm. § 387; Truly v. Wanzer, 5 How. 142; Crim v. Handley, 94 U. S. 652; 3 Pom. Eq. Jur. § 134, and note; 2 Story, Eq. Jur. § 887. In Insurance Co. v. Hodgson, 7 Cranch, 336, it was said by Chief Justice Marshall that it is a condition to the relief that the party was prevented from interposing his defense by fraud or unavoidable accident unmixed with any fault or negligence in himself or his agents. The court in which the judgment was rendered, for such a reason, also has power, until the case has passed beyond its control by the lapse of the term, to vacate the judgment and award a new trial upon motion. Here the defendant by its inattention had lost this remedy, for the power of the court which rendered the judgment to grant the relief was gone. Muller v. Ehlers, 91 U. S. 249; Bronson v. Schulten, 104 U. S. 410; Phillips v. Negley, 117 U. S. 665, 6 Sup. Ct. 901. But there is a difference in the circumstances which would be held sufficient to justify the court which renders the judgment in awarding a new trial while the case is still subject to its control and those upon which the court would, in another suit, interpose by injunction to restrain the plaintiff in an action at law from prosecuting it and remitting him to a new trial; much clearer and stronger proof of freedom from fault or negligence being required in the latter than in the former case.

In the present case we do not think the petition itself sets forth facts sufficient to justify the court, in this independent proceeding, in enjoining the prosecution of the judgment. Taking the statements in the petition to be true, they amount to no more than this: that the mayor of the village asked the attorneys whom he visited if they could attend to the suit, and they replied that they could. This was a very equivocal sort of retainer, and a careless mode of doing business. It appears that the village never gave any further attention to the case, never knew whether an answer was filed or not, and, as is to be gathered from the petition, never made any subsequent inquiry about the case. Time went on from the 27th day of June, 1890, to the 1st of September, 1891, without any inquiry being made about the case, and then only was the village informed of what had become of it by a letter from the attorney

for the bank, asking for a satisfaction of the judgment. Meantime, as appears, the village proceeded to collect from its taxpayers the money to pay the coupons for which the judgment was rendered. In these circumstances, while we do not say that the showing would not be sufficient to sustain a motion for a new trial, if that had been seasonably made in the court which rendered the judgment, we do not think the case is brought within the requirements of the rule upon which a court of equity acts in decreeing to be void a judgment recovered in a court of law. We do not think that the allegation in the petition that the petitioner "could not with reasonable diligence have discovered the fact," is supported by the facts there alleged.

For these reasons we think the decree of the court below should be affirmed, and it is so ordered.

HORTON et al. v. McKEE et al.

(Circuit Court, N. D. Georgia. April 8, 1895.)

No. 806.

1. CONTRACTS—SPECIFIC PERFORMANCE—INDEFINITENESS.
   A contract for the sale of real estate provided that a part of the purchase money, payment of which was to be deferred for a year, should be "secured by mortgage on property worth at least two for one." *Held*, that such contract was not too indefinite, as to the kind of property on which security should be given, to justify a decree for specific performance.
2. SAME—READINESS TO PERFORM.
   Held, further, that the complainant was not entitled to a decree for specific performance, without a clear and definite offer, contained in his bill, to comply with the contract on his part, especially in respect to the character of the property on which it was proposed to give security.

This was a suit by H. M. Horton and Joseph M. Parsons against David M. McKee and Frank F. Moore for specific performance of a contract for the sale of real estate. The defendants demurred to the bill.

L. E. Parsons, Jr., and Mayson & Hill, for complainants.
R. P. Lattner, F. F. Moore, and E. T. Williams, for defendants.

NEWMAN, District Judge. The amendment filed by the plaintiffs, setting up the map furnished them by defendant McKee, relieves the case of any difficulty as to the identification of the property sold, if there was any before, about which I have some doubt.

The other point raised by the demurrer and on the argument is that the contract is indefinite and incomplete as to the clause providing for securing one-half of the purchase money, the payment of which is to be deferred for one year. The language of the agreement is that it is to be "secured by mortgage on property worth at least two for one." The word "property," as used in this connection, can hardly have the enlarged meaning contended for by counsel for the defendants. They say it would embrace everything

which can be called property. This could not be true,—it could not, for example, refer to perishable property, vegetables, and the like, as they argue. Such property could not be considered as having been in contemplation to secure a debt running for a year. Neither do I think that the term would be held to embrace bonds, stocks, and the like, as contended, because in that case the term "mortgage" would hardly have been used, but rather the expressions "collateral" or "pledge," or both the term "mortgage" and one of the latter, probably; so that it refers either to substantial personalty or to real estate. My opinion is that real estate was in the minds of the parties when the contract was made. The contract itself is in reference to real estate, and this class of property is usually given to secure debts such as this, and running as long as this debt would have run. The general rule controlling cases of this sort is stated in Fry, Spec. Perf. § 349, as follows:

"It is, of course, essential to the completeness of the contract that it should express not only the names of the parties, the subject-matter, and the price, but all the other material terms. What are, in each case, the material terms of a contract, and how far it must descend into details to prevent its being void, as incomplete and uncertain, are questions which must, of course, be determined by a consideration of each contract separately. It may, however, be laid down that the court will carry into effect a contract framed in general terms, where the law will supply the details; but, if any details are to be supplied in modes which cannot be adopted by the court, there is then no concluded contract capable of being enforced."

In the agreement now before the court, as has been observed, the property which is the subject-matter of the agreement is sufficiently identified; then the parties are named, and the price is fixed. The only matter remaining to be settled is the security for the payment of the deferred part of the purchase money. The main purpose of the clause under consideration is security, and ample security, for the purchase money. The particular character of the property is immaterial, evidently; the real object is good security. It seems that this is one of the cases where, notwithstanding the general terms of the agreement, the law, through the machinery of the court, may supply the details.

Another suggestion may be made. Defendant McKee has, by his refusal to consummate the trade, put it out of the power of complainant to give him any kind of security, even of the very best character, and of ample valuation, and he should not be allowed to take advantage of his own default, if complainant was ready and willing to comply with the contract on his part. "When the contract is incomplete through default of the defendant, and the incompleteness is one which can be remedied, the court will not refuse its aid." Fry, Spec. Perf. § 322, citing Pritchard v. Ovey, 1 Jac. & W. 396; Lord Kensington v. Phillips, 5 Dow, 61 (decided by Lord Eldon and referred to in Pritchard v. Ovey). The difficulty about this case on the part of complainant is that there is not in the bill a clear and definite offer to comply with the contract on his part, and especially in the respect now under consideration. I think the bill should show a readiness and willingness on the part of complainant, prior to the filing of the bill, to fully

comply with the contract by paying the one-half cash of the purchase-money, and securing the remaining $15,000 by a mortgage on property worth at least $30,000, and naming at least the character of the property which is tendered, and a present continuing offer of the same kind. In other words, in order to save this case for complainant, it is necessary that he should particularize and come clearly within the terms of that which is general in the agreement with reference to security for the deferred purchase money. If an amendment is offered which is deemed sufficient in this respect, the demurrer will be overruled; otherwise it will be sustained.

STEVENS v. McKIBBIN.

(Circuit Court of Appeals, Fifth Circuit. May 28, 1895.)

No. 339.

PARTNERSHIP—EVIDENCE TO ESTABLISH—SUFFICIENCY.

In an action to dissolve a partnership, and for an accounting, the evidence showed that defendant was engaged in buying and selling phosphate lands, and had options on a large quantity of such land; that, to complete the purchase, he would require much money; that it was orally agreed that complainant was to advance money to defendant to invest in phosphate lands, and to have an interest in the profits, and that complainant would accept defendant's receipts for any money he might contribute; that one of such receipts recited that the money was "to be applied in payment of phosphate lands, the profits to be equitably divided with" complainant; that another recited that it was "to be applied on phosphate lands, same to be returned to him on sale of lands, and shall have, as use for same, an equitable interest accruing in all profits from sales," and that another stated that it was "to be used in dealing in phosphate lands, and returned when said lands are sold"; that there were no definite terms of partnership employed or agreed on in the contract, no estimate or valuation placed on the options and contracts held by defendant, and no agreement as to the amount of money, time, or attention to be contributed to the business by either party. *Held*, that the evidence failed to establish a partnership agreement.

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

The bill in this case alleges that on or about the 7th day of October, 1890, the appellee (who was the complainant below) and the defendant George C. Stevens, entered into a contract of partnership, for the purpose of buying, selling, and negotiating sales of phosphate lands located in the state of Florida, by which contract the complainant and the said defendant Stevens were to share equally in the profits realized or to be realized from the business of said copartnership, and it alleges that from time to time the complainant contributed sums of money to the capital of said partnership, which said sums aggregate the sum of $7,890, in cash, and that he executed notes, along with defendant George C. Stevens and others, to about the amount of $20,000, and that the said cash and the proceeds of said notes were used by said partnership in the purchase of phosphate lands, which are included in the several sales and transactions specifically mentioned in the bill; that on or about the —— of February, A. D. 1891, the defendant H. H. Graham entered into some agreement with the defendant George C. Stevens, the terms of which said agreement were and are unknown to the complainant, but by which he understood the said Graham was to have some interest in the said Stevens' interest in the said partnership; that no new contract of

partnership was entered into between the complainant and said defendant Stevens at the time the defendant Graham entered into said arrangement with the defendant Stevens, nor at any time thereafter, except that the complainant and the defendants, Stevens and Graham, some time in the month of March, A. D. 1891, entered into a partnership arrangement for the purpose of doing a real-estate, stock, and brokerage business, at Ocala, Fla., the profits of said business to be equally divided among the three partners, but that said partnership for the purpose of doing the said real-estate, stock, and brokerage business was entirely distinct and separate from the business of the partnership theretofore entered into with said Stevens, mentioned in the bill. And the bill alleges that on or about March, A. D. 1892, the said latter partnership to do a real-estate, stock, and brokerage business was dissolved. The bill further alleges that at different times during the years 1891 and 1892 the defendants, Stevens and Graham, negotiated various sales of phosphate lands, amounting in the aggregate to a large sum of money; and it alleges that all the lands so sold were purchased with the moneys and assets of the copartnership alleged to have been entered into in October, 1890. It alleges that a large portion of the moneys and other considerations for the purchase of the said lands have not been paid by the purchasers thereof, and the exact amount yet due, the complainant cannot state, but that it will exceed the sum of $250,000, all of which moneys and considerations are now due, or will soon become due, and are payable to the said Stevens and Graham within a short time; that all the negotiations, contracts, and agreements for the sale of the said lands were personally conducted by the said Stevens and the said Graham, and that they have neglected and refused, although often requested so to do by the complainant, to render to him any statement or account of their receipts from said sales, and have refused to account to him for his interest therein, and have attempted to exclude from him all knowledge of these transactions, and from all participation in the profits and receipts. And the complainant charges that the said Stevens and the said Graham are appropriating, and threatening to appropriate, all the assets of the said partnership to their own use, in fraud of the complainant's rights. The bill also alleges that the last sale made by the defendants closes out all of the phosphate lands which were purchased by the capital of the said copartnership, and that all that remains now to be done is to wind up the affairs of the copartnership. The bill alleges that the defendants, Stevens and Graham, have no visible property which could be subjected to the satisfaction of any judgment or decree which the complainant might recover against them, or either of them, and charges that it is their purpose to collect the moneys which are still due from the purchasers aforesaid, and to place them beyond the reach of the complainant, and to defraud him by excluding him from any participation in the profits arising from said sale. The bill prays for a dissolution of the partnership, that an account may be taken of all the said partnership dealings and transactions between the complainant and the defendants, and that what shall appear to be due from the defendants may be decreed to be paid to him, and for the appointment of a receiver, and for an injunction, etc. The answer of the defendant Stevens denies that on or about the 7th day of October, 1890, he entered into a copartnership with the complainant, or at any other time, for the purpose of buying, selling, and negotiating sales of phosphate lands located in Florida, or for any other purpose, and denies that there ever was any contract of copartnership, or that there was any contract or agreement, between himself and the complainant, by which they were to share equally in any profits, as charged in the bill. And he denies the allegation that the complainant ever contributed any cash, notes, or other thing of value, towards the capital of any copartnership between them, and denies that the said sums of money mentioned, or any part of them, were ever used by him as partnership funds raised by the complainant and himself for the purchase of any of the said lands, and alleges that the complainant never had any interest in any of the lands as a partner of either of these defendants, except an equity as to profits that may be realized in certain lands which have been transferred to the Florida Land Rock Phosphate Company and the Chicago Florida Phosphate Company, which equity arose out of an agreement and arrangement

made by the defendant Stevens with the complainant in October, 1890, by which the complainant was to let the defendant Stevens have money to carry on phosphate land purchases and deals, and Stevens guarantied to him great profits on all money so furnished him; that the agreement was that Stevens should use whatever moneys the complainant could furnish in the purchase of and payment for phosphate lands in the state of Florida, and for the use of which said Stevens should, upon all sales of lands purchased with such funds, return the original amount, and whatever profit would be realized upon such sum, as related to the whole amount of money invested in the particular lands so sold, with the guaranty that the complainant's money so advanced to Stevens should be doubled. The answer avers that this was the only agreement and arrangement between the complainant and the defendant Stevens; that there was no partnership, express or implied, in any manner or form, between them,—no sharing of losses by the complainant with the defendant,—but that the complainant was to have an equity in the investments made by the defendant, when profits should accrue, as before stated, but was to bear none of the losses, if any were sustained; that under this agreement and arrangement the complainant advanced, at various times, several sums of money, amounting in the aggregate to $4,930, and no more, for which the defendant gave to the complainant his receipts; the money thus advanced was invested in lands, which were subsequently sold to the Chicago Florida Phosphate Company and the Florida Land Rock Phosphate Company; that these land sales have not been closed up, and that the profits to accrue therefrom are not yet known, and can now only be approximated; that the complainant is not entitled to any profits on his advances until these sales are completed; that is to say, until the said lands are fully paid for, and all expenses connected therewith are paid off. The respondents, jointly answering said bill, deny that they entered into any agreement with each other in February, 1891, or at any other time, by which any partnership between respondent Stevens and the complainant was understood or recognized as existing in the ownership or purchase or sale of any lands; and both those defendants say, as is alleged in said bill, that the brokerage business of Stevens, Graham & Co. had no relation to or interest in any phosphate real estate owned or controlled by any of the parties to this cause. Respondents, further answering said bill, admit that the allegations thereof are true, to the extent that there was a nominal copartnership for the purpose of doing a general real-estate (except as to phosphate lands), stock, and brokerage business at Ocala, Fla., and that it was separate and distinct from the phosphate land business of these defendants. The respondent H. H. Graham, answering for himself, as to the allegations of said bill of a partnership existing between his codefendant and the complainant, says that he knows nothing, of his own knowledge, except that, upon his becoming associated with said Stevens as a partner as aforesaid, he understood the relationship between said Stevens and the complainant to be as stated by his codefendant, and that in his conversations with the complainant, both before and after this respondent and Stevens became partners as aforesaid, the complainant never claimed to be a partner with said Stevens, as is charged in said bill; that the complainant was not informed, as far as the knowledge of this defendant goes, of the partnership agreement between these codefendants, and was not consulted at the time of the formation thereof, nor at any time thereafter, as to the policy and business purposes of the defendants in the disposition of the phosphate lands embraced in the partnership rights and interests, for the reason that he (the complainant) had no right to any such recognition. The defendant Stevens, further answering said bill, and especially that part charging that complainant executed notes, along with him and others, to about the amount of $20,000, and that the proceeds thereof were used in the purchase of phosphate lands, says that, when this defendant became in need of the large sums of money that the complainant had pretended he could supply, he called upon him for it, but the complainant could not respond. Complainant then suggested that, with a good note, he might borrow $10,000 from his father, who lived in New York City. A note for that amount was then made and signed by the defendant Stevens and by the complainant. This note was made for 60 days, with this defendant's collaterals, in the amount of $20,000, as security, and the

father of the said complainant loaned the money on it, receiving for the loan the munificent pay of $1,000, this defendant getting only the sum of $9,000; and this defendant, at the maturity of the said note, paid it with his own funds, not one cent of which was advanced by complainant. Nor had any money of the complainant advanced to this defendant for investment as aforesaid earned any profits from which this defendant could draw to help pay the said $10,000 note. And the defendant, further answering said charge, says that there was another $10,000 note and a $1,000 note, which the complainant signed, with this defendant and others, but that they were never used, and not a dollar was ever raised upon them, or either of them. The receipts referred to were in evidence, and are in these words:

"Ocala, Fla., October 7, 1890.

"R. S. Clark, Sec'y.

"Received from J. C. McKibbin two thousand ($2,000) dollars, to be applied in payment of phosphate lands, the profits to be equitably divided with him on same; also, Oct. 16th, received of same party, on same conditions, for same purpose, ($300) three hundred dollars. G. C. Stevens."

"The Ocala House. R. S. Clark, Proprietor.

"Ocala, Fla., November 17, 1890.

"Received from J. C. McKibbin the following sums of money, viz.:

October 25th	$ 500 00
Nov. 12th	300 00
Nov. 10th	1,000 00
" 17th	725 00
	$2,525 00–100

—To be applied on phosphate lands, same to be returned to him on sale of lands, and shall have as use for same an equitable interest accruing in all profits from sales. G. C. Stevens."

"The Ocala House. R. S. Clark, Proprietor.

"Ocala, Fla., December 26th, 1890.

"Received of J. C. McKibbin, Nov. 25 & 29, 50.00 & 15.00,—total, $65.00,—to be used in dealings in phosphate lands, and returned when said lands are sold. G. C. Stevens."

The complainant took the testimony of several witnesses, for the purpose of proving admissions of Stevens relative to the alleged copartnership between them. On the final hearing on pleadings and proof, the circuit court rendered a decree for the complainant; deciding the alleged copartnership to exist, ordering an account, and decreeing that the complainant should recover a large sum of money from the defendant Stevens. From this decree, said defendant appealed.

John G. Reardon, George L. Paddock, and Banning & Banning, for appellant.

Bisbee & Rinehardt, for appellee.

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

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

There are several assignments of error, the first of which is that the circuit court erred in deciding that there was a partnership between the complainant and the defendant. If this assignment is sustained, there can be no need for us to consider the others. The controlling issue in the case is whether the relationship between the

complainant and Stevens was that of copartners. The parties, in their pleadings and in their testimony, agree that the contract between them, by which the complainant claims a partnership was formed, and under which he advanced his money, was made in October, 1890. They also agree that the brief partnership, for the purpose of doing a real-estate, stock, and brokerage business, formed in 1891 between Stevens, Graham, and the complainant, had nothing to do with the contract of 1890 referred to. It appears from the testimony that, at the time the agreement between the complainant and Stevens was made, the latter was, and for some time had been, engaged in buying and selling phosphate lands in the state of Florida, and had secured options on, and a control of, a large quantity of such lands, and that to complete the purchase of these lands it would require a large amount of money; that it was agreed between the parties that the complainant was to advance money to Stevens, to invest in phosphate lands, and was to have an interest in the profits realized therefrom, and it was also agreed that the complainant would accept Stevens' receipts for any money he might contribute to the adventure. There were no definite terms of partnership employed or agreed on in the contract. There was no estimate or valuation placed on the options and contracts already secured by Stevens, and there was no agreement as to the amount of money, time, or attention that was to be contributed to the business by either of the parties. The complainant was not bound to contribute any certain sum, but for such sums as he did contribute he was to accept Stevens' receipts, and Stevens was to use the money in dealings in phosphate lands. There was no agreement as to the proportion of the profits he was to receive, and none as to his sharing the losses. Indeed, the complainant himself does not undertake to state, in his testimony, what was definitely said by him and by Stevens about a copartnership. His testimony on the subject is indefinite and uncertain. He says that his intention was to form a copartnership, and his understanding was that they were entering into a copartnership, and states, as a reason for such understanding, the fact of his contributing funds to carry it on. He says that he agreed to accept Stevens' receipts for any money he might contribute, and that he was to share in the profits, but that there was no definite agreement as to the proportion of the profits he was to receive. The contract between the parties was entirely verbal, except so far as the same is expressed in the receipts given by Stevens to the complainant for the moneys contributed by him. Stevens testifies that the receipts were intended to express the contract between the complainant and himself, and he says that he guarantied to the complainant that his interest in the profits would not be less than double the amount of money he might contribute to the adventure, and that it was upon these terms the complainant advanced his money for investment, and that there was no partnership agreed on or intended. Other evidence in the case corroborates Stevens' statement as to this, and that he guarantied the complainant against any loss in his investments. One Gardner testifies that he was present when the agreement was made between the

complainant and Stevens, and that the agreement was that the former was to furnish some money, which the latter was to invest in lands, and which he agreed to double, and that neither party said anything about a partnership.

We think the character of the contract may be determined by the receipts exhibited in the testimony. They furnish the only written evidence which the parties themselves have made of their agreement. Two of the writings are more than receipts. They are contracts requiring Stevens to return the money advanced by the complainant to him when the lands in which the money was invested were sold. One of the receipts expressly provides that the complainant shall have, as use for the money, an equitable interest in all profits from the sale of the lands. We think these receipts disclose a purpose and agreement to repay the money at all events. It was to be paid when the lands to the purchase of which it was to be applied should be sold, and whether they were sold at a profit or a loss. The stipulation is not that the money advanced would be repaid out of the proceeds of the land when sold, but would be repaid when the lands were sold; the sale of the land fixing the time of the payment of the money. The testimony of the witnesses by whom it is sought to prove Stevens' admission of a partnership with the complainant is indefinite and uncertain, both as to what was said by Stevens in regard to his business relations with the complainant, and as to the time when the statements were made. They doubtless referred to the partnership in the real-estate and brokerage business of 1891–92, which had no connection with the partnership sought to be established in this suit, or to the particular land deals in which the complainant's money was used. "A partnership is a voluntary contract between two or more persons to place their money, effects, labor, and skill, or some, or all of them, in lawful business, and to divide the profit and bear the loss in certain proportions." 3 Kent, Comm. 20. If it be one of the terms of the contract that each shall share in the risks and losses, and also in the profits to be realized, this constitutes them partners inter sese. These risks or interests are not required to be equal, nor is it important that they shall agree in kind. The investment may be unequal, and the parties may agree to divide the profits unequally, but there must be a mutuality of risks,—an interest both in the profits and losses. Smith v. Garth, 32 Ala. 368. In the case of Cassidy v. Hall, 97 N. Y. 165, it is said: "It is well settled that when a party is only interested in the profits of a business, as a means of compensation for money advanced, he is not a partner." The receiving of part of the profits of a commercial partnership in lieu of or in addition to interest, by way of compensation for a loan of money, does not make the lender a partner with the borrower. Meehan v. Valentine, 145 U. S. 611, 12 Sup. Ct. 972. Thus a party may by agreement receive, by way of interest, a portion of the profits of an adventure, on money loaned to be used in the adventure, without becoming a partner. Judge Story says that the true rule is that "the agreement and intention of the parties themselves should govern in all cases." Story, Partn. §§ 1, 38, 49.

This certainly must be the rule, as between the parties themselves. In this case there are two of the essential requisites of a partnership wanting,—a joint fund and a common risk; and our opinion is that the testimony wholly fails to establish an agreement and intention of the parties to create the partnership alleged in the bill. The decree of the circuit court is reversed, and the cause remanded, with directions to dismiss the bill, but without prejudice to the complainant's rights to proceed against the defendant at law or in equity, as he may be advised his interests require.

FARMERS' LOAN & TRUST CO. v. CHICAGO & N. P. R. CO. et al.

(Circuit Court, N. D. Illinois. April 3, 1895.)

1. CORPORATIONS—TRUSTS—MORTGAGE.
   Act Ill. June 15, 1887, as amended by Act June 1, 1889, provides that every corporation organized for the purpose of accepting and executing trusts shall deposit with the auditor of public accounts, for the benefit of its creditors, the sum of $200,000, and declares that it shall not be lawful for any such company to accept any trust without first procuring a certificate from the auditor stating that it has made such deposit. *Held*, that a mortgage to secure a debt was not within the prohibition of the act.

2. MORTGAGES—VALIDITY—CORPORATIONS.
   Where a mortgage to a corporation that has not complied with said act provides for the execution of certain trusts which are within the prohibition of the act, such trusts are void, but the mortgage is not invalidated.

3. SAME—LIABILITY OF MORTGAGOR—ESTOPPEL—TRANSFER OF PROPERTY.
   Both the mortgagor in such a mortgage and a purchaser who has assumed the mortgage debt are estopped from asserting that the corporation has no power to act as mortgagee.

4. SAME—FORECLOSURE—INTERVENTION—RIGHTS OF STATE.
   Where the mortgagee in such mortgage brings suit in a federal court to foreclose such mortgage for the benefit of the innocent holders of the mortgage bonds, the state has no right to intervene in order to have the mortgage declared invalid because in violation of the state law, since the state has no property interest in the litigation.

5. SAME—RIGHTS OF JUDGMENT CREDITOR.
   A judgment creditor of a corporation has no right to intervene in a suit to foreclose a mortgage given by the corporation in order to assert the invalidity of the mortgage, on the grounds that there was no resolution of the stockholders authorizing the mortgage and that the mortgage was not recorded, where such creditor did not obtain judgment till after the foreclosure suit was begun.

In Equity.

Bill by the Farmers' Loan & Trust Company against the Chicago & Northern Pacific Railroad Company, the Northern Pacific Railroad Company, and others to foreclose a mortgage. Louis Daenell and the state of Illinois prayed leave to file petitions in intervention.

Mr. Turner, Mr. Herrick, and Mr. Burry, for complainant.
Mr. Spooner, Mr. Connell, and Mr. Miller, for defendant companies.
Mr. Varnum, for petitioner Louis Daenell.
Mr. Maloney, Atty. Gen., for the state of Illinois.

JENKINS, Circuit Judge. The Farmers' Loan & Trust Company, a corporation created by and under the laws of the state of New York, and authorized by the laws of that state to accept the trust hereinafter stated, filed its bill to foreclose a mortgage executed by the Chicago & Northern Pacific Railroad Company to the Farmers' Loan & Trust Company, as trustee. This mortgage is dated the 1st day of April, 1890, and covers all the lines of railway and property owned by the mortgagor company in the state of Illinois, and was given to secure an issue of bonds by said company, aggregating thirty millions of dollars. The mortgage provided, by article 9, that the trustee should have the right to enter and operate the road in case of default; by article 10, that the trustee might enter and sell in case of default. This latter provision is, however, understood to be void under the laws of the state of Illinois. By article 11 the trustee, upon default, and upon requisition and indemnity by the bondholders, should proceed to execute the trusts set forth in the instrument; by article 13 the trustee, at any sale of the mortgaged property, upon request of the holders of three-fourths in amount of the outstanding bonds, may bid for and purchase the property in behalf of the bondholders. These are all the special provisions in the mortgage to which reference is deemed necessary. The mortgagor company, simultaneously with the execution of the mortgage, leased its railway property, corporate rights, and franchises to the Wisconsin Central Company and the Wisconsin Central Railroad Company for a period of 99 years, at a stipulated rental of $350,000 a year, the lessees covenanting to pay such further sum or sums of money as might be necessary to pay the interest upon the mortgage bonds issued under the mortgage referred to. On the same day, the Wisconsin companies executed to the Northern Pacific Railroad Company a lease of all the properties described in their lease from the mortgagor company, and the Northern Pacific Company covenanted to keep and perform all the conditions and obligations of the lease executed by the Wisconsin companies, and, among other things, to pay such sums as might be necessary to pay interest on the mortgage bonds of the mortgagor company.

The Chicago & Northern Pacific Company and the Northern Pacific Company now file pleas to the effect that the complainant trustee has never deposited with the auditor of public accounts of the state of Illinois, for the benefit of its creditors, the sum of $200,000 in securities, as provided by law, and has never procured from the auditor of public accounts a certificate of authority stating that the complainant has complied with the requirements of the law of the state of Illinois of 1887, entitled "An act to provide for and regulate the administration of trusts by trust companies and the act amendatory thereof," and assert that the complainant is not now and has never been authorized or empowered to hold in trust the property alleged to have been conveyed in the alleged trust deed or mortgage of April 1, 1890, or to accept, enforce, or execute the trust or trusts therein reposed, or to bring any suit or action for the enforcement thereof, or for the foreclosure of the mortgaged property; that

neither the defendant companies nor any of their officers knew, at the time of the execution of the trust, or at any time thereafter prior to this suit, that the complainant had failed to comply with the statutes of the state of Illinois above referred to, but believed it had so done. They claim that by reason of the facts alleged the mortgage or trust deed in question is absolutely void. Louis Daenell, a judgment creditor of the mortgagor company, by judgment recovered on the 17th day of February, 1894, and since the institution of the suit, asks leave to intervene, and prays that the trust deed or mortgage may be declared null and void, and to constitute no lien upon the property of the mortgagor company, and that he may be permitted to sell the property now in the hands of the receivers of this court, under execution issued out of a state court of Illinois, under his judgment therein obtained. This petition proceeds upon the same ground as stated in the pleas of the two railroad companies defendant, and upon the further ground that the mortgagor company, prior to the making of the trust deed, did not cause and procure an order or resolution authorizing the mortgage to be passed by the concurrence of the holders of two-thirds of the amount of stock of the mortgagor company at a meeting of the stockholders called by the directors of the corporation for such purpose after notice given as provided by law, and cause such order or resolution for such trust deed to be recorded in the office of the secretary of state of the state of Illinois, or in the office of the recorder of deeds of Cook county, Ill., in which county the mortgagor company was located. Subsequent to the hearing the attorney general of the state of Illinois had leave amicus curiae to submit a brief against the validity of the mortgage and the power of the complainant to accept the trusts therein. Upon such submission, he presents with the brief his petition in behalf of the people of the state of Illinois, asking leave to intervene and to file an intervening bill making the people of the state of Illinois a party to the cause, and that the court will decree that the attempted acceptance by the complainant of the trusts of the mortgage without compliance with the laws of the state of Illinois is unlawful, and ineffective to clothe the complainant with the trusts therein declared, and that the mortgage deed is void for want of a grantee or trustee capable in law of taking or holding thereunder, and that the complainant may be enjoined from interfering with the rights, property, and franchises of the Chicago & Northern Pacific Railroad Company, and from transacting any other business within the state of Illinois.

The statute of Illinois (section 26, c. 32, Rev. St.) provides that, "foreign corporations, and the officers and agents thereof doing business in this state, shall be subject to all the liabilities, restrictions and duties that are or may be imposed upon corporations of like character organized under the general laws of this state, and shall have no other or greater power, and no foreign or domestic corporation established or maintained in any way for the pecuniary profit of its stockholders or members, shall purchase or hold real estate in this state except as provided for in this act." The act ap-

proved June 15, 1887, as amended by the act approved June 1, 1889, provided as follows: "Any corporation which is or shall be incorporated under the general incorporation laws of this state, being an act entitled 'An act concerning corporations,' and all amendments thereof, for the purpose of accepting and executing trusts, and any corporation now or hereafter authorized by law to accept or execute trusts may be appointed agent or trustee by deed, and executor, guardian or trustee, by will, and such appointment shall be of like force as in case of appointment of a natural person." The second count of the act authorized courts to appoint any such corporation as trustee, receiver, assignee, guardian, conservator, executor, or administrator. The third section provides that such corporations shall not be required to give bond or security in case of appointment, except as provided in the act, but shall be responsible for all investments made by it of funds intrusted to it for investment by the court, and that the amount of money which any such corporation shall have on deposit at any time shall not exceed 10 times the amount of its paid-up capital and surplus, and that its outstanding loans shall not at any time exceed that amount. Section 4 provides that the company shall pay interest on all moneys held by it by virtue of the act, at such rate as may be agreed upon at the time of its acceptance of any appointment of the court, or as may be provided by the order of the court. Section 6 provides that any such company, before accepting such appointment or deposit, shall deposit with the auditor of public accounts, for the benefit of the creditors of such company, the sum of $200,000 in the class of securities mentioned, and that the company shall be entitled to receive from the auditor the interest or dividends upon the deposit so long as the company shall continue solvent. Section 8 provides that it shall not be lawful "for any such company to accept any trust or deposit as hereinbefore provided after the passage of this act, without first procuring from the auditor of public accounts a certificate of authority stating that such company has complied with the requirements of this act in respect to such deposit." Section 9 provides for annual statements to be filed with the auditor, stating the matters specified in the act, being—First, the assets of the company; second, the liabilities of the company; third, a list of the trusts held by such company, the source of the appointment and the amount of real and personal estate held by virtue thereof, "excepting that mere mortgage trusts wherein no action has been taken by such company shall not be included in such statements." The fifteenth section provides that any violation of the provisions of the act shall subject the offending party to a penalty of $500 for each offense, and an additional sum of $100 per day for each day that any such company shall fail to file its report after the last day of January of each year. Section 16 provides for the publication of the annual statement or proper abstract thereof by the auditor, in two newspapers of general circulation, the one printed in the city of Springfield, and the other in the county seat of the county in which the principal office of the company is located.

I have very carefully considered the able arguments presented upon the hearing, and have examined the numerous authorities to which I was referred. I think it sufficient to state the conclusions to which I have come, without any elaboration of the reasons constraining me thereto. I am of opinion—

First. That a mortgage to secure a debt is not within the contemplation or the prohibition of the law.

Second. If the trust deed here involved can be considered to fall within the intendment of the law because of certain trusts therein contained which contemplate that in certain contingencies the trustee shall take possession of, operate, purchase, and acquire title to the real estate covered by the mortgage in the interest and for the benefit of the bondholders, I am of opinion that then such trusts would be held incapable of being enforced by the trustee while in noncompliance with the law of the state, but that the mortgage security of the bondholder would not be invalidated. Pennsylvania Co., etc., v. Bauerle, 143 Ill. 459, 33 N. E. 166; Hervey v. Railway Co., 28 Fed. 169, 175.

Third. The mortgagor company executed this trust deed to the complainant to secure certain bonds which it put forth upon the market as secured thereby. The Northern Pacific Company, in consideration of the lease, convenanted to pay the interest of these bonds. The mortgagor company is estopped, as against the bondholders, to assert that the trustee has not performed the acts necessary to entitle it to assume the trust. It asserted to the world the legal capacity of its appointee. It marketed its obligations upon the faith of that representation. It cannot be permitted now to assert to the contrary. It cannot be allowed to assert a violation of law by itself or by the trustee of its appointment as ground for the nonenforcement of its legal obligation. It is not the conservator of the dignity of the state of Illinois. The Northern Pacific Company took the lease subject to the mortgage, convenanted to pay the interest on the bonds thereby secured, and is in no position to assert its invalidity. It also is estopped.

Fourth. The complainant brings this suit in behalf of the bondholders. They are the parties beneficially interested. The complainant in the prosecution of the suit acts as a mere naked trustee asking the court to enforce the security for the benefit of its cestui que trust. If the instrument can be held to fall within the purview of the acts of Illinois above referred to, since the supreme court of Illinois has held that the disability goes to the right of the trustee to execute the trust, but that the conveyance is not thereby invalidated, I perceive no good reason why the federal court should not open its doors in aid of the bondholders, although coming in the name of the trustee, for the enforcement of rights recognized as valid by the laws and decisions of the state.

It may be that certain trusts contained in the trust deed or mortgage cannot be enforced by the trustee while in contempt of, and until compliance with, the laws of the state of Illinois. I refer to those provisions of the instrument which authorize the trustee to

take possession of, acquire title to, and convey the property. It is not, however, necessary, nor by this bill is it sought, to execute those trusts. If they are void, their invalidity does not necessarily invalidate the instrument as a mortgage. The court will treat it as a mortgage merely, the trustee, as mortgagee, holding the naked legal title to the security, the bondholders being the beneficial owners. The court will enforce the security by judicial sale, not permitting the execution of any trust that may be inoperative until compliance with the law of the state of Illinois. The statute has provided a penalty for the act of the trustee, if its assumption of duty is within the prohibition of the act. That penalty is the measure of punishment which the state saw fit to impose for violation of its laws. It has not undertaken to render void the trust deed or mortgage, or to deny to innocent parties the enforcement of it in protection of their rights. It may be that the courts of the state of Illinois would refuse to recognize the trustee standing in defiance of its laws. I do not think, however, that the duty is imposed upon a federal court to punish innocent parties in vindication of the authority of the state.

With respect to the second ground alleged in the petition of Louis Daenell, I am of opinion that, whether there was a resolution of the stockholders for the issuance of this mortgage, and whether or not it was recorded, is matter with which he is not concerned, and which he has no right to assert.

With regard to the petition of the attorney general of the state of Illinois, I have given to it that consideration which is due to the claim of a sovereign state, but I am not able to apprehend the justice of its position or its right to intervene. It is to be observed that the state has no property interest in the subject-matter of this litigation. It seeks no relief save to enforce the supposed prohibition of the statute, and to prevent the complainant, in behalf of its cestuis que trustent, from invoking the aid of a federal court in enforcing the mortgage security, and this because the complainant accepted the trust without compliance with the law of the state. In plain language, the petition asks a court of equity to deny innocent bondholders, and to declare void, a mortgage securing $30,000,000 of bonds, because the trustee, with whose selection the bondholders had nothing whatever to do, failed to deposit with the state certain securities to the amount of $200,000 for the protection of its creditors. The state asks a court of equity to declare that a provision of the law which was enacted in the interest of creditors, and as a weapon of defense, shall be turned into a weapon of destruction. It would be strange indeed if any chancellor could be impressed with the equity of the plea, or could bend his mind to such an injustice, unless thereto compelled by positive law. It is undoubtedly the duty of a federal court in every proper case to uphold and enforce the law of the state.

The supreme court of Illinois has, however, held, under the statute here invoked, that the security is not void. Upon the assumption that certain active trusts contained in the mortgage ought not

to be allowed to be enforced by the complainant until compliance with the statute of the state, so far as this court has jurisdiction of the matter, and out of consideration for the supposed policy of the state, it will not lend its aid to their enforcement. But I perceive no equity in refusing to the complainant the right to appear in a federal court to assert, not its own rights, but the rights of bondholders to foreclose the security and for sale of the mortgaged property, because it has rendered itself liable to the state of Illinois in a penalty for accepting a trust without first depositing security. I perceive no equity in visiting punishment upon the innocent to satisfy the violated dignity of the state. The bondholders have infracted no law of the state, and are not accountable for the sin of the Farmers' Loan & Trust Company, if it has violated the law. I do not believe in the doctrine of imputed sin in matters of property. The state of Illinois is able to punish offenders against its law in its own way, and in its own courts. It is not the duty of the federal courts to enforce the penal laws of the state. The difficulty with the position of the attorney general is that the state of Illinois has no property interest in the subject-matter of this litigation. The right of intervention is bottomed upon interest in the subject-matter of the controversy. Here the only interest of the state rests in desire to enforce the statute, and to secure obedience to its law, by preventing the enforcement of private contracts by one violating its law. That is not ground for intervention in equity. A decree will be entered overruling the pleas, and that the intervening petitions of Louis Daenell and of the attorney general of the state of Illinois be filed, docketed, and dismissed for want of equity.

CORNELL UNIVERSITY v. VILLAGE OF MAUMEE.

(Circuit Court, N. D. Ohio, W. D. May 27, 1895.)

No. 1,168.

MUNICIPAL CORPORATIONS—MISNOMER—BONDS.

Bonds duly and lawfully issued by a municipal corporation cannot be rendered invalid in the hands of a bona fide holder by the fact that such corporation, though properly a city, has issued such bonds under the name of a village, it having previously been recognized as a village in an act of the legislature changing its name, and having levied and collected taxes, passed ordinances, and otherwise acted as a village.

This was an action by Cornell University against the village of Maumee, Ohio, upon coupons cut from bonds of the village. The case was tried by the court without a jury.

Harris & Thurston and Doyle, Scott & Lewis, for plaintiff.
J. E. Pilliad, L. M. Murphy, and W. H. A. Read, for defendant.

RICKS, District Judge. The village of Maumee, in Lucas county, Ohio, in the year 1888 issued $25,000 of refunding bonds under the

provisions of section 2701 of the Revised Statutes of Ohio, which provides:

"The trustees or council of any municipal corporation, for the purpose of extending the time for the payment of any indebtedness, which, from its limits of taxation, such corporation is unable to pay at maturity, shall have power to issue bonds of such corporation, or borrow money, so as to change but not increase the indebtedness, in such amounts, and for such length of time, and at such rate of interest as the council may deem proper, not to exceed the rate of eight per centum per annum."

Section 2703 provides that:

"All bonds issued under authority of this chapter shall express upon their face the purpose for which they were issued, and under what ordinance."

Section 2706 provides that:

"All bonds, notes or certificates of indebtedness issued by municipal corporations shall be signed by the mayor and by the auditor, comptroller or the clerk thereof, and be sealed with the seal of the corporation."

The bonds so issued passed to the plaintiff as a bona fide holder and innocent purchaser for value. The suit is brought upon the coupons, and in order to determine the validity of the bonds issued. The defense interposed is substantially that no such municipal corporation as the village of Maumee ever existed; that for years prior to this Maumee City was created a city, and continued to be such until the adoption of the new constitution, when, under the legislation as to municipal corporations, it was placed in the second grade of cities as a city of the second class. It appears from the several acts of the legislature, beginning with 1838, that the incorporation sued was known as Maumee City, in the county of Lucas, and subsequently known as the city of South Toledo. In 72 Ohio Laws, 252, the general assembly passed the following act:

"An act to change the name of Maumee City, Lucas county. Section 1. Be it enacted by the general assembly of the state of Ohio, that Maumee City, Lucas county, shall hereafter be designated and known by the name of South Toledo. Sec. 2. This act shall take effect and be in force from and after its passage."

On March 4, 1887 (84 Ohio Laws, 309), the general assembly passed the following act:

"An act to change the name of the incorporated village of South Toledo. Section 1. Be it enacted by the general assembly of the state of Ohio, that the name of the incorporated village of South Toledo, Lucas county, Ohio, be and the same is hereby changed to Maumee, provided, that such change shall in no wise affect the rights or liabilities of such village. Sec. 2. This act shall take effect and be in force from and after its passage."

Whatever may have been the facts concerning the name by which the territory was known as a corporation, the people within the territorial boundaries of that corporation remained the same. Section 1571a of the Revised Statutes of Ohio (Smith & B. Ed., p. 403) provides that:

"No error, irregularity or defect in any proceeding for the creation of a municipal corporation shall render it invalid if the territory sought to be incorporated has been recognized as such corporation and any tax levied upon it as such has been paid, or it has been subjected to the authority of the council without objection from its inhabitants."

The legislature has called this incorporation a village in the act authorizing a change of name; the supreme court has called it a village. It bought a corporate seal as a village; it issued bonds as a village; it levied and collected taxes as a village; it passed ordinances by its village council without objection; it is the same municipality, and includes within its boundaries the same people who received the money as the proceeds of the sale of these bonds. It would be grossly inequitable, and a clear violation of all legal principles, to permit these people now to escape the payment of this honest debt because of this alleged defect in its proper corporate name.

The bonds are executed by the mayor and village clerk, and the seal of the village is attached to them. They refer to the ordinance of the village council under which they were issued, and state the purpose of their issue in the following recitals:

"This bond is one of a series of bonds of like date and tenor, issued for the purpose of procuring the necessary means to refund and extend the time of payment of certain outstanding indebtedness, which is now due, and from its limits of taxation said village is unable to pay at maturity. This bond is issued and executed under and by authority of and in accordance with chapter 2, § 2701 of the Revised Statutes of the state of Ohio, and all other laws on the subject. Also by virtue of an ordinance passed by the village council August 16th, 1888. And it is hereby certified and recited that all acts, conditions, and things required to be done, precedent to and in the issuing of said bonds, have been properly done, happened, and performed in regular and due form, as required by law."

The ordinance of the village council passed August 16, 1888, referred to in the bond, provides substantially as follows: Section 1: "That for the purpose of extending the time of payment of so much of its existing indebtedness now due and soon to become due as said village is unable, from its limits of taxation, to pay at maturity, there be issued the bonds of said village in the sum of $25,000, as hereinafter provided." Section 2 describes the bonds, and the form of their execution. Section 3 authorizes and directs the mayor and clerk of the village, as soon as practicable, to prepare and execute said bonds; and provides that the proceeds thereof, when the bonds shall have been disposed of according to law, "shall be used and applied, under the direction of the council, for the sole purpose of paying for and removing and extending said maturing and matured indebtedness of said village." By the certificate of the village clerk of Maumee, dated September 1, 1888, it appears that the total indebtedness of Maumee at that time was $40,000. There is no defect claimed in the advertisement, or the proceedings authorizing the issuance of these bonds, and no claim that they sold for less than par. There was a general statute authorizing the village to issue the bonds. It is therefore a case where the power of the municipality to create the indebtedness is indisputable. The village council had a right to make the recitals stated in the bonds, and there is now no right to contradict them.

In the case of State v. Village of Perrysburg, 14 Ohio St. 487, which seems to me conclusive of this case, the supreme court say:

"Again, it is urged in behalf of the defendant that these bonds were issued in the name of the 'town' of Perrysburg,—the name of the corporation prior to the taking effect of the general act for the organization of cities and incorporated villages,—instead of in the name of 'the incorporated village of Perrysburg,' which, under the operation of that act, was its true legal designation at the time the vote was taken, the subscription of stock made, and the bonds were issued. But this was a mere misnomer, and amounts to nothing. See Turnpike Co. v. Brush, 10 Ohio 111, and Ang. & A. Corp. § 99."

The legislative recognition of a county illegally and fraudulently organized gives validity to its acts and dealings with third persons. Commissioners v. Rose, 140 U. S. 71, 11 Sup. Ct. 710. The question of corporate existence cannot be raised in a private litigation by the body assuming to be a corporation, to the prejudice of rights acquired as against such assumed corporation while corporate powers were being assumed and exercised. Ashley v. Board, 8 C. C. A. 455, 60 Fed. 55. In that case the circuit court of appeals held that the question of the legal existence of the county could not be raised in a private litigation, as appears from the language of the first paragraph of the syllabus. The court say:

"But it is needless to multiply authorities. They are substantially, if not altogether, agreed upon the proposition that when a municipal body has assumed, under color of authority, and exercised for any considerable period of time, with the consent of the state, the powers of a public corporation of the kind recognized by the organic law, neither the corporation nor any private party can, in private litigation, question the legality of its existence."

I conclude, therefore, that, the legal authority or power having been conferred upon this municipality by the General Laws of Ohio to issue such bonds, the conditions prescribed by the statute upon which such bonds were issued having existed as recited on the face of the bonds, said municipality is bound by the acts and representations of its council and other officials as against a bona fide holder,—which the plaintiff has shown itself to be,—and therefore that a judgment should be entered for the amount claimed in the petition.

SHAW, Collector, v. PRIOR et al.

(Circuit Court, D. Maryland. May 8, 1895.)

1. CUSTOMS DUTIES—SUFFICIENCY OF PROTEST.
P. & Co. imported a quantity of moss, which was classified by the collector as dyed moss, dutiable, under section 4 of the tariff act of October 1, 1890, at 20 per cent., as an unenumerated manufactured article. P. & Co. filed a protest, claiming that the moss should be subject either to a duty of 10 per cent., under paragraph 24 of the act, or free, under paragraph 653, as they were unable to detect that the moss had undergone any process of manufacture. *Held*, that if the moss was free, either under paragraph 653 or paragraph 560, the protest was sufficiently definite and precise.

2. SAME—MOSSES—PARAGRAPHS 24 AND 560, TARIFF ACT OF 1890.
It seems that paragraphs 24 and 560 of the tariff act of 1890 cover only such articles as are drugs, and that mosses, which are not used as drugs, and are crude and unmanufactured, are properly classified under paragraph 653 of the act. In re Kraft, 53 Fed. 1016, doubted.

This was an application by Frank T. Shaw, the collector of customs at Baltimore, for a review of the decision of the board of general appraisers reversing the decision of the collector as to the rate of duty on certain merchandise imported by E. A. Prior & Co.

Wm. L. Marbury, U. S. Dist. Atty., for appellant.

MORRIS, District Judge. The duty on this importation was assessed by the collector at 20 per cent., as a dyed moss, and classified under section 4, as an unenumerated manufactured article. The importers protested, and appealed to the board of United States general appraisers at New York. By the testimony before the general appraisers, it was shown that it was not a manufactured article, but a natural, dried moss; and, although part of the substance had a vivid green color, the testimony proved that it was not in any way artificially colored. The decision of the board of appraisers was as follows (opinion by Sharretts, G. A.):

"The merchandise covered by this protest is natural, dried moss. This substance is of a vivid green color, and was classified by the collector as an unenumerated manufactured article, in accordance with General Appraisers, 1352, covering dyed moss. The appellants claim that said merchandise is entitled to free entry under paragraph 653, Free List. The dyed moss considered in General Appraisers, 1352, was of a dark green color in every part thereof, while the stems and fibrous roots of the moss now under consideration are not artificially colored, and are dark brown or dark gray in color. The board submitted the official sample of the merchandise to the chemist in charge of the laboratory of the appraiser's department in New York for analysis. From the result of said analysis, and on the exhibits, consideration also being given to the testimony taken in Birge, Donovan & Co. v. Collector at Philadelphia, General Appraisers, 2109, we make the following findings of fact, viz.: (1) That the merchandise is crude moss, not colored or dyed, or otherwise manufactured. (2) That said moss is not a drug. On these facts, we think the merchandise is entitled to free entry, under paragraph 653, as claimed by the appellants. In reaching this conclusion, we are not unmindful of the point suggested to the effect that if dyed moss is dutiable at 10 per cent. under paragraph 24, as decided by the circuit court at New York, then moss not edible, and not advanced in value or condition by refining or grinding or other process of manufacture, would seem to fall for classification under paragraph 560, and not under paragraph 653, in which case this protest would have to be overruled, on the ground that the appellants had claimed relief under the wrong paragraph. We are of opinion, however, for the reason set forth at some length in General Appraisers, 2109, that paragraph 560, as well as paragraph 24, applies exclusively to drugs; and, inasmuch as the moss in question is not a drug, we hold the same is denominatively provided for in paragraph 653. The protest is accordingly sustained, and the collector's decision is reversed."

It is now conceded that the original classification by the collector was wrong, and that it is a natural, unmanufactured article, entitled to be admitted free; but it is contended that the importer was in error in his protest filed August 30, 1892, in which he claims that it should be subject either to a duty of 10 per cent., under paragraph 24, or free, under paragraph 653; it being contended that by a ruling of the circuit court for the Southern district of New York, rendered January 23, 1893, the article was free, under paragraph 560, and not under paragraph 653, cited in the importer's protest. The paragraphs under the act of October 1, 1890, are as follows:

"24. Drugs, such as barks, beans, berries, balsams, buds, bulbs and bulbous roots, and excrescences, such as nutgalls, fruits, flowers, dried fibers, grains, gums and gum resins, herbs, leaves, lichens, mosses, nuts, roots and stems, spices, vegetables, seeds (aromatic, not garden seeds), and seeds of morbid growth, weeds, woods used expressly for dyeing, and dried insects, any of the foregoing which are not edible, but which have been advanced in value or condition by refining or grinding, or by other process of manufacture, and not specially provided for in this act, ten per centum ad valorem."

"560 (Free List). Drugs, such as barks, beans, berries, balsams, buds, bulbs and bulbous roots, excrescences, such as nutgalls, fruits, flowers, dried fibers and dried insects, grains, gums and gum resins, herbs, leaves, lichens, mosses, nuts, roots and stems, spices, vegetables, seeds aromatic, and seeds of morbid growth, weeds and woods used expressly for dyeing; any of the foregoing which are not edible and are in a crude state, and not advanced in value or condition by refining or grinding, or by other process of manufacture, and not specially provided for in this act."

"653 (Free List). Moss, sea weeds and vegetable substances, crude or unmanufactured, not otherwise specially provided for in this act."

It is provided by section 14 of the act of June 10, 1890, in the same language used in section 2931 of the Revised Statutes, that the protest shall be in writing, and that the importer shall set forth therein "distinctly and specifically the grounds of his objection thereto." This has been held not to require technical precision, and that the protest "is sufficient if it shows fairly that the objection afterwards made at the trial was in the mind of the party, and was brought to the knowledge of the collector, so as to secure to the government the practical advantage which the statute was designed to secure." Arthur v. Morgan, 112 U. S. 495–501, 5 Sup. Ct. 241. The ruling by Judge Curtis, which was approved by the supreme court, is that it was sufficient to notify the collector of the true nature and character of the objection, to the end that he might ascertain the precise facts, and have an opportunity to correct the mistake and cure the defect, if it was one which could be obviated. It is further held that there were two objects to be secured by the requirement of the act of congress: (1) To apprise the collector of the objections urged by the importer before it should be too late to remove them, if capable of being removed; (2) to hold the importer to the objections he then contemplated, on which he really acted, and prevent him, or others in his behalf, from seeking out defects after the business should be closed. The cases in which these rulings were made are all cited and approved in Herrman v. Robertson, 152 U. S. 521, 14 Sup. Ct. 686.

The protest in the present case states that the importer objected to the duties assessed, "claiming that the same should be subject either to a duty of 10 per cent., under paragraph 24, or free, under paragraph 653, as we are unable to detect that the moss has undergone any process of manufacture." This protest brought specifically to the attention of the collector the real ground of the objection, viz. that the moss was a crude, unmanufactured article, and had not been advanced in value by any process of manufacture. This was the ground of the objection, as understood by the collector, as appears from the report made by the appraiser at Baltimore to the collector, in which he states that the importers

claim that the merchandise should be free, or subject to the duty of 10 per cent. ad valorem, and reports "that the goods in question, dyed moss, a sample of which is inclosed, are similar in character to the merchandise described in decision No. 12,703, made by the Hon. board of general appraisers, April 6, 1892. In that case the ruling was that the proper classification fell under section 4, at the rate of 20 per cent. ad valorem." The ruling of the board of general appraisers of April 6, 1892, referred to in the above report (In re Kraft, General Appraisers, 1352), had reference to moss which had been dyed. The board of appraisers held that the dyeing constituted a process of manufacture, and that dyed moss was to be classed as a manufactured article not specially enumerated or provided for, and was dutiable under section 4, at 20 per cent., and was not to be classed as one of the articles enumerated in paragraph 24, as was claimed by the importer, and dutiable only at 10 per cent. ad valorem. In the present case, on the appeal to the board of general appraisers, the only question considered was the sole one raised by the protest, viz. was the moss dyed, or in its natural state? If it was a natural moss, crude and unmanufactured, it was on the free list, and it made no difference in the consideration of the case whether it was properly to be classed under paragraph 560 or paragraph 653 of the free list of the tariff of 1890.

In my opinion, the protest meets all the requirements which have been held to be essential in such a document. To hold otherwise would be to require a technical precision, not only not customary in documents of a like nature, but not required in any practical affairs. The protest stated the real objection. It raised the real question of fact on which the classification depended. The collector understood precisely what the objection was, and what the question of fact was. He referred that question of fact to the local appraiser, who examined the goods, and decided the issue against the importers. Before the board of general appraisers the same question of fact was the only issue, and they had it investigated by the government expert, and on his report they decided in favor of the importers. I hold that the protest ought to be held sufficient, no matter whether the imported article is exempt from duty under paragraph 560 or paragraph 653.

But the general appraisers held that, if the article was to be classified under paragraph 560, then the protest was insufficient, because the importer had cited paragraph 653, and the correctness of their ruling in this respect has been raised by this appeal. In the case of In re Kraft, 53 Fed. 1016, it was held in the circuit court for the Southern district of New York that it did not appear from the wording of paragraph 24—and consequently of paragraph 560, which is in similar terms—that those paragraphs were intended to apply only to such articles as are drugs. When this question came up again before the general appraisers, additional testimony was adduced, which has been transmitted with this appeal, which tends to prove that all the articles enumerated in these paragraphs are in some of their forms known to trade and commerce as drugs, so that

to the inference to be drawn from placing paragraph 24 in the act under "Schedule A, chemicals, oils and paints," and the fact that paragraph 24 is susceptible of the construction that only drugs are intended to be enumerated therein, there is now added the fact proven that all the articles enumerated therein are in some of their forms known as drugs. It seems to me, therefore, reasonable to conclude that paragraphs 24 and 560 cover only such mosses as are used as drugs, and that paragraph 653 covers mosses which are not used as drugs, and are crude and unmanufactured. The decision of the board of general appraisers is affirmed.

HENDRICKS, Collector, v. SCHMIDT et al.

(Circuit Court of Appeals, Second Circuit. March 18, 1895.)

No. 40.

1. CUSTOMS DUTIES—LIEN FOR PAYMENT.
   In respect to a single consignment of goods covered by a single entry, the lien of the government for payment of the whole duties attaches to each and every part thereof; and where the whole consignment is warehoused under bond, and parts of it are fraudulently withdrawn without payment of duties, the collector is entitled to hold the remainder until the duties on the entire consignment are paid, and is not bound to surrender the same upon tender of the amount of duties payable upon that part alone.
2. SAME—PAYMENT OF DUTIES.
   To constitute a payment of duties upon any particular consignment of goods, there must be an intent, both on the part of the importers and of the collector, to apply the money to that consignment. *Held*, therefore, that where a check was given by the importers to an employé with directions to pay the duties upon a particular consignment, but he absconded with the same, and it afterwards came into the hands of the collector, and was applied by him to the payment of duties upon a different importation, this was not a payment of the duties upon the former consignment.

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

This was an action at law by the plaintiffs, trading under the firm name of Charles F. Schmidt & Peters, to recover of the collector of customs of the port of New York the possession of 11 cases of champagne imported December 19, 1892, by the steamship La Champagne, subject to the payment of certain duties, with the collection of which defendant was by law charged.

The complaint alleged a tender of the duty upon such champagne to the amount of $95.92, a refusal on the part of the defendant to accept the tender, to deliver the goods, or to execute any documents whereby plaintiffs might in due course become possessed of such goods, and a conversion of the property to his own use.

Upon trial before a jury, the court directed a verdict in favor of the plaintiffs in the sum of $352, being the value of the champagne, with interest, upon which verdict judgment was subsequently entered, and defendant sued out this writ of error.

C. D. Baker, Asst. U. S. Atty., for plaintiff in error.
Benno Lewinson, for defendants in error.

Before BROWN, Circuit Justice, and WALLACE and SHIPMAN, Circuit Judges.

BROWN, Circuit Justice (after stating the facts). There was little, if any, dispute with regard to the facts in this case, which were substantially as follows: On December 19, 1892, plaintiffs imported, per steamer La Champagne, 1,420 cases of champagne, and gave a single bond for warehousing the same. From that time until February 18, 1893, they withdrew from the warehouse, for consumption, all except 50 cases, which were still remaining. On that day their agent presented to the storekeeper in charge of the warehouse a paper purporting to be a withdrawal delivery permit, whereby he was directed to deliver the remaining 50 cases to the plaintiffs, the permit stating that the duty had been paid. Believing the permit to be valid, the storekeeper delivered to the plaintiffs, at various times, 39 cases of the champagne, leaving 11 cases in the warehouse. Some time between that day and the 22d of June, following, the customs officers discovered that the permit upon which the 39 cases had been delivered had never been presented to the cashier of the customhouse, and that his initials and that of the naval officer had been forged by a clerk of the plaintiffs who in the meantime had absconded, and that the duty had not been paid on the 39 cases drawn out upon such fraudulent permit. Plaintiffs, on June 22d, presented a withdrawal entry and permit, and demanded the remaining 11 cases, which demand was refused until the duties were paid on the 39 cases which had been fraudulently withdrawn. Plaintiffs, protesting that the duty had already been paid, tendered a check for the sum of $95.92 in payment of the duty on 11 cases, and demanded the possession of the same. The defendant collector refused to accept the sum tendered, or to deliver the 11 cases, until the unpaid duties on the 39 cases had been paid, claiming a lien on the 11 cases for the unpaid balance of duties upon the entire consignment. Plaintiffs then brought this action for an alleged conversion by the collector in refusing to deliver possession of the 11 cases.

1. The complaint is based upon the theory that plaintiffs were entitled to the possession of the 11 cases upon payment of the duties thereon, which amounted to $95.92. But we agree with the court below in holding that they were not entitled to a delivery of the 11 cases without also paying the duties upon the 39 cases which had been previously withdrawn under the fraudulent permit; in other words, that the lien of the government upon the whole consignment remained, and attached to every part thereof, notwithstanding the withdrawal of the 39 cases of such consignment upon which the duties had not been paid. No question arises as to the previous withdrawals, as the duties had been paid upon each of such withdrawals as it was made. If there had been different consignments, —separate entries of different classes of goods,—the lien upon one consignment would probably not have attached to the others. But in this particular each consignment covered by a single entry

is indivisible, and the lien upon the whole attaches to each and every part thereof.

Analogous cases are those wherein it is held that a shipmaster's lien for freight attaches to every part of the consignment, notwithstanding the delivery to the consignee of a portion of the consignment, although, if the goods of the same owner are sent under different contracts, with a different terminus in each case, no lien attaches for freight under one contract upon goods shipped under another. Macl. Shipp. 480; 1 Pars. Shipp. & Adm. 360; Sodergren v. Flight, cited in Hanson v. Meyer, 6 East, 622; Potts v. Railroad Co., 131 Mass. 455; Boggs v. Martin, 13 B. Mon. 239; Frothingham v. Jenkins, 1 Cal. 42; Fuller v. Bradley, 25 Pa. St. 120.

2. The case made by the complaint having been thus disposed of by the adverse ruling of the court below, plaintiffs attempted to maintain their right to recover by proving that the duties upon the 50 cases remaining in warehouse February 18, 1893, had in fact been paid, and that the amount tendered on June 22d, if accepted, would have been a double payment upon the 11 cases. The facts established by them were substantially as follows:

On February 18, plaintiffs made a check of which the following is a copy:

"No. 20,925. New York, 2/18, 1893.

"The German American Bank: Pay to the order of collector of customs, for duty, eight hundred and fifty-four 00/100 dollars.

"Charles F. Schmidt & Peters.

"$854.00/100. By Heinrich Imhorst, Atty."

This check was intended for the payment of the duties upon the 50 cases, as well as for other importations, and was given to a boy to take to the customhouse, to obtain the usual permit for the withdrawal of the champagne. The boy absconded, and the check was subsequently returned as paid, in the usual course of business. There is some uncertainty as to what was done with the check after its delivery to the employé; but it appears to have been received at the customhouse, through other parties than the plaintiffs, in payment of duties upon a wholly different importation, and that the collector took it without notice, except as such notice may appear upon the face of the check, that it was to be applied to any specific purpose.

From this statement of facts, it is entirely clear that there was no actual payment of duties upon this consignment which would render the collector chargeable with a tortious conversion, upon his refusal to deliver the champagne. To constitute a payment upon that consignment, there must have been an intent on the part of the plaintiffs to pay the duties upon such consignment, and a corresponding intent upon the part of the collector to apply that payment upon the same consignment. Granting that the plaintiffs had this intent in drawing the check, no such intent was ever conveyed to the collector. Plaintiffs intrusted the check to an employé, with instructions to pay the duty upon the 50 cases, and thereby made him their agent for that purpose. Exactly what he did with the

check does not appear, but it does clearly appear that it was never made use of for that purpose; that the collector, when he received it, was not informed that it was not intended for duties upon that importation; and that he in fact applied it to a different importation. Under such circumstances, there was obviously no such meeting of minds as constituted an agreement on one part to pay the duties, and on the other part to receive the money for that purpose.

Hence it is quite clear that the plaintiffs mistook their remedy, and, if they have any cause of action at all, it is against the collector for a conversion of the check, and not for a conversion of the champagne. The title to the champagne would not pass, freed of the lien, until the duties had been actually paid, and the money received by the collector, with intent to apply it to that purpose.

The judgment of the circuit court must therefore be reversed, and a new trial granted.

HORN v. BERGNER et al.

(Circuit Court, D. Maryland. May 13, 1895.)

1. PATENTS—INVENTION.
   A method of overcoming disadvantages and difficulties in the use of celluloid for covers for books, albums, and like articles, by forcing the whole cover, with the celluloid veneering attached, into a heated die having the exact shape required, *held* to show invention, it appearing that the method produced beautiful, artistic, and commercially successful results, and was hit upon by the patentee only after continued experiment, and that it was not discovered by others long engaged in applying celluloid veneering to such articles.

2. SAME—BOOK COVERS.
   The Hafely patent, No. 488,630, for a method of applying celluloid veneering to the covers of books, albums, and other like articles, *held* valid, and infringed.

3. SAME—MARKING "PATENTED."
   Failure to give notice, or to mark an article "Patented," as provided in Rev. St. § 4900, only affects the question of damages, and not the right to an injunction.

This was a bill by William C. Horn, president of Koch, Sons & Co., an unincorporated joint-stock company, against Frederick Bergner and others, for infringement of a patent.

Witter & Kenyon, for complainant.
H. T. Fenton, for defendants.

MORRIS, District Judge. The complainant is an unincorporated joint-stock company, under the laws of New York, suing by its president, as the assignee of patent No. 488,630, December 27, 1892, granted to Alfred C. Hafely, who is also a member of the complainant company. The defenses are want of novelty, want of patentability, want of notice of the patent, and noninfringement. The patent is

for a method of making corners, covers, and like parts for books, boxes, and similar articles of celluloid or kindred material. It appears from the testimony that sheet celluloid, which is made of extreme thinness, and which in sheets is highly elastic, dense, and durable, and susceptible of a high polish, and may be tinted of any color, and which can be rendered plastic by heat, had, before the alleged invention of Hafely, been used as a veneering for the covers of albums and books. The sheet of celluloid having been embossed by any desired design by being pressed between heated dies, and, being cut to proper sizes, was cemented to the foundation for the cover, and the edges were turned over upon the cover and made fast by cement or glue or small metal fastenings. The result of this method was very unsatisfactory, particularly at the corners. The beauty of the sheet celluloid largely consists in its resemblance to solid ivory, and to the impression on the sight and senses that it is not a thin veneer, but that the cover was made of a solid material. In turning the sheets of celluloid over the corners, prior to Hafely's alleged invention, there was always some wrinkling, or fullness, or want of smoothness, or physical indication of some kind which disclosed that the celluloid was but a thin, applied veneer, and this marred the effect and merchantableness of the result. So much was this the case that it was usual to make the sides of the cover of celluloid, but to make the covers of plush, so as to conceal this defect, and for this reason the use of celluloid for album covers was quite limited. Hafely, with other associates in the complainant joint-stock company, was engaged in the manufacture of albums, fancy boxes, and similar articles, and for some time was unable to overcome this difficulty, which, for the purposes of manufacture, was a great obstacle in the use of sheet celluloid. After trials and experiments, he hit upon the method which he has patented, and which has now produced results which are very beautiful and artistic, and which have obtained great commercial success. The covers of such albums and books and similar articles, in order to have the substantial appearance required by the ornamental figures embossed on the sheet celluloid veneering, must be made thick, of wood or paper boards, or filled in with padding, and the corners must not be sharp and rectangular, but should be rounded and beveled, or cup-shaped, as the complainant's expert has called them. The discovery of Hafely was that, while the celluloid sheet veneering could not be bent to the shape of these corners, if a die was prepared which had the exact shape of the corners, and was heated, and the whole cover, with the celluloid veneering attached, was forced into the die, the celluloid took the exact shape of the corners. The heat rendered the sheet plastic, and conformed the molecular arrangement of its substance to the required form, and the polish of the surface was not impaired, and the appearance was that of a solid block of celluloid or ivory. The pressing of the cover or corners into the heated die left the sheet with the edges turned up at right angles to the plane of the cover, and he found that if these edges were by the application of a heated iron turned over flat against the upper side of the cover, and sufficient

heat applied at the corners to blend the lapping material together, then the appearance was that of a solid cover, durable, and pleasing to the eye and touch. Hafely's specification is as follows:

"The object of my invention is to produce covers, corners, and like articles for books, boxes, albums, and other uses, which shall have certain ornamental features, not heretofore accomplished, and which may be readily and economically manufactured, may be somewhat elastic, and of shapes which do not tend to injure surrounding objects. * * * I have * * * discovered a new and useful manner of preparing such covers and corners from thin sheet celluloid or other substance rendered plastic by heat, and the finished article can thereby be made to possess features not heretofore possible by any method I am aware of. The elasticity of the celluloid, together with its plasticity when warm, renders it peculiarly adaptable to my invention; and, as it may be made transparent, translucent, or tinted and grained, I am enabled by embossing, and by the use of suitable coloring, and suitable tinted backings beneath it, to obtain a variety of beautiful effects. * * * In making box covers according to my invention, I may employ a wooden frame, B, which is shown in cross section in Fig. 3, and is provided with ornamental moldings as shown. The celluloid sheet, cut to the proper size, and embossed with ornamental figures, as will hereinafter be described, as plainly if preferred, is then laid upon the frame. A heated matrix corresponding in shape to frame, B, is then brought down, and the celluloid, which is heated, and rendered plastic, thereby is pressed into shape between the matrix and the frame, the latter forming a patrix therefor, to which the celluloid conforms. It is preferable to first coat the frame with celluloid cement, so that the celluloid, when pressed into place by the heated die, may be firmly cemented to the frame. After this operation, the edges of the celluloid sheet project perpendicularly from the frame. They may then be heated and turned down, as in figure 2, and a flat, heated iron applied to them. By a pressure from or against the heated iron the overlapping corners are thoroughly blended and united. * * * I form covers for books and albums in a similar manner. Preferably, however, the cover is embossed, and its edges turned at right angles, as shown in Fig. 7, by means of two heated dies, which render the material plastic, and capable of taking up the curved outline required. A pad made of wadding or other soft material is then substituted in the place of the patrix die, as in Fig. 8, and the corners turned over, and secured at the rear of the cover, as is shown in Fig. 6, in a manner substantially the same as in the case of the box just described. * * * The construction may be modified somewhat by substituting a permanent patrix in the process of embossing and turning up the edges upon the back of such patrix to form a cover for either boxes or albums. * * * In the forms heretofore described, the finished article has contained a frame, of permanent padding, to which the celluloid is secured. In figures 10, 11, and 12 is shown, on the other hand, a cover adapted to be fitted over, and to be secured to, the finished cover of a book or album. In forming this corner, the sheet of celluloid is first cut to a suitable blank, as in figure 10. This blank has the side flaps which turn over the edges of the book, and the flap or tongue to cover the corner where the two flaps meet. The blank is first pressed between two suitable dies, which are heated, and render the blank soft and plastic. By these dies the central or exposed portion is embossed with ornamental designs, and given the rounded form shown in figure 12 at E. The flaps, C, and the tongue are turned up at right angles on the line, F, and present the appearance indicated by dotted lines in figure 12. The flaps and tongue are then treated with suitable cement, and subjected to pressure between the flap back of the patrix and a heated plate, and by this action of heat and pressure are secured together, and securely blended, as shown in figure 11. The corner is now complete, and may be removed from the die, and the patrix slipped out of it. A full celluloid side or cover of a book may be made in a manner similar to the corner just described, it being only necessary to use a blank, dies, etc., provided with two instead of one corner."

The claims are:

"(1) The method of making covers, corners, and like parts of books, boxes, and other uses of sheet celluloid or kindred material, rendered plastic by heat, which consists of forming up its border by suitable dies, first at right angles, and then parallel to the cover or corner, and uniting them by the application of heat and pressure, substantially as set forth. (2) The method of making covers, corners, and like parts of books, boxes, and other uses, of sheet or kindred material, rendered plastic by heat, which consists of forming up its border of suitable dies, first at right angles, and parallel to the cover or corner, uniting and blending them by the application of heat and pressure, and padding or filling the interior so formed, substantially as set forth. (3) The method of making corners, covers, and like parts for books, boxes, and other uses, of celluloid or other material that may be rendered plastic by heat, which consists in applying heat and pressure by suitable dies, folding over the borders, and cementing or otherwise securing them together, substantially as set forth. (4) A cover or corner for books, boxes, and like uses, consisting of sheet celluloid or kindred materials, and provided with round corners, the borders of the said cover or corner being folded over upon its back, and a tongue or flap at meeting edges of said borders, cemented or otherwise secured thereto, substantially as and for purposes set forth."

It is quite true, as urged by the defendants, that the use of heated dies in embossing figures upon sheet celluloid was well known at the date of Hafely's patent, and, indeed, the sheets used for his purposes are often furnished to the trade by manufacturers, already embossed with a central figure, but it is very remarkable that, if Hafely's method of forming album covers of celluloid required no invention, it was not practiced before he disclosed it in 1890 or 1891. Sheet celluloid was to be had ever since Hyatt invented the process of making it in 1878. The beauty, usefulness, and commercial success of the articles made after Hafely's method are not questioned, and yet it does not appear that any one, before his invention, was ever able to apply sheet celluloid successfully, as he has applied it. It appears to me by no means obvious that the result sought for was to be obtained by having a heated die just the size and shape of the box cover or album side, which would form up the round corners, and turn up the sides at the edges by turning over the edges with a heated tool. The experiments of Lefferts, a witness for defendants, who for 15 years had been a manufacturer of sheet celluloid, in making a round corner of celluloid suitable for pocket books, as a substitute for metal corners, and his failure, show the difficulty, and show that Hafely's method was not one which even an experienced workman in celluloid would hit upon. It seems to me that both the novelty and the patentability of Hafely's method are fully sustained.

With regard to the defense of public, authorized use for more than two years before the application for a patent, I do not think the evidence in support of this defense is convincing. It is true that the substance of Hafely's invention was contained in a prior application, which he made on September 25, 1889, and subsequently abandoned. This was two years and seven months prior to the application on which his patent was granted. Hafely testifies that album covers made by this process were not put upon the market until 1891, or the latter part of 1890, which was within two years of his second application.

It is contended that there is no evidence of infringement, and that the specimens of defendants' manufacture were purchased before the assignment of the patent to the complainant company; but in the testimony of defendant William Bergner he speaks of having begun the manufacture of albums, such as the one offered in evidence by the complainant as an infringement, in 1892, and as having continued to manufacture them, and describes the process now practiced by the defendant. His testimony is a practical admission of the continued manufacture. He describes the process which the defendants now use, and claims that they do not use the heated die to turn up the sides, but, after placing the sheet of celluloid between two heated dies to emboss it, they use a heated brake to turn up the sides, and bend them over onto the cover, and then use a heated tool to flatten them down on the inside of the cover. The specimen produced by Bergner to illustrate his process clearly shows that what he calls the embossing die is the exact size and shape of the cover; that it has the exact shape of the beveled edge, and rounded, cup-shaped corners; and that the sheet of celluloid, upon being forced into this heated die, is permanently molded into the exact shape of the edges and corners of the cover. It may be true that the sides are not turned up exactly at right angles to the plane of the cover; but they are turned up sufficiently to permanently take the shape of the edges and corners, and the heated brake used merely completes the turning over. The specimens clearly show that the defendants used, and continued to use up to the taking of the testimony, all the essentials of complainant's patented process.

Another defense is that the complainant's articles were not marked "Patented," as provided by section 4900, Rev. St., and that no notice was given to the defendants. Whatever doubt there may be, under the proofs, as to marking the complainant's articles "Patented," I think the actual written notice is sufficiently proved; but, at the most, the want of notice or marking would only affect the question of damages, but not the right to an injunction. The complainant is entitled to the usual decree for an injunction and an accounting.

UNITED STATES v. TINSLEY.

(Circuit Court of Appeals, Fourth Circuit. May 28, 1895.)

No. 94.

PRACTICE—FINDINGS—SUIT AGAINST THE UNITED STATES.

Where, in an action brought against the United States, pursuant to the act of March 3, 1887 (24 Stat. 505), the facts are undisputed, no answer being interposed on behalf of the government, but questions of law only being argued on the plaintiff's pleadings, an opinion in writing, by the court, which expressly or impliedly finds all the necessary facts, and gives judgment for the amount allowed, though it does not state separately findings of fact and conclusions of law, is a sufficient compliance with the requirements of the statute as to the decision of the court, although it is the better practice to make such separate findings and conclusions.

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

This was an action brought by William B. Tinsley, chief supervisor of elections for the Western district of Virginia, against the United States, pursuant to the act of March 3, 1887, to recover fees as such supervisor. The circuit court gave judgment for the plaintiff. Defendant brings error. Affirmed.

A. J. Montague, U. S. Atty.

William B. Tinsley, pro se.

Before GOFF and SIMONTON, Circuit Judges, and SEYMOUR, District Judge.

SIMONTON, Circuit Judge. This case comes up on a writ of error to the circuit court of the United States for the Western district of Virginia. The action was brought in the circuit court under the provisions of the act of congress entitled "An act to provide for the bringing of suits against the United States," approved March 3, 1887 (24 Stat. 505).

The plaintiff below (defendant in error here) in September, 1891, filed his petition against the United States, claiming payments for certain items in his account against the government as chief supervisor of elections, which had been presented to and disallowed by the first comptroller of the treasury. The disallowed items are as follows:

Date of Adjustment.	Treas. Rept.	Charge or Item Disallowed.		Amount.
Feb. 21, 1887.	100,901.	Blank oaths, etc., furnished supervisors..	$14 00	
April 9, 1889.	113,833.	Blank oaths, etc., furnished supervisors..	14 00	28 00
Feb. 21, 1887.	100,901.	Indx. 810. Comrs. of Sup'rs, 810 fol.....	121 50	
Nov. 10, 1890.	124,515.	Indx. 65. 65 fols., at 15 cents.....	9 75	131 25
Feb. 21, 1887.	100,901.	Admrs. 10 oaths of office to Sup'rs.....		2 50
April 9, 1889.	133,833.	Recording and Indx. names, returns, Rpts., etc., of Sup'rs, 5,035 fols., at 15 cents.....		755 25
Nov. 10, 1890.	124,515.	Filg. 65 recommendations of Sup'rs.....		6 50
Nov. 10, 1890.	124,515.	Copies of Sup'rs' Rpts. furnished in criminal cases, is of elec. laws		129 15
Total.....				$1,052 65

With the petition, as an exhibit, he filed a full statement of the disallowances on his whole account by the first comptroller, with the reasons for such disallowances. These reasons are not for nonperformance of the services rendered, but for illegality of the charges. No answer or other pleading was interposed. But both sides filed briefs of argument. After hearing, the court rendered its opinion on each item of the claim nominatim, and allowed every item but the one for $6.50, stating the amount allowed, and the reasons for the allowance. On the same day the judge filed his judgment, reciting the proceeding; that it is a claim for fees disallowed in plaintiff's account for services as chief supervisor of elections for the Western district of Virginia, properly made out and duly approved by the court, and presented to the proper accounting officers; that the petition was duly filed and served, and evidence in support of the same heard. Then follows the order that the plaintiff recover of the United States the sum of $1,046.15, with interest at 4 per cent. per annum. From this judgment, after motion for new trial made, refused, and exception taken, a writ of error was sued out from this court.

There are seven assignments of error. The seventh will be first considered, as it goes to the whole case. It is in these words:

"In failing to make specific findings of the facts in the case, as required by section 7 of the act of March 3, 1887 (24 Stat. 505)."

The section provides that:

"It shall be the duty of the court to cause a written opinion to be filed in the cause setting forth the specific findings by the court of the facts therein and the conclusions of the court upon all questions of law involved in the case and to render judgment thereon."

The court in this case filed an opinion, but did not file a separate finding of facts, followed by conclusions of law. The supreme court of the United States, in O'Reilly v. Campbell, 116 U. S., at page 421, 6 Sup. Ct. 421, discussing a case very similar to this says:

"Findings are not to be construed with the strictness of special pleadings. It is sufficient if from them all, taken together with the pleadings, we can see enough upon a fair construction to justify the judgment of the court, notwithstanding their want of precision and the occasional intermixture of matters of fact and conclusions of law. Defects of form should be called to the attention of the trial court by the objecting party, and the requisite correction of the findings would seldom be denied."

It may be remarked in passing that the plaintiff in error had an opportunity of doing this when he made his motion for a new trial, and did not avail himself of it. The pleadings in this case set out in full the items of the account claimed, accompanied by the full text of allowances and disallowances by the department. These showed that no facts were disputed, and that the questions were all questions of law. The course pursued by the district attorney, interposing no formal denial, and proceeding to an argument on the pleadings of the petitioner, leads to the conclusion that the fact of service was not disputed, and that his objections were as to the legality of the charges. From these enough can be seen to enable an examination into the judgment of the court. There were four

essential facts to be found in this case: (1) That the claimant was the chief supervisor of elections for the Western district of Virginia; (2) that his account or fee bill was duly presented to the treasury department, as required by law; (3) that the items and amounts of the said account have been disallowed by the said department; (4) that the services charged for in said account have been duly performed by claimant as said chief supervisor. The opinion opens with the statement that the petition is filed by William B. Tinsley, chief supervisor of elections for the Western district of Virginia, under the act of congress of March 3, 1887, to recover fees claimed to be due him, which have been disallowed by the first comptroller of the treasury. Then it gives the amount of these fees,—$1,052.65. The opinion then states each item in detail: (1) Printing blanks for petitions, oaths, and notices, $28; (2) indexing 875 commissions or appointments of supervisors, $131.25; (3) administering the oath of office to 10 supervisors, $2.50. It is impossible to read what is said of these items without concluding that the court not only passed upon the validity of the charges, but on the fact of the service also. Without this it could not have allowed the charge. In the fourth item, recording and indexing names, etc., of supervisors, the court refers in terms to the evidence, and in doing so states "the facts found from the evidence" (Insurance Co. v. Tweed, 7 Wall., at page 51), and on these facts allows the amount charged,—$755.25. So, with the sixth item, it states the fact that copies of the reports of supervisors were furnished to the United States attorney to be used by him in criminal prosecutions, and adopts the evidence that these copies were furnished by request. Having thus gone into the items of the account in detail, and stating in figures the sum allowed in each item, and the amount of one disallowance, the judgment of the court gives the exact aggregate sum allowed. This takes the case out of U. S. v. Clark, 94 U. S. 75.

It is better practice to state the findings of fact distinctly, and afterwards to set forth the conclusions of law. The statute, however, requires the court to file a written opinion, and to render judgment thereon. When the facts do not seem to be disputed, and when the only questions made are whether the charges are according to the written law, it is difficult in an opinion to pursue any other course than that taken here. At all events, when, as in this case, the pleadings, exhibits, opinion, and judgment enable this court to see enough, upon a fair construction, to justify the judgment of the court below, it would push a regard for mere form very far if the cause were remanded solely for the purpose of changing the mode of presenting the conclusions of the circuit court. This assignment of error is overruled. Of the other assignments of error, five go to the several items, and the sixth to the aggregate of them. Each of these has been considered, and the arguments against them, but no error in the ruling of the court has been seen.

The decree of the circuit court is affirmed.

KINNE et al. v. LANT.

(Circuit Court, E. D. Michigan. May 13, 1895.)

No. 8,056.

1. REMOVAL OF CAUSES — MOTION NOTICED AFTER APPLICATION — WAIVER OF IRREGULARITY.
   Where, after a petition and bond for removal of a cause from a state court have been filed, but before they have been called to the attention of or passed on by such court, a motion is made therein by the defendant, which is afterwards brought on for hearing in the federal court, the plaintiff waives any irregularity, by seeking an adjournment of the hearing in the federal court for his own convenience, without objection on such ground.
2. SAME—APPEARANCE.
   A petition for removal of a cause from a state to a federal court, which is qualified by a statement that the attorneys for the petitioner appear specially for the purpose of such petition only, does not constitute a general appearance or cure defects in the service of process.
3. SERVICE OF PROCESS—PRIVILEGE OF SUITOR.
   A suitor who has come from his home into a foreign jurisdiction, upon the request of his counsel and for the purpose of consultation with such counsel during the argument of a demurrer, is privileged from the service of process, in any part of such jurisdiction, during the argument and pending a temporary adjournment thereof for the convenience of the court.

This was an action by Edward D. Kinne and Otis C. Johnson, surviving executors of the estate of Lucy W. S. Morgan, deceased, against George Lant, Sr. It was commenced in a court of the state of Michigan, and removed into the federal court by the defendant, who now moves to set aside the service of process.

Lawrence & Butterfield and Bowen, Douglas & Whiting, for plaintiffs.

Fraser & Gates, for defendant.

SWAN, District Judge. This is an action on the case commenced in the circuit court for the county of Washtenaw, on the 26th day of September, 1894, by the service of a summons upon the defendant, by the sheriff of Washtenaw county. On the 28th of September defendant filed his petition in the circuit court for the county of Washtenaw, for the removal of the cause to this court. This petition was duly verified, and was accompanied by the bond required by the act of congress of March 3, 1887, and it was qualified upon its face by the statement that the attorneys for the petitioner appeared specially for the purpose of the petition, and not otherwise. The petition was not presented nor called in any manner to the attention of the state court. On the next day the defendant entered, in the state court, a motion to set aside the service of process upon him, on the ground that such service was made while he was in attendance upon this court as a suitor in equity, and during the pendency of a hearing herein in a cause in which the defendant was complainant, and the plaintiffs in this cause, and others, were defendants, and therefore was privileged from the service of process of the state court. This motion was erroneously entitled in the

circuit court for the county of Wayne, and carefully disclaimed any and all intention of entering an appearance to the action in the state court, except for the purpose of the motion, and expressly limited defendant's appearance to said purpose only. The notice attached to the motion notified the attorneys for plaintiffs that the motion was entered in the special motion book kept by the clerk of the circuit court for the county of Washtenaw, in his office, in the city of Ann Arbor, in said county, and that the attorneys for the defendant "appeared specially in the cause, for the purpose of said motion only, and that the making of said motion is in nowise a waiver of any proceedings to remove said cause to the circuit court of the United States for the Eastern district of Michigan," and also that the proceedings for such removal were for the primary purpose of invoking the judgment of said United States court upon the jurisdictional question of said defendant's privilege as a suitor therein, upon the facts set forth in said motion and affidavit. Notice of this motion was duly served upon the attorneys for the plaintiffs in the cause, in the state court, on the day of the filing of the same in said court. On the 2d day of October, 1894, upon defendant's application to the court, the circuit court for the county of Washtenaw made an order removing the cause to this court upon the said petition of defendant. After the filing of the transcript of the record in this court, the motion to vacate and set aside the service of the process made upon defendant, Lant, was noticed for hearing in this court. Upon the application of plaintiff's counsel, the hearing was postponed to meet his convenience, and, at the adjourned time, was duly heard. The defendant, Lant, is a resident of Evansville, Ind., and a citizen of said state. The plaintiffs are citizens of Michigan. At the time of the service of the summons upon defendant, a hearing was in progress in the suit pending in this court, in equity, wherein said Lant is complainant, and the plaintiffs in this cause, and others, are defendants. Under the advice of his counsel, whose affidavit establishes that he required the presence of Lant in the equity cause upon the argument of the demurrer to the bill of complaint filed by him in this court, Lant came into this district, both to attend the argument and also to confer with his counsel, at the latter's request, concerning certain matters of fact connected with said equity cause, and the management thereof. It also appears, by Lant's affidavit and that of his counsel, that he came here, upon that occasion, under the assurance of his counsel, Jasper P. Gates, Esq., that while in the Eastern district of Michigan, for the purposes aforesaid, he would be privileged from the service of legal process, and would be protected therefrom by this court, in which his suit was pending. The demurrer to the bill in equity was heard in part on the 21st of September, 1894, and deponent was present, as he states, pursuant to said advice, and for the purposes above stated. Because of other business before the court, the argument of the demurrer was not concluded, and the further hearing thereof was postponed, under the intimation that the court would hear the conclusion of the ar-

gument during the then present week. Lant was advised by his counsel that his privilege and exemption from the service of process, as a party to the cause in equity, continued, and he stayed, for the purpose of consulting and advising with his said counsel with reference to the cause, and its conduct, until the conclusion of the argument upon the demurrer. Pending the resumption of that argument, and under the advice of his counsel, Lant remained in the district. While so waiting the convenience of the court in the premises, Lant went to the city of Ann Arbor, in this district, for the purpose of making inquiries relative to certain matters of fact connected with his cause in this court, and while there was served with the summons at the suit of the plaintiffs in this cause, which service he now asks to be vacated and held for naught, on the ground that he was privileged therefrom as a suitor attending this court.

1. The first ground of objection on the part of the plaintiffs to the motion is that the same is not properly before the court, because it was entered in the state court after the petition and bond for removal had been filed; and, coupled with this, it was also urged that the motion, being entitled in the circuit court for the county of Wayne, instead of the circuit court for the county of Washtenaw, was not properly before the court. Both these objections are purely technical, and if they possessed any original force, have been waived by the conduct of plaintiffs' counsel in recognizing them as properly before the court, and requesting postponement of the argument upon the motion, thereby leading the defendant to assume the regularity of the paper and the procedure for the relief prayed. In this view of the matter, it is unnecessary to decide whether the state court lost jurisdiction of the cause by the mere act of filing the petition and bond for its removal, so that the subsequent filing of the motion in that court, before the petition and bond for removal were called to the attention of the state court, was entirely nugatory. It would seem, notwithstanding it has frequently been said in terms "that the filing of the petition and bond for removal deprive the state court of jurisdiction," that some further act would be necessary to work that result, and that it would not be successfully claimed that a party would be entitled to the removal of a cause by the mere deposit and filing of the papers with the clerk of the state court, without advising the court itself of his action, and asking, at least, for the usual order of removal. He could not, for example, sit silently by, and permit the court to dispose of his cause, without insisting upon the rights to which his compliance with the removal act would entitle him. But inquiry into the effect of the mere filing of the petition and bond is made immaterial by the recognition by plaintiffs' attorneys of the motion as one proper to be heard in this court, and ignoring the clerical error in the name and the irregularity, if any, of filing the motion in the state court, after having filed therein the petition and bond for removal. Had these objections been promptly made, and notified to counsel as objections to the propriety of the motion, a different question would have been presented.

2. The next objection made to the motion is that the filing of the petition for removal was an appearance and a waiver of any objection of the service of process. If the petition for removal had been unqualified, this would doubtless defeat the motion, agreeably to the rule that a general appearance heals all defects in the service of process, but this is not the case here. The petition for removal was signed, "Fraser & Gates, attorneys for said petitioner, who appear herein specially for the purposes of the above petition, and not otherwise." It is properly conceded by plaintiffs that where a special appearance is entered in the first instance, and limited solely for the purpose of removal, it is not a waiver of defect in the service of process, nor a submission by the party sued to the jurisdiction of the court. The authorities to this effect are numerous: Parrott v. Insurance Co., 5 Fed. 391; Small v. Montgomery, 17 Fed. 865; Miner v. Markham, 28 Fed. 387; Perkins v. Hendryx, 40 Fed. 657; Golden v. Morning News, 42 Fed. 112; Clews v. Iron Co., 44 Fed. 31; Reifsnider v. Publishing Co., 45 Fed. 433; Bentlif v. Finance Corp., 44 Fed. 667; Hendrickson v. Railroad Co., 22 Fed. 569; McGillin v. Claflin, 52 Fed. 657; Railway v. Brow, 13 C. C. A. 222, 65 Fed. 941, 950; Southern Pac. Co. v. Denton, 146 U. S. 202, 13 Sup. Ct. 44; Goldey v. Morning News of New Haven, 15 Sup. Ct. 559.

In Railway Co. v. Pinkney, 149 U. S. 194, 209, 13 Sup. Ct. 859, the question of the effect of a special appearance under the statute of Texas was considered by the court, it being contended in argument that as the statute of that state made an appearance to question the jurisdiction of the court a general appearance, so as to bind the person of the defendant, the statute must be followed in the federal courts in that state. The court say:

"The effect of a statute of a state giving such an operation to an appearance for the sole purpose of objecting to the jurisdiction of the court would be practically to defeat the provisions of the federal statutes which entitle it to the right to have this court review the question of the jurisdiction of the circuit court. Under well-settled principles, this could not and should not be permitted, for wherever congress has legislated on or in reference to a particular subject involving practice or procedure, the state statutes are never held to be controlling. In Harkness v. Hyde, 98 U. S. 476, it was held by this court that illegality in the service of process by which jurisdiction is to be obtained is not waived by the special appearance of the defendant to move that the service be set aside, nor, after such motion is denied by his answering to the merits. Such illegality is considered as waived only when he, without having insisted upon it, pleads in the first instance to the merits."

The court therefore, it being established that the plaintiff in error was never brought before it by any proper or legal process, held the circuit court was without jurisdiction to proceed in the case, and reversed its judgment.

3. The main question argued in support of the motion was the amenability of defendant, Lant, to service of process, he being then in attendance in this district as a suitor in this court. A defendant here as a suitor, and not within the jurisdiction of his residence, is generally privileged from arrest on civil process, and equally from the service of such process while going to and returning from attendance upon the suit to which he is a party, and is entitled to the

same exemption if he comes as a witness in the cause. That both suitors and witnesses are exempt from arrest in a jurisdiction other than that of their residence, during the trial or hearing of a cause in which they are concerned, and for a reasonable time after its conclusion, in the court in which they have attended, is generally held, and "the reasons for such exemption are," as said by Judge Cooley in Mitchell v. Circuit Judge, 53 Mich. 542, 19 N. W. 176, "applicable, though with somewhat less force, in other cases also." In Harris v. Grantham, 1 N. J. Law, 142, it was held that even a common appearance could not be secured by serving a capias on a party while in attendance on the court. In Hammerskold v. Rose, 7 Jones (N. C.) 629, it was held that the privilege of immunity from the service of process belonged to the suitor, not only when in attendance upon court, but while going to and remaining at court, and returning home. In Matthews v. Tufts, 87 N. Y. 568, it was ruled that where the defendant in any action is a nonresident, the summons cannot be served upon him, while he is attending the court of that state as a party. In Bank v. McSpedan, 5 Biss. 64, Fed. Cas. No. 7,582, the court held a nonresident exempt from service of process, if he comes into the state for the purpose of presenting or defending a cause. In Parker v. Hotchkiss, 1 Wall. Jr. 269, Fed. Cas. No. 10,739, the suitor attending court was held privileged from service of process either by summons or capias. The case of Blight v. Fisher, Pet. C. C. 41, Fed. Cas. No. 1,542, holding that the privilege of a suitor or witness extended only to exemption and from arrest, was overruled by Judge Kane in Parker v. Hotchkiss, cited supra, with the concurrence, as stated by him, of Mr. Justice Grier and Chief Justice Taney. In Bridges v. Sheldon, 18 Blatchf. 507, 515, 7 Fed. 17, the question is elaborately considered by Judge Wheeler, who says: "The privilege to parties to judicial proceedings, as well as others required to attend upon them, of going to the place where they are held, and remaining so long as is necessary, and returning, wholly free from the restraint of process in other civil proceedings, has always been well settled and favorably enforced. * * * It extends to every case where attendance is a duty in conducting any proceeding of a judicial nature." It was not uncommon, formerly, to issue a writ of protection out of the court which the party was attending as a suitor or witness, but it is no longer usual, as the court, in the enforcement of its own authority and dignity, protects the witness or the party, on the ground that the object of the privilege was that the person should not be drawn into a foreign jurisdiction, and there be exposed to be entangled in litigation far from his home, and subjected to the expense thus entailed. It is obvious that, whether the process be for the arrest of the person or by the mere service of a summons upon him, he would incur almost equal annoyance and expense, and that there is no tenable distinction, on principle, between the two methods of service of process. Both are equally within the mischiefs intended to be prevented by the rule which protects a party against such service. They differ only in the degree of annoyance and expense inflicted on the defendant. In Halsey v. Stewart, 4 N. J. Law, 366, it is said that a

party who cannot attend to his suit without being liable to such service would be under a personal restraint from which those engaged in the administration of justice have a right to be free. In Miles v. McCullough, 1 Bin. 77, the summons was served upon the defendant while attending court, and, on motion to vacate such service, the court said that it had been repeatedly ruled that a suitor was equally privileged from the service of both capias and summons under such circumstances, and set the service aside. In Plimpton v. Winslow, 9 Fed. 365, the defendant was served with process by his adversary in New York while attending the examination of witnesses before an examiner, where the testimony was being taken in a suit pending in the circuit court for the district of Massachusetts. Judge Blatchford said, upon motion to set aside the service of the subpoena, on the ground that the privilege of the defendant was violated:

"The defendant attended as a party before the examiner. The examination was made a regular proceeding in the suit in Massachusetts. The defendant had a right to attend upon it in person, whether he was to be himself examined as a witness before Mr. Thompson, a special examiner, or not, and he had a right to be protected, while attending upon it, from the service of the papers which were served in this suit. He attended in good faith. The examination was pending, and he was served during the interval of an adjournment. The privilege violated was a privilege of the Massachusetts court, and one to be liberally construed for the due administration of justice."

The defendant's motion to vacate the service was granted. To the same effect are Brooks v. Farwell, 1 McCrary, 132, 4 Fed. 166, and Larned v. Griffin, 12 Fed. 590, where the authorities are fully recapitulated in the opinion of Judge Colt. See, also, Atchison v. Morris, 11 Fed. 582.

Without further citations, which are rendered unnecessary by the able discussions of the question to be found in the cases given, it is clear that the defendant is entitled to have this motion granted. While it is true that no examination of witnesses was pending at the time, nor was he here under the compulsion of legal process, yet, as a party to the suit pending in this court, he had a right to be present in his own interest at any stage of the litigation, when advised by his counsel that his presence was necessary for the proper conduct of the cause. He attended in good faith, and, although the question under discussion at the time of his arrival and during his stay was purely legal, it cannot be said, in view of the facts set forth in his affidavit and that of his counsel as to the necessity of his presence, that he was needlessly here. The decision of the court upon the demurrer would, if adverse to him, necessitate the amendment of the bill, and presumably require his presence here for that purpose, and for the verification of the amended bill, as well as for the purpose of consultation with his counsel as to the course to be pursued in the cause. It is not claimed, nor is it a fact, that the cause of action in the plaintiffs' declaration in this cause arose during Lant's presence here, but the contrary is impliedly admitted, as it appears that in this suit he is proceeded against for matters which transpired long prior to his coming to attend the argument of the demurrer. Notwithstanding the postponement of the argument, the defendant was still under the protection of the court as to

the matter for which this suit is brought, and there seems to be no reason or principle upon which he can be held to have lost his privilege because, during the adjournment of the argument, he proceeded to Ann Arbor upon business connected with that litigation. The protection accorded him as a suitor, so long as he did not misconduct himself, it seems to me entitled him, during the pendency of the hearing, to go anywhere within the district while the hearing was pending. The motion to set aside the service of process in this cause must therefore be granted.

UNITED STATES GRAPHITE CO. v. PACIFIC GRAPHITE CO.

(Circuit Court, E. D. Michigan. May 16, 1895.)

No. 8,000.

1. SERVICE OF PROCESS—OFFICER OF FOREIGN CORPORATION.
   Service of process upon an officer of a foreign corporation casually in the state where the service is made, but where such corporation has no place of business nor agency, is insufficient to confer jurisdiction, though such officer was at the time engaged upon business of the corporation.
2. SAME—MICHIGAN STATUTE—CAUSE OF ACTION ACCRUING IN THE STATE.
   By a contract made in Michigan, defendant agreed to sell to plaintiff certain graphite ore, to be delivered on board the cars at T., in Mexico, and to be paid for in notes payable in Michigan. *Held*, that a cause of action for nondelivery of the ore arose in Mexico, and gave no right to make service of process in accordance with section 8145, How. Ann. St. Mich., providing for service on foreign corporations where the cause of action accrues within the state.

This is an action of assumpsit to recover damages for the alleged breach of a contract, which the declaration claims was committed in the state of Michigan.

The plaintiff is a corporation organized and existing under the laws of the state of Michigan. The defendant is a corporation organized under the laws of California, and has its office at San Francisco, in that state. It has no office nor agency in Michigan, and none elsewhere than at San Francisco, except an agency in Mexico, where its mines are situated. The suit is upon a written contract between the parties, which is set forth in full in the declaration. The defendant was the owner of certain graphite mines in Mexico, and in 1891, by the contract sued upon, agreed to sell its ore exclusively to the plaintiff. The plaintiff, on its part, agreed to take a certain amount yearly, the ore to be delivered on board of the cars at Torres, in Mexico, consigned to plaintiff. The plaintiff's principal office is at Saginaw, Mich., and payment was to be made for the ore by remitting the amount due in New York exchange within 15 days after the receipt at Saginaw of the bill of lading. At the time of the entering into of the contract, the plaintiff advanced the defendant $6,000, for which it received defendant's promissory notes. The contract provided that out of all payments due on the shipment of ore, five dollars per ton was to be retained by plaintiff, and applied on the defendant's notes. The plaintiff also agreed to erect a factory at Saginaw. The declaration sets up a breach of this contract, in that the defendant did not furnish the ore as agreed, whereby plaintiff has suffered damage in the loss of the money invested in the factory and in employing agents and advertising to promote and establish its business; and, second, in the loss of profits. Service was had upon James O. Roundtree, the president of the defendant corporation, who was casually within this state, and, as it is claimed by plaintiff, in the service of, and attending to the business of, the defendant corpora-

tion. Mr. Roundtree's affidavit shows that he is a resident and inhabitant of the city of San Francisco, Cal., and is president of defendant corporation, and at the time the summons issued in this cause was served upon him he was in the city of Detroit, state of Michigan, for a few days, on business of the corporation. On the 13th of February, 1894, while temporarily here, as aforesaid, Mr. Roundtree was served with the summons in this cause. The defendant, appearing specially by its attorneys for the purpose of the motion, moves the court that the writ of summons, the return of service thereof, and all proceedings in the cause be quashed and held for naught, for the following reasons: "(1) Because the defendant is not an inhabitant of this district, nor was said defendant found therein at the time of the service of said writ. (2) Because said defendant is a foreign corporation, and has never engaged in business within the state of Michigan, so as to be amenable to process issued out of any of the courts of Michigan, either state or national. (3) Because the defendant is a foreign corporation, and the cause of action alleged in the declaration did not accrue within the state of Michigan. The service of process in this cause was made under and in accordance with section 8145, How. Ann. St. Mich., which provides that a foreign corporation may be sued in this state in all cases 'where the cause of action accrues within the state of Michigan.'"

Charles S. McDonald and James H. McDonald, for plaintiff.
Gray & Gray, for defendant.

SWAN, District Judge (after stating the facts). The validity of the service of process is rested upon the construction given to section 8145, How. Ann. St. Mich., by the supreme court of Michigan. It is also necessarily claimed that the plaintiff's cause of action accrued in the state of Michigan. In Shickle, H. & H. Iron Co. v. Wiley Const. Co., 61 Mich. 226, 28 N. W. 77, the court held that, if the officer of the foreign corporation is within the jurisdiction, and served there, such service is valid to bind the corporation, and subject it to the jurisdiction of the court; and the defense that the officer served was not here on the business of the corporation cannot avail the defendant; and that the statute was passed for the purpose of abrogating the rule enunciated by the supreme court of Michigan in Newell v. Railway Co., 19 Mich. 336. The contention of the defendant is that, under the act of congress approved March 3, 1887, and amended August 13, 1888, defining the jurisdiction of courts of the United States, this court is without jurisdiction. The provision of these acts involved is that:

"No civil suit shall be brought before either of said courts against any person, by any original process or proceeding in any other district than that whereof he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suits shall be brought only in the district of the residence of either the plaintiff or the defendant."

It is unnecessary to review at length the authorities bearing upon the sufficiency of this service to confer jurisdiction upon this court. The exact question, since the argument of this cause, has been decided by the supreme court of the United States in an opinion delivered by Mr. Justice Gray in the case of Goldey v. Morning News, 15 Sup. Ct. 559, 156 U. S. 518, in which the defendant had "no place of business, officer, agent, nor property" in the state where process was served. The learned justice says:

"This writ of error presents the question whether, in a personal action against a corporation, which is neither incorporated nor does business within the state, nor has any agent or property therein, service of the summons upon its president, temporarily within the jurisdiction, is sufficient service upon the corporation. * * * It is an elementary principle of jurisprudence that a court of justice cannot acquire jurisdiction over the person of one who has no residence within its territorial jurisdiction, except by actual service of notice within the jurisdiction, upon him, or upon some one authorized to accept service in his behalf, or by his waiver, by general appearance or otherwise, of the want of due service. Whatever effect a constructive service may be allowed in the courts of the same government, it cannot be recognized as valid by the courts of any other government. [Citing authorities.] * * * So the judgment rendered in the court of one state against a corporation neither incorporated nor doing business within the states must be regarded as of no validity in the courts of another state or of the United States, unless service of process was made in the first state upon an agent appointed to act there for the corporation, and not merely upon an officer or agent residing in another state, and only casually within the state and not charged with any business of the corporation there. Insurance Co. v. French, 18 How. 404; St. Clair v. Cox, 106 U. S. 350, 357, 359, 1 Sup. Ct. 354; Fitzgerald & Mallory Const. Co. v. Fitzgerald, 137 U. S. 98–106, 11 Sup. Ct. 36; Railway Co. v. Pinkney, 149 U. S. 194, 13 Sup. Ct. 859; In re Hohorst, 150 U. S. 653, 663, 14 Sup. Ct. 221. * * * The jurisdiction of a circuit court of the United States depends upon the acts passed by congress pursuant to the power conferred upon it by the constitution of the United States, and cannot be enlarged or abridged by any statute of a state."

In that case the suit had been originally commenced in the state court, and was removed to the circuit court of the United States, where the defendant appeared specially by its attorneys for the purpose of applying for an order setting aside the summons and the service thereof, filed a motion, supported by affidavits of its president and of its attorneys, to set aside the summons and the service thereof on the ground "that the said defendant, being a corporation organized under the laws of the state of Connecticut, and transacting no business within the state of New York, not having any agent clothed with authority to represent it in the state of New York, cannot legally be made a defendant in an action by a service upon one of its officers while temporarily in said state of New York." The cases cited in the opinion of the court, and the extracts therefrom given above, are decisive of the first and second grounds of this motion.

James O. Roundtree, the president of the defendant company in this cause, was not a resident agent of the corporation, for it had none such in Michigan; and if it be conceded that, while temporarily here, at the time of the service made upon him, he was engaged in negotiations concerning the business of the company, this is not sufficient to subject the defendant to the jurisdiction of any court in this state by reason of service made upon him. See, also, Golden v. Morning News, 42 Fed. 112; Good Hope Co. v. Railway Barb Fencing Co., 22 Fed. 635; Reifsnider v. Publishing Co., 45 Fed. 433; U. S. v. American Bell Tel. Co., 29 Fed. 17, 34.

3. The third ground of the motion presents the question of the effect of the words, "where the cause of action accrues within the state of Michigan." The statutory method of service authorized by section 8145, supra, is conditioned upon the existence of this fact.

It is only in cases where the cause of action accrues within this state that any right is given to a plaintiff to subject a foreign corporation, which has not consented to be sued here, to the jurisdiction of the courts of the state. In the case at bar it clearly appears from the declaration that the cause of action arose in Mexico, at the place where the defendant was obliged, by the contract, to ship the ore which it had contracted to furnish to plaintiff. By the terms of the contract, the notes of the defendant, given for the advance of $6,000 made to defendant by plaintiff, were payable out of the proceeds of the shipments of ore there to be made by defendant to plaintiff. It is plain that the contract was broken at the place where the defendant failed to ship the ore. The fact that the contract was made here, and the notes were payable here, cuts no figure in determining the place of breach. The undertaking of the defendant was to sell to the second party "all the graphite ore which can be produced from such mines, and also all the graphite ore which can be produced from any other graphite mine or mines which the first party may hereafter acquire, and the amount that the second party may call for or require, for and during the period of ten years from this date, and deliver the same on board the cars of the railroad at Torres, state of Senora, Mexico, billed and ready for shipment to said second party at Saginaw, Michigan." It is true, without doubt, that generally an action for a breach of contract is transitory, and, in the absence of statutes or rules of court to the contrary, may be brought in almost any jurisdiction where the defendant may be found; but this elementary doctrine affords no aid in maintaining our jurisdiction in this cause. The controlling fact for ascertainment is that expressed in the statute, viz. the locality of the breach. Unless the contract has been broken here, there is no authority of law for the statutory service upon which the plaintiff rests the institution of this suit. Maxwell v. Railroad Co., 34 Fed. 286. In that case an action of trespass upon the case was brought to recover damages for the expulsion of plaintiff from one of defendant's passenger cars within the state of Kansas. The plaintiff, a citizen of Michigan, was traveling on a ticket bought from the Wabash Company here for transportation to Denver and return. He was ejected from the train upon the return trip. Upon these facts, Judge Brown held that the cause of action arose under section 8145, How. Ann. St. Mich., "not where the contract is made, but where it is broken; and that, as the expulsion of the plaintiff took place in the state of Kansas, the cause of action must be deemed to have arisen there." There is no apparent distinction between this case and that of Maxwell v. Railroad Co., supra, as to the locality of the breach of contract. The motion to vacate the service of process must be granted.

EAST TENNESSEE IRON & COAL CO. et al. v. WIGGIN et al.

(Circuit Court of Appeals, Sixth Circuit. June 4, 1895.)

No. 265.

1. COURTS—TERMS.
Unless sooner adjourned, a term of a United States circuit court may extend from the beginning of one term to the opening of the succeeding statutory term, and does not necessarily end at the opening of a term held, pursuant to statute, in another place in the same district.

2. ADVERSE POSSESSION—TENNESSEE STATUTE.
Under the Tennessee statute (Mill. & V. Code, §§ 3459–3461) providing that any person having had seven years' adverse possession, under color of title, of lands granted by the state, is vested with a good and indefeasible title in fee, adverse possession, with color of title, for the statutory period, extinguishes the title of the excluded owner, and bars him from recovering the land even from one whose title is defective.

3. SAME—COLOR OF TITLE.
A grant of land from the state, void because of the existence of a prior grant, and a sheriff's deed, purporting to convey land not embraced in an attachment from which the sole right of the sheriff to convey arose, are both sufficient color of title, under the Tennessee statute, of adverse possession.

4. SAME—ACCUMULATION OF DISABILITIES.
Under the Tennessee statute of adverse possession, the disability of an heir, who is beyond the limits of the United States at the time of descent cast, cannot be added to that of his ancestor, who was also beyond such limits during the period of adverse possession.

5. ABANDONMENT—TITLE TO LAND.
There can be no abandonment of a legal title to land by mere failure to assert it, in the absence of adverse possession.

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

This was an action of ejectment by Augustus Wiggin and others against the East Tennessee Iron & Coal Company and Lucien Bird. Judgment was rendered in the circuit court for the plaintiffs for a part of the land claimed. Defendants bring error. Reversed.

This is an action of ejectment brought to recover a tract of mountain land containing 5,000 acres, lying in Campbell county, Tenn. The plaintiffs below claimed title through and as heirs at law of one Timothy Wiggin, a subject and resident of Great Britain, who died in London, February 1, 1856. Plaintiffs' ancestor acquired title by deed in 1840, but never resided in the United States or had any actual possession of the lands in controversy. He left surviving him seven heirs, four of whom have continuously resided "beyond the limits of the United States and the territories thereof." The other three stirpes have been residents of the United States since 1865. The defendants in possession claimed under inferior and junior paper titles, except as to one parcel of 50 acres, held under an older and superior grant. These junior grants for lands within plaintiffs' grant were as follows: (1) Grant No. 28,171, to John McCoy, dated August 21, 1851, for 200 acres; (2) grant No. 28,172, to John McCoy, dated October 21, 1851, for 1,000 acres; (3) grant No. 27,939, to Jacob Hammon, dated April 10, 1851, for 2,000 acres. The defense as to the lands held under these junior grants depended upon the statute of limitations. There was a judgment for the defendants as to the lands held under the grants for 50 and 200 acres, respectively, and for three undivided sevenths, being the interest of the resident heirs of Timothy Wiggin in the McCoy grant for 1,000 acres. For the rest there was a judgment for the plaintiffs. From this judgment the defendants have sued out this writ of error.

W. A. Henderson, for plaintiffs in error.
Henry H. Ingersoll, for defendants in error.

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

After stating the facts as above, the opinion of the court was delivered by LURTON, Circuit Judge:

There is a preliminary question for decision relating to the legality and sufficiency of the bill of exceptions. The cause appears to have been tried with a jury in February, 1894. A motion for a new trial was made and overruled February 9, 1894. The bill of exceptions is dated June 21, 1894. Appellees say that this was after the term had closed. This insistence is based upon the provisions of the statute prescribing the terms of the circuit court for the Eastern district of Tennessee. The statute provides for terms at Knoxville beginning the second Mondays in January and July, and at Chattanooga, in the same district, beginning the first Mondays in April and October. The argument is that, when the Chattanooga term began, the Knoxville term was necessarily at an end. This is not sound. Section 612, Rev. St., provides that circuit courts may be held at the same time in the different districts of the circuit. By section 611, cases may be heard and tried by each of the judges authorized to hold the circuit court, sitting apart and concurrently. Unless sooner adjourned, a term of the United States circuit court may extend from the beginning of one term to the opening of the succeeding statutory term of the same court. The practice has in this circuit been almost universal to keep the court open from one statutory term to the succeeding regular term. This bill of exceptions was allowed and signed before the beginning of the ensuing term, and is altogether regular and valid.

Appellees have also insisted that it does not sufficiently appear that exception was taken to the charge or refusals to charge at the time the charge was delivered or refused. The bill of exceptions has not been prepared with that degree of care and accuracy which might be expected from the learning and skill of the attorneys representing appellants. Still it is evident, upon a fair and careful construction of the paragraph reciting the exceptions taken by appellants, that the expression "then and there excepted" refers to the time when the court charged or refused to charge as requested, and not to the later day when a motion for a new trial was overruled.

There was evidence tending to show that John McCoy, the grantee under grant No. 28,172, took adverse possession under his junior grant as far back as between 1849 and 1853, and therefore during the lifetime of Timothy Wiggin, the ancestor of plaintiffs, and that his possession was continued down to some time during the Civil War, when he abandoned his occupation, and disappeared amid the smoke and dust of that conflict, leaving no trace behind, and has not since turned up. This evidence tended also to show that this adverse occupation was under a grant purporting to convey a fee. Beginning during the lifetime of Timothy Wiggin, it was continuously main-

tained for a period of more than seven years, including more than three years after descent cast upon the plaintiffs below. Defendants below endeavored to connect themselves with McCoy's title through a sheriff's deed made in 1870, purporting to convey certain lands which had been levied on and sold as the lands of McCoy, to satisfy a debt due to James Williams, the vendee under the sheriff's deed. Williams, in 1877, conveyed the land embraced in his deed to one L. Silcox, who, in 1886, conveyed the same land to defendant Bird. There was evidence tending to show that, after Williams took his sheriff's deed, he took possession, and that that possession had been kept up by himself or those who succeeded to his title for some 12 or 15 years before this suit was brought. The proceedings upon which the sheriff's deed to Williams was founded were not operative to convey the title to the 1,000-acre grant now under consideration. The suit was begun by attachment of McCoy's lands as a nonresident. The levy of the attachment did not embrace this particular body of land, and no liberality of construction will justify the subsequent inclusion of this parcel in the sheriff's deed of 1870. That deed was therefore inoperative as a conveyance of McCoy's title, and was properly held by the district judge as useful only as color of title.

Appellants insisted that the effect of the evidence as to McCoy's adverse possession was to extinguish the Wiggin title, and vest in McCoy the superior legal title, and that plaintiffs could not recover upon a title which had been thus annulled by adverse possession for the period required by the Tennessee statute. They also insisted that the subsequent adverse possession of Williams, Silcox, and Bird, under deeds purporting to convey the fee, was adverse to the title acquired by McCoy, and resulted in its extinguishment, and that thereby defendants had acquired the perfect legal title. Their further insistence was that it was wholly unimportant whether the sheriff's deed to Williams was operative as a conveyance of McCoy's title, and equally unimportant whether they connected themselves with the McCoy possession or not, provided his possession was operative to toll the superior title originally in Timothy Wiggin.

The Tennessee limitation of actions for the recovery of land is found in sections 3459–3461, Mill. & V. Code. Those sections are from the Tennessee act of 1819, and were carried into the Code without change. They are as follows:

"3459. Any person having had, by himself or those through whom he claims, seven years' adverse possession of any lands, tenements, or hereditaments, granted by this state or the state of North Carolina, holding by conveyance, devise, grant, or other assurance of title, purporting to convey an estate in fee, without any claim by action at law or in equity, commenced within that time and effectually prosecuted against him, is vested with a good and indefeasible title in fee to the land described in his assurance of title.

"3460. And, on the other hand, any person, and those claiming under him, neglecting for said term of seven years to avail themselves of the benefit of any title, legal or equitable, by action at law or in equity, effectually prosecuted against the person in possession, as in the foregoing section, are forever barred.

"3461. No person, or anyone claiming under him, shall have any action, either at law or in equity, for any lands, tenements or hereditaments, but within seven years after the right of action has accrued."

By the express terms of section 3459, the effect of an adverse possession for a period of seven years, without suit commenced within that time and effectually prosecuted, is to vest in the adverse possessor, provided his possession was held under a deed, grant, or other conveyance of title purporting to convey an estate in fee, "a good and indefeasible title in fee to the land described in his assurance of title." Possession, without color of title, under the Tennessee statute, is a mere defense, and is inoperative as an assurance of title. Crutsinger v. Catron, 10 Humph. 24; Marr's Heirs v. Gilliam, 1 Cold. 510; Hopkins' Heirs v. Calloway, 7 Cold. 37. But, under the long-settled construction of section 3459, the effect of adverse possession taken and held under an assurance of title is not only to bar the action of the person ousted, but extinguishes the title of the excluded owner, and vests in the possessor an indefeasible title, operative as a muniment of title superior to any and all others. Waterhouse v. Martin, Peck (Tenn.) 406; Belote v. White, 2 Head, 712; McClung v. Sneed, 3 Head, 221; Hopkins' Heirs v. Calloway, 7 Cold. 46; Nelson v. Trigg, 4 Lea, 705, 706; Hanks v. Folsom, 11 Lea, 562. The junior grant under which McCoy took possession was color of title under this section of the Tennessee act, although the land had been previously granted. The sheriff's deed to Williams, though void as a conveyance of McCoy's title, was operative as an assurance of title. Ellege v. Cooke, 5 Lea, 637; Blantire v. Whitaker, 11 Humph. 314; Martin v. Pryor, 12 Heisk. 668; Thurston v. University of North Carolina, 4 Lea, 519.

It must therefore follow that, unless plaintiffs are within the operation of some exception to this statute of limitations, defendants were entitled to go to the jury upon the question of the character and duration of the McCoy possession, as well as upon the character and extent of the subsequent possession under the deed purporting to convey McCoy's title. A plaintiff in ejectment must recover upon the strength of his own title, and is not aided by the weakness of that of his adversary. If the Wiggin title was extinguished by operation of an adverse possession by McCoy, then it is most obvious that plaintiffs have no title upon which they can maintain an action, and the question as to whether defendants have acquired the title which they have lost is an immaterial matter. There can be but one good and indefeasible legal title. The plaintiff in ejectment must have that, or his suit must fail, and this is all there is in the defense of an outstanding title. If the title is not in the plaintiff, he cannot recover. Whether it is in the defendant or outstanding in a third person, the result must be the same. Bleidorn v. Mining Co., 89 Tenn. 188, 189, 15 S. W. 737; Walker v. Fox, 85 Tenn. 160, 2 S. W. 98.

Precisely what is meant by "an abandoned" legal title is hard to define. If it is the valid legal title, it is inconceivable how it can be abandoned. McCoy's disappearance and long neglect to assert the title which appellants claimed he acquired by his adverse possession did not operate to extinguish or toll it; nothing but a possession adverse to him for the statutory period would have such a

consequence. Plaintiffs did not abandon their title by neglecting for 40 years to take possession or bring action. If there has not been a devolution of title by operation of an adverse possession, their title is perfect, and their right of recovery would not be affected by a theoretical abandonment predicated alone upon a neglect of their estate. Upon the same ground, it is hard to perceive how McCoy's title has been lost by mere neglect for a shorter period. Nothing but a subsequent possession adverse to McCoy for the statutory period will affect the title acquired by his own earlier possession adverse to the Wiggin title.

This brings us to the question as to whether the plaintiffs, or those under whom they claim, are within any exception to the statute we have been considering. Undoubtedly, Timothy Wiggin, the ancestor of plaintiffs, was within the saving clause of the statute. He never resided within the limits of the United States or the territories thereof.

By section 3451, Mill. & V. Code, it is provided as follows:

"3451. If the person entitled to commence an action is, at the time the cause of action accrued, either, (1) within the age of twenty-one years; or, (2) of unsound mind; or, (3) a married woman; or, (4) beyond the limits of the United States and the territories thereof; such person, or the representatives and privies, as the case may be, may commence the action after the removal of such disability, within the time of limitation for the particular cause of action, unless it exceed three years, and in that case three years from the removal of such disability."

Thus, Timothy Wiggin might have sued at any time within three years after the "removal of his disability"; i. e. his coming within the "limits of the United States and the territories thereof." He died in London in 1856. The contention of defendants below was that McCoy's adverse possession began several years before his death, and that his heirs were obliged to sue, or be forever barred, within three years after the title came to them. Four of the heirs have remained continuously beyond the limits of the United States. Three other sets of heirs came to America about 1865. Now, it is evident that, unless the fact that the heirs of Timothy Wiggin were themselves beyond the seas when their intestate died operates to place them under the disability or saving provision of the statute, they were required to bring suit against McCoy within the limitation of the statute, or within three years after descent cast. This they did not do. If, therefore, McCoy's possession began within the lifetime of Timothy Wiggin, and was continuous for seven years, including three years after his death, then the necessary legal consequence was that plaintiffs' title was tolled, and McCoy acquired a good and indefeasible title as to all the land within his assurance of title.

Cumulative disabilities are not allowed under statutes saving a right of action for a definite period after removal of a disability existing when an adverse possession began. McDonald v. Johns, 4 Yerg. 257; Guion v. Anderson, 8 Humph. 326; Young v. Jones, 9 Humph. 551; Alvis v. Oglesby, 87 Tenn. 182, 10 S. W. 313. This principle has been widely applied: Lewis v. Marshall, 5 Pet. 470; Mercer's Lessee v. Seldon, 1 How. 37; Thorp v. Raymond, 16 How.

247; Hogan v. Kurtz, 94 U. S. 779; Floyd's Heirs v. Johnson, 2 Litt. (Ky.) 114; Jackson v. Wheat, 18 Johns. 40; Parsons v. McCracken, 9 Leigh, 495.

That there shall be no accumulation of disabilities is distinctly provided by section 3453 of the Tennessee Code, which reads as follows:

"3453. No person can avail himself of a disability unless it existed when his right of action accrued; but when two or more disabilities then exist, the limitation does not attach until all are removed."

These principles have equal bearing upon the 2,000-acre tract held under grant to Jacob Hammon. There was evidence tending to show that Hammon began adverse possession several years before the death of plaintiffs' ancestor, and that this possession was continued for more than seven years, including a period of more than three years after his death. Appellees have insisted that Hammon's possession was not of such a character as to be the open and notorious possession necessary to start the statute. The evidence as to this is not of such a character as to enable us to say that the error of the circuit court in regard to the effect of adverse possession upon plaintiff's title was harmless. There was evidence of adverse possession, and defendants were entitled to a correct charge as to the effect of such possession if they found it to be open and notorious.

The appellants presented the questions of law we have discussed in four distinct requests for instruction. Each request was refused. The charge was for the most part in distinct antagonism to the doctrine embodied in these requests. For the error in the charge as to the necessity of a connection between McCoy's adverse possession and the subsequent possession adverse to McCoy, and for the error in refusing the charges requested by appellants, the judgment must be reversed, and a new trial awarded.

AMERICAN GRAPHOPHONE CO. v. EDISON PHONOGRAPH WORKS.

(Circuit Court, D. New Jersey. June 24, 1895.)

EQUITY PRACTICE—PLEA.

A defendant in a suit in equity interposed a plea setting out certain agreements by which defendant alleged that it was licensed in perpetuity to make a patented machine. The complainant filed a replication to the plea. Upon examination of the agreements the court found them insufficient to sustain the claim set up in the plea. *Held*, following Pearce v. Rice, 12 Sup. Ct. 130, 142 U. S. 28, that the plea should be overruled.

This was a suit by the American Graphophone Company against the Edison Phonograph Works. On replication to plea to the bill.

Pollok & Mauero, for complainant.
Dyer & Driscoll, for defendant.

ACHESON, Circuit Judge. In Pearce v. Rice, 142 U. S. 28, 12 Sup. Ct. 130, the supreme court distinctly held that, under the practice in chancery as modified by equity rule 33, when, by filing a repli-

cation, issue is taken upon a plea, the facts, if proven, will avail the defendant only so far as in law and equity they ought to avail him. The force of that ruling was not at all weakened by the decision in Horn v. Dry-Dock Co., 150 U. S. 610, 14 Sup. Ct. 214, that, when the established plea meets and satisfies all the claims of the bill, it ought, in law and equity, to avail the defendant so far as to require a final decree in his favor, and that matters wholly foreign to the issue made by the pleadings are not to be considered. In the still more recent case of Green v. Bogue, 15 Sup. Ct. 975, the doctrine laid down in Pearce v. Rice, supra, was reiterated and acted upon by the supreme court. Such being the authoritatively settled rule of practice, it follows that notwithstanding the execution of the written agreements set out in the plea is proved, and even if it be conceded that it is also shown that all those agreements were executed with the knowledge and consent of the complainant, and for the purpose stated in the plea, it is yet incumbent upon the court to look into the agreements to see whether, as asserted by the plea, the defendant was thereby "licensed in perpetuity to make and sell, under the graphophone patents, including the patents referred to in said bill of complaint, a machine called the 'phonograph,' and supplies therefor." Accordingly, such an examination of the agreements has been carefully made by the court, and with a result unfavorable to the defendant. I am unable to discover that the agreements of August 1 and October 10, 1888, purport to invest the defendant with a perpetual license to manufacture and sell under the complainant's patents. Nor do I perceive that Lippincott had authority so to deal with the complainant's patents. His rights with respect to the graphophone patents are to be found in the two agreements between him and the complainant,—one original, and the other supplemental,—dated, respectively, March 26 and August 6, 1888. The rights thereby conferred upon Lippincott were personal to himself, and were subject to certain terms and conditions. I am of the opinion that the agreements relied on, even when considered together, did not confer upon the defendant the license set up in the plea. Beyond this it is not necessary now to go.

And now, June 24, 1895, the plea is overruled, without prejudice to the defendant's right to answer the bill; and leave is granted to the defendant to file an answer within 30 days from this date.

GERMAN-AMERICAN INV. CO. OF NEW YORK v. CITY OF YOUNGSTOWN.

(Circuit Court, N. D. Ohio, W. D. May 24, 1895.)

No. 5,286.

1. EQUITY—JURISDICTION—INADEQUATE REMEDY AT LAW.
   The city of Y. advertised for bids for certain bonds about to be issued by it. Complainant submitted the highest bid, and was notified that the same would be accepted. It then asked for information and documents relating to the bonds, in order to submit them to its counsel, and, after receiving an opinion from its counsel that the bonds were invalid, declined

to take them, and demanded the return of $3,500, deposited on making its bid. The city refused to return the money, and notified complainant that it would sell the bonds to the highest bidder, and hold complainant liable for any loss. Thereupon complainant filed its bill, praying an adjudication as to the validity of the bonds, a return of the $3,500 if they were found invalid, or the delivery of the bonds on payment of the price if found valid, and an injunction against the city's disposing of the bonds. *Held*, that equity had jurisdiction of the suit, the remedy at law being inadequate.

2. MUNICIPAL CORPORATIONS—SPECIAL ACTS—OHIO CONSTITUTION.

The constitution of Ohio provides (article 13, § 1) that "the general assembly shall pass no special act conferring corporate powers." By sections 2835–2837, Rev. St. Ohio, municipal corporations are given power to issue bonds for the erection of waterworks, provided that, before such bonds are issued, the question of issuing them is submitted to a vote of the electors and two-thirds vote in favor of the issue. *Held*, that an act authorizing a named municipal corporation to issue bonds for the erection of waterworks, without requiring the submission of the question to the electors, is a special act conferring corporate powers, and is invalid under such constitutional provision.

This was a suit by the German-American Investment Company of New York against the city of Youngstown, Ohio, for the construction of an act of the legislature, and for other relief. The cause was heard upon the bill and answer.

S. D. Dodge and Williamson & Cushing, for complainant.

John A. L. Campbell, M. A. Norris, and King, McVey & Robinson, for defendant.

RICKS, District Judge. On April 25, 1894, the legislature of Ohio passed an act authorizing the city council of the city of Youngstown to issue bonds to extend and improve the waterworks of said city, and to provide for the payment thereof. The amount of bonds so issued was not to exceed $186,000, and they were to be of such denomination and payable at such times, not to exceed 20 years from the date of issue thereof, as the city council of said city might determine, and should bear a rate of interest not to exceed 6 per cent. Soon after the passage of said act, the city clerk of Youngstown issued a circular notice, inviting sealed proposals for the purchase of $160,000 of the said bonds, which bids were to be filed on or before 2 o'clock, standard time, June 18, 1894. In compliance with said circular, the complainant filed its bid, in which it offered to purchase said bonds for the sum of $172,752, and deposited with the defendant, as security for the performance of said bid, the sum of $3,500. Upon being notified that its bid was the highest and best bid, and was accepted, the complainant requested of the defendant all information and documents relating to the authority of the city to issue such bonds, in order that it might submit the same to its counsel to determine whether or not they were valid. Such information was duly furnished and submitted to its counsel, who gave a written opinion that such bonds were invalid. Thereupon the complainant notified the defendant of such opinion, refused to take the bonds, and requested the return of said sum of $3,500. This request the defendant refused, and therefore notified the complainant that it would sell said bonds to the highest bidder, and hold it liable for damages

for failure to comply with its bid. Thereupon, on July 18, 1894, the complainant filed its bill in this court, setting forth the above facts, and averring that, up to the time of the acceptance by the defendant of the complainant's bid for said bonds, complainant had no knowledge or means of knowledge of the validity of said bonds, or as to the act under which they were issued, and made said bid upon the faith of the validity of said bonds and the incorporate power and authority of the defendant to issue the same; and further averring that said bonds were negotiable in form, and payable to bearer, and that in consequence of doubts that had been raised and existed as aforesaid, respecting the validity of said bonds, the same cannot now be sold for their actual market value, which they could have if free from such doubt as to their validity. If said bonds are valid, complainant avers that they are worth the amount bid for same, but, if invalid, they are altogther worthless and void, and it would be impossible to determine as to the validity of the same and the rights of the complainant under its said bid without the intervention of a court of equity, which would determine finally as to the validity of said bonds, and whether, under its said bid, the complainant should take the same, or whether the defendant should refuse to return the amount of the deposit aforesaid. If the defendant should carry out its threat, and should sell said bonds, such sale would necessarily be for very much less than the value they would have if free from such doubt, and, in case it should be finally determined that the said bonds are valid, such sale would cause this complainant irreparable loss, and one which could not be adequately compensated in damages, and for which the complainant would have no redress in a court of law. Wherefore the complainant prays that it be adjudged and decreed: First, whether said act of the legislature was valid; second, that if this court should determine that such statute is unconstitutional, and the said bonds are invalid and void, the defendant be adjudged to pay this complainant the $3,500 so deposited as aforesaid; third, that if this honorable court shall determine that said statute is constitutional and valid, and the said bonds are valid and binding obligations of the defendant, the defendant be adjudged to issue and deliver the same to the complainant upon its paying to the defendant the unpaid balance of the purchase price thereof, and for other and general relief; and in the meantime, and during the pendency of this action, the bill prayed for an injunction restraining the defendant and its agents from selling or transferring said bonds. A temporary restraining order was granted, prohibiting the said city of Youngstown from disposing of said bonds until the case could be heard upon its merits.

In due course of procedure, the city filed its answer, in which, among other things, it affirms and contends that the special act of the legislature under which said bonds were issued is a constitutional enactment, and the bonds issued thereunder are valid; that the complainant bid for his bonds having notice of the public legislation on the subject; that its bid had no qualification that such

bonds were to be subject to the approval of its counsel; and denies that, if the complainant's bid was accepted, the papers showing the authority of the defendant to issue said bonds were to be submitted to counsel for the successful bidder; and the defendant avers that said papers were furnished before the complainant made its bid, and the complainant had full opportunity to ascertain the opinion of its counsel, and should have done so before it made its bid for said bonds. The defendant further admits that the complainant requested the return of the $3,500 deposit, which the defendant refused. It admits that it never obtained the consent of persons owning two-thirds of the taxable property within its corporate limits to the issue of said bonds, and denies that the statute in controversy is in violation of section 26 of article 2 of the constitution of the state of Ohio, which provides that all laws of a general nature shall have a uniform operation throughout the state.

The defendant, after denying other averments, which are not material here to be considered, closes its answer with this allegation:

"That the complainant's bill of complaint ought to be dismissed at its costs, because it does not state any cause of action nor ground of complaint that in equity or good conscience ought to give the complainant any relief in this honorable court."

The above statement contains the main facts necessary to be considered in the disposition of the questions arising in this controversy. The defendant, on the argument of the case, seriously pressed the question of jurisdiction, contending that, under the averments of the bill, no case is presented of which this court has equitable cognizance. This contention is based principally upon the claim that, if the complainant has suffered any injury by reason of the allegations of its bill, it has a complete and adequate remedy at law. On behalf of the complainant, it is urged that the bill in its general scope is one asking for a specific performance of a contract which the defendant, by its circular letter and proposal, undertook to perform. This contract was to furnish bonds of the city of Youngstown, which were valid, and which were issued under an act of the legislature which was in full compliance with the requirements of the constitution of the state of Ohio. This, the bill avers, the defendant failed to perform, because it says that by the opinion of counsel eminent in the law, and specially qualified to pass upon such questions, it was advised that said bonds were invalid. Under these circumstances, the complainant's remedy at law would be neither as plain nor as adequate as its remedy in equity. The remedy at law would compel the complainant to decide at its own peril whether the special act of the legislature, under which the bonds were issued was valid or not, and would subject it to the unnecessary risk of loss, whether it took the bonds and they proved to be invalid, or whether it refused the bonds and they were sold at a depreciation on account of the prevailing doubt of their validity, and should thereafter be held valid.

Counsel for the complainant contend that the following equitable elements are presented by the bill.

"(1) The prayer for injunction pending decision as to the validity of the act.
"(2) The saving of multiplicity of suits which might otherwise arise, as if the bonds are refused, a suit may be brought by the complainant to recover its forfeit, and a suit by the city to recover damages suffered on resale; or, if the complainant accepts the bonds, there may be suits by taxpayers to enjoin the levy of taxes to pay them, or the city may refuse to pay them, and force the holder to sue on the bonds; and, if he should recover judgment by reason of any supposed estoppel by any recitals of the bond, he might still have to contend with the city as to its liability to levy an extra tax to pay them, on the theory that estoppel as to the bonds might not be estoppel as to the extra tax requirement.
"(3) The suit is in the nature of one for the specific performance of the city's contract to deliver valid bonds, as hereinbefore already stated."

The doctrine that a complete and adequate remedy at law is open to the complainant, and defeats the jurisdiction of a court of equity, has been very much modified by recent decisions.

In the case of Kilbourn v. Sunderland, 130 U. S. 505, 9 Sup. Ct. 594, the supreme court say:

"The jurisdiction in equity attaches unless the legal remedy, both in respect to the final relief and the mode of obtaining it, is as efficient as the remedy which equity would confer under the same circumstances."

It will hardly be seriously contended in this case, considering the peculiar circumstances under which the complainant was placed by the action of the defendant, that its remedy at law was as complete or as efficient as the one now sought on the equity side of the court. The defendant, by its own acts, placed the complainant in a position where it was called upon to incur the risk of great loss, providing the issue of bonds which the defendant had made should be declared valid.

Mr. Justice Story, in his work on Equity Jurisprudence (paragraph 717a), goes even further than this, and says:

"The truth is that, upon the principles of natural justice, courts of equity might proceed much further, and might insist upon decreeing a specific performance of all bona fide contracts, since that is a remedy to which courts of law are inadequate. There is no pretense for the complaints sometimes made by the common-law lawyers that such relief in equity would wholly subvert the remedy by actions of the case and actions of covenant, for it is against conscience that a party should have a right of election, whether he would perform his covenant, or only pay damages for the breach of it."

No person or corporation is more interested in the proper determination of this question than the defendant itself. It is not to be presumed that the people of the city of Youngstown desire to have bonds sold which are invalid, and which would result in loss to the purchasers thereof. The court is therefore of the opinion that, having jurisdiction of the parties and the subject-matter, it is in its power to grant the relief to which the complainant is entitled under the law in this case.

This brings us to the consideration of the question whether or not the bonds issued in this case are invalid because of the unconstitutionality of the special act of the legislature under which they were issued. Section 1, art. 13, of the constitution of Ohio, provides that "the general assembly shall pass no special act conferring 'corporate powers.'" It is claimed on behalf of the defendant in this case that the city of Youngstown had the power to issue the bonds in controversy, under the general authority conferred upon munic-

ipal corporations by section 2835, as amended by the act of April 21, 1893, and sections 2836 and 2837 of the Revised Statutes of the state of Ohio. Under these three sections of the statutes, it is clear that the city of Youngstown has the power to issue bonds in such denominations and at a rate of interest not to exceed 6 per cent., payable semiannually, for the purpose of "erecting or purchasing waterworks or supplying water to the corporation or township and the inhabitants thereof" providing that, before any such bonds are issued or the tax levied for the payment of principal and interest of same, the question of issuing the bonds is first submitted to the voters of the municipal corporation, after due notice and advertisement as provided in the statute, and, "if two-thirds of the voters voting at such election upon the question of issuing the bonds vote in favor thereof, then, and not otherwise, the bonds shall be issued and the tax levied."

It appears from statements made during the argument of the case that a vote was had on the question of the issuance of these bonds by the voters of the city, but, either from want of proper notice or for some misunderstanding, the vote was not sufficient to authorize the issuance of the bonds; and it being apparent that more than the requisite number of voters prescribed by the statute desired this improvement, and that these bonds should issue, the city proceeded to secure the special act authorizing them to issue the same rather than submit to the delay and expense of a second election. Under this condition of affairs, the legislature of Ohio, on the 25th day of April, 1894, passed an act entitled "An act to authorize the city council of the city of Youngstown, Ohio, to issue bonds to extend and improve the water-works of said city, and to provide for the payment thereof." In view of what may hereafter be said with reference to this act, it may be well to incorporate it bodily in this opinion, as it is short:

"Section 1. Be it enacted by the general assembly of the state of Ohio, that the city council of the city of Youngstown be and the same is hereby authorized to issue the bonds of said city in the sum of not to exceed $186,000, for the purpose of raising money to improve and extend the water-works system of said city.

"Sec. 2. Said bonds shall be of such denomination and payable at such times, not to exceed 20 years from the date of the issue thereof, as the city council of said city shall determine, and shall not be sold for less than their par value. Such bonds shall have attached thereto interest coupons, and shall be signed by the mayor and clerk of said city, and attested by the seal thereof.

"Sec. 3. For the purpose of paying bonds and the interest thereon as the same may become due and payable, the said city council is hereby authorized and empowered to levy a tax on all taxable property of said city, in addition to that otherwise authorized by law, in such amount each year as shall be necessary to the payment of said bonds and interest.

"Sec. 4. This act shall take effect and be in force from and after its passage."

In order that we may intelligently and fairly construe this act, it may be well enough to state the reasons for the constitutional inhibition which prevented special acts conferring corporate powers on municipal corporations.

The supreme court of the state of Ohio, in the case of State v. City of Cincinnati, 20 Ohio St. 18, in discussing this constitutional provision, said:

"These provisions of the constitution are as imperative, as comprehensive, and emphatic as if the people, speaking through their constitution, had said 'this bane and curse of our legislation as it existed under the latitudinarian provisions of the constitution of 1802 is in the future utterly and absolutely prohibited; hence the laws conferring corporate powers shall be general, affecting, or liable to affect, the constituency of every individual member of the general assembly, and so, by powerful motives, calling his attention to the effect of the proposed enactments upon his own immediate constituency as well as upon the people of other localities.' "

Judge Ranney, in the case of Atkinson v. Railway Co., 15 Ohio St. 21, in referring to this same provision, said:

"These provisions of the constitution are too explicit to admit of the least doubt that they were intended to disable the general assembly from either creating corporations or conferring upon the same corporate powers by special acts of legislation. It was intended to correct an existing evil, and to inaugurate the policy of placing all corporations of the same kind upon perfect equality as to all future grants of power; of making such law applicable to all parts of the state, and thereby securing the vigilance and attention of its whole representation. * * * We must give such construction to the constitution as will preserve its leading objects intact."

We have in these judicial declarations of the highest court of the state the best evidence that the purpose of this constitutional inhibition was and is to make all acts conferring corporate power general, so that every member of the legislature may feel that the rights and interests of his constituency are involved in the measure, and therefore to secure from him his best judgment and his vote and influence upon the measure, as he deems it to be best for the interests of all the people concerned. I call attention particularly to this annunciation of the law by the supreme court of Ohio, because the contention is pressed with great earnestness that this special act does not confer corporate powers upon the city of Youngstown, but merely removes a restriction expressed in the general statute which permitted the issuance of these bonds only by the consent of two-thirds of the legal voters of the city. This restriction was a most important one. It was placed there for the purpose of protecting the taxpayers of the municipalities against a wild and reckless imposition of taxes by the bare action of their city councils. Surely, an act which seeks to remove this restriction ought to be an act which upon its face purported to be an act of general legislation, so that it might challenge the attention of all the members of the general assembly of the state of Ohio, which the makers of the constitution deemed so important and valuable. An act which sought to remove this restriction ought to be a general act, operative upon all municipalities, so as to make it free from the objection to special legislation so forcibly stated by Judge Ranney in the opinion from which a quotation has been made. But it is said in reply to this that there is no constitutional inhibition against special acts which do not confer corporate powers, and this act, it is contended, does not confer corporate powers. It seems to the court that this is a mere evasion of the force and meaning of the constitutional provision referred to. Under the general statutes cited, the city of Youngstown was without power or authority to issue these bonds, unless two-thirds of its voters, voting at an election to be held as provided for by said statute,

should vote in favor thereof. Any act which was framed to remove this restriction, with sole reference to its application to the city of Youngstown, was special in its intent and effect. An examination of this act shows conclusively that it was intended to confer in and by its own provisions upon the city council alone all the power and authority necessary to issue these bonds, without the consent of the voters as required by the general laws. If it was intended solely to remove the restriction, it should have referred to the inhibition in section 2837, and provided that the city of Youngstown should have the power to issue said bonds without first complying with said special provision. But it sought to remove this restriction by securing an act which in and by its own provisions, independent of the general provisions of sections 2835–2837, conferred upon the city the corporate power to issue these bonds.

In State v. Mitchell, 31 Ohio St. 592, the court says: "The constitutionality of an act is to be determined by its operation." This special act operated to confer power upon the municipality to do that which, by general laws, it was without power to do. It will not do to say that the city acquired this power by the removal of a restriction in a general law, and not by corporate power conferred by a special act. I am of the opinion that the special act did confer corporate power upon the city of Youngstown, and it was so intended; and, being concededly special in its application, it is invalid. The bonds in this case have not been issued or sold, and the rights of purchasers are therefore not involved, and happily no loss accrues to bona fide holders for value.

Other questions have been argued, which I do not deem it necessary to discuss. The conclusion reached as to the invalidity of this act is decisive of the case, and makes any further statements unnecessary.

As to the question of damages, I think the only relief to which the complainant is entitled is a decree ordering the defendant to repay to it the $3,500, money deposited, and to pay the regular taxable costs of the case.

MECHANICS' SAVINGS BANK & TRUST CO. v. GUARANTEE CO. OF NORTH AMERICA et al.

(Circuit Court, M. D. Tennessee. June 8, 1895.)

1. PRINCIPAL AND SURETY—FIDELITY INSURANCE—INTERPRETATION OF BOND.
   Bonds of indemnity given by fidelity insurance companies are analogous to ordinary policies of insurance, and are governed by the same principles of interpretation.
2. SAME—RELEASE OF SURETY.
   A printed condition in a bank teller's bond issued by a fidelity insurance company, requiring inspection of his accounts at least once a year, is satisfied by a quarterly examination required by the contract as actually agreed on and written out at the time of executing the bond.
3. SAME.
   A bank teller's bond issued by a fidelity insurance company required the bank to "observe all due and customary supervision over said employé for the prevention of default," and the only supervision specifically agreed

on was a quarterly examination of the books and accounts as customarily made by the bank on its own account, and a report of any known speculation on the part of the teller. *Held*, that an examination in good faith, such as was customary, and such as the appointed committee deemed sufficient for the protection of the bank and its stockholders, was sufficient to satisfy the requirement of the bond, though it was somewhat loose and careless.

4. SAME.
A bank teller's bond required the bank, "on its becoming aware of the employé being engaged in speculation," to report the fact to the surety. The bank heard of speculation by the teller, and on investigation found that he had once contributed $200 towards forming a brokerage association, but, becoming dissatisfied, had sold out. *Held* that, in the absence of bad faith, the failure to disclose the result of the inquiry did not invalidate the bond.

5. SAME.
In an application to a fidelity insurance company for a cashier's bond, the bank, in reply to a question, answered that there had never been a default in the position of cashier. *Held*, that a controversy between the bank and a former cashier about certain commissions made by the latter, which he thought was an individual matter, while the bank officers thought he should account for it, as his time was paid for by the bank, was not a default within the terms of the contract.

6. SAME—APPLICATION FOR BOND—WARRANTY OF ANSWERS.
Where a bond issued by a fidelity insurance company provides that the answers made by the employer to questions asked in the application shall be warranties, and the answers are made on the employer's "best knowledge and belief," mere falsity of the answers is not sufficient to avoid the bond, but the company must show that they were "knowingly false."

Action by the Mechanics' Savings Bank & Trust Company against the Guarantee Company of North America and others on a bond.

Edward H. East, for plaintiff.
Granbery & Marks, for defendant.

CLARK, District Judge. Plaintiff is a banking institution, organized under the laws of the state of Tennessee, with its chief and only office and place of business in the city of Nashville during all the time it was a going concern, with a capital stock of $50,000. Defendant guarantee company is a corporation organized under the laws of the Dominion of Canada for the purpose of carrying on the business of furnishing bonds of suretyship and guarantee, and has been engaged in such business since 1872. Defendant Union Bank & Trust Company is a corporation organized under the laws of the state of Tennessee, and is administrator of John Schardt, deceased. The guarantee company has a local agent and manager, residing in Nashville (Mr. Cooley), who has resided there all his life, and has been such agent since 1882, having given up the banking business to become such agent, with large experience in banking in the position of cashier among others. It is a part of the duties of the local agent to gather information concerning applicants for bonds, as well as persons already bonded in the company, and for this purpose detectives are at times engaged to follow up the habits of persons bonded. This company also has a branch board located at Nashville. John Schardt was teller and collector in plaintiff bank from 1888 to January 1, 1893, when he was elected cashier, which position

he held until April 17, 1893, when the bank closed its doors, made a general assignment for the equal benefit of its creditors, and on the same day Schardt departed this life. This suit is brought for the use of the assignee of the bank.

Schardt, as teller, was required to furnish bond in the sum of $10,000, which was done, with defendant guarantee company as his surety, to make good to the bank any pecuniary loss on account of Schardt's fraudulent acts in said position, and this bond was renewed each year, and was in force during the year 1892, and at the time Schardt became cashier, January 1, 1893. Bond was furnished as cashier in the sum of $20,000, January 1, 1893, for the same purpose as the teller's bond, with the same company as surety, and for the year 1893. The annual premium for each bond was $100, paid by the bank. The assignee coming into possession, expert accountants and bookkeepers were at once employed, and put to work on the books of the bank. The assignee furnished an accountant, and one was employed on behalf of Schardt's estate, but the guarantee company, on request, declined to select one on its behalf. It was shown in the result that Schardt had been a defaulter during the years 1890, 1891, and 1892 as teller, and also during his short term as cashier. The amount of embezzlements during the years 1890 and 1891 was comparatively small, and has been paid out of collections from assets transferred by Schardt to the bank to secure it, just before his death, and the events of those years may be put aside without further notice. The embezzlements in the year 1892 amounted in the aggregate to $50,649.90, without interest, and those for the short time in 1893 during the currency of the cashier's bond amounted to $22,964.17, besides interest. Total amount of embezzlements in both positions and during all the years named was $101,342.73, a little more than double the amount of the capital stock of the bank. Bill was filed in state chancery court for account and decree on the bonds, alleging that Schardt had assigned certain policies on his life for the benefit of the bank, amounting in all to $80,000, some of which had been paid and others were in suit and contested. The case was removed to this court.

What is called a "guarantee proposal" was made for each bond, similar to the application in life insurance. In the proposal for the teller's bond in questions 8 and 9 the bank was asked as to its custom in making inspections of the accounts of the office, and answered that this was done quarterly by the finance committee, and this statement is made part of the contract. This is a written statement. The bond provides that the bank "shall observe or cause to be observed all due and customary supervision over said employé for the prevention of default," and "that the employer shall at once notify the company, on his becoming aware of the said employé being engaged in speculation or gambling, or indulging in any disreputable or unlawful habits or pursuits," and "that there shall be an inspection or audit of the accounts and books of the employé on behalf of the employer at least once in every twelve months from the date of this bond." On and before each renewal of this bond from year to year the bank furnished to the company a certificate,

in which it was stated, among other things, that the accounts of Schardt, the teller, had been examined and verified by the finance committee of the bank. The defense is rested on the falsity of this statement, and failure to observe these promissory stipulations. The contention is that the quarterly examinations and the examination or audit once in every 12 months were not made; that customary supervision was not observed; and that speculation by Schardt was known by the bank officers, and not communicated to the guarantee company; and that the finance committee had not examined and audited the teller's accounts, as represented in the certificate on which the bond was renewed. It is to be observed that this statement in the certificate is not made part of the contract, as the other statements, and its position is that of a written representation in an application not incorporated in the bond or policy issued thereon. This is not important, however, in the view taken of the case.

Recovery on the cashier's bonds is resisted upon the grounds: (1) That the answer in the proposal to the question whether there had ever been a default by any one in that position in the bank was false, it being in the negative. (2) That the statement in answer to question 13, that the books and accounts of the teller were examined December 31, 1892, by the finance committee, and found correct, was false. (3) That Schardt was insured as cashier only, while he was permitted to perform the duties of general bookkeeper, increasing his opportunities to commit and conceal his embezzlements. (4) That the bank stated in answer to the question that it had heard nothing unfavorable to Schardt's habits, or of matters which should be made known to the guarantee company, and that this was false, the officers having heard of speculation on Schardt's part.

Before taking up these points separately, it will be of service to refer to some cases as bearing on the questions generally, and as showing the tendency of the ruling on similar contracts. Although of more recent origin than the ordinary forms of insurance, such as fire, marine, and life, that this bond is a branch of insurance is clearly apparent. Cases involving this form of contract are extremely few, still, that the law of insurance applies by analogy is undoubtedly true, and this was fully recognized and clearly stated by the circuit court of appeals for this circuit in Supreme Council Catholic Knights of America v. Fidelity & Casualty Co. of New York, 63 F. 48, 11 C. C. A. 96, in which Judge Lurton, delivering the opinion, said:

"With reference to bonds of this kind, executed upon a consideration, and by a corporation organized to make such bonds for profit, the rule of construction applied to ordinary sureties is not applicable. The bond is in the terms prescribed by the surety, and any doubtful language should be construed most strongly against the surety, and in favor of the indemnity, which the assured had reasonable grounds to expect. The rule applicable to fire and life insurance is the rule, by analogy, most applicable to a contract like that in this case."

This method of furnishing bond to make good loss is rapidly superseding all others in the case of officers of private corporations, and I am advised that legislation by the general assembly in session enables companies engaging in this business to make bonds for all

public officials of the state and counties thereof. The business is, therefore, becoming one of vast public as well as private importance, and it cannot be objected if rules of reasonably stringent liability are applied to these contracts, as in other forms of insurance. Conditions on which forfeiture of the contract is claimed being construed strongly against insurer and liberally in favor of insured, the burden is on defendant, and the defense must be clearly made out. Cotten v. Casualty Co., 41 Fed. 506; Steel v. Insurance Co., 2 C. C. A. 463, 51 Fed. 723, and cases cited; Moulor v. Insurance Co., 111 U. S. 341, 4 Sup. Ct. 466; Supreme Council Catholic Knights of America v. Fidelity & Casualty Co. of New York, 63 Fed. 48, 11 C. C. A. 96. And statements made as on knowledge, or knowledge and belief, are not untrue, unless shown to have been knowingly false. Insurance Co. v. Gridley, 100 U. S. 614; National Bank v. Insurance Co., 95 U. S. 673. And the written portions of the contract overrule the printed portions, in case of conflict. Insurance Co. v. Kuhn, 12 Heisk. 518. Being of the opinion that the statements are made part of the contract, the case is freed from the question as to any distinction and its effect between representation of an existing fact and those of an unexecuted intention as to the future, or promissory statements, for the rule is settled in the courts of the United States that a promissory statement, when incorporated in the contract, must be performed, just as any other stipulation. Prudential Assur. Co. v. Aetna Life Ins. Co., 23 Fed. 438, and cases cited; Schultz v. Insurance Co., 6 Fed. 672. It is also settled that the sureties on the bond of a bank cashier are not released because the cashier performs, or undertakes for added compensation to perform, other duties, such as those of a bookkeeper. Minor v. Bank, 1 Pet. 73; Bank v. Yard (Pa. Sup.) 24 Atl. 635; Wallace v. Bank (Ind. Sup.) 26 N. E. 175; Bank v. Carleton, 136 Mass. 226.

Coming now to the defense, I will consider the objections to recovery on the teller's bond. There is no room for the contention that there was no inspection or audit of the accounts and books of the employé at least once in every 12 months, except upon the assumption that this printed provision in the bond required an annual inspection in addition to the quarterly inspection expressly agreed upon in writing in the application. This printed condition, requiring inspection at least once a year, occurs as a printed condition in the blank or skeleton bond prepared for general use, and is intended as a minimum requirement in regard to inspection. As the contract was actually agreed upon and written out at the time of execution, the quarterly examination was provided for, and this fully satisfied, and more than satisfied, this provision, if the quarterly examination was sufficient; otherwise this condition would, in substance and effect, be inconsistent with the written stipulation, and would give way to it. Moreover, on the theory of a rigid, literal, exaction under this provision, it was performed by the examination December 31, 1892, on Schardt's going out of office as teller, the bond for that year alone being in question, and still in force, and no particular time designated for this annual inspection,

provided, of course, that examination was good. In regard to the customary supervision over the employé which was to be observed, it is only necessary to say that the supervision specifically agreed upon at the time of execution of the contract was a quarterly examination of the books and accounts, and to report any speculation, and no other duty is pointed out in argument, and no other breach of the contract set up in the answer. And the statement in the certificate for renewal of the bond that the accounts had been examined and audited may be considered in connection with the quarterly examinations. Indeed, it is not to be doubted that this statement was understood as referring to the quarterly examinations specifically provided for in the original contract, and was an assurance that this part of the contract had been performed. And when the defenses made in regard to inspections or examinations as applied to both bonds are followed down to the real facts on which they rest, the position is not that such inspections were not made, but that they were so partial and negligently made as to amount to no examination within the requirements of the contract. It is insisted that inspection, with reasonable care and caution, would have disclosed the defalcation of Schardt. It will be observed that the requirements as to inspection are general in terms. It is simply stated that examinations will be made quarterly, and by the bank's finance committee. Nothing as to qualification of members of this committee, or the method of inspection, is specified. All of this was necessarily left to the judgment of the committee. This statement was in answer to the question, "What is your custom in regard to frequency of inspections?" The customary examinations made by the bank for itself and on its own account were clearly contemplated, and it was neither in terms nor by implication required to make any other or different inspection. Plaintiff was not required to employ expert accountants, nor make examinations with the distinct object of ascertaining if Schardt was acting fraudulently, for this was what was insured against. This being so, I am of opinion that, so long as the bank officers and the committee acted in good faith, such examination as the appointed committee thought proper and sufficient for the protection of the bank and its stockholders would satisfy the requirements of this contract as made. If anything more was wanted, it was matter for specific agreement. And, notwithstanding the effect of the searching and skillful examination and cross-examination by defendant's solicitors, I am satisfied these examinations were, in substance, such as are customary in banking institutions such as this, although it is true they were somewhat loose and careless. Defendant's experienced local manager was on the ground, and, if he thought the details important, it was easy for him to ascertain all the facts, as all the transactions between the two companies were conducted through him, and it was part of his business to gather information. It is not maintained, and could not be, that there was any positive bad faith. The finance committee was made up from the directors, and these were all stockholders, and pecuniarily and directly interested in the fidelity of the employé;

and the magnitude of the shortage would be an answer to any suggestion of bad faith.

This brings up the only remaining objection to decree on this bond, namely, the failure to report speculation on Schardt's part. Proof on this point is to this effect: That in the summer or fall of 1892 a man by the name of Kyle, from New York, representing a brokerage concern of that city, desired Sykes, then cashier, to become the local representative of that concern. Sykes remarked that he did not like a speculative business like that, whereupon Kyle said it made no difference; that Schardt was interested in a similar business. Sykes spoke of this to Baxter, the president of the bank, and also to Schardt, who said he had at one time been interested in such concern, but had sold his interest, and said that to some extent he had speculated at one time, but had ceased to do so. After this Sykes says he received an anonymous letter, saying Schardt had been speculating. On Schardt's attention being called to this letter by Eatherly, a director, and on examination it was shown that at one time Schardt, Searight, and Dr. Barry agreed to form a brokerage association, each putting in $200. Schardt soon became dissatisfied, and sold out to Searight. This is evidently what Kyle had referred to in the previous interview with Sykes, though no details were given. This, then, was what the officers of the bank knew or learned, and Cooley, with his duty to look up information, and on the ground, and familiar in banking circles, never heard of this. The language of the bond is that the employer shall report "on his becoming aware of the employé being engaged in speculation." Without now stopping to consider at length the meaning of the terms here used, I am of opinion that, in the absence of fraud or bad faith, the failure to disclose the result of the inquiry made in this instance did not invalidate the bond as to the surety. Certainly, speculation in a reasonable and substantial sense is meant, such in length of time or magnitude as would make it serious. This, when brought to the attention of the bank officials, was a past event, and apparently in itself unimportant. The bank was under no duty by the contract or independently of it to actively institute or prosecute inquiries about Schardt, or to run down loose rumors or anonymous letters. State v. Atherton, 40 Mo. 209; Supreme Council Catholic Knights of America v. Fidelity & Casualty Co. of New York, 11 C. C. A. 96, 63 Fed. 48. It was only on "becoming aware of the employé being engaged in," etc., that report was to be made. This refers to knowledge coming to the bank officials in the usual way that such knowledge comes, and imposes no original, active duty in this respect; and it is pertinent to remark that if the bank was left under an active duty of vigilance as to supervision of habits or inspection of accounts with a view to prevent fraud, there would be little or no motive to secure and pay for insurance like this.

It remains to consider the objections to recovery on the cashier's bond. The bank answered that there never had been a default in the position of cashier. The proof is that the bank and its former cashier, Durr, had a controversy about certain commissions made

by the cashier, which he thought was an individual matter, while the bank officers thought that while engaged by the bank the cashier should account to it, as his time was paid for. It was no default within the terms of the contract. The objection that Schardt was allowed to keep books while insured as cashier only is overruled. The bond, it is true, insures Schardt as cashier, but there is no limitation in terms against performance of other duties, and the cases already cited hold that there is none by implication.

The statement that Schardt's accounts had been examined December 31, 1892, and found correct, is next objected to as false. What has been said on this subject applies here. There can be no reasonable doubt that, where examinations are spoken of as made, they refer to those by the finance committee, and it is expressly so stated here. It is not probable that any examination the bank would have caused to be made would prove satisfactory as looked at after the facts are all known, unless the same had detected Schardt.

The last objection is that the bank falsely stated that it knew nothing in regard to Schardt's conduct which defendant should know, and the speculation is here again referred to. What has been said disposes of this point. All of the answers made in the application for the cashier's bond are followed by this statement: "The above answers and representations are true, to the best of my knowledge and belief." Some stress is put upon condition 3 on this bond as making the statements in the application warranties. The condition is this:

"(3) That any written answers or statements made by or on behalf of the said employer in regard to or in connection with the conduct, duties, accounts, or methods of supervision of the said employé, delivered to the company, either prior to the issuance of this bond or to any renewal thereof, or at any time during its currency, shall be held to be a warranty thereof, and form a basis of this guaranty, or of its continuance."

Without deciding whether this has the effect insisted on (Moulor v. Insurance Co., 111 U. S. 341, 4 Sup. Ct. 466; Insurance Co. v. Raddin, 120 U. S. 183, 7 Sup. Ct. 500), it is to be observed:

First. That these terms and conditions, printed and indorsed on and common to all the bonds, are to be read and construed with the application, in which the written statements made when the contract is executed define more particularly, in part, the duties as finally agreed upon.

Second. That this condition (excepting the term "conduct") relates to duties to be performed under and during the currency of the cashier's bond, and is prospective only in its operation, as more fully appears when placed side by side and read with No. 8; and, as the bond was canceled in so short a time,—April 15, 1893,—there is really little or no basis for this contention.

Again, if the statements were made warranties in the fullest sense, this does not change or enlarge the answers as made. It would have the effect to make everything material, and require the answer to be true at all events. But where, as in this instance, the answers are to the best of the bank president's knowledge and belief, defendant would have to show that they were

knowingly false. It is to be borne in mind, in regard to the examinations and reports to be made, that whether that duty was sufficiently discharged is to be determined by the circumstances as they appeared at the time the duties were being performed, and not as seen after all the disclosures are made, and the embezzlement, and how it occurred, with Schardt's dishonesty, are known. It is not difficult, after a disaster has occurred, to look back and criticise freely. It is that wisdom after the event which is the possession of many, while foresight is the gift of few. Comparatively few human transactions would stand an after-event test.

The issues respecting examination and report of speculation are fairly close, especially the latter, and on both sides of which much might be and has been well said.

Decree will go on both bonds, with interest after the amounts were payable under the terms of the bonds, with costs. The liability of defendant is secondary to that of Schardt's estate and of all assets and security which the bank holds on account of this shortage, and the decree will be so drawn as to give effect in defendant's favor to its rights growing out of the suretyship relation to the liability.

AULTMAN, MILLER & CO. v. HOLDER.

(Circuit Court, E. D. Michigan. May 13, 1895.)

No. 8,044.

1. CONTRACTS—LAW OF PLACE.

Plaintiff, an Ohio corporation, having its principal place of business at A., in that state, made a contract with defendant, a resident of Michigan. The contract was executed by defendant in Michigan, and subsequently countersigned by plaintiff's agent in that state and approved at plaintiff's main office at A., pursuant to a provision, contained in it, that it was "not valid unless countersigned by our manager at L. and approved at A." *Held*, that the contract was made in Ohio, and was not within the terms of a statute of Michigan relating to contracts made in that state.

2. INTERSTATE COMMERCE—TAXATION—MICHIGAN STATUTE.

The statute of Michigan (Act No. 182 of 1891, as amended by Act No. 79 of 1893), providing that "every foreign corporation * * * which shall hereafter be permitted to transact business in this state * * * shall pay to the secretary of state the franchise fee of one-half of one mill upon each dollar of the authorized capital stock: * * * All contracts made in this state * * * by any corporation which has not first complied with the provisions of this act shall be wholly void,"—is void, as a regulation of interstate commerce, as applied to the business of a foreign corporation engaged in selling its wares by itinerant agents in the state of Michigan.

This was an action of assumpsit by Aultman, Miller & Co. against William Holder. The case was submitted to the court, without a jury, upon an agreed statement of facts. Judgment for plaintiff.

The plaintiff is a corporation organized under the laws of the state of Ohio, and is engaged in the business of manufacturing agricultural implements at Akron, in that state, and sells reapers and mowers in Michigan, through local agents at different places, who sell on commission for the company, and as its agents. A written contract is entered into between the company and the agent similar in form to that sued upon in this case. The action is assumpsit, and

is brought against the defendant, William Holder, who is a citizen of Michigan, resident of Lansing, and acted for the plaintiff as a commission agent under the contract executed by himself at Lansing, February 27, 1894, and there countersigned by the local agent of the plaintiff under these provisions of the contract: "This contract not valid unless countersigned by our manager at Lansing, and approved at Akron." The parties have signed and filed a stipulation of facts of which the following is a copy:

"To Said Court: It is agreed between the parties to the above action that the following facts are agreed upon without the submission of evidence, and the parties ask that this stipulation of facts be made a part of the record: First. It is agreed that the contract referred to between the parties was executed, accepted, and approved, as set forth in the said contract. Second. It is agreed that the provisions of the contract, in so far as plaintiff is concerned, have been fulfilled. Third. It is agreed that the balance due, amounting to five thousand and fifty-two and fifty-six hundredths dollars ($5,052.56), is correct. Fourth. It is agreed and admitted that Aultman, Miller & Co. is a corporation organized and existing under the general laws of Ohio, having its corporate office in the city of Akron, county of Summit, and state of Ohio, and having its manufactory at the same place. Fifth. It is agreed and admitted that Aultman, Miller & Co. does not manufacture any goods whatever within the state of Michigan. Sixth. It is agreed that Aultman, Miller & Co. sells its goods by means of local commission agents, and that it has a general agent at the city of Lansing, and that its commission agents are under similar contracts with the plaintiff to the one set forth in this action. Seventh. It is agreed and admitted that all contracts are sent to Aultman, Miller & Co., at Akron, Ohio, for approval or rejection before taking any effect. Eighth. It is agreed and admitted that the goods sold by Aultman, Miller & Co. in the state of Michigan, and manufactured at its factory at Akron, Ohio, are shipped from the factory upon orders received from commission agents, forwarded by the general agent from Lansing to Akron. Goods are shipped either direct to the commission agent or in bulk to Lansing, or various points throughout the state, and reshipped in smaller lots direct to the commission agent. Ninth. It is agreed and admitted that Aultman, Miller & Co. own a warehouse in the city of Lansing, for the transfer of such reshipments, for the temporary storage of a small stock of extras or repairs, which experience has shown may be suddenly needed by customers throughout the state during the harvest season. A portion of the commission agents throughout the state also keep on hand a very small stock of repairs, for the immediate use of their customers. These are partially commission goods and partially goods sold direct to them. Tenth. It is agreed and admitted that accounts with every commission agent in the state of Michigan are kept at the office of the plaintiff in Akron, Ohio. Eleventh. It is agreed and admitted that the plaintiff effects settlement with its commission agents by sending to its general agent copies or statements of all such accounts, that the general agent and his assistant check over the season's work with the commission agent, collect pay for the machines sold in notes or cash, or both, and forward the same direct at once to the plaintiff at Akron, Ohio, and that the notes so taken are subject to the approval or rejection of the plaintiff. Twelfth. It is agreed and admitted that all notes taken by the commission agents of Aultman, Miller & Co. are sent through its general agent at Lansing, to the factory at Akron, Ohio, where they are numbered, recorded, filed, and retained until just before maturity, when they are sent direct to banks or express companies for collection and remittance direct to Akron, Ohio.

F. A. Baker, Attorney for Plaintiff.

"Wood & Wood, Attorneys for Defendant."

As will be seen, it is agreed and admitted that the balance due the plaintiff from the defendant, arising out of the business done by the defendant for the plaintiff at Lansing, as its agent as aforesaid, under the contract referred to, amounted on the 3d day of November, 1894, to $5,052.56. The declaration sets forth fully the breaches of contract relied upon by the plaintiff, from which this balance arose. The plea of the defendant is the general issue, with notice in accordance with the authorized practice at law in the courts of Michigan that the defendant will show under said plea that Act No. 182 of the Laws of Michigan for the year 1891, as amended by act No. 79 of the Laws

of Michigan for the year 1893, provides that: "Every foreign corporation or association which shall hereafter be permitted to transact business in this state, which shall not, prior to the passage of this act have filed or recorded its articles of association under the laws of this state, and been thereby authorized to do business herein, shall pay to the secretary of state, the franchise fee of one-half of one mill upon each dollar of the authorized capital stock of such corporation or association and a proportionate fee upon any and each subsequent increase thereof; and that every corporation heretofore organized or doing business in this state which shall hereafter increase the amount of its capital stock shall pay a franchise fee of one-half of one mill upon each dollar of such increase of authorized capital stock of such corporation or association and a proportionate fee upon any and each subsequent increase thereof; provided that the fee herein provided, except in cases of increase of capital stock shall in no case be less than five dollars; and in case any corporation or association hereafter incorporated under the law of this state or foreign corporation authorized to do business in this state, has no authorized capital stock, then in such case each and every corporation or association so incorporated or doing business in this state shall pay a franchise fee of five dollars. All contracts made in this state after the first day of January, 1894, by any corporation which has not first complied with the provisions of this act shall be wholly void. This act is ordered to take immediate effect. Approved May 13th, 1893." The notice further declares that the contract set forth in plaintiff's declaration, and upon which the right of recovery is based, was made and is to be performed in the state of Michigan, within the meaning of the said act. Also that said plaintiff, being a foreign corporation, was, at the time of the execution of said contract, doing business in the state of Michigan, within the meaning and application of said statute, and has not complied with the requirements thereof, nor before nor since the passage of such statute has it filed or recorded its articles of association with the secretary of state for the state of Michigan, nor paid to said secretary of state the franchise fee of one-half of one mill upon each dollar of its authorized capital stock; that, owing to plaintiff's noncompliance with said statute, the said contract is absolutely void and without force as against said defendant.

F. A. Baker, C. A. Sadler, and C. C. Kirkpatrick, for plaintiff.
Wood & Wood, for defendant.

SWAN, District Judge. The questions arising in this case have been argued with great learning and ability by counsel, and, although the discussion has taken a wide range, it has left for determination but two inquiries: (1) Was the contract sued upon made in this state? (2) Is the statute upon which the defense is founded a regulation of commerce obnoxious to the constitutional grant of the power over that subject conferred upon congress?

In regard to the first of these questions, it will be noticed that the provision of the statute upon which reliance is had for the avoidance of the defendant's liability for the sum found due from him to the plaintiff limits its penalty to "contracts made in this state after the first day of January, 1894." This contract was made, it is admitted, after that date. What was the locality of its execution? It did not become a contract until all the parties executed it. By its express provision it was not to be valid until countersigned by the agent of the plaintiff at Lansing, and approved at Akron, Ohio. This latter requisite—the approval of the plaintiff—is the crowning act of its consummation, as expressing the agreement of the parties. It, therefore, was not made until, by plaintiff's approval, it was perfected and adopted. Until then it was an imperfect obligation, having no force whatever. The act which gave it vitality was

performed outside of the state of Michigan, i. e. in the state of Ohio. It seems clear, therefore, that it was not a contract made in this state, within the prohibition of the statute. The question of construction of the language of the statute is analogous to that arising upon the alien labor acts, which have been the subject of much discussion in the federal courts. In cases founded on those acts, a vital element of the offense is the making of a contract in a foreign country with a nonresident alien, previous to the immigration or importation of such alien into the United States, to perform labor or service in this country, and in pursuance of which such nonresident alien comes to the United States and enters upon the performance of the contract. There, as here, the character of the act is made to depend upon the locality of the execution of the prohibited contract. It is perfectly lawful, notwithstanding the alien labor acts, to contract with an alien within the jurisdiction of the United States. U. S. v. Craig, 28 Fed. 795, 799; U. S. v Edgar, 45 Fed. 44; same case on error, 1 C. C. A. 49, 48 Fed. 91. Thus, in the Michigan statute, no penalty is directed against the execution of a contract outside of the state by a corporation which has not complied with the provisions of the acts of 1891 and 1893. The inquiry, therefore, is not by what law the contract is to be construed,—whether that of the place of its execution or that of its performance,—or of the form in which suit may be brought upon it. The single question is, where was it executed? And upon the admitted facts of this case, evidenced by the stipulation, the concessions of counsel, and the fair construction of the clause "and approved at Akron," but one answer can be given to this inquiry. It became the contract of the parties at Akron, Ohio, and was not made in the state of Michigan, within either the language or the spirit of the act of the legislature pleaded in defense. Giving to the language of the act its natural and obvious meaning, the phrase "made in the state of Michigan" can have but one interpretation, and must be held to designate contracts there perfected by the assent of all parties. It is not necessary to invoke the rule that a penal act is to be strictly construed, for the language employed has excluded all doubt of the intent of the legislature. The contract sued upon is not avoided by the act of 1893.

2. Upon the second question, as to the constitutionality of the state statute, there is, in my judgment, as little doubt as upon the first. By the contract sued upon the defendant "is hereby authorized to sell Buckeye mowers, reapers, and binders, and extra parts thereof, in the following territories, viz.: Laingsburg and vicinity and Elsie and vicinity, including the townships of Washington and Elba, in Gratiot county, and Chapin in Saginaw county, and the west half of Fairfield in Shiawassee county, for and during the season of 1894." The defendant, therefore, was not a resident local agent of the plaintiff, and, although selling on commission, was really, as the contract contemplates, nothing more than an itinerant vendor in the territory specified. The fact that the company had a warehouse at Lansing, where it stored its implements, and the necessary "repairs" or parts of the machines which it manufactured and

sent here for sale, in order that it might meet the demands of those having its machines to supply such repairs or parts, is immaterial in this case. Without doubt, property so stored and kept within the state of Michigan, for the convenience of the company and the promotion of its business, in affording facilities to its customers for the purchase and repair of the implements which it manufactured and sold, unless these were merely in transit for delivery to customers here, would authorize the state to tax such property for the protection it received, but the right to taxation of such property is not in question here. The state statute really imposes a tax upon the corporations included within its provisions for the privilege of selling their wares in Michigan, and therefore is obviously a tax upon interstate commerce within the provisions of the federal constitution, and the decisions of the supreme court of the United States. It is equally so regarded by the supreme court of the state, and in Coit v. Sutton, 60 N. W. 690, decided in October, 1894, the supreme court of Michigan, in passing upon this very statute, so decided, holding that it imposed a tax "upon the occupation of the corporation, with a provision that all its contracts shall be void until the tax is paid, which, if enforced, would embarrass plaintiff in its commerce with noninhabitants of Michigan. It must, therefore, be held that the act in question does not apply to foreign corporations whose business within this state consists merely of selling through itinerant agents, and delivering commodities manufactured outside of this state." The opinion cites many decisions of the supreme court of the United States upon the construction of the commerce clause of the constitution, which all sustain this conclusion. In addition to these, the cases of Crutcher v. Kentucky, 141 U. S. 47, 11 Sup. Ct. 851, Brennan v. City of Titusville, 153 U. S. 289, 14 Sup. Ct. 829, and Covington & C. Bridge Co. v. Com., 154 U. S. 204, 14 Sup. Ct. 1087, in which cases the opinions of the court are delivered respectively by Mr. Justice Bradley, Mr. Justice Brewer and Mr. Justice Brown, review fully the authorities upon this question, and render unnecessary any lengthy discussion of the question upon principles. The fact that the act of 1893 (Laws 1893, p. 82) does not discriminate against foreign corporations does not exempt it from the charge of being an interference with interstate commerce. This point is so fully discussed in several of the cases cited supra that it need not here be elaborated. Indeed the decision of the supreme court of the state of Michigan leaves nothing to be said in support of the statute as applied to this case. There is nothing in the stipulation of facts which takes the case outside of the effect of that decision.

The judgment must be entered for the plaintiff for the sum of $5,052.56, with interest at 6 per cent. from November 3, 1894.

UNITED STATES v. HARMAN.

(District Court, D. Kansas, First Division. June 1, 1895.)

No. 2,584.

CRIMINAL PROCEDURE—ERRONEOUS SENTENCE.

Where a sentence different from that authorized by law, has been imposed on a defendant convicted of a criminal offense, and, for such error, the judgment is reversed, and the cause remanded to the trial court, with instructions to proceed therein according to law, such trial court resumes jurisdiction of the cause, and has authority to resentence the defendant, and impose the penalty provided by law, notwithstanding part of the void sentence has been executed.

The defendant, Moses Harman, was indicted in the United States district court at Leavenworth, Kan., in 1888, for depositing in the mails of the United States an obscene paper, in violation of section 3893, Rev. St., amended. On trial before a jury he was found guilty, and thereupon sentenced by the court to "be imprisoned in the Kansas state penitentiary for five years, and that he pay a fine of $300." On writ of error, sued out to the United States circuit court, under Act Cong. March 3, 1879 (20 Stat. 354, c. 176), this judgment was reversed, for the reason that the statute directs that the imprisonment must be "at hard labor," which words were omitted from the sentence. The cause was remanded "with instructions to proceed therein according to law." See 50 Fed. 921. By assignment, the cause comes before me on motion of the district attorney for resentence of the defendant.

W. C. Perry, U. S. Atty.
David Overmeyer, for defendant.

PHILIPS, District Judge (after stating the facts). It would be an idle labor for this court to enter upon an enlarged discussion of the distinction between erroneous, or voidable, and void judgments. As applied to the facts of this case, the ruling of the United States circuit court judge, on writ of error, is, that the omission of the trial court, in the sentence, of the words "at hard labor" rendered "the judgment absolutely void." Harman v. U. S., 50 Fed. 922. The principles of law are reviewed in Re Bonner, 151 U. S. 242, 14 Sup. Ct. 323. The solicitor general, on behalf of the government, with vigorous insistence, sought to have the court hold that, where the trial court erred in imposing a sentence different from that prescribed by the statute, the sentence was only voidable, and, therefore, only reversible for error, in contradistinction to a void judgment. But the court, through Mr. Justice Field, combated and overruled the contention, and distinctly held that after verdict of guilty the only sentence both "as to the extent or the mode or the place of it" the court can give is one in conformity to the statute. The learned justice said: "The proposition put forward by counsel that, if the court has authority to inflict the punishment prescribed, its action is not void, though it pursues any form or mode which may commend

itself to its discretion, is certainly not to be tolerated." Logically, therefore, it can make no difference whether the sentence imposes a greater or less punishment in severity than that prescribed by statute. It is the departure from "the extent or form" prescribed by law that nullifies it, because of the lack of power in the court to impose any other sentence, both as to extent and manner of executing it, than the statute directs. Woodruff v. U. S., 58 Fed. 766, and citations.

On the authority of the Bonner Case this defendant would have been discharged on writ of habeas corpus, because the sentence of the court to imprisonment, without the words "at hard labor," was a nullity, for want of power to so limit it. It must, therefore, logically follow that in respect of the imprisonment the case stands as if no judgment had been entered.

The cause being remanded by the circuit court judge, "with instruction to proceed therein according to law," the only question this court has now to determine is, what is the proceeding authorized by law? Did the circuit court mean that this court should now turn the defendant loose, unpunished for the offense of which he stands found guilty by the verdict of a lawful jury? The cause is not here for trial de novo. There was no error in the former trial. The whole proceedings up to and including the return and recording of the verdict were regular and lawful.

Whatever may be the diversity of opinion in different jurisdictions, the rule is well established in the federal courts that in a case situated like this the trial court resumes jurisdiction of the case precisely at the point where the error supervened, which was after verdict, and it proceeds to render such judgment as it was authorized to render by the statute on such a verdict. In Coleman v. Tennessee, 97 U. S. 509–519, the prisoner was released on writ of habeas corpus from a sentence of a state court for homicide, for the reason that he was a soldier in the regular army at the time of the commission of the offense, and was not amenable to the jurisdiction of the civil courts. But the court held that, inasmuch as he was under sentence of a military court-martial for murder growing out of the same offense, he should not be set at liberty, but was ordered to "be delivered up to the military authorities of the United States, to be dealt with as required by law." In Reynolds v. U. S., 98 U. S. 145 (note on page 168) the petitioner had been sentenced to imprisonment at hard labor, when the act of congress under which the indictment was found provided for punishment by imprisonment only. The cause was remanded "with instruction to cause the sentence of the district court to be set aside, and a new one entered on the verdict in all respects like that before imposed, except so far as requires the imprisonment to be at hard labor." In Re Bonner, supra, the court discusses the direct question under consideration, as to the course to be pursued in such a case, and it quotes with approval the language of the supreme court of Pennsylvania in Beale v. Com., 25 Pa. St. 11, 22:

"The common law embodies in itself sufficient reason and common sense to reject the monstrous doctrine that a prisoner whose guilt is established by a regular verdict is to escape punishment altogether because the court commit-

ted error in passing sentence. If this court sanctions such a rule it would fail to perform the chief duty for which it was established."

And although Bonner had been imprisoned wrongfully in that case, in the penitentiary, he was discharged "without prejudice to the right of the United States to take any lawful measures to have the petitioner sentenced in accordance with law, upon the verdict against him."

The final contention of the learned counsel for the defendant here is that inasmuch as the defendant was in the penitentiary, under the former sentence of the district court, for a period of four months before the case was reversed on writ of error, he cannot again be imprisoned, because to do so would be to subject him to a double punishment for the same offense. The case of In re Lange, 18 Wall. 163, is principally relied upon in support of this contention. In that case the court imposed both a fine and imprisonment, when the statute only conferred power to punish by fine or imprisonment. The fine having been paid, the prisoner was discharged, and set at liberty from the penalty of imprisonment; and the language of Mr. Justice Miller, on page 169, must be understood in reference and restrained to the particular facts under discussion. The prisoner, by paying the fine, had suffered the full penalty of one of the alternative sentences, and, therefore, to punish him corporeally by imprisonment would have been a cumulative penalty, which the law does not tolerate. He had satisfied to the full the demands of the law when he paid the fine. It is a well-recognized rule of criminal practice that, where a judgment is arrested on motion of the accused, the plea of autrefois convict will not lie. Where a prisoner is in jail temporarily, awaiting the result of his appeal or writ of error, he cannot avail himself of the penalty thus suffered as a plea against a trial de novo, and sentence thereunder. The sentence of the court under which the defendant went to prison was void. It was the same in legal effect as if it had been rendered by a justice of the peace or a United States commissioner, or the same as if the circuit court had ordered the defendant to be transported or hanged. Such a judgment would be coram non judice, and in contemplation of law would be the same as if never rendered; and the defendant would stand as if he had gone voluntarily and surrendered himself to the warden of the prison. This is the inevitable, logical conclusion from the very premise on which the circuit judge discharged the defendant from the sentence of the district court. He has not paid the fine imposed upon him, nor has he suffered any penalty the court could lawfully impose upon him. It must, therefore, result that the defendant is subject to resentence on the verdict returned against him.

Out of regard for the infirmity of the defendant, and with the hope that he may not persist in opposing his individual opinion as to what the law ought to be against what the courts declare it to be, and thereby invite further trouble, I shall modify the measure of punishment the trial court sought to mete out to the defendant, by directing sentence to be entered that he be imprisoned, at hard labor, in the penitentiary of the state of Kansas, for one year and one day from this date.

UNITED STATES v. LOO WAY.

(District Court, S. D. California. May 21, 1895.)

1. CHINESE—RIGHT TO ENTER UNITED STATES—DECISION OF COLLECTOR.
   Act Sept. 13, 1888 (section 12), providing that the decision of the collector as to the right of any Chinese passenger to enter the United States should be subject to review only by the secretary of the treasury, was never in force, having been enacted subject to the ratification of a treaty then pending between the United States and China, which was never ratified, and therefore the right of a Chinese person to enter the United States may be tried in proceedings of arrest, though the collector has previously decided that he was entitled to enter.
2. SAME—CHINESE MERCHANTS.
   Quaere. Whether a Chinaman, whose name does not appear in the firm designation, and where it is not shown that his interest appears in the business or partnership articles, is a "merchant," within the definition prescribed by Act Nov. 3, 1893.
3. SAME—RIGHT TO RETURN.
   The right of a Chinaman to readmission to the United States on the ground that he has already been engaged as a merchant therein is governed by Act Nov. 3, 1893, though he departed from the country before that act was passed.

Proceedings by arrest to determine the right of Loo Way, a Chinaman, to remain in the United States.

George J. Denis, U. S. Atty.
M. L. Ward and E. J. Ensign, for defendant.

WELLBORN, District Judge. The defendant, Loo Way, was arrested at the city of San Diego, in this district, April 4, 1895, upon a complaint under oath, charging that said defendant, "on or about the 12th day of December, 1893, knowingly and unlawfully came into the United States from a foreign country, to wit, China, he, the said Loo Way, then and there being a Chinese laborer, and a person not entitled to enter the United States," and, after a hearing before S. S. Knoles, circuit court commissioner, who found the facts to be as charged in the complaint, was ordered to be removed from the United States to China. By an appeal, under section 13 of the act of congress of September 13, 1888, the case has been brought into this court. The evidence adduced upon the trial here establishes the following facts, to wit: The defendant is a native of China. He first came to the United States about the year 1878, and resided continuously in this country up to some time between the 26th of December, 1892, and the 1st of January, 1893. In March or February, 1894, and for the five years next preceding, he was the owner of an interest in a mercantile business in San Diego, carried on under the name and style of Hop Wo Chung & Co., a firm consisting of six partners, and for his interest in this firm he paid $1,500. For six years previous to the acquisition of this interest he was employed as a cook, and, with the savings thereby accumulated, he purchased the aforesaid interest. Some time between the 26th and the last day of December, 1892, he left the United States for China, from the port of San Francisco, intending to return, and having, prior to his departure, to wit, on the 26th day of Decem-

ber, 1892, for purposes of his identification, procured a certificate, bearing his photograph, signed by five citizens of San Diego, to the effect that they had known him for about two years as a resident of said city of San Diego, and that he was a merchant and "member of Hop Wo Chung & Co., a firm engaged in a general merchandise business at said city." For about four months of the year next preceding his departure from the United States he was employed as cook at a restaurant in said city of San Diego. This employment terminated some three or four months before his departure, and for the said last-mentioned three or four months he lived at the store belonging to the firm of which he was a member, and aided in the conduct of its business. He returned to San Francisco in December, 1893, and on the 12th day of that month, after an examination of the above-mentioned certificate by the custom-house officials, who detained him half a day, he was permitted to land. He then went for a short while to Sacramento, to visit an uncle, and from there to San Diego. On the 16th of February, 1894, at San Diego, he applied for and received a certificate of residence as a Chinese laborer under the amendatory act of November 3, 1893. A short time before that he sold his interest in the mercantile business aforesaid, and a few months thereafter began working again as a cook, and was so employed at the time of his arrest.

The first section of the act of October 1, 1888, which act is supplementary to the act of May 6, 1882, provides:

"That from and after the passage of this act, it shall be unlawful for any Chinese laborer who shall at any time heretofore have been, or who may now or hereafter be, a resident within the United States, and who shall have departed, or shall depart, therefrom, and shall not have returned before the passage of this act, to return to, or remain in, the United States." 25 Stat. 504.

The defendant claims to be exempt from said section on the grounds:

First. That the lawfulness of his entrance into the United States, or, more specifically, whether he was a merchant or a laborer, cannot be made the subject of inquiry in this proceeding, because the question was adjudicated by the collector of customs at San Francisco, whose duty it was to pass upon the sufficiency of his proof when the defendant was permitted to land. This contention of the defendant finds support in the case of U. S. v. Lee Hoy, 48 Fed. 825. In that case the court enunciates as applicable thereto and cites authorities in support of the general doctrine that, "when the law has confided to a special tribunal authority to hear and determine certain matters arising in the course of its duties, the decision of that tribunal within the scope of its authority is conclusive upon all others." A careful reading of the decision, however, shows that it was rested mainly on section 12 of the act of September 13, 1888, which is as follows:

"That before any Chinese passengers are landed from any such vessel, the collector, or his deputy, shall proceed to examine such passengers, comparing the certificates with the list and with the passengers; and no passenger shall be allowed to land in the United States from such vessel in violation of law; and the collector shall in person decide all questions in dispute with regard to the right of any Chinese passenger to enter the United States, and his de-

cision shall be subject to review by the secretary of the treasury, and not otherwise." 25 Stat. 478.

The circuit court of appeals of this circuit, on an appeal of the case last cited, held that said section 12 was never in force. On this subject the court says:

"In the opinion of the court which accompanied the findings of fact and conclusions of law the court appears to have assumed that section 12 of the act of September 13, 1888, is in force, and that consequently the action of the collector in admitting Gee Lee was final, and not reviewable by the court. But we are of opinion that such section never went into force. It occurs in a statute entitled 'An act to prohibit the coming of Chinese laborers to the United States,' the taking effect of which so far is made to depend upon the ratification of a treaty then pending between the United States and the emperor of China, which ratification had never taken place. Particular provisions of the act may be in force, as not being within the purview thereof, as declared in section 1, as follows: 'It shall be unlawful for any Chinese person, whether a subject of China or any other power, to enter the United States except as hereinafter provided.' Such is section 13 of the act, which provides for the arrest and deportation of 'any Chinese person * * * found unlawfully in the United States,' and under which this proceeding was instituted. It follows that section 12 of the statute, which is wholly taken up with the future landing or excluding of Chinese passengers by the collector, is not in force, and his act in admitting or refusing Gee Lee to enter the United States is not final; but the truth of the matter may be inquired into in any appropriate judicial proceeding, of which habeas corpus and arrest for being unlawfully in the United States are two." U. S. v. Gee Lee, 1 C. C. A. 516, 50 Fed. 271.

This decision, of course, is authoritative. But, even had the question not been so decided by the appellate court of this circuit, I should still hold the general doctrine enunciated in the case in 48 Fed., above cited, to be inapplicable to the action of a collector of customs in permitting or refusing to permit a Chinese person to land. The books are full of cases in which the rights of Chinese persons to enter this country have been re-examined on habeas corpus, after denials of such rights by customs officials; and I have not been able to find an opinion by any court in which the authority for such re-examination is questioned. It was, doubtless, in view of this unbroken line of decisions, and for the purpose of changing the law thus declared, that congress enacted the twelfth section of the act of September 13, 1888. With this section in force, the action of the collector, in the absence of fraud, would be conclusive and final. As I have already stated, however, the appellate court of this circuit has decided that said section never became a law. This statutory provision being thus disposed of, the question here involved is definitely settled by the decision of the supreme court of the United States in the case of U. S. v. Jung Ah Lung, 124 U. S. (Lawy. Ed.) 591, 8 Sup. Ct. 663. The syllabus of that case (subdivision 3), as given in the Lawyers' Edition, is as follows:

"The authority to pass upon the question of allowing a subject of China to land in the United States is not exclusively confided by the statute to the collector of the port, but his action in the premises may be reviewed."

Conformably to this decision of the supreme court of the United States, and to the decision of the circuit court of appeals of this circuit in the case of Gee Lee, supra, I hold that the lawfulness or

unlawfulness of the defendant's return to this country may be inquired into and determined in this proceeding.

Second. Defendant further insists that he was entitled to return to the United States, for the reason that at the time of his departure therefrom he was a merchant, within the meaning of that term as used in the treaty and statutes then in force; and that he procured his certificate to that effect under the circular of the treasury department of July 3, 1890, and that said certificate was all the proof then required of his right to re-enter the country. This raises the question whether the lawfulness of his return into the United States, or, in other words, whether he was a merchant or laborer, is to be determined by the law as it stood at the time of his departure or by the act of November 3, 1893, which was passed during his absence from the United States. If this last-named act controls, it is clear, to my mind, that the defendant was not a merchant, but a laborer. The second section of the act provides as follows:

"The term 'merchant,' as employed herein and in the acts of which this is amendatory, shall have the following meaning, and none other: A merchant is a person engaged in buying and selling merchandise, at a fixed place of business, which business is conducted in his name, and who during the time he claims to be engaged as a merchant, does not engage in the performance of any manual labor, except such as is necessary in the conduct of his business as such merchant. Where an application is made by a Chinaman for entrance into the United States on the ground that he was formerly engaged in this country as a merchant, he shall establish by the testimony of two credible witnesses other than Chinese the fact that he conducted such business as hereinbefore defined for at least one year before his departure from the United States, and 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, and in default of such proof shall be refused landing."

Before proceeding to the decisive point in this connection, I may say that it is matter of serious doubt with me if the defendant is not excluded from the above definition of "merchant," on the ground that the business of the firm to which he belonged was not conducted in his name. I am aware that the circuit court of appeals of this circuit has decided that, in order to constitute a person a merchant within the meaning of said definition, it is not necessary that his name appear in the firm designation, but that it is sufficient if his interest be real, and appear in the business and partnership articles in his own name. Lee Kan v. U. S., 10 C. C. A. 669, 62 Fed. 914. In the present case there is no proof whatever that the defendant's name appeared in the partnership articles, or anywhere else in the business; and herein this case is distinguished from that of Lee Kan v. U. S., supra. However, it is unnecessary to decide this question, as there is another point manifestly determinative of this branch of the case. The defendant himself testifies that he was for three or four months of the year next preceding his departure from the United States engaged in the performance of manual labor (that is, cooking at a restaurant) in no way connected with the business of the firm of which he was a member. The only question necessary to determine, therefore, is

whether or not said act of November 3, 1893, applies. This question is affirmatively answered by the decision in Re Yee Lung, 61 Fed. 641. In that case Judge Morrow expressly holds, and I think rightly, that said act applies as well to those who departed from the United States prior to its passage as to those who departed thereafter. I am of the opinion that the defendant's return to the United States was unlawful, and that he is not entitled to be or remain in this country. The judgment of the commissioner, therefore, is affirmed, and it is now ordered that the same be executed, pursuant to the terms thereof, and for this purpose the defendant is remanded to the custody of the marshal.

HASLEM et al. v. PITTSBURG PLATE-GLASS CO.

SAME v. STANDARD PLATE-GLASS CO.

(Circuit Court, W. D. Pennsylvania. December 19, 1894.)

1. PATENTS—INVENTION AND MECHANICAL SKILL—EVIDENCE.
   The fact that three skillful mechanics, acting independently of each other, suggested the same devices for improving a defective machine, is persuasive evidence that such change involved mechanical skill only, and not patentable invention.
2. SAME—PLATE-GLASS POLISHERS.
   The Haslem reissue, No. 10,872, for improvements in plate-glass polishers, *held* void for want of invention, and because, even if patentable, Haslem was not the first inventor.

These were bills by James Haslem and others against the Pittsburg Plate-Glass Company and the Standard Plate-Glass Company, respectively, for infringement of a patent relating to plate-glass polishers.

S. B. Schoyer, S. Schoyer, Jr., John H. Roney, and Edmund Wetmore, for complainants.

George H. Christy, J. Snowden Bell, and James I. Kay, for defendants.

ACHESON, Circuit Judge. These two cases were heard together, upon substantially the same evidence. Each of the suits is for the infringement of reissued letters patent No. 10,872, dated October 11, 1887, granted to James Haslem for improvements in plate-glass polishers. The original patent was No. 349,430, dated September 21, 1886, issued upon an application filed March 4, 1884. The invention, the specification recites, "relates to that class of machines for polishing plate glass which embody a frame or holder for the plate glass and mechanism for reciprocating the same in one direction and reciprocating rubbers or polishers moving upon the glass in a transverse direction." It is further stated that, "The invention consists in certain details of construction and operating mechanism in such machines, as hereinafter described and particularly pointed out in the claims, whereby plate glass may be smoothly, quickly, and safely polished." The claims are as follows:

1. In a plate-glass polishing machine, the combination of the beams G, G, each carrying a series of loosely-journaled rubbers or polishers, J, on each side thereof, crank shafts upon which said beams are journaled, and means for rotating said crank shafts, the cranks upon which one beam is mounted extending in one direction, and the cranks on which the other beam is mounted being extended in the opposite direction, whereby said beams have a curvilinear reciprocating movement in opposite directions, substantially as set forth.

2. In a plate-glass polishing machine, the combination of beams, G, G, each carrying a series of loosely-journaled rubbers or polishers, J, on each side thereof, crank shafts upon which said beams are journaled, the cranks upon which one beam is journaled extending in one direction, and the cranks upon which the other beam is journaled being extended in the opposite direction, whereby said beams have a curvilinear reciprocating movement in opposite directions, means for rotating said crank shafts, a frame or support for the glass plate, and means for reciprocating said frame or support, substantially as set forth.

The principal defenses are, first, that the alleged invention does not comprise any patentable subject-matter, but involves only the skill of the mechanic in the adoption and application of well-known mechanical principles; second, that, whether patentable or not, Haslem was not the original and first inventor of the improvement.

As bearing on each of these defenses the action of the patent office with respect to the alleged invention deserves mention. On January 12, 1884, William A. Sleeper filed an application for a patent for this identical improvement, and on the 17th day of the same month his attorney addressed a letter to the commissioner of patents asking for a declaration of interference between Sleeper and Haslem, it being supposed then that Haslem's application had been filed. On February 2, 1884, the office rejected Sleeper's application, upon the ground that the improvement was not patentable, citing, inter alia, the Dodé patent and also certain prior "machines to move polishing beams in opposite directions, so as to cause the momentum of one beam to counteract that of the other." Haslem's application, as we have seen, was not filed until March 4, 1884. His claims were subsequently allowed, without any interference having been declared or any opportunity having been afforded Sleeper to contest in the office the question of priority.

Now, confining our attention to the particular art of polishing plate glass, to the exclusion of mechanisms employed for analogous purposes, the proofs touching what was old in this art disclose these facts: The English plate-glass polishing machine which was in use in this country before the alleged invention here in question has two separate polishing beams, parallel to each other, each carrying two series of rubbers or polishing pads and provided with oppositely set cranks, which impart to the two beams a longitudinal reciprocating movement in opposite directions, so as always to balance each other when in motion, while the frame or table supporting the glass has a transverse reciprocating movement under the polishing pads. The Dodé machine described in the French patent of 1872 has a beam composed of three parallel members, each carrying polishing pads, but all connected and moving together, the beam having a curvilinear or orbicular movement, and the table which supports the glass a reciprocating movement in a crosswise direction. Then the "Belgian machine," which, al-

though working in an unsatisfactory and defective manner, was in use at the Jeffersonville plate-glass works, in the state of Indiana, as early as the month of August or of September, 1880, had a single beam carrying a series of loosely-journaled rubbers or polishers, two vertical crank shafts with cranks upon their upper ends, on the pins of which cranks the beam was mounted, and means for rotating the crank shafts, whereby a curvilinear reciprocating motion or orbicular movement was imparted to the beam, the glass holder or support reciprocating transversely below the polishing beam.

In this condition of the art, did it involve invention to duplicate the orbicular beam of the Belgian machine and apply to these duplicated beams the reverse crank adjustment of the English machine, whereby the two orbicular beams were caused to move in opposite directions? I feel constrained to answer negatively. I think that the original decision of the patent office upon Sleeper's application was right. I do not find in the Haslem machine any patentable novelty in combination, function, or result. As confirmatory of the view that this improvement did not call into exercise inventive genius, reference may be made to the fact that, even if priority of conception could be accorded to Haslem, at or about the same time three skillful mechanics,—namely, Haslem, Sleeper, and Edward Ford,—acting independently of each other, suggested the duplication of the orbicular beam in the Belgian machine at the Jeffersonville works, and the application of the reverse-crank movement to the beams. This circumstance furnishes persuasive evidence that the change was obvious to the skilled mechanic. Atlantic Works v. Brady, 23 O. G. 1330, 107 U. S. 192, 199, 2 Sup. Ct. 225.

But if patentability were conceded, is Haslem justly entitled to the credit of the invention? In answering this inquiry, a brief history of the Belgian machine above mentioned must be given. The Jeffersonville Plate Glass Company on May 12, 1880, placed an order for that machine with Sweeney's machine shops, of which William A. Sleeper was superintendent and draftsman. It can safely be said that the machine was completed before the last of July of that year. Now, it is satisfactorily shown that while the machine was in course of construction, and at an early stage of the work, Sleeper suggested to persons interested in the same the employment of two orbicular beams moving in opposite directions, so that the force of one beam would counteract that of the other, and he then made rough sketches embodying his plan. Haslem came to the Jeffersonville plate-glass works on July 27, 1880. He was employed as chief engineer, and as such it was his duty to keep the machinery in repair and ready for operation. He continued in that position until late in the fall of 1883. He states that he had never seen a glass-polishing machine before he came to these works. His asserted claim to the invention will be stated hereinafter. Edward Ford was superintendent of the works when the one-beam Belgian machine was erected. This machine was put to work in August or September, 1880. From the first it worked badly. Its throw was too great for the foundation, and the strain upon the beam often

caused the glass to be pushed off the table. It is clearly proved that, within four or five weeks after the machine was started, Ford recommended to the company the adding of another like beam to that machine, with an adjustment of shafts and gearing whereby the two beams would be moved in opposite directions, so as to equalize the strain. To the president of the company and to several of the employés he fully explained at that time this proposed change. Shortly afterwards he made complete drawings of such a machine. I think it is established beyond question that his drawings were finished and exhibited to several persons before Christmas, 1880. These identical drawings are in evidence. The only criticism made with respect to them is that they do not positively show how the beams are to be moved in relation to each other; but upon this point no user or skilled constructer would have any doubt. Moreover, Ford's explanations to the witnesses in the fall of 1880 as to the opposite movement of the beams and the object to be thereby attained were full and clear. In February, 1881, the Jeffersonville Plate Glass Company took bids upon these drawings of Ford for a machine as therein shown. The company, however, lacked money, and, the bids being thought too high, nothing further was then done. Subsequently other changes were made in the operating mechanism of the machine, but its defects were not thus cured. In the year 1883 the board of directors of the company directed H. T. Sage, the then superintendent of the works, to change the machine into a two-beam machine. This order Sage communicated to Haslem. The change was made during that year. Haslem had such general oversight of the work as appertained to his position as chief engineer, but the actual work was done by others. Everything in the old machine was used in the new, and the parts were duplicated. Mr. Galey, who did most of the work, testifies that the only drawings used were those of Mr. Sleeper, to which he was permitted by Sleeper to have free access at Sweeney's machine shops. Those drawings, Galey states, bore date 1880, and showed a complete machine of this kind.

Mr. Haslem alleges that his conception of the machine described in his patent was anterior to the conception of either Sleeper or Ford, and that his sketches and drawings were earlier than theirs; that he was the first to suggest the erection of such a machine at the Jeffersonville works, and that in fact he advised and brought about the change there made, and that he built the new two-beam machine in conformity with his drawings. To this effect he testifies, and, in support of his claim of priority, the plaintiffs have examined a number of witnesses; but I do not think that Mr. Haslem's allegations are sustained by the proofs. Haslem's own testimony is uncertain and lacks consistency. When first upon the stand he said: "I commenced my invention in the fall of 1880. I think I commenced making the drawings in September. * * * I got my drawings up in the fall of 1880, and built the machine in the fall of 1883." On cross-examination, being asked how long he worked on his drawing, he answered: "I worked on it for some time; I could not tell how long. I made several drawings before I

got one to suit me. I made several changes." In answer to the question when he first got the drawing completed, he said: "Some time in the winter of 1880, in pencil; I didn't ink it until some time afterwards. * * * I can't tell exactly what time I finished them; some time in the winter." Being asked if he could swear positively that he finished the drawing that suited him before February, 1881, he answered: "I am not willing to swear positively; I cannot remember. I think it was. I think it was before January that I finished them, but I am not positive." When on the stand later, in rebuttal, he testified that he conceived the idea of his machine within two weeks after he came to the Jeffersonville works, and before he had ever seen or heard of the one-beam Belgian machine; that he made sketches of his machine in August, 1880, and he produced sketches which he stated were the ones he then made; but with respect to these sketches he is not corroborated by any witness, and the probabilities are all against his having made them at that date. In so stating, Mr. Haslem, it seems to me, is laboring under a great mistake. Then, again, the corroborative evidence as to his alleged disclosures made in the fall of 1880, and the alleged exhibition of his drawings prior to the year 1881, is vague and very unsatisfactory. In my judgment, the decided weight of the evidence upon this branch of the case is with the defendants. I am quite convinced by the proofs that in the conception of the improvement in question, and in the embodying of it in working drawings, Mr. Haslem was anticipated by both Sleeper and Ford. Let a decree be drawn dismissing the bill of complaint, with costs.

REYNOLDS et al. v. STANDARD PAINT CO.

(Circuit Court of Appeals, Third Circuit. June 14, 1895.)

No. 11.

1. PATENTS—INVENTION—SEVERAL PATENTS FOR SAME THING.
   After the granting of several patents covering the use of maltha (a residuum obtained in the distillation of petroleum), with various compounds, for coating paper, cloths, and roofing fabrics, and especially of a patent for paper "painted or saturated with a compound of maltha and bisulphide of carbon," *held*, that there was no patentable invention in dispensing with the use of a solvent, and applying pure maltha to paper as a coating substance; and that the case came within the rule that a second patent cannot issue for the same invention, especially to the same patentee.

2. SAME—PAPER COATED WITH MALTHA.
   The Pearce and Beardsley patent, No. 378,520, for a new article of manufacture, consisting of paper coated or saturated with "maltha," *held* void for want of invention.

Appeal from the Circuit Court of the United States for the District of New Jersey.

This was a bill by the Standard Paint Company against James S. Reynolds and Henry J. Bird for alleged infringement of a patent. The circuit court denied a motion for a preliminary injunction (43 Fed. 304), but afterwards entered a decree for complainant upon final hearing (65 Fed. 509). Defendants appeal.

Henry P. Wells and T. B. Wakeman, for appellants.
Willard Parker Butler, for appellee.

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

ACHESON, Circuit Judge. By the decree of the court below the appellants were adjudged to have infringed, and were enjoined from the further infringement of, letters patent No. 378,520, dated February 28, 1888, granted upon the application of Truman J. Pearce and Melvin W. Beardsley, filed March 9, 1887.

The patent has a single claim, namely: "As a new article of manufacture and of commerce, paper coated or saturated with maltha, substantially as herein set forth." In order to ascertain the meaning and scope of the claim, resort must be had to the specification, which describes maltha thus: "The product and substance known as 'maltha,' which we employ and utilize in the manufacture of our improved paper, is the solid residuum obtained in the distillation of the heavier grades of petroleum." From the history of the alleged invention, as disclosed by the evidence, it appears that the experiments and operations of the inventors were carried on exclusively in California, with the heavy grades of petroleum there found. This record shows that before the patent in suit was applied for Pearce and Beardsley had already obtained no less than five other patents relating to this same maltha and its uses. The earliest of these patents, No. 338,868, which bears date March 30, 1886, is for a composition consisting of maltha and bisulphide of carbon. In the specification of that patent, maltha is declared by the inventors to be "the base of our composition," and it is stated that it may be utilized in a cold state, without the agency of heat, by uniting with it a fluid solvent of suitable character to reduce the maltha and hold it in solution, and bisulphide of carbon is suggested as best adapted for that purpose. The specification further sets forth that the composition will form "a thoroughly waterproof and weatherproof" paint or coating for the surfaces of wood and metal; that "it will protect leather and fibrous and textile substances"; and that it "will be found to possess the peculiar and very valuable property of resisting the action of acids and alkalies." It is also stated, that "the qualities and properties of hardness, tenacity, pliability, and elasticity, peculiar to and inherent in the maltha," may be varied and secured in different degrees by adding to the composition other ingredients, such as asphalt, resin, sulphur, and paraffine. And finally it is said: "From the foregoing description and illustrations, a person skilled in the preparation and manufacture of paints and compositions of the kind to which our invention appertains will understand how to produce and make the composition in any desired form or grade of consistence from the aforesaid product."

Four patents of this series for the use of maltha, namely, No. 348,993, No. 348,994, No. 348,995, and No. 348,996, were issued on September 14, 1886. No. 348,993 is for all kinds of cloths, felts, etc., and all kinds of texture and fabrics, other than paper, treated with

a compound of bisulphide of carbon and maltha. No. 348,994 is for electric conductors covered with the same mixture. No. 348,995 is for paper coated with the same compound, the claim being in these words: "As a new article of manufacture and commerce, paper painted or saturated with a compound of bisulphide of carbon and maltha, substantially as herein set forth." No. 348,996 is for roofing fabric "composed of maltha and a basis or foundation of fibrous or textile fabric, with or without a backing of paper." The specification of this patent states that the maltha can be applied to the fibrous or textile foundation fabric either by the "hot method" or by the "cold method," the maltha in the former case being brought to a plastic state by the application of heat, while in the latter method it is reduced to a proper consistency by means of a suitable solvent, such as bisulphide of carbon; and it is added that "the results may be said to be equally effective as regards the qualities and properties secured in the finished article."

The proofs establish, and indeed the complainant's own expert testified, that prior to the application for the patent in suit coated waterproof and nonconducting papers were in common use, and were made in a great variety of ways, by applying to the paper, either in a melted condition or in solution, many different substances, those substances being used separately and singly, or being mixed with each other in different proportions; oils, waxes, paraffine, coal tar, asphaltum, and liquid products of petroleum being among the materials most commonly employed. It also appears that the method of coating paper described in the patent in suit was old. It may then be confidently affirmed that whatever of novelty, if any, is to be found in this patent is in the substitution of maltha pure and simple for the coating substances or compositions previously used.

The alleged infringing paper was made under and in conformity with letters patent No. 426,633, dated April 29, 1890, granted to Henry J. Bird for an improvement in "waterproofing compositions for paper." The Bird compound consists of a mixture of "the pitchy material from the distillation of petroleum," designated as "petrocite" throughout this record, "petroleum residuum," known as "tailings," and Trinidad asphalt, in the proportions of 50 to 60 per cent. of petrocite, 20 to 35 per cent. of tailings, and 10 to 15 per cent of asphalt; to which is added a small proportion of "Carnauba wax," to act as a drier, to prevent sticking.

The proof discloses that the maltha of the patent in suit is the product of a single distillation of the "heavier grades" of petroleum; which distillation is carried on at a comparatively low temperature. On the other hand, petrocite—the substance employed by the appellants, and the use of which constituted their alleged infringement—is obtained from the light grades of petroleum common to Pennsylvania and other Eastern states, and is the product of a secondary distillation, carried on at an exceedingly high temperature. Its method of production is in this wise: The crude oil is subjected to a distillation process, during which kerosene—the refined illuminating oil of commerce—is produced. When the kerosene is driven off,

there remains a small residuum of petroleum tar, which is a distinct article of commerce. The petroleum tar is the subject of a second distillation—a destructive distillation—resulting in several products, according to the stage to which the process is carried. One of these products is petrocite. The method whereby this substance is produced is described in letters patent No. 239,260, dated March 22, 1881, issued to Julius J. Livingston, for a plastic from petroleum, styled in the patent "petroleum-asphaltum." That product is the petrocite which the appellants used in their paper-coating composition. Notwithstanding the difference in the methods of production of petrocite and the maltha of the patent, the court below decided that they are the same thing, and therefore held that the defendants (the appellants) were infringers. In the view we take of the case, it will not be necessary for us to express an opinion upon the question of the identity of petrocite and maltha, nor yet upon the question whether or not the words of the patent, "the solid residuum obtained in the distillation of the heavier grades of petroleum," impose upon the claim such a limitation as excludes petrocite. Aside altogether from these considerations, and waiving also the further question whether a patent granted in the year 1888 for the use of maltha by itself is violated by the use of a composition which has petrocite as one of its ingredients, the case, we think, is with the appellants.

In the first place, as we have already seen, the alleged infringement by the appellants was in the use by them of the product which was patented by Livingston in 1881 under the name of "petroleum-asphaltum," but which is now called "petrocite." Livingston's patent distinctly sets forth that that substance is suitable for the purposes to which asphaltum had theretofore been applied. The specification states that it is "of such superior quality that it is adapted for use for purposes for which Trinidad or other like natural asphaltum has heretofore been thought to be necessary." Now the proofs conclusively show that long prior to the date of Livingston's patent natural asphaltum was largely and openly used in the United States in coating paper. Livingston, then, having disclosed to the public as early as the year 1881 that the artificial petroleum-asphaltum, described in and covered by his patent, could be used for all purposes as a substitute for natural asphaltum, and the latter substance having been previously commonly used for coating paper, argument is not needed to show that no patent could lawfully be granted in 1888, upon an application made in 1887, which would prevent the use, in the coating of paper, of the asphaltum or petrocite of the Livingston patent. Hence, that patent was a complete defense to the complainant's suit.

But then again, having regard to the five earlier patents appertaining to maltha granted to Pearce and Beardsley, the patent in suit, in our judgment, is destitute of patentable novelty. The very first patent of this series, that of March 30, 1886, for the compound of maltha and bisulphide of carbon, set forth the peculiar qualities and properties inherent in maltha which make it a suitable waterproof and weatherproof coating body for fibrous and

textile substances and the surfaces of other things. The purpose of the invention of that patent was to utilize maltha in a cold state by dissolving it and holding it in solution by means of a solvent, thus dispensing with the common melting agency of heat. After naming bisulphide of carbon as the best solvent for the purpose, the specification proceeds thus: "Bisulpide of carbon has also great penetrating power, and after evaporation, when the composition is spread on or otherwise applied to a surface, it leaves a solid, dry, firm coat or covering, which is elastic and pliable, and which will protect the surface or substance it is applied to both against the elements and against acids and alkalies." The roofing-fabric patent of September 14, 1886, prescribed the application of maltha alone by the hot method, stating that the results were equally satisfactory whether the hot or the cold method was pursued. Then, not stopping to discuss No. 348,993 and No. 348,994, we have the patent No. 348,995 for "paper painted or saturated with a compound of maltha and bisulphide of carbon." Now, after this lavish issue of patents involving the same subject-matter, and to the same patentees, could the monopoly be still further broadened and prolonged by the grant of a later patent for "paper coated or saturated with maltha" alone? We have no hesitation in responding negatively. Such an extension of exclusive privileges would be a sheer abuse of the patent laws. Assuredly, in view of the prior state of the art, the mere dispensing with the solvent, and the application of pure maltha to paper as a coating substance, did not involve invention. Moreover, as is indicated by the above quotation from the first of these maltha patents, bisulphide of carbon quickly evaporates, and thus paper treated with the compound of the prior patent (No. 348,995), after the evaporation of the solvent, becomes essentially "paper coated or saturated with maltha." In our opinion, this case is clearly within the principle declared in Miller v. Manufacturing Co., 151 U. S. 186, 14 Sup. Ct. 310,—that no patent can rightfully issue for an invention actually covered by a former patent, especially to the same patentee, although the terms of the claims may differ. Upon the case presented by this record, the court below should have dismissed the bill of complaint.

The decree of the circuit court is reversed, and the case is remanded to that court, with a direction to enter a decree dismissing the bill with costs.

EDISON et al. v. HARDIE.

SAME v. POMEROY DUPLICATOR CO. et al.

(Circuit Court, D. New Jersey. June 15, 1895.)

PATENTS—INVENTION AND UTILITY—INFRINGEMENT—STENCIL SHEETS.

The Edison patent, No. 224,665, for an invention relating to autographic stencil sheets for multiplication of writings, and which consists in the use of a slab having numerous fine points or projections, upon which the sheet is laid, and which are made to penetrate the paper upwardly by the use of a blunt stylus pressed upon the sheet by the hand in writing, sustained, as a meritorious and useful invention, and *held* infringed.

These were suits in equity by Thomas A. Edison and others against William C. Hardie, and against the Pomeroy Duplicator Company and others, respectively, for infringement of a patent relating to autographic stencil sheets for the multiplication of writings.

Dyer & Driscoll, for complainants.
Gallagher & Richards, for defendants.

ACHESON, Circuit Judge. Each of these suits is upon letters patent No. 224,665, dated February 17, 1880, issued to Thomas A. Edison. The invention relates to autographic stencil sheets of paper for the multiplication of writings, etc. The object is accomplished by means of a slab or plate provided with a number of perforating points or projections, closely proximate, upon which a sheet of paper is laid, and the use by the person writing of a blunt stylus, which is pressed on the sheet by the hand with a force sufficient to cause the points or projections of the plate to penetrate the paper upwardly in the lines beneath the stylus. In his specification the patentee states:

"I make use of a slab or plate with a surface of numerous sharp points. Such surface is represented at a, composed of needle points set closely together, or wire points, the extreme ends of which are in the same plane, and the bodies united by solder or cast metal; or the said surface may be a metal plate with its surface scored with grooves that leave the intervening sharp points projecting. * * * A steel plate thus prepared and hardened is preferred."

The claims of the patent are as follows:

"(1) The method herein specified of preparing stencil sheets for printing, consisting in pressing the sheet, in the lines to be printed, against the numerous fine perforating points of a slab, by means of a blunt stylus that is passed over the sheet at the lines to be perforated, and forces such sheet upon the points, substantially as set forth. (2) As an appliance for puncturing stencil sheets by the aforesaid method, the slab, a, having a surface composed of numerous and closely-proximate penetrating points, in combination with a blunt stylus adapted to be moved by hand over the paper to be perforated, substantially as set forth. (3) An autographic stencil sheet, substantially as described, for multiplicate printing, having perforations that are the largest at the side next the surface to be printed, substantially as set forth."

The defenses of lack of novelty and want of invention are not sustained by the proofs. That the invention was one of decided merit, and is of great utility, the evidence demonstrates. It is satisfactorily shown that Edison was the first to use the plate upon which the stencil sheet rests as the perforating instrument; the stylus being, relatively to the projections of the plate, so blunt that it cannot enter the spaces between the projections, but bridges the projections, and passes freely over them, so as to admit of easy writing. This is the gist of the invention. The Adair patent for a check protector proceeded upon a different principle. By his method the perforation of the paper was effected by the sharp point of the stylus, and not by the corrugated or roughened face of the plate, block, or tablet. His patent calls for a "sharp-pointed stylus," and, as stated in his specification, "the result is that the point of the stylus punches the paper between the ridges of the corrugations, or between the highest points of the roughened surface below."

A careful examination of the proofs and exhibits has satisfied me that the charge of infringement is fully made out. The defendants' stencil plate is a metal plate scored in two directions with fine grooves, which create intervening sharp points, upwardly projecting, and their stylus is blunt, when compared with the points or projections of their plate. In a word, their stylus and the projections or perforating points of their plate are so related to each other as to accomplish the results contemplated and disclosed by the patent in suit, in the manner therein prescribed.

I see nothing in the patent calling for the limitations upon which the defendants insist, namely, that the points on the plate must be "conical or pyramidal in form," and the stylus must be of "some soft or yielding material." No special formation of the points is specified, and, as to the stylus, the only limitation expressed is that it shall be "blunt." The specification states that "any suitable blunt pencil or stylus may be used." In each case there will be a decree in favor of the plaintiffs.

WOODMANSE & HEWITT MANUF'G CO. v. WILLIAMS et al.

(Circuit Court of Appeals, Sixth Circuit. June 4, 1895.)

No. 267.

1. EQUITY JURISDICTION IN PATENT CASES.
The ground upon which a court of equity takes cognizance of an infringement suit is the relief through an injunction. There is nothing peculiar to infringement suits for damages and profits whereby equity jurisdiction may be maintained, and it must appear that the remedy at law is inadequate.

2. SAME—LACHES OF PATENT OWNER—EFFECT OF ASSIGNMENT.
The negligence or acquiescence of the former owners of a patent in an alleged infringement has, in equity, the same effect upon an assignee's rights as his own neglect or acquiescence.

3. SAME.
Fourteen years' delay by a patent owner and his predecessors in interest, in making any attempt to assert their rights against an alleged infringing company, openly engaged in making and selling a rival and competitive machine, and without even serving notice of infringement, *held* such laches as to require dismissal of the bill.

4. SAME.
Laches is a defense which may be made by demurrer, or by plea, or by answer, or presented on argument either upon preliminary or final hearing. It need not be formally set up in answer.

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

This was a bill by the Woodmanse & Hewitt Manufacturing Company against Bradley S. Williams, Malcolm B. Williams, Homer Manvel, and the Williams Manufacturing Company for alleged infringement of certain patents for improvements in windmills. The circuit court dismissed the bill on the ground of laches, and complainant appeals.

L. L. Coburn, for appellant.

Bondeman & Adams (Dallas Bondeman, of counsel), for appellees.

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

LURTON, Circuit Judge. This is a bill in equity. It was filed August 1, 1890. Complainant is by assignment the owner of two patents for certain improvements in windmills, which it alleges have been, and are being continuously, infringed by the defendants. The prayer of the bill is for an injunction, and for an accounting as to damages and profits. No preliminary injunction was asked or allowed, and upon final hearing the bill was dismissed upon grounds stated in an opinion by District Judges Sage and Severens.[1] The original bill was filed alone against the individual defendants Bradley S. Williams, Malcolm B. Williams, and Homer Manvel, who were charged as being engaged in manufacturing and selling windmills infringing the complainant's two patents, under the firm name and style of B. S. Williams & Co. The evidence taken developed the fact that about two years before the suit was begun the firm of B. S. Williams & Co. had ceased to do business as a firm, and had organized a corporation known as the Williams Manufacturing Company, to which the entire plant and business of the firm had been conveyed, and in which the individual members of the firm were interested as shareholders and managers. Upon this appearing, the court required complainant to amend its bill by making the corporation a defendant, which was done May 10, 1892. Its answer embodied substantially the defenses theretofore set up in the answer of the individual defendants. Among the defenses set up in their answer were, noninfringement, want of patentable novelty, anticipation by many other patents specifically set out, prior use by the defendants and their predecessors in business, denial that either complainant or its assignors had given defendants or their predecessors in business any notice that they were infringing. They further specifically aver that both of the patents claimed by complainant were anticipated by the Bignell patent No. 180,189, dated July 25, 1876, and that defendants were owners of an interest under that patent, or of the invention therein secured to Bignell and others, and that they had, as assignees of an interest therein, made and sold windmills under the Bignell patent in good faith. The answers also denied that Anderson, the patentee under one of complainant's patents, was the original inventor of the improvement claimed in the patent issued to him.

In the view we have taken of the evidence, it is only necessary for us to determine whether the laches of the complainant and its assignors has been such as will prevent a court of equity from entertaining this bill. One of the patents owned by complainant is for an improvement in windmills, issued December 19, 1876, on an application filed August 14, 1876, and was issued to L. D. Anderson,

[1] Not reported.

assignor to Harrison Woodmanse, being patent No. 185,423. What the patentee claimed is thus described:

"What I claim as new, and desire to secure by letters-patent, is as follows: In a windmill, the shoe or brake, d, in combination with the vane, B, and shaft, A, of the windmill, substantially as and for the purposes specified."

The other patent involved is patent No. 220,514, dated October 14, 1879, and was issued to Harrison Woodmanse, assignor of the Anderson patent, and Samuel Lebkicker, for an improvement in windmills by providing a lever in connection with a brake wheel so arranged as to be operated by a projection upon the inner end of the vane, for the purpose of rendering the brake more effective. Complainant's suit must turn upon the alleged infringement of the claims of the Anderson patent. The claim of the Woodmanse & Lebkicker patent involved is the first, which reads as follows:

"The brake shoe, b; the lever, c, in combination with the wheel, a, and vane, c, substantially as and for the purposes specified."

This slightly different arrangement of the leverage, in the application of the brake to the shaft, from that claimed in the Anderson patent, is not satisfactorily shown to have been infringed by the brake used by defendants.

In 1873, Bradley S. Williams, W. H. Pendleton, Kirk A. Smith, and C. M. Hobbs, under the style of Pendleton, Williams & Co., began the business of making and selling windmills at Kalamazoo, Mich. That business has been steadily pursued, and the Williams Manufacturing Company are but the successors of the original firm of Pendleton, Williams & Co. Hobbs and Smith, of the original firm, sold out in 1879. The defendant Homer Manvel bought in in 1874, and the other individual defendants bought an interest in 1880. From 1880 the firm was composed of B. S. Williams, Homer Manvel, and M. B. Williams, and did business as B. S. Williams & Co. until 1889, when the present corporation was organized, the same persons being stockholders and officers. The evidence clearly establishes that, as early as 1874 or 1875, the defendants, or their predecessors in business, began making a brake, and applying it to their windmills, which is substantially the same brake which the present corporation is making, and this brake, with occasional slight improvements, has been continuously made and used on the windmills sold by defendants, or those to whom it has succeeded, for a period of about 15 years before this suit was brought. Now, if it be conceded that the patents owned by complainant were not anticipated by either the Bignell patent or any of the others claimed as anticipations, a point by no means clear, and that the brake made and sold with the defendants' mills does infringe both or either of the complainant's patents, we then have a case where suit has been delayed against an infringer openly and publicly engaged in selling a rival and competitive mill to that made and sold by complainant and its assignors for a period of 14 years after issuance of the Anderson patent, and of about 11 years after the Woodmanse and Lebkicker improvement. No excuse for this long delay is shown. Mr. Woodmanse, who is the manager of

the complainant corporation, was the assignor of the Anderson patent, and a joint patentee under the improved brake covered by the letters patent granted in 1879. Since 1876 Woodmanse has been engaged in the same line of business, and has been interested in the successive firms and corporations controlling both the Anderson and Woodmanse patents. The complainant does not pretend that it or its predecessors were ignorant of the alleged infringement. No such excuse is offered. Indeed it is not within the range of probability that two rival concerns engaged in selling competitive windmills in the same section of the Union could have been ignorant of the fact that the mills of each contained substantially the same brake mechanism. Neither does it appear that the complainant was involved in other litigation with other infringers, which might to some extent explain its conduct in standing by and acquiescing in the alleged infringement for a period of 14 years. Indeed no excuse whatever is made for its long neglect to assert its right. In the meantime the defendants and their predecessors in the business, under claim of right, have been suffered to go on and build up their business and push their mills into common use, without any notice whatever from complainant or its assigns of a claim that they were infringing. It is no answer to say that the complainant corporation was only organized a few years before suit was brought. Its predecessors in the ownership of the patent were also its predecessors in the business it is now carrying on in the making and selling of windmills embodying the brake covered by its patents. The complainant took these patents by assignment from assignors who had for years been guilty of negligence in the assertion of their alleged monopoly. The acquiescence of the former owners of the patent has in equity the same effect upon complainant's rights as its own subsequent neglect. Rob. Pat. § 1194; Spring v. Sewing Mach. Co., 4 Ban. & A. 427, Fed. Cas. No. 13,258. In McClurg v. Kingsland, 1 How. 205, the plaintiff was the assignee of Harley, the patentee. Harley's invention had been made while in the employment of the defendant, and under such circumstances as to raise the presumption of a license to his employers to continue the use of his discovery in its business. The court held that the plaintiff, as assignee of Harley, stood in his place as to right and responsibility, "and took the assignment of the patent subject to the legal consequences of his previous acts, and, connecting these with the absence of an assertion of a right adverse to the defendants' use till this suit was brought, protected the defendants from liability for any damages therefor."

The ground upon which a court of equity will take cognizance of a suit for an infringement of a patent is the relief through an injunction. There is nothing so peculiar to a suit for damages and profits for infringement of a patent as will, independently of some recognized ground of equitable jurisdiction, justify a court of chancery in assuming jurisdiction. It must appear that the legal remedy at law is inadequate, and if the case is one in which equitable relief by injunction is inappropriate, as where the patent has expired, or where the circumstances are such as to justify a court

in refusing equitable relief, the suit will not be entertained for the mere purpose of an account of past damages and profits. Root v. Railway Co., 105 U. S. 189; McLaughlin v. Railway Co., 21 Fed. 574; Clark v. Wooster, 119 U. S. 325, 7 Sup. Ct. 217.

Aside from the fact that no preliminary injunction was applied for or allowed, and that when the final hearing was had plaintiff Anderson's patent had expired, we think that the conduct of complainant, and those to whose rights it has succeeded, has been such as to require a court of equity to refuse it any relief whatever. Reasonable diligence as well as good faith are necessary to call into operation the powers of a court of equity. Maxwell v. Kennedy, 8 How. 222. One who invokes the protection of equity must be "prompt, eager, and ready" in the enforcement of his rights. Equity will not encourage a suitor who has long slept over his rights. It was well observed by Judge Coxe, in Kittle v. Hall, 29 Fed. 511, that "time passes, memory fails, witnesses die, proof is lost, and the rights of individuals and of the public intervene. Long acquiescence and laches can only be excused by proof showing excusable ignorance, or positive inability to proceed on the part of the complainant, or that he is the victim of fraud or concealment on the part of others." He adds "that the court will not entertain a case when it appears that the complainant, or those to whose rights he has succeeded, have acquiesced for a long term of years in the infringement of the exclusive right conferred by the patent, or have delayed, without legal excuse, the prosecution of those who have openly violated it." These general principles find ample support in many cases, only a few of which need be cited: Piatt v. Vattier, 9 Pet. 416; Maxwell v. Kennedy, 8 How. 221, 222; Leggett v. Oil Co., 149 U. S. 288–294, 13 Sup. Ct. 902; McLaughlin v. Railway Co., 21 Fed. 574; Speidell v. Henrici, 15 Fed. 753; The Walter M. Fleming, 9 Fed. 474; Lewis v. Chapman, 3 Beav. 133. That this doctrine of courts of equity requiring reasonable diligence as a condition precedent to the exercise of its discretionary powers is applicable in patent cases is manifest from a consideration of the nature of the relief sought against an infringer. Equity will not entertain a suit merely involving an ascertainment of damages and profits. This question was elaborately considered and expressly decided in Root v. Railway Co., heretofore cited. Equitable jurisdiction in patent cases is therefore subject to the general principles of equity jurisprudence, and the power to grant injunctions in such cases, according to the provisions of section 4921, Rev. St., must be "according to the course and principles of courts of equity, to prevent the violations of any rights secured by a patent, upon such terms as the court may deem reasonable." That inexcusable laches of the complainant is a sound reason for noninterference on the part of a court of equity was expressly decided in McLaughlin v. Railway Co., heretofore cited; the opinion being by Circuit Judge Brewer, now Justice Brewer. In that case a delay of 13 years was held ground for dismissing the bill upon a demurrer. In Lane & Bodley Co. v. Locke, 150 U. S. 193, 14 Sup. Ct. 78, the supreme court held that a delay of 12 years was a bar to any relief in equity against an in-

fringer, Justice Shiras, who delivered the opinion of the court, saying:

"Courts of equity, it has often been said, will not assist one who has slept on his rights, and shows no excuse for his laches in asserting them."

In the very late case of Keyes v. Mining Co., 15 Sup. Ct. 772, the doctrine of McLaughlin v. Railway Co., and Lane & Bodley Co. v. Locke, was followed, and a complainant who had delayed for nearly 17 years was repelled from court as guilty of inexcusable laches. Neither is it important that the defense of laches was not formally set up in the answer. Laches is a defense which may be made by demurrer, or by plea, or by answer, or presented by argument, either upon a preliminary or final hearing. Maxwell v. Kennedy, 8 How. 222; Walk. Pat. § 597; Curt. Pat. § 440; McLaughlin v. Railway Co., 21 Fed. 574.

The decree of the circuit court dismissing complainant's suit will be affirmed.

GRISWOLD v. WAGNER et al.

(Circuit Court of Appeals, Sixth Circuit. June 10, 1895.)

No. 303.

1. PATENTS — WHAT CONSTITUTES INVENTION — TRANSFER TO ANALOGOUS INDUSTRY.
   Transferring the hinging and journaling devices found in coffee roasters, and applying them to waffle irons, does not involve invention, within the rule relating to the transfer of devices from one branch of industry to another.
2. SAME.
   There is no invention in forming a projecting socket to support the hinge of a waffle iron and at the same time to give support to the raised half of the open pan.
3. SAME—WAFFLE IRONS.
   The Griswold patent (No. 229,280) for improvements in waffle irons, "consisting in a novel construction of the hinge connecting the two parts of the divided pan," was anticipated, as to claims 1 and 2, by the Harrington and Tower coffee roaster patents (Nos. 24,024 and 21,858, respectively), and is void of invention as to claim 3. 65 Fed. 513, affirmed. Griswold v. Harker, 10 C. C. A. 435, 62 Fed. 389, distinguished.

Appeal from the Circuit Court of the United States for the Western Division of the Southern District of Ohio.

This was a bill by Matthew Griswold against W. H. Wagner and others for infringement of a patent relating to waffle irons. The circuit court dismissed the bill (65 Fed. 513), and complainant appealed.

J. C. Sturgeon, for appellant.

Wilson & Wilson and Foraker & Prior, for appellees.

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

LURTON, Circuit Judge. This appeal involves the validity of the first three claims of letters patent No. 229,280, to Selden and Gris-

wold, issued June 29, 1880, for improvements in waffle irons. These claims are:

"(1) In a waffle iron, the hinge upon which the pan opens, provided with one of the journals or pivots on which the pan is rotated. (2) The journals or pivots on which the pan rotates, formed upon or connected, one with the hinge upon which the pan opens, and the other on the handle for rotating and opening said pan. (3) The waffle-iron frame or ring, provided with the enlargement or projection on one side, as described, forming the socket for the hinge of the pan, and a support for the lid when raised, substantially as described."

The defense presented by the answer included: (1) Anticipation; (2) nonpatentability of the invention claimed; (3) noninfringement. The case was finally heard by the Honorable George R. Sage, District Judge, who held that the first two claims were void as having been anticipated, and that the third claim was void as not patentable, and dismissed the bill. From this decree appellant has appealed, and assigned errors.

The prior state of the art, so far as it relates to waffle irons, is thus described by the patentees in their specifications:

"In waffle irons, as ordinarily constructed, the hinge connecting the two parts of the pan has been made separate from the pivot on which the pan rotates, and located at one side of the pan, relatively to said pivot. Our improvement consists in a novel construction of the hinge connecting the two parts of the divided pan, whereby one of the pivots or journals on which the pan rotates is made to form a part of said hinge, the hinge and pivot being thus brought together, while the opposite pivot or journal on which the pan rotates is formed on the divided handle, by means of which the pan is rotated, and by means of which, also, either portion of the pan which for the time being is uppermost is lifted for opening the pan. It further consists in a novel construction and arrangement of the socket in the rim or supporting ring for the reception of the hinge and pivot, whereby the tilting or dumping of the pan is prevented when the cover is raised, and in a novel manner of attaching the wooden handles, as hereinafter described."

No testimony was filed on the part of the defendants below, the defense resting wholly upon the state of the art as shown by patents pleaded as anticipatory, and by the expert evidence introduced by the complainant. Mr. Hallock, the expert examined on behalf of appellant, thus explained the prior state of the art, and the scope of the improvements covered by the claims here involved:

"The invention consists in certain improvements in waffle irons, and had for its object and purpose the simplification of the structure and mode of operation of a waffle iron. Before the date of the invention set forth in this patent, waffle irons were made with the pans hinged together, and mounted on trunnions within a frame piece in the form of a ring, which fitted upon, or was intended to fit upon, the holes on the top of a stove. The hinge by which the pans were joined together, so as to open and close like a book, for example, was on the side of the pan, at a joint midway between the trunnions, and thus the device was made to revolve upon an axis which was at right angles to the journal of the pivot of the hinge by which the pans were joined together. These old waffle irons had no handles on the pans, by which they could be revolved, or opened and closed. They were manipulated wholly, usually, by a case knife in the hand of the operator. By the invention set forth in the patent inquired of, a very radical change in the construction and method of operation of waffle irons was effected. We may say that the principal improvement consisted in providing the pans with handles by which they could be operated both rotatively, and to open and to close them. The first step towards effecting this result, and the necessary one, was to bring the journals

or trunnions on which the pan was rotated into such a position that the axis on which the pan rotated was lying in the same plane as that in which the pans moved when being opened, or, in other words, into such a position that the hinge upon which the pan opens is provided with one of the journals or pivots upon which the pan is rotated. A secondary feature of the invention consists in providing means for supporting the open pan while a waffle is being removed from the lower pan, and new batter is being placed therein. The first, second, and third claims of the patent are for the means by which the above-stated objects are accomplished."

The improvement by providing the pan with handles by which it could be opened, closed, or rotated, and which appellant's expert says is the principal improvement on the old form of waffle iron, is not here involved. It is obvious that, if the old form of waffle iron revolved upon an axis at right angles to the journal of the pivot of the hinge, handles rigid with the pans would prevent such revolution. To provide handles, it became, therefore, necessary that the journals or trunnions on which the pan was rotated should be so placed as that the axis on which the pan rotated should be on the same plane as that in which the pans moved when being opened. This result was reached by providing the hinge by which the pan opens with a journal upon which the pan could be rotated, and this improvement constitutes the first claim. While a second journal was not essential to the rotation of the pan, yet it is obvious that the side of the pan opposite the hinge would need a support, and that the pan could be rotated more evenly and easily if the pan should be journaled at this point of support. This was provided for by divided handles, one-half being rigid with one-half of the pan, and the other half with the corresponding half of the pan. The second journal upon which the pan rotates was therefore upon the handles. This constitutes the second claim.

The devices which appellees claim to have anticipated appellant's improvements are said to be found in the following patents: (1) Webster's patent, No. 27,176; (2) E. J. Smith's patent, No. 67,478; (3) Link & Curtis' patent, No. 96,930; (4) E. P. Russell's patent, No. 63,753; (5) Samuel Smith's patent, No. 126,585; (6) O. J. Smith's patent, No. 131,910 (all of which are for improvements in gridirons or broilers); (7) Thomas R. Wood's patent, No. 6,345; (8) Josiah D. Harrington's patent, No. 24,024; and the Samuel Tower patent, No. 21,387 (both of which are for coffee roasters). None of these alleged anticipations are for waffle irons. But, though this be so, it is very clear that the improvements in claims 1 and 2 of the appellant's patent are for devices found in both the Harrington and Tower coffee roasters. The Harrington patent is for a coffee roaster which consists of two hollow hemispheres of iron, constituting the receptacle for the coffee to be roasted. These hemispheres constitute, when united, a hollow ball, which is designed to rest upon bearings formed upon a ring or iron frame designed to be placed over the hole of a cooking stove when the roaster is in use. The handles are divided as in the case of appellant's waffle iron, one half being attached to each half of the spherical ball or pan; and this handle, when the two parts are united, is cylindrical, and forms one of the journals or pivots on which the ball is rotated. One side of the

handle is shorter than the other. The outer end of the united handle is square, so that when the ball is closed a crank by which the ball is revolved fits upon the square end. This crank can be slipped on or off the shorter side of the handle, but is held on the longer handle by a washer at its outer end. When the crank is slipped into position upon the united handle, it aids in holding the two halves of the divided ball firmly together, and by it the ball is safely rotated. The side of the ball opposite this handle is held together by means of a joint or hinge. This hinge is the method claimed by Harrington for uniting the two halves of his roaster and holding them together, and constitutes the second claim of his patent, which is in these words:

"I claim my method of uniting the two halves of a coffee roaster by means of the hinge, E, formed of the curved jaw attached to one-half of the ball, and passing into a slot in the second jaw; said slot having the pin, F, beneath which the curved jaw passes."

Appellant denies that this joint is a hinge. A hinge is defined to be "an artificial movable joint; a device for joining two pieces together in such manner that one may be turned upon the other." Cent. Dict. An inspection of the model of the Harrington roaster shows that this device does operate to hold the two halves of the roaster together when rotated, and in such manner as that one half may, when desired, be turned upon the other. This hinge forms one of the journals or pivots on which the roaster is revolved, while the united handles on the opposite side form the other journal or pivot. The hinge has therefore the same two functions found in the hinge of appellant's patent,—that is, it both holds the two parts of the roaster together when being rotated, and serves as one of the journals upon which the ball rotates,—and is therefore a complete anticipation of complainant's first claim. The second claim is likewise anticipated, in that the ball, which is nothing more than a spherical pan, rotates upon a journal formed upon the hinge which holds the divided ball together, while the other is formed by the united handles. That the hinge in the one patent is constructed in a somewhat different way from the hinge in the other is an immaterial circumstance. Essentially, they are the same, and perform the same functions in the same way. The first two of these claims were involved in the case of Griswold v. Harker, 10 C. C. A. 435, 62 Fed. 389, and were upheld as valid claims in an opinion delivered by Sanborn, Circuit Judge, for the court of appeals of the eighth circuit. In the opinion of Judge Sanborn, it is stated that none of the devices covered by the patents pleaded as anticipations, including this Harrington patent, included a hinge which operated both to hold the two parts of the apparatus together, and as a journal upon which the united parts might be rotated. This is an oversight, due doubtless to the fact that no model of Harrington's roaster was before the court. The drawings and specifications of the Harrington patent are not very plain as to the construction of this hinge, and nothing is said as to its function as a journal, which is, however, very obvious upon an examination of the official model. In the absence, therefore, of a model, both its operation in holding

the parts together, as well as its function as a journal, might have been unobserved. Neither did the court in that case have the Tower patent, or any model thereof, before it. The hinge and journaling of the roaster claimed by Tower are essentially the same in principle as that claimed by appellant. Tower, in his specifications, describes the part, a, shown in his drawings as capable of being elevated like a cover or lid, "the journal, B, forming a hinge." The hinge, as shown by the original model from the patent office, and exhibited upon the hearing in the circuit court, and again upon the hearing of this appeal, is essentially a hinge in construction, and much the same as the hinge used by the defendants in the infringing waffle iron. Indeed, it may be said with confidence that, if the joints used in the Harrington and Tower roasters are not "hinges," it would follow that the infringing joint is not a "hinge," and therefore does not infringe either the first or second claim. The hinge of the alleged infringement consists of the ball member of a ball and socket joint divided in halves, which co-operate by means of a pin or stud fixedly inserted in the face of one of them, and projecting into a hole or opening in the face of the other adapted to receive it. This ball, when united, constitutes the outer journal upon which the pan rotates. If it be sought to differentiate the journaling of appellant's waffle iron from the journaling of either the Harrington or Tower roaster by the suggestion that appellant does not journal his pan upon his hinge proper, but upon an independent member, described as a wedge-shaped block mechanically attached between the lugs forming the hinge, and that the journaling is upon a projection of this member outside of and beyond the hinge, and that this projecting end upon which the pan is journaled performs no part of the functions of a hinge, then it would follow that appellees do not infringe either the first or second claim of appellant's patent, for the obvious reason that the waffle iron of appellees is journaled upon the hinge, and not upon an independent, mechanically attached, member of the hinge.

The suggestion has been made that, if the hinging and journaling devices covered by the first and second claims are substantially identical with the devices found in the Harrington and Tower coffee roasters, nevertheless those claims should be sustained as a transference of a device from one branch of industry to another, and therefore a patentable novelty, under the doctrine of Potts v. Creager, 155 U. S. 597, 15 Sup. Ct. 194. This contention is not to be supported upon the facts of this case. In the case cited by counsel, and referred to above, Justice Brown, for the court, very clearly and tersely qualified and limited the doctrine invoked by appellant by saying:

"But, where the alleged novelty consists in transferring a device from one branch of industry to another, the answer depends upon a variety of considerations. In such cases we are bound to inquire into the remoteness of relationship of the two industries, what alterations were necessary to adapt the device to its new use, and what the value of such adaptation has been to the new industry. If the new use be analogous to the former one, the court will undoubtedly be disposed to construe the patent more strictly, and to require clearer proof of the exercise of the inventive faculty in adapting it to the new

use,—particularly if the device be one of minor importance in its new field of usefulness. On the other hand, if the transfer be to a branch of industry but remotely allied to the other, and the effect of such transfer has been to supersede other methods of doing the same work, the court will look with a less critical eye upon the means employed in making the transfer."

What the applicant has done is this: He has taken the hinging and journaling devices found in the two coffee-roaster patents we have referred to, and applied them to his waffle iron, where they perform precisely the same functions in precisely the same way. Neither can it be said that coffee roasters and waffle irons belong to different branches of industry. Upon the contrary, both constitute instruments used in the culinary art. It is clear that the case is simply one of double use. One acquainted with the structure and use of these patent coffee roasters, and with the structure and uses of the old, handleless form of waffle iron, would readily see the adaptability of the hinging and journaling devices found in the first as a remedy for the obvious defects of the other. This plain capability of a double use is more analogous to the facts involved in Brown v. Piper, 91 U. S. 37, where invention was denied to one who applied the principle of an ice-cream freezer to the preservation of fish, and to the facts in Pennsylvania R. Co. v. Locomotive Engine Safety-Truck Co., 110 U. S. 490, 4 Sup. Ct. 220, where an old method of attaching car trucks was applied to the forward truck of a locomotive engine, and to the facts upon which a claim of novelty was based, found in Atlantic Works v. Brady, 107 U. S. 192, 2 Sup. Ct. 225, and Tucker v. Spalding, 13 Wall. 453.

We come now to consider the validity of appellant's third claim, which reads as follows:

"The waffle-iron frame or ring, provided with the enlargement or projection on one side, as described, forming the socket for the hinge of the pan, and a support for the lid when raised, substantially as described."

The appellant's expert thus explains the scope of this claim:

"The invention here intended to be summarized, as I understand it, is the secondary feature of the structure shown, and relates to the means for supporting the upper pan when elevated into position to allow the removal of the finished waffle, and the refilling of the pan. The essential feature is that the enlargement on the side of the ring is to form a socket for the hinge of the pan, and also a support for the lid when raised. I do not understand that there is any limitation in the claim as to the form or location of the hinge or of the socket; the only limitation being that the socket is to be an enlargement on the ring, and is to receive and hold the hinge, necessarily, and it is to form a support for the lifted pan, so as to hold it in an upright position while the finished waffle is being removed, and new batter placed in the pan."

The socket supporting the ball member of the hinge found in the waffle iron of the appellees is formed by an enlargement or projection of the flange of the iron ring or frame which supports the waffle iron. The back and sides of this projecting socket are raised higher than the other part of the range or iron ring, and the object of this projection is to form a socket for the support of the hinge. The undoubted purpose in making the back and sides of this projecting socket higher than that of the flange of which it is a part is to afford support to the raised half of the pan; thus preventing tilting or sagging and at the same time holding the

raised half of the pan in an upright position while the finished waffle is being removed, or the pan refilled. If this third claim is a patentable novelty, it may be conceded that appellees are guilty of infringement. Clearly it cannot be invention to form a projecting socket to support a hinge and at the same time give support to the raised half of the open pan. The matter covered by this claim "does not," to quote from the opinion of the learned and experienced patent judge who heard this case in the circuit court, "rise to the dignity of an invention." "Given the other parts of the combination," said Judge Sage, "and the necessity for a support for the lid when raised is obvious. Any intelligent artisan ought to be competent, in the exercise of the ordinary skill of his craft, to suggest the enlargement or projection covered by this claim." We quite agree with the trial judge in regarding this third claim as void for want of novelty. The decree is therefore affirmed.

WITHINGTON-COOLEY MANUF'G CO. v. KINNEY.

(Circuit Court of Appeals, Sixth Circuit. June 4, 1895.)

No. 270.

PATENTS—LICENSE BY IMPLICATION—INVENTION BY EMPLOYE.

An inventor was employed at a salary by a manufacturer of machines to devise a new and improved machine and superintend the making of patterns therefor, with full knowledge that his employer intended to construct the machines for sale. A successful machine was accordingly made. Soon afterwards the inventor left the employment and obtained a patent, but the manufacturer continued to make and sell the machines. The original patterns were subsequently destroyed by fire, but new ones were made and the construction of the machines continued. The inventor claimed a royalty, but the manufacturer refused to pay it, on the ground that he was entitled to make the machines. After the expiration of 10 years, an infringement suit was brought against users of the machine who bought it of the manufacturer. *Held* that, under the circumstances, there was an implied license to the manufacturer to make and sell the machines, and that the same was not terminated by the destruction of the original patterns.

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

This was a bill by Horace B. Kinney against the Withington-Cooley Manufacturing Company for infringement of a patent for an improvement in power presses. There was a decree for complainant in the court below, and the defendant appeals.

Edwin H. Risley, for appellant.

A. H. Swarthout, for appellee.

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

LURTON, Circuit Judge. The complainant in the court below, Horace B. Kinney, is the inventor and sole owner of patent No. 264,837, which was issued September 19, 1882, for an improvement in power presses used in the manufacture of hoes and forks. The de-

fendant below was the Withington-Cooley Manufacturing Company, a corporation of the state of Michigan. The object of the bill was to enjoin and restrain the defendant company from using two power presses which complainant alleges infringe the improvement covered by his patent. Upon a final hearing there was a decree in favor of the complainant, sustaining the validity of his patent, adjudging the defendant to have infringed, and enjoining it from making, selling, or using power presses embodying the invention described and claimed in letters patent No. 264,837. There was also a judgment against the defendant for nominal damages and costs, an accounting being waived by complainant.

The validity of Kinney's patent has not been seriously questioned. Neither can there be any serious doubt on this record that the power presses used by the appellant do infringe the complainant's patent. The only substantial defense urged by the appellant is that the presses used by it were made by one Henry D. Babcock, and bought by it from Babcock, who claims to be a licensee under Kinney, having authority to make and sell presses embodying the invention secured under his letters patent. The controversy must therefore hinge upon the rights of Babcock as a licensee under Kinney. For some 12 years or more prior to the issuance of Kinney's patent, Babcock had been a manufacturer of machines used in the making of steel goods, especially of such machines as were used in making hoes and forks. His shops were at Leonardsville, N. Y. Kinney lived in a village near by, and was a practical machinist and a good mechanic. He had made some improvements in machines used in the fork and hoe manufacture, and had taken out a patent on a splitting and bending machine, which Babcock made, paying a royalty to Kinney on each machine as he sold it. Babcock was also the maker of a power press, made upon old principles and covered by no patent. The claim of appellant is that Kinney was employed for the express purpose of drawing plans and constructing patterns by which a new and improved power press might be made for the trade, with the clutch mechanism located in the slide or die holder in place of on the eccentric shaft, as in all the old forms of such presses. The appellee, on the other hand, insists that he was employed to make drawings and construct patterns by which an old form of press used by the Remington Agricultural Works, at Ilion, might be duplicated and sold to Babcock's customers in place of the old form of press made by Babcock, called a post press. He also claims that after he had made a rough sketch of this Ilion press, and had taken its measurements, he told Babcock that he had for a long time had an idea in his head, which it had not been convenient to work out before, by which a new press, acting more quickly and smoothly, might be made with the clutch mechanism shifted from the eccentric shaft to the slide sash, and that upon explanation Babcock directed him to prepare the drawings according to his new idea, with the understanding that if his plan was a failure he (Kinney) should bear the expenses of the experiment. While there is some evidence that Babcock was frequently consulted by Kinney during the preparation of the draw-

ings, making of the patterns, and in the experiments incidental to the perfecting of his improvements, yet there is no substantial conflict in regard to the fact that Kinney was the real inventor of the material improvements embodied in the patent subsequently issued to him. Neither is there any evidence of an agreement by which the employer should have any interest in any patentable improvement in power presses which Kinney might make during the period of his employment by Babcock. In the absence of evidence of such an agreement, it would seem that the title to the invention made by Kinney, or to any patent subsequently obtained by him, would be unaffected by the fact that he was in the service of Babcock, and in the use of his shop, materials, and of the service of his employés while devising and perfecting his invention. Hapgood v. Hewitt, 119 U. S. 226–233, 7 Sup. Ct. 193.

The conceded or established facts essential to a determination of the question as to whether Babcock is a licensee are substantially these: Babcock's business was that of making machines used by manufacturers of hoes and forks. He was not an inventor, and does not claim to be. Neither was he engaged in using these machines. What he wanted was such a power press as would meet the requirements of those engaged in using such machines, and enable him to satisfy what he had for some time recognized as a demand for a better press. The defect in the press of which he had patterns was in the fact that the upright presses known to him had the clutch mechanism, consisting of a pin or bolt for engaging the gear or collar, attached to the eccentric shaft. If a mechanism could be devised which could be attached to the sash or slide, which operated between two upright pieces, it was thought it would thereby do away with the stopping and starting of the eccentric shaft and pitman, and make a quicker-acting press. Babcock says that before his employment of Kinney to draw plans for a new form of press he had frequently spoken to him about the demand of the trade for a quicker press, and in their conversations a shifting of the clutch mechanism from the eccentric shaft to the slide or sash was suggested, discussed, and pronounced practicable. He does not say whether this suggestion was made by himself or Kinney, and we shall therefore assume it to have been made by the latter. The mechanism for the new clutch was not discussed, as he was not then ready to have new patterns made. In this condition of things, the Ashtabula Tool Company began negotiations with Kinney relating to some machines for use in their fork and hoe department, and a Mr. Tinker, in December, 1879, went to see Kinney about such machines, and with him examined the press in use at the Remington Works, at Ilion, New York. Such correspondence ensued between Kinney and Tinker as led to a proposal for prices upon a number of machines used in hoe and fork making, including a power press. Kinney had no shop, and was idle. He applied to Babcock for bids on the machines the Ashtabula Company wanted, hoping that there would be a margin of profit for himself. Kinney's statement concerning what occurred between himself and Babcock, when he applied to Babcock

for his prices for the machines desired by the Ashtabula Company, is that he told Babcock that his prices were so high, that he did not think he could make anything out of it, and that the Ashtabula Company was anxious that he (Babcock) should take the contract and that he (Kinney) should superintend the work. He also claims that he had made some improvements in the patterns for his patented machines which were in use at Ilion, and that he wanted the Ashtabula Company to have the benefit of his improved patterns as shown by the machines in use at Ilion. He then says that Babcock agreed that if the order was turned over to him he would have new patterns made from the Ilion machines, and employ him to superintend the structure. He further says, concerning a new power-press pattern, that Babcock said that, "if you think the Ilion press is a good press, the best press you know of, I will build patterns to that, and hold them for my own use as a press for the trade." "He said," says Kinney, "that he desired a better press than the one they were making; he thought he could sell some of them if he had it, and if I thought the Ilion press was as good as I had had any experience with, why he would be willing to make the patterns to that to fill this contract." Kinney insists that, in negotiating with the Ashtabula Company and with Babcock about their order, he had in mind nothing more than a duplication of the press at Ilion, and that nothing was then said as to any change in the location of the clutching device. One thing is made clear by this evidence, and that is that, before any order was made by the Ashtabula Company for any of Kinney's machines, or for a power press, he understood Babcock's anxiety for an improved power press, and he purposed abandoning the patterns then in use and owned by him, and have Kinney get up for him new drawings and new patterns, for use in making machines to be supplied to his (Babcock's) trade. As to whether these new drawings and patterns were to be a mere duplication of the old form of press in use by the Remington Works at Ilion, or were to embody a new plan for a quicker working press than any of the old forms known to the trade, there is a sharp conflict in the evidence. Upon this question, the weight of evidence is with the appellants. Babcock is very positive that before he received any order from the Ashtabula Company he had consulted Kinney in regard to a new press, one which would be a quicker-acting press. He says that they considered the practicability of shifting the clutch mechanism from the eccentric shaft, where it was located both in the Ilion press and the one which he had theretofore made.

The chief difference between the Ilion press and that which Babcock had theretofore made was that the former was an upright press standing on legs, while Babcock's press was called a post press, because it was hung to an upright post. Both were slow-running presses, due to the fact that the clutching device was attached to the eccentric shaft. The mechanism of a clutching device which could be attached to the slide or die-holder was not, says Babcock, discussed, but both agreed that if the mechanical difficulties could be overcome a quicker-acting press would result. Now,

in view of the fact that Kinney, according to his own statement, had for a year or more such a scheme in mind, is it likely that he would wish to have the old, slow form of press built for his friends of the Ashtabula Company, or would he wish to have Babcock, who was paying him a royalty upon his machines used in association with a power press, build expensive new patterns which did not embody the improvement which he says he had in mind so long, and about which Babcock says they had consulted before any negotiation with the Ashtabula Company? The written order sent Babcock by the Ashtabula Company, in its description of the press desired, seems to clearly indicate that Kinney had conferred with its agent, Mr. Tinker, about his scheme for a new press, and that he intended to furnish them with a press which should not be either the post press of Babcock or the old form of press in use at Ilion. That company, under date of March 30, 1880, after stating that the writer was in receipt of a letter from Mr. Kinney "saying that he preferred to have me order the fork machinery that we have been writing about, and the same we talked over at Ilion the 25th, of you, and he agreeing to superintend the getting up of the same," proceeds with a description of the several machines needed, and thus describes the press ordered:

"One upright shanking press, standing on legs of the right height to be handy, with adjustable dies, with the same to round the back or head of the fork at the same time they are set down, with 3-inch lift or stroke, finished completely and ready to set, and belted up according to the plans described to me by Mr. H. B. Kinney, as he designed to have this new press."

Now, this description refers to a "new press," on designs by Kinney, and seems to us could not refer to a mere duplication of an old press which the writer had been shown in operation at Ilion. This view is confirmed by the evidence of Oscar F. Clark, an expert machinist and pattern maker, wholly disinterested. Clark, on receipt of this order, was employed especially to aid in making patterns for a new press, under Kinney's direction and from Kinney's drawings. Babcock, on receipt of this order, at once engaged Kinney and Clark to go to work on the patterns for the new press, and both were sent to Ilion by him to examine the Remington press. Kinney says the object of this visit was to make a sketch and measurements, so that it might be duplicated. Clark says that his understanding was that they were not to make a mere duplicate of the Ilion press, but were to get up a "new style of press," and that it was to get such points from the Ilion press as might be useful in the preparation of a new press that the visit was made. This view supports Babcock, and is supported by the terms of the Ashtabula Company's order. Kinney spent from four to six weeks in the preparation of the drawings, and in supervising the making of patterns for this new press embodying the improvements claimed in his patent. His work was done in Babcock's shop and with his materials, and he was assisted by Babcock and Clark and other employés in the service and pay of Babcock. He was paid journeyman's wages and board, according to an agreement made before

he began his work. He knew that Babcock was a machine maker and not a machine user, and that the object of Babcock in having these drawings made and patterns constructed was that he might make such presses and furnish them to those engaged in the fork and hoe manufacture. Kinney remained in Babcock's employment, and aided in the construction and shipment of the machine ordered by the Ashtabula Tool Company. When asked when he "became aware of the fact that Mr. Babcock was furnishing and marketing machines produced from the patterns made from your drawings?" he answered: "From the commencement. From the time that he shipped the first press; after that he kept right along making and selling them." In July, 1880, he left Babcock's employment, and in November, 1881, applied for a patent covering the improvement shown in his drawings and patterns, which was granted September 19, 1882. Kinney claims that about a year after he quit Babcock's employment he notified him of his purpose to apply for a patent, and that he should require him to desist from making his machines unless he came to terms as to royalty. He says that after he got his patent he tried to come to a settlement, but that Babcock claimed that the improvement had been made at his expense, and that he had been advised that it rightfully belonged to him, and refused to make any proposition for a shop right or otherwise. This was in 1883. From that time until 1893 Kinney took no step to dispute Babcock's claim of right to make and sell these machines.

Upon this state of facts, we conclude that appellee must be presumed to have granted to Babcock a personal license to make and sell power presses embodying the improvements covered by his patent. In the early case of McClurg v. Kingsland, 1 How. 202, the facts were quite like those presented on this record. Harley was employed by the defendants in their foundry upon the weekly wages of a journeyman. While thus employed, he made an improvement in a molding process as the result of many experiments made at the expense of his employers. He continued in the same employment for several months thereafter, using his improved process in their business, though he often spoke of obtaining a patent, and proposed that the defendants should purchase his right, which they declined to do. After leaving their employment, he applied for and obtained a patent, which he assigned to the plaintiff, who brought suit for infringement. An instruction to the jury that, if they found the facts as we have substantially stated them to be true, they would justify the presumption of a license or special privilege to the defendants to use the invention in their business after he had left their employment, was approved on appeal. It is true that in that case Harley's wages were increased on account of his invention, but in Solomons v. U. S., 137 U. S. 342–348, 11 Sup. Ct. 88, where a like question was under consideration, the court approved and followed McClurg v. Kingsland, saying that, "There was one difference between that case and this, in that Harley's wages were increased on account of his invention; in this,

Clark's were not; but such difference does not seem vital." In the case last cited the rule deduced from McClurg v. Kingsland was thus stated:

"When one is in the employ of another in a certain line of work, and devises an improved method or instrument for doing that work, and uses the property of his employer and the services of other employés to develop and put in practicable form his invention, and explicitly assents to the use by his employer of such invention, a jury or a court trying the facts is warranted in finding that he has so far recognized the obligations of service flowing from his employment, and the benefits resulting from his use of the property, and the assistance of the coemployés of his employer, as to have given to such employer an irrevocable license to use such invention."

In the late case of Lane & Bodley Co. v. Locke, 150 U. S. 193, 14 Sup. Ct. 78, the court refused to extend the doctrine of Hapgood v. Hewitt, 119 U. S. 226, 7 Sup. Ct. 193, to the facts of that case, and affirmed the rule of McClurg v. Kingsland and Solomons v. U. S. See, also, Rob. Pat. § 832, and cases cited.

There was some evidence tending to show that the original patterns made by Kinney were destroyed by fire before the machines sold appellant were made, and it has been insisted that the scope of the license should be limited by the life of the identical patterns made by Kinney. The duration and scope of a license must depend upon the nature of the invention and the circumstances out of which an implied license is presumed, and both must at last depend upon the intention of the parties. Rob. Pat. §§ 809, 810. The author last cited, at section 811 says:

"A license to make confers upon the licensee the right to construct the article which is described and claimed in the letters patent. If conferred alone, it gives the licensee no right to use or sell the article when constructed, and hence is generally coupled expressly with one or the other of these additional rights, as in licenses to make and use or to make and sell. Where the express words of the license embrace only the right to make, and the other rights are necessary to enable the licensee to derive any advantage from the license, the presumption that the licenser intended that the right conveyed should be beneficial to the licensee controls the interpretation of the license, and extends it to include the right to use or sell rather than permit it to be practically void. Thus a license to make the invention, conferred upon a licensee in whose business the thing made is ordinarily employed, carries by implication a right to use it when constructed. A similar license to a manufacturer of articles for sale, who has no use for this particular article when made, authorizes him to sell as well as make it. The scope of the license is governed by the same presumption. A license to make an article which is covered by several patents, all owned by the same licenser, is a license under each of these patents, to whatever extent the making of the invention may require."

In Montross v. Mabie, 30 Fed. 237, the court said:

"A license to a man engaged in business to make and sell a patented article in his business generally, unless there were something else to restrict it, would manifestly be coextensive with his business, and would continue until his business was wound up. The licensee in such a case is not restricted to manufacturing with his own hands, or selling by his own personal efforts only. He may employ as many hands and as many salesmen and agents as his business will admit. So long as the articles are made and are sold in his business, and for his use and benefit, the sale would be within the license, though effected by the hands of hundreds of different agents and employés."

See, also, Steam Cutter Co. v. Sheldon, 10 Blatchf. 1, Fed. Cas. No. 13,331.

The object of Babcock in employing Kinney, so far as that employment had relation to patterns for a power press, was to obtain patterns and drawings by which he, as a manufacturer of presses for the trade, might make and supply the trade with presses built on the new design and from the new patterns. This fact was well known to Kinney, and when he accepted employment and produced an improvement it must be presumed that he intended that his employer would use that improvement in such new machines as he should make while engaged in the business of supplying such machines to the trade. We cannot reasonably liken this case to the building of a machine for use. In such a case the license might well be limited to the use of the machine so long as its identity was preserved. But here Kinney was to make drawings at the expense of Babcock, and then patterns by which a working press might be made for sale and not for shop use. In McClurg v. Kingsland, heretofore cited, the invention was for an improved mode of casting chilled rollers. The nature of the invention was such as to imply a license for the continued use of the mode during the life of the patent by the licensee. In Solomons v. U. S., heretofore cited, the invention was for a self-canceling stamp, which stamps were made by the government for the use of revenue agents. The license implied was not limited to the stamps made while Clark, the inventor, continued in the government service, but was held to be a broad license to make and use the stamps.

We are of opinion that the license to be presumed, on the facts we have stated, was not limited by the mere life of the patterns, but was intended as an authority to make and sell power presses embodying Kinney's improvement so long as Babcock should continue in business, and during the life of the patent. The decree must be reversed, and the bill dismissed, with costs.

THE DAKOTA.

WALSH et al. v. BROOKLYN & N. Y. FERRY CO.

(Circuit Court of Appeals, Second Circuit. March 5, 1895.)

COLLISION—FERRYBOAT WITH TUG—SPECIAL CIRCUMSTANCE RULE.

A ferryboat crossing the East river from Brooklyn was about to make her slip when she perceived a tug going up the New York shore. She thereupon blew one whistle, indicating an intention to cross the bows of the tug, slowed down, and stopped and backed as soon as danger became apparent. *Held* that, although she was the privileged vessel, the fact that she was about to make her slip was a special circumstance qualifying the rule requiring her to maintain her course and speed, and that she was not in fault for the resulting collision. 60 Fed. 1020, affirmed.

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

This was a libel by William E. Walsh and others, owners of the tugboat Olive Baker, against the steam ferryboat Dakota (the Brooklyn & New York Ferry Company, claimant), to recover damages for a collision. The district court dismissed the libel (60 Fed. 1020), and the claimant appeals.

The opinion of the district court, delivered by BROWN, District Judge, was as follows:

"The ferryboat Dakota, while crossing from her slip at Broadway, Brooklyn, to Grand street, New York, came in collision with the libelant's tugboat Olive Baker, at about half past 6 in the morning of August 15, 1893. The starboard bow of the ferryboat struck the starboard side of the tug about amidships, at an angle of from 2½ to 3 points. The time was about an hour and a half after low water at Governor's Island; and as the current in the East river continues to run down for about an hour and a half after low water, although there is a little upward current along the shores somewhat earlier, it is certain that there could not have been much flood tide to cause the ferryboat to deviate very greatly from a straight course across the river.

"Beyond the fact that the Dakota gave a signal of one whistle, almost every other circumstance in the case is a subject of most flagrant contradiction. The general theory of the libelant, to the effect that after the Dakota had given one whistle, and the Olive Baker had passed to the right, so that the boats were really out of all danger of collision, the Dakota, when pointing astern of the tug, and nearly straight down river towards the navy yard, gave two whistles and swung still more to port towards the Brooklyn shore until she ran upon the Baker far on the Brooklyn side of the river, is not only improbable in the highest degree, but is contradicted throughout by the respondent's witnesses. Such navigation by the ferryboat is inconceivable and cannot be credited. The burden of proof is upon the libelant. I cannot regard any part of his case as established. The Dakota gave no signal of two whistles; but after her first single whistle, she gave only an alarm signal of three whistles. The collision was near the New York shore. I find that the ferryboat pursued her customary course towards the Grand street slip; that there was but a slight flood current, and that she did not head down river, or towards the navy yard at any time, nor towards the southwest, though the pilot's mistake and confusion in testifying, or some error in his compass, gives a slight color to the libelant's contention in that regard. As soon as the Olive Baker was seen coming up near the New York side, threatening to go between the Dakota and her slip, the Dakota properly gave a signal of one whistle, slowed down, and afterwards stopped and backed as soon as danger from the Baker became apparent. This was in accordance with the rules of navigation. When her whistle was given, the Olive Baker had the Dakota on her own starboard hand, and was bound to keep out of the way. She could easily have done so, either by going to the right, as was her duty to do, or by stopping and backing; neither of which she did.

"I find that the Dakota did all that was required of her, by stopping and backing as soon as such action on her part was apparently needful to avoid collision; and that the collision arose from the failure of the Olive Baker to take proper and timely steps to keep out of the way."

W. W. Goodrich, for appellant.

F. A. Wilcox, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. The case was tried in the district court upon oral testimony which, except as to the giving of a signal of one

whistle by the Dakota, is extremely conflicting. It is unnecessary to rehearse the facts as found by the district judge. They are fully set forth in his opinion, and we do not find sufficient in the case to warrant a reversal of such findings. The libelant contends that, even conceding the signals and movements of both vessels to be as found by the district judge, the navigation of the Dakota was faulty in that, having given a signal of one whistle, as she was entitled to do, being the privileged vessel, thereby indicating an intention to cross the bow of the Baker, she thereafter stopped and reversed her engines, thereby confusing the navigation of the Baker, and inducing her to abandon the attempt to pass under the stern of the Dakota, and to endeavor to cross the latter's bow. The district judge, however, found that the collision happened near the New York shore, the Dakota being bound into her slip at Grand street, a special circumstance qualifying the rule that the privileged vessel should keep her course and, as libelant contends, her speed. The Baker knew that she was a ferryboat about to make her slip, and should have anticipated a checking of her speed. The difficulty with the Baker seems to have been that she maintained too high a speed to allow her to conform her own movements to the course of the ferryboat. Decree of the district court affirmed, with costs.

THE NORMA.

MERRILL v. SULLIVAN.

(Circuit Court of Appeals, Second Circuit. May 28, 1895.)

EVIDENCE—PROOF OF ACCOUNT—ABSENCE OF MEMORANDA.

A bill of particulars containing numerous items of work and materials may be proved, after destruction of the original memoranda, from which the account was made up, by the evidence of the bookkeeper that he correctly transcribed the memoranda, and the testimony of the persons who made and furnished the memoranda to him that the same were correct; but the proof is insufficient where it consists only of the bookkeeper's testimony as to the correctness of his transcription.

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

This was a libel by John W. Sullivan against the steam yacht Norma, Charles H. Merrill, claimant, to recover for labor and materials employed in making certain repairs. There was a decree in favor of libellant for $2,150.95, with interest, and the claimant appealed.

Henry W. Bates, for appellant.

Chas. C. Burlingham, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. The suit was brought to recover $4,122.87, for labor and materials in repairing the engines of the yacht Norma. After the libel was filed, the claimant paid libellant $2,000 on ac-

count. The district court referred it to a commissioner to take proofs and report the amount due. Libellant was employed to put the engines in repair and fit them up thoroughly in the best manner and as rapidly as possible, but no price was agreed upon in advance. The libellant served a bill of particulars, which fills 20 printed pages of the record, and avers in his libel that the work done and materials furnished were necessary and were reasonably worth the sum of $4,122.87. The issues raised by the pleadings were as to the doing of the work and furnishing the materials set forth in the bill of particulars, and as to the reasonable value thereof.

The report of the commissioner is simply: "In my judgment, the libellant has clearly proved his case, and I find that there is due him a balance [after crediting the $2,000] of $2,109.12." This is $13.75 less than libellant's claim, but the commissioner does not state what item or items he disallowed or reduced.

In the absence of any discussion of the case by the commissioner, it is wholly impossible to ascertain by what process of reasoning he reached his conclusion. There was evidence sufficient to sustain a finding that the prices charged for specific items in the bill were reasonable and customary. There is also abundant evidence to show that a great deal of work was done and much material furnished, and it is possible from the testimony to state, in general terms, the character and extent of libellant's services with sufficient fullness to enable persons familiar with work of that kind to estimate its value. A hypothetical question which recited the facts thus proved elicited from a witness called by the claimant an estimate of $2,200. No similar question was put to any of libellant's witnesses, and none of them who gave any estimate of a lump sum for the work had sufficient personal knowledge of what was done to testify to the value, except in reply to such a question. Presumably, the commissioner reached the conclusion that the libellant had proved his bill of particulars (except as to items aggregating $13.75) by competent evidence, but we fail to find such proof in the record.

The bookkeeper who made up the bill had but little personal knowledge of the correctness of any of the items. He made up the account from memoranda furnished to him, by foremen or other employés of libellant. When he had transcribed the several items from the memoranda to the account, he destroyed the memoranda, with some few exceptions. Under the rule laid down in Mayor, etc., of New York City v. Second Ave. R. Co., 102 N. Y. 572, 7 N. E. 905, it was competent to prove the charges by the testimony of the bookkeeper, who transcribed them from the temporary memoranda (which were substantially slate entries) supplemented by testimony of the persons who made the memoranda that such memoranda, to their own knowledge, were correct. The bill contains items of charge under 38 different dates. The character of these items is well illustrated by the charges under date of June 29th.

June 29.

1 file	.50
1 lubricator	2.90

1½ lbs. Tupper's [] flax packing	.80	1.20
1 lb. pure rubber		.40
1 ⅝ " stud. and hx. nut		.08
2 ½ " "	.07	.14
1 1½ " nipple		.17
8 1¾ " fin. hx. nuts. for C. H.	.70	5.60
9 hrs. fit. eccs. and straps	.35	3.15
4 " drill ecc. rod	.60	2.40
9 " fit. cylinder	.35	3.15
5 " lathe check valves	.60	3.00
17 " fit. air pumps	.35	5.95
6 " fit. brass oil cups	.36	2.10
1 day lathe valve stems and valve stuff box		6.00
3 hrs. fit. valve stems	.35	1.05
7 " " quadrant	.35	2.45
9 " " blower engine	.35	3.15
2 " " gland	.35	.70
2 " lathe bush for link motion	.60	1.20
3 " " pins " " "	.60	1.80
3 " drill link and block	.60	1.80
9 " fit. " " " "	.35	3.15
2 " " lever	.35	.70
2 " plan. rev. links		.60
9 " large lathe crank and int. shaft	1.00	9.00
1 " drill C. P boxes		.60
2 " fit. thrust collars	.35	.70
3 " patt. mak. on thrust collars	.45	1.35
2¾ days helper on eng. parts	3.50	9.63
¼ day patt. mak. on pist. valve and v. cover	4.50	1.13
1 hrs. forge valve stem and piston rod		.80
4 lbs. steel	.06	.24
4½ hrs. lathe blinder bolts and nuts	.60	2.70
54 hrs. foreman in charge	.50	27.00
352 " mach. & rigger on board	.35	123.20

A large part of these charges is for labor at rates per hour which vary with the character of the work done, or of the machine or tool used by the workman. Part of this work was done in the shop, and part on the yacht. The time of the men working on the yacht was kept by a foreman, who testified that the memoranda he made of the time of the men under him was correct to his personal knowledge. As to such items on the bill, therefore, as represent the time of the men on the yacht there was competent evidence sustaining them, before the commissioner, for the bookkeeper swears that he correctly transferred the items from the memoranda; and, although the master of the yacht testified that some of the men were frequently idle during working hours, the finding of the master on conflicting evidence would not be disturbed.

In the case of work done in the shop, the bookkeeper made up his account from memoranda furnished to him by the workmen, which he assumed to be correct, as he had only general knowledge as to the fact that they were working. These memoranda were destroyed, but as they were of the nature of slate entries that circumstance is not material, when the person transcribing them testifies to the accuracy of his transcription, and the persons furnishing them to their correctness. Each workman returned, on these shop memoranda, not only the hours he worked, but also the materials he used. The form of memorandum is as follows:

Date.	Name.
John W. Sullivan. Engine Works. 385 South Street.	
Hours. Tool.	Kind of Work. For Whom.
Materials used and what for.	

The difficulty with the proof on this branch of the case is that no one testifies of his own knowledge to the accuracy of these shop memoranda. Since the originals are destroyed, it would probably not be possible to produce specific evidence to the accuracy of each separate memorandum, but libellant should at least have called the workmen who made the memoranda to testify that all memoranda made by them and turned in to the bookkeeper during the period in question correctly set forth the hours they worked and the materials they used. Without such proof, the charges in the bill are supported only by hearsay evidence. Besides the charges for material used by a workman who returned his time on a shop memorandum, other material was sent direct to the yacht, either from the shop or from some outside place where it was bought. Except in a few instances, however, there is no competent evidence of the delivery of such material.

Upon the argument it was intimated that the court would make an independent examination of the entire bill in connection with the evidence, and determine what items are sustained by competent proof. It has become apparent, however, that without further evidence such a disposition of the case would work injustice to the libellant, who apparently, being misled by the commissioner's acceptance of his proof as sufficient to cover his whole charge, has failed to identify those items on the bill as to which the proof is legally sufficient. For example: The charge above quoted, "352 hours mach. & rigger on board," is evidently for work done at the yacht; the charge, "5 hours lathe check valves," is presumably for work at the shop, where the lathe is; but, as to such charges as "17 hours fit. air pumps," we cannot tell whether the work was done at the shop or on the yacht, and therefore whether it stands unproved or proved upon the record.

The decree of the district court is therefore reversed, with costs of this court to appellant, and the cause remitted to the district court, with instructions to refer it back to the commissioner to take such further evidence as may be offered, and report either the fair and reasonable value of the work and material as a whole or what items are proved, and the fair and reasonable value of such items.

PEARSOL et al. v. MAXWELL et al.

(Circuit Court, W. D. Pennsylvania. March 2, 1895.)

No. 1.

CONSTRUCTION OF WILL—ESTATES TAIL—BARRING REMAINDER.

A testator devised land to E., "to have and to hold the same to the said E. and the heirs of her body, provided, however, that the children of the said E. do not marry or be given in marriage to any of the children of my uncle J., or to any of his grandchildren, or great-grandchildren, or other lineal descendants of the said J.; but should any of the children of the said E. marry any of the descendants of the said J., the share of my estate of he, she, or they so marrying as aforesaid shall go to and become vested in the other child or children of the said E., share and share alike"; and the testator charged E. with the payment of a legacy of $2,000: *Held*, that E. took an estate tail, which became converted into a fee simple absolute by her deed executed agreeably to the Pennsylvania statute for the barring of estates tail.

This was an action of ejectment brought by William S. Pearsol and others against George C. Maxwell and others. In pursuance of a written stipulation, the case was tried by court without the intervention of a jury. The following facts were found by the court:

(1) This action of ejectment is for the recovery of the undivided one-half part of a tract of land situate in Luzerne township, Fayette county, Pennsylvania. (2) The plaintiffs and the defendants respectively claim title to said land under the will of Samuel N. Crawford, who died in the year 1853, seised in fee of said land, having first made his last will, dated May 15, 1853, which will was duly probated after his death, namely, on July 13, 1853, and is recorded in said county of Fayette in Will Book No. 3, page 86. Said will contains the following clauses: "Item. I give and devise to my cousin Edith Pearsol, daughter of Benjamin Sharpless, all that portion of the farm upon which I now reside, and bounded and described as follows, viz.: Beginning on the Monongahela river where my lands adjoin those of Joseph Crawford's and said river; thence north 74°, west 30 perches; south 83°, east 75 perches, to lands of William Crawford; thence south 14°, east 207 perches; thence north 89¾°, east 134 perches, to a post; thence along the lands of Joseph Crawford north ¼°, west 205 perches, to the place of beginning, on the Monongahela river aforesaid,—to have and to hold the same to the said Edith Pearsol and the heirs of her body, provided, however, that the children of the said Edith Pearsol do not marry or be given in marriage to any of the children of my uncle Joseph Crawford, or to any of his grandchildren or great-grandchildren, or to any other lineal descendant of the said Joseph Crawford; but should any of the children of the said Edith Pearsol marry any of the descendants of the said Joseph Crawford, the share of my estate of he, she, or they so marrying as aforesaid shall go to and become vested in the other child or children of the said Edith, share and share alike. The part of my farm above devised to Edith Pearsol contains one hundred and seventy-five acres by a survey thereof made by James Moffit. It is my will and desire and I do hereby bequeath to the said Edith Pearsol all my household and kitchen furniture, and that she shall pay to my cousin Benjamin W. Crawford, Sr., the sum of two thousand dollars within five years after my decease, without interest on the same." Said will (prout) is made part of this finding. (3) By deed dated June 10, 1858, William Pearsol and Edith, his wife (the above-named devisee), conveyed the said tract of land to Christopher Cox, his heirs and assigns; the said grantors declaring in said deed that it was their intention by said deed forever to debar any estate tail in possession, reversion, or remainder, which the said Edith had in the said land, which deed was executed, acknowledged, and recorded agreeably to the provisions of the act of assembly of January 16, 1799, for the barring of estates tail. (4) The defendants (or some of them) have succeeded to and are invested with the

title of Christopher Cox by virtue of sundry deeds recited in their abstract of title (prout). (5) Edith Pearsol died in April, 1893. Her husband died previously. (6) The land which is described in the writ of ejectment is the same devised in and by the above-quoted provisions of the will of Samuel N. Crawford. (7) The plaintiff William S. Pearsol is a son of Edith Pearsol, and the other plaintiffs are her grandchildren, being children of deceased children of Edith. If entitled to recover at all in this action, the plaintiffs would be entitled to recover the undivided one-half part of said land. (8) At the date of the will of Samuel N. Crawford and at the time of his death, seven children—three sons and four daughters—of Edith Pearsol were living. There were none after born. (9) None of the children of Edith Pearsol married in violation of the above-quoted provisions of the will of Samuel N. Crawford.

Edward Campbell and J. R. Ritchey, for plaintiffs.
Shiras & Dickey and W. G. Guiler, for defendants.

ACHESON, Circuit Judge. This case turns upon the question as to what estate Edith Pearsol took, under the will of Samuel N. Crawford, in the land in controversy. The plaintiffs maintain that the devise to Edith was for her life only, and that the remainder in fee was devised to her children. Obviously, however, this will contains no express devise to Edith's children. If they took anything, it was inferentially, and not by the positive terms which the testator employed to declare his intention. His disposing language is: "I give and devise to my cousin Edith Pearsol * * * all that portion of the farm upon which I now reside, * * * to have and to hold the same to the said Edith Pearsol and the heirs of her body." These are the aptest words for the creation of an estate tail. Standing alone, they would admit of no other interpretation. When, after the devise of the land to Edith, the testator subjoined the words, "to have and to hold the same to the said Edith Pearsol and the heirs of her body," it is difficult to conceive how he could have had in view any other purpose than thereby to define the quantum of estate which she was to take. What ground is there for holding that the words "heirs of her body" were used by him in the sense of children? The presumption, of course, is that the words were employed in their technical meaning. Ihrie's Estate, 162 Pa. St. 369, 29 Atl. 750. Now, "heirs of the body" are strictly and technically words of limitation. "Nothing can convert them into words of purchase but a clearly-expressed intention of the testator to use them in an abnormal sense." Linn v. Alexander, 59 Pa. St. 43, 46. Speaking of technical words used in wills, the supreme court of Pennsylvania, in Stone v. McMullen, 10 Wkly. Notes Cas. 541, 543, declared that the cases "show that the intent not to use the words in their legal sense must be unequivocal, and so plain that no one can misunderstand it." Certainly, no such clear intent is here discernible. It is to be noted that there are no words whatever in this will to restrict Edith's estate to her lifetime. Had that really been the intention of the testator, he surely would have so expressed himself. He knew very well how to do this; for, making provision in favor of Sarah Wellington, he provided that "she is to have a life estate in the first room in my mansion." Again, the fact that the testator imposed on Edith the payment of $2,000 to Benjamin W. Crawford, Sr., raises a presumption that the testator intended to give her an

estate greater than for her life. Lobach's Case, 6 Watts, 167, 171; Coane v. Parmentier, 10 Pa. St. 72. Moreover, the rule is to regard the first taker as the preferred object of the testator's bounty, and in doubtful cases the gift is to be construed so as to make it as effectual to him or her as possible. Wilson v. McKeehan, 53 Pa. St. 79. Still further, the language of the testator—"The part of my farm above devised to Edith Pearsol contains one hundred and seventy-five acres"—is very significant. It clearly evinces that in the mind of the testator Edith was his sole devisee of this land. This, indeed, she was, by the disposing words of the will. The succeeding provision touching the marriage of Edith's children is awkwardly expressed, and somewhat confusing. It does not, however, I think, import an intention to cut down the inheritable estate devised to Edith. If regarded otherwise than as a provision in terrorem, its purpose, it would seem, was to ingraft on the estate tail a condition or contingency subject to which it should descend from Edith. It does not militate against this view that the testator's language may, perhaps, indicate ignorance as to how an estate tail descends. This construction reconciles all the provisions of the will, and is consonant with the rules of law. An estate tail may depend for its continuance on the performance of a condition, or may be defeated by the happening of a contingency. The tenant in tail, however, may at any time before the happening of the contingency or breach of the condition bar the entail, in the manner provided by law, and thereby he defeats every contingent interest, and his estate becomes a fee simple absolute, free from all conditions and limitations. This was the effect of the deed to bar the entail executed by Edith Pearsol and her husband to Christopher Cox on June 10, 1858. The present case is closely analogous to that of Linn v. Alexander, supra, and the rulings of the supreme court in that case fully sustain the conclusion here reached, that the estate devised to Edith Pearsol was an estate tail, which was converted into a fee simple absolute by the deed to Christopher Cox. The court, therefore, finds in favor of the defendants, and it is ordered that judgment be entered in their favor.

ILLINOIS STEEL CO. v. PUTNAM et al.

(Circuit Court of Appeals, Fifth Circuit. May 28, 1895.)

No. 348.

1. RAILROAD COMPANIES—STOCKHOLDERS' BILL FOR RECEIVER — PROPERTY IN GREMIO LEGIS.

Where a stockholders' bill asks for the appointment of a railroad receiver, not with a view to enforcing any lien or debt, but merely to secure a better management of the property until arrangements can be made for discharging its debts, the mere filing of the bill and service of process do not draw the property of the company into the possession of the court, so as to prevent the company, prior to the appointment of a receiver, from surrendering steel rails lying along its right of way, but not yet attached to its road, to the creditor from whom they were purchased, as part of a larger lot, in partial extinguishment of debt for the purchase price.

2. INSOLVENCY—FRAUDULENT PREFERENCES—CORPORATIONS.
The surrender by a railroad company of certain steel rails and other property lying upon its right of way, but not yet attached to the road, to the creditor from whom they were purchased, as part of a larger lot, in partial extinguishment of the purchase price, is not a fraudulent or unlawful preference, though made pending a motion for the appointment of a receiver under a stockholder's bill which seeks to procure a better management of the property until its debts can be discharged by the stockholders.

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

This was a petition by C. M. Putnam and Sam Lazarus, receivers of the Texas, Louisiana & Eastern Railway Company, against the Illinois Steel Company, to recover from it certain steel rails and other property which were purchased of it by the railroad company, with other rails and materials, but which had been surrendered to it by the managers of the railroad company under an agreement for the partial extinguishment of the purchase price. The circuit court held—confirming the report of a special master—that the receivers were entitled to the property, and ordered that possession be taken accordingly. The Illinois Steel Company appeals.

R. S. Lovett and E. Parmalie Prentice, for appellant.

F. C. Dillard, H. L. Lazarus, I. D. Moore, and J. H. Luce, for appellees.

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

McCORMICK, Circuit Judge. In April, 1893, the Texas, Louisiana & Eastern Railroad Company purchased of the appellant, the Illinois Steel Company, about 700 tons of steel rails, with sufficient and suitable fastenings for placing the rails in its railroad track. These rails were delivered to the railroad company, and about 400 tons of them were placed in its track before November 29, 1893. On that day the president and manager of the railroad company, in the name of the company, gave to the appellant a chattel mortgage on the rails not yet laid in the track, but piled on the right of way of the railroad, to secure the unpaid balance of the purchase money of the 700 tons of rails. On the 25th day of December, 1893, Samuel A. Walker exhibited his bill against the railroad and against its president, Charles M. Putnam, to one of the judges of the circuit court for the Eastern district of Texas, averring that the complainant was a stockholder and bondholder of the railroad, and presenting the condition of the corporation, its property and management, asked for the appointment of a receiver to take charge of the affairs of the corporation, and to manage, operate, and maintain its line of road "until such time as it is meet that the corporation, through its legitimate and bona fide stockholders, shall, upon discharging its obligations to its creditors, assume possession thereof." The judge directed that the bill be filed, and notice be given the defendants to show cause on the 18th of January, 1894, why the relief prayed for should not be granted. The bill was filed December 29, 1893, and the required notice to defendants was served on them the next day. On the 15th day of January, 1894, the defend-

ant railroad company, by its president and manager, by written instrument duly signed, witnessed, and sealed, surrendered to the agent of the appellant the possession of all the rails and appurtenant fastenings remaining unused on the 29th of November, 1893, and included in the chattel mortgage of that date, with the right at any time, upon the refusal of the railroad to pay its indebtedness to the appellant, to rescind the original contract of sale, as to so much of the material thereby surrendered, for which, on such rescission, specified credit should be given by the appellant on the debt due it by the railroad. The rails and other material thus surrendered were on the same day (15th January) taken into the actual custody of the agent of appellant, and removed from the right of way of the railroad, where the material had been stored or piled, and were put on other ground, not under the control of the defendant railroad. The appellees were appointed receivers February 1, 1894. They claimed the surrendered material, as part of the property of the defendant railroad. The ownership of these 300 tons of steel rails and fastenings is the matter in controversy in this case. In the original transaction between the appellant and the railroad company, the property in these rails completely passed. It is not claimed that any lien for the unpaid purchase money was fixed on any of these movables prior to the giving of the chattel mortgage, on the 29th of November, 1893.

Appellees insist that Charles M. Putnam, as president and manager of the railroad company, had no power to make that chattel mortgage, because not authorized by a duly passed and registered resolution of the company's stockholders, and that he had no power on the 15th of January, 1894, to surrender the property to the appellant, and to provide for a rescission of appellant's sale made in April previous, and completed by delivery, because the railroad corporation was at that time insolvent, and the transaction was an unlawful preference of one creditor, and also because at that time the property had been drawn into the custody of the law by the filing of the stockholders' bill on the 29th of December, and service of notice on the defendants. If neither of these objections to the transactions had on the 15th of January is sound, it is wholly immaterial whether the objection to the chattel mortgage is sound or unfounded. Where a bill in equity brings under the direct control of the court all the property and estate of the defendants, or of certain named defendants, or certain designated property of all or of either of the defendants, to be administered for the benefit of all entitled to share in the fruits of the litigation, and the possession and control of the property are necessary to the exercise of the jurisdiction of the court, the filing of the bill and service of process is an equitable levy on the property, and pending the proceedings such property may properly be held to be in gremio legis. The actual seizure of the property is not necessary to produce this effect, where the possession of the property is necessary to the granting of the relief sought. In such cases the commencement of the suit is sufficient to give the court whose jurisdiction is invoked the exclusive right to control the property. Adams v. Trust Co., 66 Fed. 617,

and cases therein cited. Is the stockholders' bill here such a suit, as to the steel rails in controversy? We think it is not such a suit. We call it a "stockholders' bill," because it only seeks to secure the better management of the property, and expressly disclaims any right or wish to foreclose any lien or enforce any debt against the property of the defendant corporation. No specific mention is made of these steel rails, or necessary reference made to them, either in the bill filed on December 29, 1893, or in the order appointing the receivers, passed on the 1st of February, 1894. It does not appear in the original bill or the amended bill, nor in the subsequent order of the court, that the possession of this property was necessary to the exercise of the jurisdiction of the court. The contention that the surrender of this property as security for, or in part satisfaction of, the debt incurred by the purchase of it, and of a larger lot obtained from the appellant at the same time, was an unlawful preference of one creditor, is not supported by the authorities relied on, or by sound reasoning. The railroad company was not proposing or contemplating going out of business. The object of the bill was not to wind up its affairs, but to secure an opportunity for it to get into better shape, by the voluntary adjustment and satisfaction of its debts. No suggestion is made that appellant's claim of debt was not a just one, for an amount largely more than the value of these materials surrendered. It is not suggested that the credit stipulated for was not the fair and full value of the material at the time and place of the surrender. It could hardly be suggested by the receiver Charles M. Putnam that the settlement which President and General Manager Charles M. Putnam made pending the application for his appointment as receiver, or for a receiver, in answer to which he was appointed, was not fairly and judiciously made. While, if we exclude from our view the chattel mortgage, it is true that the appellant had no lien on this material it had furnished, and for which it had not been paid, the common conscience, uncharged and unobscured by technical distinctions, approves of the surrender of these materials to the unpaid original vendor. There is nothing in this case to take the transaction out of the operation of the law of natural justice. The decree appealed from is reversed, and the cause is remanded to the circuit court, with directions to pass a decree confirming the right of the Illinois Steel Company, appellant, to all of the rails, frogs, spikes, and other railroad iron and steel intended for use in laying railroad track, surrendered and delivered to the appellant under the contract of 15th of January, 1894, and providing that if any of the same has been put by the receivers into the railroad track, or has been otherwise disposed of by the receivers, so that it cannot be now restored to the appellant, then, for so much as has thus been used or disposed of, the receivers shall pay the appellant the market value thereof prevailing at the works of the Illinois Steel Company on February 25, 1894, plus the freight on said rails and fastenings paid by the Illinois Steel Company, and appropriating to such payment the amount deposited in the Merchants' & Planters' National Bank of the City of Sherman under the agreement of 16th of March, 1894.

ure of the court, and that all the citizens of a county not then registered as voters should be denied the right of suffrage during that pleasure. It seems to me that the mere statement of this view of the case shows that the injunction was improvidently granted.

LEE v. ELECTRIC TYPOGRAPHIC CO.

(Circuit Court, S. D. New York. May 28, 1895.)

1. SPECIFIC PERFORMANCE—TENDER OF CONSIDERATION.
   Complainant's bill alleged that he held a license under certain patents owned by defendant, and which defendant wished to dispose of; that he agreed to aid defendant in disposing of the patents, to surrender his license, and to assign certain patents owned by him, in consideration of one-fifth of any stock or other things of value received by defendant on the sale; that by his aid a sale had been made, upon which defendant had received a large amount of stock; that he had tendered an assignment of his patent and a surrender of his license; and that he was ready to transfer the patent, but did not specifically offer to surrender the license. *Held*, that a decree for specific performance might, nevertheless, be made, conditioned upon complainant's surrender of the license.
2. EQUITY—ENFORCING CLAIM TO STOCK.
   It further appeared from the bill that the defendant's patents had been sold, with complainant's concurrence, free from the license, which might accordingly have become merged, by estoppel. *Held*, that the bill, regarded as one to enforce complainant's interest in the proceeds, arising from his furnishing part of the thing sold, was not demurrable.

This was a suit by Homer Lee against the Electric Typographic Company for the specific performance of a contract. Defendant demurred to the bill.

Rush Taggart, for plaintiff.
Frederick Geller, for defendant.

WHEELER, District Judge. The bill alleges, in substance, that the defendant had patents on printers' composing, justifying, and stereotyping machines, which the defendant wanted to dispose of to another company, and under which the plaintiff had an exclusive right to make, use, and let for use, machines in the counties of New York, Westchester, Kings, Queens, Richmond, and Suffolk, in the state of New York; that the plaintiff had an agreement with one Graham for a patent for a similar device; whereupon the plaintiff and defendant agreed that, in consideration of the surrender of the license, the assignment of the patent of Graham, and of services to be rendered by the plaintiff in helping to effect such sale, the defendant would deliver and pay over to the plaintiff one-fifth of any stocks or other things of value which the defendant should receive in consideration of the sale; that the plaintiff spent much time in assisting to make, and with his aid was made, such sale to the Rogers Typographic Company, an assignee of the other company, for $445,000 of the capital stock of the Rogers Typographic Company delivered to the defendant; that the plaintiff afterwards tendered an assignment of the Graham patent, and of the

license, and demanded $80,000, one-fifth of $400,000 of the stock received, waiving the balance of $45,000, which the defendant refused; that the plaintiff still owns and holds the Graham patent and the license, and is ready to transfer the patent, on delivery of $80,000 of the stock, which has no recognized market value, and which he had reason to apprehend may be distributed among the stockholders of the defendant. The defendant demurs to the bill, and the principal cause of demurrer relied upon is the failure to aver readiness to surrender the license, as well as to transfer the patent.

This demurrer has been argued principally as if the bill was merely for specific performance, and the prayer is framed in that aspect; and unquestionably, as is insisted for the defendant, a plaintiff in such a bill, where the performance is sought by force of a mere contract, and things are to be done by each, must, by his bill, show himself able and ready to perform on his part. Relief in equity is, however, very flexible; and a decree could readily be made, as is frequent, that the defendant should do certain things, like making conveyances or transfers of property, upon the doing of other things by the plaintiff necessary to the protection of the defendant's rights. And in this case a decree for the delivery of the stock claimed to the plaintiff could readily be made conditional upon the transfer of the Graham patent and surrender of the license, whereby the defendant's rights concerning them would be protected; and the bringing of the bill, with allegations that the defendant has once tendered the license, and has it now, may so have brought the license within the reach of the court, as a part of the case, as to authorize the court to decree that, as well as the Graham patent, to the defendant, and to entitle the defendant to have it so decreed, as a part of a decree for delivery of the stock.

But the patents are understood to have been transferred to the Rogers Typographic Company as free from the license, and as this was done in part by the plaintiff's aid, and necessarily with his concurrence, his rights as licensee may have become merged in the title to the patents, and passed with it by estoppel; so that he furnished a part of the thing sold, and therefore has an interest in the agreed share of the price paid. And, by the terms of the contract as set forth, he would have a joint interest in the proceeds of the sale, having reference to the proportion agreed, for what he did and yielded in procuring it. In this aspect the bill is brought rather upon the plaintiff's right to the stock arising out of the transaction than for a conveyance of the defendant's title in specific performance of the agreement. In a bill to so ascertain and enforce his own interest in the stock, less particularity about averring readiness in respect to conveying the license might be sufficient. The allegations of the bill seem rather meager, but, on the whole, they appear to be sufficient to support a decree if taken pro confesso, and therefore sufficient to require an answer.

Demurrer overruled, and defendant to answer by the July rule

SARANAC LAND & TIMBER CO. v. ROBERTS.

(Circuit Court, N. D. New York. June 28, 1895.)

1. CONSTITUTIONAL LAW—SUIT AGAINST STATE.
   The mere fact that a defendant in ejectment is sued as comptroller of a state does not deprive the federal courts of jurisdiction, on the ground that the suit is against the state, where it is alleged in the complaint that the plaintiff is seised and entitled to the possession of the land in controversy, and that the defendant withholds possession unlawfully.
2. SAME—LAWS OF NEW YORK 1893, CH. 711, § 13.
   Laws of New York 1893, c. 711, § 13, providing that, under certain circumstances, the comptroller of the state shall be deemed to be in possession of wild, vacant, or forest lands, and that such possession shall continue until the comptroller has been dispossessed by the judgment of a court of competent jurisdiction, sanctions the bringing of a suit against the comptroller, as such, to recover possession of lands so in his possession.

This was an action of ejectment by the Saranac Land & Timber Company against James A. Roberts, as comptroller of the state of New York. The defendant demurred, on the ground that the court had no jurisdiction.

Weeds, Smith & Conway and Frank Smith, for plaintiff.

T. E. Hancock, Atty. Gen., and G. D. B. Hasbrouck, Dep. Atty. Gen. of New York, for defendant.

COXE, District Judge. This is an action of ejectment. The plaintiff is a New Jersey corporation. The defendant is the comptroller of the state of New York. The complaint alleges that the plaintiff is seised in fee simple and entitled to the possession of a large tract of forest land situated in Franklin county within the Northern District of New York and that the defendant, as comptroller, is in actual possession of said land and unlawfully withholds the possession thereof from the plaintiff. The defendant demurs upon the ground that the court has no jurisdiction, for the reason that the real party in interest is the state of New York and the state cannot be sued. The situation, then, is this: A citizen of New Jersey who is the owner in fee of land in this district sues in ejectment a citizen of New York who is in unlawful possession of the plaintiff's land. All this is admitted by the demurrer. The sole question is, does the fact that the defendant holds as comptroller of the state deprive the court of jurisdiction? As the issue now stands the defendant is a naked trespasser in possession of plaintiff's land without color of right. It is thought that the demurrer should be overruled on the authority of U. S. v. Lee, 106 U. S. 196–204, 1 Sup. Ct. 240; Tindall v. Wesley, 13 C. C. A. 160, 65 Fed. 731; Pennoyer v. McConnaughy, 140 U. S. 1, 11 Sup. Ct. 699, and cases there cited.

The court cannot anticipate what defense the defendant will interpose. He may seek to justify under an unconstitutional law, or a law conferring no valid title. If the allegation be true that the plaintiff is the owner in fee and entitled to the possession of the land in question it is not easy to see how he can defend under a valid law. The mere fact that he is sued as comptroller is not enough to oust the court of jurisdiction. The complaint shows nothing

more. But suppose the court proceeds a step further and assumes that the defendant is sued and will justify under chapter 711 of the Laws of 1893. Section 13 of that act provides:

"The comptroller may advertise once a week for at least three weeks successively, a list of the wild, vacant and forest lands to which the state holds title, from a tax sale or otherwise, in one or more newspapers to be selected by him, published in the county in which the lands are situated, and from and after the expiration of such time, all such wild, vacant, or forest lands are hereby declared to be and shall be deemed to be in the actual possession of the comptroller, and such possession shall be deemed to continue until he has been dispossessed by the judgment of a court of competent jurisdiction."

This section must be considered in its entirety. The last clause cannot be ignored. It would seem clear that it was the intention of the legislature to submit the question of the comptroller's title to the decision of a court having jurisdiction. It was conceded at the argument that the theory of the demurrer made the clause in question inoperative and would enable the defendant to seize and hold the property of others without being amenable to the process of any court. There is no occasion for so drastic a construction. In placing the comptroller in possession of the forest lands the legislature recognized the probability of controversies over his title and pointed out the manner in which such disputes should be decided. The plaintiff is pursuing the remedy of the statute. It is a suit sanctioned by the state. Reagan v. Trust Co., 154 U. S. 362, 392, 14 Sup. Ct. 1047.

The demurrer is overruled.

DAVIS v. CORNWALL.

SAME v. WAKELEE.

(Circuit Court of Appeals, Second Circuit. May 28, 1895.)

Nos. 5 and 6.

ESTOPPEL—BANKRUPTCY PROCEEDINGS—JUDGMENT.

After one D. had been adjudged a bankrupt, C., one of his creditors, who had filed a proof of debt founded on promissory notes, obtained leave from the bankruptcy court to sue D. in a state court on the notes, and thereafter duly recovered judgment. Subsequently D. applied for his discharge, and C., having filed specifications in opposition thereto, moved to dismiss such specifications, and cancel C.'s proof of debt, on the ground that C. had recovered the judgment in the state court, and that the same was in full force. The motion was granted, and C. acquiesced in the decision. *Held*, that D. was estopped to set up his discharge in bankruptcy in a suit afterwards brought against him on the judgment. Davis v. Wakelee, 15 Sup. Ct. 555, followed.

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

This was an action by Pierre B. Cornwall against Erwin Davis upon a judgment recovered by the plaintiff against the defendant in a court of the state of California. The circuit court rendered judgment for the plaintiff. Defendant brings error. Affirmed.

See Wakelee v. Davis, 37 Fed. 280, 44 Fed. 532, and 48 Fed. 612; Id., 15 Sup. Ct. 555, and Cornwall v. Davis, 38 Fed. 878.

Logan, Clark & Demond, for plaintiff in error.
Anson Maltby, for defendants in error.

Before WALLACE and LACOMBE, Circuit Judges.

WALLACE, Circuit Judge. This is a writ of error by the defendant in the court below to review a judgment for the plaintiff entered upon the verdict of a jury by the direction of the trial judge. The action was brought upon a judgment recovered by the plaintiff against the defendant December 18, 1892, in the district court of the Fifteenth judicial district of the state of California. The defense was that the defendant had duly obtained a discharge from all his debts, including the judgment, by a decree of the United States district court for the district of California in a proceeding in bankruptcy.

The ruling of the trial judge in directing a judgment for the plaintiff proceeded upon the theory that the defendant was estopped from asserting this defense by his conduct in the course of the bankruptcy proceeding. The correctness of this ruling is the principal question presented by the assignments of error.

Whether the defendant was estopped depends upon the following facts: It appeared that after the defendant had been adjudged a bankrupt the plaintiff, who was then a creditor of the defendant, and had filed a proof of debt founded upon various promissory notes made by the defendant, obtained leave of the court in the bankruptcy proceeding to sue and enforce his demands against the defendant in the courts of the state, and commenced a suit which resulted in the judgment upon which the present action was brought. After the judgment had been rendered the defendant applied in the bankruptcy proceeding for a discharge from his debts, and the plaintiff filed specifications in opposition thereto, setting up the existence of various grounds disentitling the defendant to a discharge. Thereupon the defendant applied to the court in the bankruptcy proceeding for an order dismissing the specifications of the plaintiff, and canceling the plaintiff's proof of debt. This application was opposed by the plaintiff, but was granted by the court. The petition on which the application was founded set forth as the only grounds the statement that after the plaintiff had proved his debt, and had obtained leave to commence an action in the state court, he commenced such an action in the Fifteenth judicial district court of the state of California, and recovered a judgment against the bankrupt, the defendant therein, and that said judgment still stood of record in the said court, and was in full force. The plaintiff did not attempt to review the order by a petition of appeal, or otherwise, but acquiesced in the decision.

Inasmuch as the sole basis for the order of the court in the bankruptcy proceeding was the averment in the petition of the bankrupt that the plaintiff had recovered the present judgment, and that said judgment was in full force, it would seem obvious that the decision embodied in the order canceling the proof of debt and dismissing the specifications must have proceeded upon the ground that the plaintiff, because of his judgment, had no rights or interests to

protect in the bankrupt court. This conclusion could only have been reached upon the view that the plaintiff's judgment could not be affected by a discharge of the defendant in bankruptcy. Manifestly it was the purpose of the petition to induce this view, and the object was accomplished by it.

The ruling of the trial judge thus presents the question whether the defendant, after having obtained a decision in the bankruptcy proceeding precluding the plaintiff from contesting his right to a discharge upon the ground that the discharge could not affect the judgment, can be permitted, when sued upon the judgment, to deny what he then asserted, and impeach as erroneous the order which he procured the court to make, to the prejudice of the plaintiff, while retaining its benefit himself. We think this question is settled adversely to the defendant by the recent decision of the supreme court in Davis v. Wakelee, 15 Sup. Ct. 555. That was a suit in equity brought in the United States circuit court for the Southern district of New York by the assignee of Henry P. Wakelee, alleging that she was about to commence an action at law in that court to enforce a judgment recovered by her assignor against the defendant in a California court, and praying for a decree in aid of such action, adjudging the defendant to be estopped from asserting a defense that the judgment was void for want of jurisdiction of the person of the defendant by the court in which it was rendered, and from setting up his discharge in bankruptcy as a defense. The estoppel claimed was predicated of facts precisely similar to those in the present case, viz. the recovery of the judgment by Wakelee after defendant had been adjudicated a bankrupt, and after leave to sue had been granted in the bankruptcy proceeding; the application of the bankrupt for his discharge, and opposition thereto by Wakelee; the application by the defendant in the bankruptcy proceeding for an order canceling Wakelee's proof of debt, and dismissing his specifications opposing the discharge; and the granting of the order, and the acquiescence of Wakelee therein. The petition upon which the order was obtained was identical with that in the present case, except as to the name of the creditor, and the date and amount of the judgment. The circuit court sustained the bill, and made a decree restraining the defendant from asserting the invalidity of the judgment. That court, however, declined to decide whether the defendant was estopped from pleading his discharge; holding that the complainant could avail herself of any such estoppel in an action at law, and did not need the assistance of a court of equity. Upon an appeal by the defendant from this decree the supreme court was of the opinion that the defendant was estopped from claiming that the judgment of the California court was void for want of jurisdiction, and affirmed the decree of the circuit court. That court, after considering the question whether the complainant could resort to equity, or could get the benefit of the estoppel in the action at law, and expressing the opinion that the remedy at law was not so plain or clear as to oust a court of equity of jurisdiction, proceeded to discuss the case upon the merits, and used the following language:

"It may be laid down as a general proposition that where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not, thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him. * * * It is contrary to the first principles of justice that a man should obtain an advantage over his adversary by asserting and relying upon the validity of a judgment against himself, and, in a subsequent proceeding upon such judgment, claim that it was rendered without personal service upon him. Davis may possibly have been mistaken in his conclusion that the judgment was valid, but he is conclusively presumed to know the law, and cannot thus speculate upon his possible ignorance of it."

This decision is controlling, and renders any discussion of the question now before us superfluous. The appellant attempts to parry the force of the decision by urging that the case then before the court differed from the present case, inasmuch as the estoppel was based upon the defendant's false assertion of fact in the bankruptcy proceeding that the judgment was in full force. The court, however, did not consider the case upon the rules applicable to the common estoppel which springs from the misrepresentation of fact, but put its conclusions upon the salutary doctrine of estoppel, which prohibits parties from playing fast and loose with courts of justice. Indeed, all the statements in the petition which was the basis of the order in the bankruptcy proceedings were matters of legal conclusion; and the court was of the opinion that although the defendant, in making them, was under a mistaken view of the law, that circumstance could not shield him from the effect of an estoppel. The plaintiff, as well as the defendant, was bound to know the law, and, by conclusive presumption, could not have been misled by the defendant's statement that the judgment was in full force, when in fact it was a nullity, because of want of jurisdiction of the court which rendered it. He was prejudiced, not by any false statement of the defendant, but by the conduct of the defendant in procuring a disposition of his legal rights by a judicial tribunal to his disadvantage, and for the benefit of the defendant; and if he chose to acquiesce the defendant ought not to be permitted now, with the fruits of his conduct in his hands, to assert that what he then maintained was a delusion, and that the disposition made was wrong.

The assignments of error impugn the rulings of the trial judge in admitting in evidence the arguments made by counsel in the bankruptcy proceeding upon the application for the order canceling the plaintiff's proof of debt and dismissing the specifications. It may be that the statements made on that occasion by the counsel for the defendant ought not to be imputed to and used as the representations of the defendant to the court. However this may be, the arguments were admissible for the purpose of showing what question was before the court; and in any event the admission of the evidence was innocuous, because, as we have shown, it was obvious from the petition itself that the order proceeded upon the ground that the plaintiff's judgment could not be affected by a discharge of the defendant in bankruptcy, and the trial judge would have been justified in so ruling without looking further.

We conclude that there was no error in the rulings of the trial judge, and that the judgment should be affirmed.

WHEELER v. CITY OF CHICAGO.

(Circuit Court, N. D. Illinois. May 28, 1895.)

1. PUBLIC LANDS — GRANT IN AID OF ILLINOIS & MICHIGAN CANAL — CONDITIONS.

In 1822 congress passed an act granting certain public lands to the state of Illinois for the purpose of a canal, and providing that a survey should be made in 3 years, and the canal opened in 12 years. In 1827 congress passed another act granting certain other public lands in aid of the canal and extending the time for commencing the canal to 5 years, and for completing it to 20 years, after 1827. In 1834 one W. made an entry of part of the granted land, and received a patent therefor. *Held*, that the grants to the state contained in the acts of 1822 and 1827 vested in the state of Illinois at once, the conditions as to filing maps and beginning and completing the canal being conditions subsequent; and W., being bound to take notice of such grants, acquired no title by his entry and patent.

2. CONSTITUTIONAL LAW—SUIT AGAINST STATE.

The state took possession of the granted land, and constructed the canal. In 1881 a joint resolution of the general assembly permitted the city of C. to erect pumping works on a part of the land, to supply water to the upper level of the canal, and such city erected and operated the pumping works accordingly. An action of ejectment was brought against the city by one claiming under the patent to W. *Held*, that the interest of the state in the land did not make the action one against the state, so as to defeat the jurisdiction of the federal court.

This was an action of ejectment by Hiram E. Wheeler against the city of Chicago. The defendant pleaded the general issue and a special plea denying possession. The case was heard by the court without a jury.

The plaintiff sued the city of Chicago, in an action of ejectment, to recover from the city, in fee simple, a piece of ground on section 30, in Canalport, Cook county, Ill., traversed by the bed of the Illinois & Michigan Canal, and including a portion of strips 90 feet in width on each side of the canal. He showed a connected patent title in himself under a cash entry made by one Welsh, in 1834, of a portion of section 30, including the premises demanded. It was shown in defense that the land in question was a part of the Illinois & Michigan Canal, as occupied and used by the canal authorities of the state of Illinois, and that it had been in such actual use since the completion of the canal. It further appeared that the premises in question are a part of the original channel of the canal; that in 1881, under the joint resolution of the general assembly of the state, the city of Chicago was permitted by the canal authorities to erect the pumping works now standing upon the premises, which, ever since their erection, have been in operation, and have caused a flow of water from the south branch of the Chicago river into the canal, thereby supplying the water for the first or summit level of the canal. These pumping works were erected by the city at its own expense, and city employés have since operated them under the provisions of the joint resolution. The city filed a special plea denying possession. The attorney general of Illinois, relying upon the grants to the state mentioned above, and the occupancy of the canal by the state, filed a suggestion for the dismissal of the suit for lack of jurisdiction. The point was made that the suit was practically an action of ejectment against the state to deprive it of a portion of the Illinois & Michigan Canal, and therefore within the prohibition of the eleventh amendment to the constitution of the United States.

Robert B. Kendall, for plaintiff.

Duncan & Gilbert and George L. Paddock, for defendant, and M. T. Moloney, the Attorney General of Illinois.

ALLEN, District Judge. In the common-law case of Wheeler against the city of Chicago, which was tried a couple of weeks ago,

I have reached a conclusion,—not having been able to write anything like an opinion in the matter,—and I thought I had better announce it this morning, it being uncertain how long I may be able to remain here, so the parties to the suit could take such action as they thought proper.

The first matter that my attention was directed to was whether I should take jurisdiction of the case, because of the state being substantially a party, and I heard arguments with pleasure upon that branch of the subject. I am inclined to think that that point ought not to be sustained; that the court ought not to refuse jurisdiction because of the interest that the state has, or the attitude of the state to the case. I reach that conclusion largely upon authorities cited by the defendant in the argument, and from the very nature of the question, and will pass over that view by saying that the court has overruled the jurisdictional point made.

The action is ejectment. There were the general issue and two special pleas. To one of the special pleas a demurrer was sustained. The other, which was held good, was a plea denying possession by the defendant, city of Chicago.

It seems, from the proof in the case, that on March 30, 1822, congress passed an act to the effect "that the state of Illinois be and is hereby authorized to survey and mark through the public lands of the United States, the route of the canal connecting the Illinois river with the southern bend of Lake Michigan, and ninety feet of land on each side of said canal shall be forever reserved from any sale to be made by the United States, except in cases hereinafter provided for; and the use thereof forever shall be and the same is hereby vested in the said state for a canal and for no other purposes whatever." There was a provision in the subsequent sections of that act of 1822 that a survey should be made in 3 years, and that the canal should be opened within 12 years thereafter. Again, March 2, 1827, congress passed another act on the subject, providing that there should be granted to the state of Illinois, "for the purpose of aiding said state in opening a canal to unite the waters of the Mississippi with those of Lake Michigan, a quantity of land equal to one-half of five sections of width on each side of said canal, and reserving each alternate section to the United States," with a proviso that the canal should be commenced within 5 years, and completed within 20 years. Under my view of the case, these grants—that of 1822, authorizing the state to survey through the public lands a route for the canal, connecting the Illinois river with the southern bend of Lake Michigan, granting 90 feet on each side of the canal to the state, and the grant of 1827 to the state, of a quantity of land equal to one-half of five sections in width on each side of said canal, to aid said state in opening a canal to unite the waters of the Illinois river with those of Lake Michigan—must be taken together; those two acts containing these two grants of right of way or strips of land, and land to aid in the construction of this canal to unite the waters of the Illinois river with Lake Michigan. The last act was a clear recognition by congress of the continuing force of the first one, and extended the time for the commencement of the work on the

canal for 5 years from March, 1827, and its completion for 20 years from that time. In the view I have taken of the entire case, the question of possession on the part of the state and its agents—a continuing possession for 20 years—will not be considered at the present time. That presents, or would present, for consideration, an important question, if the title of the plaintiff were different, or if it had been affected less by an outstanding title. The plaintiff, of course, must recover, if at all, on the strength of his own title. Assuming, for argument's sake, he has made a prima facie case by tracing back title to a sale made by the government of the land in question in October, 1834, to Welsh, the question of outstanding title must then be considered; that is, if a prima facie case has been made. Under the congressional grant of 1822 the strip of land in dispute became vested in the state of Illinois at once. A legislative grant operates as a law as well as for the transfer of the property, and has such force as the intent of the legislature requires. I have no doubt that the title vested in the state at once; that these conditions with reference to commencing the work, and the completion of the work, were conditions subsequent, and not, as claimed by plaintiff's counsel, conditions precedent. They were subsequent conditions, as I think our supreme court has held in a number of cases, and the supreme court of the United States in quite a number. I think it may be regarded as the settled law of the country now that the conditions as to the filing of the map of the location, etc., of the canal, and the commencement of work and completion of the same, must be classified as conditions subsequent, to be taken advantage of only by the grantor, or some one under the grantor, and not to be complained of, or taken advantage of, by any one else. These conditions were conditions subsequent, to be taken advantage of only by the grantor, by judicial proceedings authorized by law, finding the fact of forfeiture, and adjudging the restoration of the estate, or there must at least be some legislative assertion of the ownership of the property by the government. Nothing of that character appears in the evidence. The act of 1827 clearly extended the time for the commencement of the work until 1832 (5 years),—that is my understanding,—and its completion until 1847 (20 years). In 1829 it is shown in the evidence that Gov. Edwards forwarded to the department at Washington a copy of the survey and location of the canal. That was within two years after this act of 1827 was passed, and, there never having been a forfeiture, the grants were in full force and effect; and the state had title certainly to this strip of land, for I understand this is a part of the 90 feet. If I am right, then in 1834, when Welsh purchased from the United States, he was compelled to take notice of the two public laws referred to and the grants thereunder to the state, and, of course, could get no title from the government to the 90 feet on either side of the canal, then and ever since in the possession of the state for canal purposes. I understand from the evidence that men are there now upon the premises sued for, who trace back their authority and claim to the state. The state having taken possession and built a canal, there was nothing for the government to grant.

There has been no reversion and no forfeiture, but everything belonging to the government had passed out, so far as this particular 90 feet was concerned. The verdict will be, "Not Guilty."

MERCANTILE CREDIT GUARANTEE CO. OF NEW YORK v. WOOD et al.

(Circuit Court of Appeals, Second Circuit. May 28, 1895.)

CREDIT INSURANCE—MEANING OF "LOSS."

A policy of credit insurance insured the holder, to an amount not exceeding $10,000, against "loss sustained by reason of the insolvency of debtors owing the insured for merchandise." It also contained, besides various provisions as to loss to be first borne by the insured, other insurance, limitation of loss on individual debtors, disposition between insurer and insured of debts on which settlements were made or offered, etc., a provision that "in adjusting losses, * * * before determining the percentage of loss to be borne by the company, there shall first be deducted all sums paid, offered, and accepted, settled or secured, and the value of any security or collateral * * *." *Held*, that the "loss" insured against meant, not the whole amount due from an insolvent debtor at the time of his suspension, but the amount remaining due after deducting from such indebtedness any payments made by the debtor, and that a clause in the policy providing that when only a part of a loss was covered by it the proportionate part of everything realized should be credited to so much of the loss as the policy covered, did not change such meaning, but if said clause did not refer to the case of other insurance, and introduced an ambiguity, the doubt should be resolved against the insurance company, which prepared the policy.

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

This was an action by Charles F. Wood and others against the Mercantile Credit Guarantee Company of New York on a policy of insurance. In the circuit court, judgment was rendered for the plaintiffs. Defendant brings error. Affirmed.

This is a writ of error by the defendant below to review a judgment in favor of the defendants in error (plaintiffs below) entered upon a verdict recovered upon a trial in the circuit court, Southern district of New York, on October 26, 1894. The action was brought to recover the sum of $5,627.65 and interest, claimed by the defendants in error, partners in business under the firm name of Charles F. Wood & Co., under a policy of insurance executed by plaintiff in error, which insured the plaintiffs against loss sustained by reason of the insolvency of debtors owing the insured for merchandise sold and delivered. There was, upon the trial, no dispute as to the facts. The only controversy in the case was one of amount,—the amount for which a verdict should be directed for the plaintiffs. The defendant asked that the verdict be for the sum of $1,109.92 only, which amount the defendant admitted to be due on the policy, which motion was denied by the court. The plaintiffs asked for a verdict for $5,108.09 and interest, which motion was granted, and verdict directed accordingly. The assignments of error are—First, to the admission of certain evidence; second, to the court's refusal to direct verdict in accordance with defendant's request; third, to direction of the verdict for the amount asked by plaintiff. The first of these assignments has not been argued in this court. It has apparently been abandoned, and need not be considered.

A. J. Dittenhoffer, for plaintiff in error.

Albert Stickney and David Murray, for defendants in error.

Before LACOMBE and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge (after stating the facts). It will not be necessary to go into any elaborate analysis of the computations by which the losses sustained under this policy were adjusted. The main controversy is as to the interpretation of the word "loss," as used in the policy. The defendant contends that it means the amount of indebtedness due from the insolvent at the time of his suspension or failure. The plaintiffs contend that the word "loss" means, not the amount of indebtedness due from the insolvent debtor at the time of his suspension, but the balance of such indebtedness after deducting from the entire indebtedness the payments made by the debtor prior to adjustment under the policy; such balance only being, as plaintiffs claim, the amount actually lost by the insolvency of the debtor. The circumstance that the policy contains limitations as to the amount of loss by reason of the insolvency of each particular debtor for which the insurance company agrees to respond makes it necessary to determine which construction is the correct one. For example, if the debtor fails owing $15,000, and subsequently pays $10,000, and the policy limits the company's liability for loss sustained through him to $7,500, shall it pay $15,000, the whole debt, less $10,000, the payment on account, which difference equals $5,000, or shall it pay $7,500, the amount of risk it took, less $5,000, the proportionate part of the debtor's payment when distributed between the amount of the company's risk and the amount of credit extended to the debtor in excess of such risk, —a difference which, in the case assumed, equals $2,500? To determine this question it is necessary carefully to analyze the entire policy. For a consideration expressed, the company "insures Chas. F. Wood & Co., to an amount not exceeding $10,000, against loss sustained by reason of the insolvency of debtors owing the insured for merchandise * * * sold and delivered, in the regular course of business," between certain dates. "Loss by reason of the insolvency of debtors owing for merchandise," in the ordinary use of common speech, means such money thus owed as the insolvency of the debtor has prevented the creditor from collecting. If, notwithstanding the insolvency, the debtor pays a part of his debt, it is the unpaid portion only which is lost by reason of his insolvency. The clause above quoted limits the total liability of the company, in any event, to $10,000. Other limitations are provided for in the ensuing clauses. It is therein provided that the loss insured by defendant company is the loss sustained "in excess of the face of a bond of the American Credit Indemnity Company for the same term for $10,000, and also the initial loss stated therein, viz. one per cent. on the total gross sales and deliveries," etc. It is agreed by both sides that this so-called initial loss is $4,519.57. Therefore, there can be no recovery by the assured, under the policy in suit, unless the losses sustained, and which are within the terms of the policy, exceed the sum of $14,519.57 (the initial loss and the American Credit policy), and then only for such excess. The policy next provides that the defendant shall be liable only for losses which shall

be sustained on sales to debtors rated, both as to capital and credit, in a specified mercantile agency, and then limits defendant's liability to respond for individual losses by reason of persons thus rated as follows:

"Such losses to be included in the calculation of losses hereunder to an amount not exceeding thirty per cent. (30%) of the lowest capital rating of such debtor, according to the rating given him by the said mercantile agency, but in no case to exceed $7,500 upon any debtor."

By a rider annexed to the policy it is further provided that during the continuance of the bond of indemnity issued by the American Credit Company to Charles F. Wood & Co. for $10,000, with a $7,500 individual limit—

"The limit to any one debtor who, according to his or their capital and credit rating, would be entitled thereto, within the terms of this policy, is increased to not to exceed $15,000, upon the condition, however, that this company shall in no case be liable for any one individual loss exceeding $7,500, but that $7,500 is to follow after loss by same debtor of the full $7,500 individual limit named in said bond of indemnity of the American Credit Indemnity Co., or so much of it as may remain unexhausted."

In none of these clauses restricting liability is there anything tending to show that the phrase, "loss by reason of the insolvency of debtors," is intended to express any other than its ordinary meaning. The next paragraph is as follows:

"In consideration of the unsettled debts included in the calculation of losses remaining the exclusive property of the insured, twenty per cent. shall be deducted from the gross amount of said unsettled debts, subject to the right of the company to have an assignment of those unsettled debts, on which an amount or settlement offered by debtors has not been accepted by the assured, on payment of the net amount thereof by this company, without such twenty per cent. deduction, or such portion of such debt or debts as shall be covered by this policy, or said company may deduct the said amount or settlement offered in calculating losses thereunder, and leave such debts the property of the insured."

The following paragraph, which is found on a subsequent page of the policy, should be read in this connection:

"It is agreed that 'unsettled debts' means losses on which the debtor has not made settlement and been discharged, but no such settlement shall be considered discharged that has not paid the insured at least twenty per cent. Where less than twenty per cent. settlement has been made, it shall be calculated as if the insured had received that amount."

In the case at bar, claim is made for the loss sustained by the insolvency of four different debtors, with each of whom a settlement was effected by the insured, and the debtor discharged, upon the payment of more than 20 per cent. in each instance. The provisions above cited as to "unsettled debts," therefore, do not apply.

The policy next contains clauses requiring the insured to notify the company, on its notice of loss blanks, of the insolvency of any debtor, within 10 days after the insured receives information of insolvency, and that verified proofs of loss, on the blank forms of the company, must be presented within a specified time, "giving in de-

tail the losses sustained, and the facts which bring them within the terms of this policy"; that the insured will give such other information as may be required, will submit to oral examination, and permit an inspection of books, papers, etc. Then follows this paragraph:

"In adjusting losses under this policy, and before determining the percentage of loss to be borne by the company, there shall first be deducted all sums paid, offered, and accepted, settled or secured, and also the value of any security or collateral held by the insured, and all credits, trade discounts, and allowances to which the debtor was entitled, had the debt been paid at the time of the failure; also all cash discounts to which the debtor would be entitled at the time the company settles with the insured."

In plain, direct, and positive language, this paragraph indicates that what the company is to respond for is the net actual loss sustained by the insured, not the original indebtedness at the moment of insolvency, but so much of it only as is not made up to the insured by payments or settlements, or what he may realize from securities or collaterals. All thus received by him is to be first deducted, and afterwards the loss,—i. e. the real loss sustained will be adjusted, and the percentage of such loss to be borne by the company determined,—upon consideration of the restrictions as to the amount of individual indebtedness, the existence of other insurance, and what not. The policy then provides that when an offer of a debtor has been deducted, and the assured does not realize through such settlement the amount of the offer, then such debt shall be readjusted, the same as though such offer had not been made, provided that such settlements or refused offers are noted in writing at the time of adjustment, and the debtor's estate closed and deficiency ascertained within three months from the date of expiration of the policy. Next follows the clause upon which the plaintiff in error relies, and which will be quoted and discussed hereafter. Other clauses regulate the time within which losses shall be adjusted and paid, the time of commencing suit, the effect of fraud, concealment, or misrepresentation in obtaining the policy, and of failure to inform the company of additional insurance, and the result of the insured's ceasing to carry on business, or of his transferring it to another. It is further provided that in the event of the insured holding any other insurance the company shall not be liable for a greater proportion of the losses covered by the policy than the amount of the policy shall bear to the whole amount of insurance. The policy then defines the term, "loss sustained by the insolvency of debtors," and declares that it is "agreed to mean losses upon sales made by the insured to debtors who have made a general assignment for the benefit of their creditors, or who have been declared insolvent in legal or judicial proceedings, or whose business has been sold by the sheriff, marshal, or other public officer, under an attachment, execution, or other process, or against whom an execution has been returned unsatisfied upon a judgment obtained by the insured or some other creditor for sales of merchandise made during the period covered by the policy." It is apparent from this résumé of the elaborate document which evidences the contract between the parties that, except for the clause not yet quoted, there is noth-

ing to indicate that the word "loss" is used with any peculiar meaning. The clause on which plaintiff in error relies is as follows:

"When only a part of a loss is covered by this policy, the proportionate part of everything realized or secured by the insured shall be credited to so much of it as this policy covers."

It is contended that this clause requires the insured to apportion everything realized on account of indebtedness after insolvency, and before adjustment under the policy, in the proportion which the individual risk assumed by the company on the particular insolvent bears to the total debt of the insolvent at the moment of failure, on the ground that when the credit given exceeds the limit of individual risk "a part of the loss," only, is covered by the policy. If the words "loss" and "debt" are to be taken as interchangeable, the clause last quoted is susceptible of such interpretation, and, if standing alone, would tend to support the contention of the plaintiff in error. But there is nothing elsewhere in the policy to indicate that the phrases, "debt due at insolvency," and "loss sustained by reason of insolvency," are intended by the parties to mean the same thing, and, if the clause be given the meaning contended for, it is most flatly contradictory of the other paragraph quoted above, which provides that in adjusting losses, before determining the percentage of loss to be borne by the company, there shall first be deducted all sums paid or secured by the debtor. The result would be a contract ambiguous in its provisions as to adjusting losses and determining the amount to be paid by the insurance company; and as that contract is a voluminous document, prepared by the company, any ambiguity in its phraseology should be resolved against the draftsman. The clause under consideration may be susceptible of a construction which will not be contradictory of the paragraph providing that the loss sustained by the insured is to be determined by first deducting the amounts received on settlement. It apparently refers to cases where part of a loss is covered by one policy, and part by another. But if it cannot thus be brought into harmony with the rest of the contract, and the instrument, considered as a whole, is ambiguous touching the precise loss which the policy covers, that meaning is to be given to it which is most favorable to the insured. Allen v. Insurance Co., 85 N. Y. 475, and cases there cited. The meaning most favorable to the insured is expressed with clearness and precision in the earlier paragraph, whose provisions apply to the losses sued upon in this case, since no one of the four falls within the definition of "unsettled debts." In each instance the debtor made settlement and was discharged, and each settlement so made paid the insured more than 20 per cent. The adjustment of the several losses is as follows:

Sanford & Co.

Total indebtedness	$10,158 03
Received in settlement 27 per cent. cash	2,740 40
Loss sustained by reason of insolvency	$ 7,417 63
The liability of the company, however, for this loss, is limited by the provision as to "thirty per cent. of the lowest capital rating" to	$ 4,500 00

E. E. Kipling.

Total indebtedness	$16,173 62
Present value, when received, of notes accepted in settlement	7,743 16
Loss sustained by reason of insolvency	$ 8,430 46
Deduct loss of the full individual limit named in policy of the American Credit Company	7,500 00
Loss covered by policy in suit	$ 930 46

Cottier & Son.

Total indebtedness	$15,520 75
Present value, when received, of notes accepted in settlement	9,126 21
Loss sustained by reason of insolvency	$ 6,394 54

—Which is not limited by either of the clauses as to individual liability.

Goldsmith & Son.

Total indebtedness	$605 33
Received in settlement 50 per cent. cash	302 66
Loss sustained by reason of insolvency	$302 67

—Which is not limited by either of the clauses as to individual liability.

Recapitulation.

Sanford & Co			$ 4,500 00
E. E. Kipling			930 46
Cottier & Son			6,394 54
Goldsmith & Son			302 67
			$12,127 67
Initial loss	$4,519 57		
Policy in American Company to be first exhausted	$10,000 00		
Less amount already credited against Kipling loss	7,500 00		
		$2,500 00	$7,019 57
			$5,108 10

This being the amount for which, with interest, verdict was directed in the circuit court, the judgment of that court is affirmed

DICKSON v. UNITED STATES.

(Circuit Court, S. D. New York. June 3, 1895.)

No. 2,150.

1. CUSTOMS DUTIES—PRACTICE—PROTEST.
   Upon an importation of ginger ale in bottles, the collector added the value of the bottles to that of the ale, for the purpose of assessing the duty. *Held*, that the question of the propriety of such action was one of classification, not of valuation, and was properly raised by protest, not by notice of dissatisfaction.
2. SAME—GINGER ALE IN BOTTLES.
   In assessing duty, under paragraph 248 of the tariff act of 1894, upon ginger ale imported in bottles, the value of the bottles cannot be added to that of the ale.

This was an appeal from the decision of the board of general appraisers affirming the decision of the collector of the port of New York as to the assessment of duty upon certain merchandise imported by one Dickson.

Edward Hartley, for importer.
Jason Hinman, Asst. U. S. Atty.

TOWNSEND, District Judge (orally). In this case the importer entered certain ginger ale in bottles for duty at 20 per cent. ad valorem, under paragraph 248 of the tariff act of 1894. The collector added the value of the bottles to that of the contents, and assessed the duty on the sum of the value of the ginger ale and of the bottles, as thus ascertained, under the provisions of section 19 of the customs administrative act of June 10, 1890. The importer protested, and subsequently appealed from the decision of the board of general appraisers sustaining the action of the collector.

The attorney for the United States first claims that this court has no jurisdiction, inasmuch as this was a mere question of valuation of goods and reappraisement by the collector, in accordance with the provisions of said section 13 of said customs administrative act. As no notice of dissatisfaction was given by the importer, it is claimed that said decision was final. I think the evidence shows that the real question involved herein was not one of valuation, but of classification for duty, and that under the practice and the decisions cited by counsel the proper way to raise and dispose of the question was by protest.

The importer claims that said bottles are free by virtue of the provision in said paragraph 248 of said act of 1894. Said paragraph is as follows: "248. Ginger ale or ginger beer, twenty per centum ad valorem, but no separate or additional duty shall be assessed on the bottles." In Lelar v. Hartranft, 33 Fed. 242, it was held that this paragraph exempted bottles containing ginger ale from all duty. The ground of this decision, however, seems to have been that section 7 of said act exempted all usual coverings of imported merchandise from duty. Section 19 of the customs administrative act of June 10, 1890, provides as follows: "That whenever imported merchandise is subject to an ad valorem rate of duty, the duty shall be assessed upon the actual market value or wholesale price of such merchandise, including the value of all coverings of any kind," etc. The history of the legislation on this subject leaves the intent of congress in doubt. The long-continued practice of the treasury department supports the interpretation contended for by the importer. I conclude that the duty assessed in this case upon the bottles was a separate and additional duty. Inasmuch as paragraphs 88 and 90 of the present tariff act provide for special rates of duty on glass bottles, filled or unfilled, whether the duty be ad valorem or otherwise, these ginger-ale bottles would be dutiable thereunder if they were not exempted, in terms, from any separate or additional duty. The decision of the board of general appraisers is reversed.

KENT v. UNITED STATES.

(Circuit Court, S. D. New York. June 2, 1895.)

No. 1,801.

CUSTOMS DUTIES—TARIFF ACTS OF 1883 AND 1890.

The tariff acts of 1883 and 1890 were intended to be exhaustive, and to take the place of all prior legislation, and section 7 of the act of February 8, 1875, was thereby repealed.

This was an appeal from the decision of the board of general appraisers affirming the decision of the collector of the port of New York as to the imposition of duty upon certain merchandise imported by Percy Kent.

S. G. Clarke, for importer.

Jason Hinman, Asst. U. S. Atty.

TOWNSEND, District Judge (orally). The articles in question are empty grain bags, made of burlap, of foreign manufacture, having been used in the transportation of American products. The collector assessed the duty thereon at two cents per pound, under paragraph 365 of the act of October 1, 1890, and the board of general appraisers sustained the action of the collector. The importer claims that said bags are entitled to free entry under section 7 of the act of February 8, 1875. The sole question presented is whether said section of said act of 1875 has been repealed.

It appears that, after the passage of the tariff acts of 1883 and 1890, the treasury department admitted such bags free of duty, and continued to do so until August 22, 1893. In view of this fact, counsel for the importer invokes the application of the rule that the contemporaneous construction of a law by the officials charged with its administration is very persuasive evidence as to its proper interpretation, and, in cases of ambiguity or doubt, may be sufficient to turn the scale. An examination of said tariff acts of 1883 and 1890, and a consideration of the decisions thereon, have satisfied me that congress clearly intended said legislation to be exhaustive, and to take the place of all prior legislation. There is therefore no occasion for the application of said rule of interpretation.

The decision of the board of general appraisers is affirmed.

UNITED STATES v. WOODRUFF.

(District Court, D. Kansas. June 1, 1895.)

No. 2,715.

CRIMINAL PROCEDURE—ERRONEOUS SENTENCE—UNDETERMINED ISSUE.

A defendant was convicted, under Rev. St. § 4046, of embezzling moneys received by him as assistant postmaster. By consent of the district attorney, in view of the insolvency of the defendant, a verdict was taken upon the issue of embezzlement alone, without any finding of the amount embezzled; and the court sentenced the defendant to imprisonment only, without rendering judgment, by way of fine, for the amount embezzled.

For this error the judgment was reversed and the cause remanded for further proceedings according to law. *Held*, that the trial court was without authority to fix the amount of the fine without the verdict of a jury, and, as the two issues must be tried together, the defendant, having been once in jeopardy on the issue of the amount embezzled, must be discharged.

This was an indictment against Frank Woodruff for embezzlement. The defendant was convicted on trial in the district court. On writ of error to the circuit court the judgment was reversed, and the cause remanded for further proceedings. 58 Fed. 766. The district attorney now moves the court to take further proceedings according to law.

W. C. Perry, U. S. Atty., for the United States.
J. G. Waters and S. A. Riggs, for defendant.

PHILIPS, District Judge. The defendant was convicted in 1891, in this court, under section 4046, Rev. St. U. S., for embezzling moneys received by him as assistant postmaster at Lawrence, Kan., and was sentenced to the state penitentiary for a year and a day. On writ of error to the circuit court (this being prior to the act creating the United States circuit court of appeals) the judgment was reversed on the ground that the trial court failed to ascertain, and render judgment by way of fine for, the sum embezzled, as provided in said section. See Woodruff v. U. S., 58 Fed. 766. The order of the circuit court is that "the judgment of the district court of the United States for the district of Kansas is reversed, and the cause remanded to that court for further proceeding therein according to law." By assignment of the circuit judge, I am directed to sit in hearing the motion of the United States district attorney "for further proceeding therein according to law."

At the trial of this cause in 1891, the district attorney, being satisfied of the insolvency of the defendant, expressed his content with a verdict upon the issue of embezzlement, without any finding or judgment as to the amount thereof. The trial court adopted this suggestion of the district attorney, because it recalled the text in Cooley, Const. Lim. (6th Ed.) p. 403, that:

"If the legal punishment consists of two distinct and several things, as fine and imprisonment, the imposition of either is legal, and the defendant cannot be heard to complain that the other was not imposed also."

The case cited in support of this text (Kane v. People, 8 Wend. 211) holds that:

"The defendant may, on writ of error, object that the punishment is too great in its extent, or that it is different in form from what the law has prescribed; but where a party is subject to distinct and independent punishments for the same offense, if one of them is inflicted upon him by the sentence of the court, he cannot object that the court has not gone further, and inflicted the other punishment also."

The circuit court declined to give directions or to express opinion as to "the proper practice for the purpose of ascertaining the amount embezzled, with a view to the imposition of a fine which the statute requires shall be imposed," but did make reference to certain authorities which would seem to indicate that the inclination of the

court's mind was that the trial court might now proceed to enter up the proper judgment. It may be conceded to be the better established rule of criminal practice that where the trial court, after the coming in of a verdict of guilty, fails to render the proper judgment under the statute, on reversal for such error it may proceed to render the proper judgment. Reynolds v. U. S., 98 U. S. 168; Roberts v. State (Fla., 1892) 11 South. 536; Lacy v. State, 15 Wis. 13; State v. Smith, 6 Blackf. 549; Kelly v. State, 3 Smedes & M. 518; In re Bonner, 151 U. S. 242, 14 Sup. Ct. 323. So there would be no legal difficulty in now correcting the judgment by imposing the corporeal punishment of imprisonment for embezzlement, and adding thereto a fine for the amount embezzled, provided the statute in question permits the construction that where the indictment, as in this case, sets out the sum embezzled, a verdict of guilty thereon, without more, would be sufficient to authorize the court to assume that the amount stated in the indictment was found by the jury to have been embezzled, or if the meaning of the statute be that, on return of verdict of guilty, the court should proceed to fix the amount of the fine from the evidence in the case. The statute is silent on the subject. It does not provide, in terms, that the jury shall ascertain the sum embezzled. It would seem reasonable enough that the court should fix the amount of the fine, provided the statute contemplated a state of case where there was not any controversy as to the amount embezzled. But a statute like this, entitling the government to a judgment by fine against the defendant "in a sum equal to the amount embezzled," does not contemplate that the defendant, on a verdict of guilty of the act of embezzlement, should be concluded by the sum alleged in the indictment, as to the fine he should be called upon to pay. The statute, on the contrary, contemplates that there should be an ascertainment of the exact sum for which a fine may be imposed. On such an issue the defendant is entitled to his constitutional right of trial by jury, which he has not waived. Nor was the jury which tried the case charged by the court to ascertain, and return in their verdict, the amount embezzled by the defendant. Recurring to the evidence preserved in the bill of exceptions in this case, it must be conceded that the jury might well have found that the defendant embezzled a lesser sum than that charged in the indictment, and there was ground for reasonable difference of opinion among 12 honest men as to the maximum amount taken by the defendant. In such a conjuncture of affairs, what is the proceeding to be had "according to law?" The jury which tried the case have been discharged, and gone to their homes, and some of them may be dead, and the term of court at which the trial was had has passed. No warrant in law is known to this court for reassembling the jury to pass upon this issue. Can another jury be impaneled in the case? If so, would the whole of the issues under the indictment be submitted de novo, or the single issue as to the amount of the sum embezzled by the defendant? Ordinarily the reversal and setting aside of judgment is equivalent to an order for a new trial, in which the plea of autrefois convict would not apply, because the judgment was arrested upon the motion of the defendant. People v. Casborus, 13 Johns. 351. But

it is quite evident, from the opinion of the circuit judge, that it was not contemplated that there should be a new trial as to the embezzlement, because the opinion expressly holds that there was no reversible error on that issue, up to the time of entering the verdict in the case. The verdict on the question of embezzlement was, in and of itself, complete. On that verdict the statute authorized a judgment of sentence to imprisonment "for not less than six months nor more than ten years." It was on this view that the trial court conceived that the judgment (being responsive to this verdict, and in and of itself complete, as respects the corporeal punishment) was so far independent of the matter of the fine that the sentence for embezzlement could not be made to depend upon the fine,—the mere incident of the principal thing. But the circuit court has held, in effect, that the sentence of imprisonment is inseparable from the sentence of fine, and therefore the judgment of imprisonment for the act of embezzlement was reversed. And the trial court, in its opinion, being without authority to fix the amount of the fine without the verdict of the jury thereon, and the statute contemplating that the two issues of fact—as to the embezzlement, and the amount thereof—should be tried by one and the same jury, and the defendant having once been in jeopardy on the issue of fact as to the amount of his embezzlement, I see no escape from the conclusion, as a result of the reversal of said judgment, that the defendant must go "unwhipped of justice," and be discharged. Order of discharge made accordingly.

AMERICAN GROCERY CO. v. SLOAN et al.

(Circuit Court, S. D. New York. May 27, 1895.)

1. TRADE-MARKS—DESCRIPTIVE NAME.
   The word "Momaja," as applied to a blend of Mocha, Maracaibo, and Java coffees, is not so far descriptive as to be objectionable as a trade-mark.
2. SAME—INFRINGEMENT—"MOMAJA" AND "MOJAVA."
   A trade-mark consisting of the word "Momaja," as applied to a blend of coffee, is infringed by the use of the word "Mojava," applied to another blend of coffee.

This was a suit by the American Grocery Company against Bennett Sloan & Company to restrain the infringement of plaintiff's trade-mark. Complainant moved for a preliminary injunction. Granted.

J. C. Clayton, for complainant.
Wise & Lichtenstein, for defendants.

LACOMBE, Circuit Judge. In the year 1884, the firm of Thurber, Whyland & Co. devised and adopted a trade-mark for a blend of roasted coffee. The name thus adopted was "Momaja." This name is suggestive of a composition of Mocha, Maracaibo, and Java coffees, but certainly is not sufficiently descriptive to invalidate it as a trade-mark, under the decisions. See the "Cottolene" case (N. K. Fairbank Co. v. Central Land Co., 64 Fed. 133), and cases

there cited, sustaining "Maizena," "Cocoaine," "Valvoline," "Bromidia," and "Bromo-Caffeine." The brand was at once put on the market, was extensively advertised and largely sold, and became well known to the trade. In 1891 the right to this trade-mark passed to a corporation known as the "Thurber-Whyland Co." That corporation passed into the hands of receivers in 1893, and on June 30, 1894, the complainant duly obtained the trade-mark "Momaja" by purchase. From the time it was first adopted it has been in use, and sales of coffee under it have been made by the successive holders of the title.

The defendants, who are charged with infringement, are engaged in business as grocers in this city. Their western agent in Chicago, one Charles H. Smith, was for many years subsequent to the adoption of the "Momaja" trade-mark in the employ of Thurber, Whyland & Co., and of the corporation of the same name. Defendants make a blend of coffee, and wishing, as they say, to give their product a distinctive character, they devised a trade-mark about a year ago, under which they have since been offering their coffee for sale. The answer and affidavits submitted by defendants deny any intent to simulate or infringe complainant's trade-mark, "Momaja," which was well known to defendants. On the contrary, the defendants' affidavits, with great unanimity, assert that, at the time they undertook to devise their trade-mark, coffee sold under complainant's mark had deteriorated, and had obtained less and less favor in the market; that complainant's brand had no value; that the title "Momaja" was rather a drawback and detriment, hindering, and not assisting, the sale of coffee; that because "Momaja" had become so unpopular and unsalable they intended to strictly differentiate in the selection of their own title, for, as the affidavits assert, "it would have been the poorest business policy, without considering the question of good morals or ethics, to have attempted to work up a new brand successfully upon the fading reputation of the 'Momaja.'" The great object sought to be secured in the selection of defendants' trade-mark, as suggested on the argument, was "to get away as far as possible from 'Momaja.'" The result of defendants' efforts in that direction is somewhat startling. They selected the word "Mojava." Certainly they did not get very far away; in fact, from the point of view of a court of equity it looks much less like a departure than it does like an approach, and it may well be apprehended that if defendants continue to use the word "Mojava" they run considerable risk of confusion with the unpopular and unsalable brand from which they wanted "strictly to differentiate" their own title. In the light of decisions which find infringing resemblances between "Cottoleo" and "Cottolene," between "Cellonite" and "Celluloid," between "Wamyesta" and "Wamsutta," between "Maizharina" and "Maizena," between "Saponite" and "Sapolio" (see citations in 64 Fed. 135), there is little difficulty in disposing of this case. In the period of rest and quiet which will be secured by a temporary injunction, possibly defendants may renew their strength sufficiently to be able to get further away from "Momaja" the next time they try "to strictly differ-

entiate" their own goods. The case of Medicine Co. v. Wood, 108 U. S. 218, 2 Sup. Ct. 436, has no application to the facts of this case. No misrepresentation as to who is the manufacturer of complainant's coffee, nor as to where it is manufactured, is shown. The letters of Thurber referred to in defendants' affidavits are immaterial. They were written after the title to the trade-mark passed from the concerns in which he was interested.

Motion for injunction pendente lite is granted

CUERVO v. OWL CIGAR CO.

(Circuit Court, S. D. New York. May 23, 1895.)

UNFAIR COMPETITION—SIMULATION OF LABELS.

When a defendant has been enjoined from using a label almost identical with that of complainant, he will also be enjoined from resorting to another label, differing in detail from complainant's, but so like it in general appearance as to deceive consumers, if not trade experts.

This was a suit by G. Garcia Cuervo against the Owl Cigar Company and others to restrain the use of certain labels. A preliminary injunction was granted at the commencement of the suit. Complainant now moves for leave to file a supplemental bill, and for a second preliminary injunction against the defendant company.

Jones & Govin, for plaintiff.

H. Banning, for defendant.

LACOMBE, Circuit Judge. Defendant was enjoined, when this suit was begun, upon proof of the sale by it of cigars put up in boxes ornamented with labels so closely resembling those which mark complainant's goods that it was extremely difficult to find any variance between them. Subsequent to the granting of that injunction, defendant's officers appear to have searched the stock of certain lithographers who get up the ornamental dressing for cigar boxes, and, finding a set of labels which presented many points of difference when closely compared with complainant's labels, purchased the same, and now use them to dress up their own goods. Defendant's officers swear that in selecting these last labels they had no intention to infringe complainant's trade-mark, but, despite their affidavits, this court cannot escape the conviction that the present method of dressing up their goods was intended to deceive the purchasing consumer, and delude him into the belief that the cigars he purchases are those of the complainant. With an almost infinite variety of designs to choose from or to devise, it is remarkable that defendant should persist in one which, with differences of detail, still presents the same peculiar appearance of elaborate ornamental tracery work, combined with striking coloring, unless its object was to represent its goods as those of complainant,—to the consumer, if not to the trade expert. That this is the result is abundantly shown by the moving affidavits. Had defendant shown that there had been on the market other genuine labels than

the complainant's, resembling them even generally in the arrangement of ornamental tracery, the affidavits submitted on its behalf might have more weight; but, on the papers and exhibits now before the court, there is apparently an effort still to simulate complainant's distinguishing packages, and at the same time present a number of points of difference to argue upon when charged with infringement. It is apparently so easy for one who honestly seeks to sell his own goods as his own to dress them up in such a way that they may be recognized as his own, that, when he offers them to the public in a dress sufficiently like his neighbor's to deceive the average consumer, courts naturally suspect his motives to be such as his actions indicate.

Motions for preliminary injunction and for leave to file supplemental bill are granted.

AMERICAN BELL TEL. CO. et al. v. UNITED STATES.

(Circuit Court of Appeals, First Circuit. May 18, 1895.)

No. 121.

1. PATENTS—DELAY IN PATENT OFFICE—LACHES OF APPLICANT—MOTIVE.
   If an applicant is under no legal obligation to prevent delays arising from the acts or omissions of the patent office officials, there is no rule of law by which it can be said that, because he may have received an incidental benefit therefrom in the prolongation of his monopoly, his purpose in not more vigorously pressing his application was unlawful. One's motives will not make wrongful an act which is not in itself wrongful.
2. SAME—DUTY OF APPLICANT—DILIGENCE.
   There is no rule of diligence requiring an applicant, on pain of forfeiting his rights, to do, in the interest of the public, all the things which he has a right to do, in his own interest, for the purpose of pressing his application to a speedy issue.
3. SAME—BILL TO CANCEL PATENT.
   Upon a bill to cancel a patent on the ground that the patentee acquiesced in delays of the patent office whereby his monopoly was, in effect, prolonged, it is not for the court to say, under the circumstances of this case, that he was not entitled to use his own judgment in respect to what unofficial methods he might take, or the persistency of his representations to the public officials for the purpose of speeding his application.
4. SAME—UNDERSTANDING WITH OFFICIALS OF PATENT OFFICE.
   The existence of an understanding between the patent office officials and an applicant that further action should abide the result of certain litigation involving the applicant's rights is no ground for forfeiting a patent subsequently granted, though the delay in effect operated to prolong the patentee's monopoly, where the understanding was the result of the honest and independent judgment of both parties that this course was, on the whole, the best, and consisted in nothing more than a mere interchange of these views.
5. SAME—ERROR OF JUDGMENT BY COMMISSIONER.
   An error of judgment on the part of the commissioner in delaying action upon an application pending certain litigation which involved the applicant's rights, and the acquiescence of the applicant in such delay, is no ground for forfeiting the patent subsequently issued.
6. SAME—BILL TO CANCEL PATENT—BURDEN OF PROOF.
   Where a bill was brought by the United States to cancel a patent, on the ground of laches of the applicant in pressing his application to a final

issue, and it was contended that, by reason of the special circumstances of the case, he was under an extraordinary duty to the public to exercise the greatest possible diligence to move the patent office officials to speedy action, *held* that, assuming the existence of such an obligation, the burden rested upon the United States of proving that under some practical method or methods, not resorted to by the patentee, the action of the patent office would have been hastened.

7. SAME—CONSTRUCTIVE FRAUD.
A patent should not be canceled merely upon the ground of imputed or legal fraud arising from delay of the patent office, acquiesced in by the applicant, where there was no deceit, collusion, or corruption.

8. SAME—AUTHORITY OF COMMISSIONER—TWO PATENTS TO SAME PERSON FOR SAME INVENTION.
The issuance of a second patent to the same person for the same invention, under such circumstances that it is not clearly manifest that the inventions are the same, and that there might be a reasonable difference of opinion on the question of identity, does not involve such an excess of power on the part of the commissioner as will justify a court of equity in canceling the second patent, especially in view of Rev. St. §§ 4893, 4911.

9. SAME—TELEPHONES.
The Berliner patent, No. 463,569, for a combined telegraph and telephone, *held*, in a suit to cancel the same, not void on the ground of fraud, mistake, or laches in pressing the application to final decision in the patent office.

10. APPEAL—ALLOWANCE OF AMENDMENTS TO PLEADINGS.
On appeal by complainant from a decree rendered against him after final hearing in equity, the appellate court, on affirming, will not ordinarily reserve leave for an amendment of the bill which would require the taking of new evidence.

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

This was a bill by the United States against the American Bell Telephone Company and Emile Berliner to cancel patent No. 463,569, for combined telegraph and telephone. The circuit court entered a decree for the cancellation of the patent (65 Fed. 86), and the respondents appeal.

William G. Russell, James J. Storrow, and Frederick P. Fish (William W. Swan and William K. Richardson, on the brief), for appellants.

Causten Browne and Robert S. Taylor, for the United States.

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

PUTNAM, Circuit Judge. This is a bill in equity, filed February 9, 1893, signed in behalf of the United States by its attorney general, against the American Bell Telephone Company and Emile Berliner, containing a prayer in the alternative touching patent issued November 17, 1891, numbered 463,569, to the American Bell Telephone Company, as assignee of Berliner. The prayer is that the patent be in all things recalled, repealed, and decreed absolutely null, but that, if the patent is not deserving to be wholly repealed, but is repealable in part, a decree be made repealing only such parts as the court shall deem to be repealable. As to the latter part of this alternative prayer for relief the court has heard nothing, and there is no occasion to consider it.

The bill contains enough on its face and in its frame, and in its signature by the attorney general, to bring it within U. S. v. American Bell Tel. Co., 128 U. S. 315, 9 Sup. Ct. 90. But in the development of the proofs all allegations of affirmative or positive fraud dropped out; so U. S. v. American Bell Tel. Co. fails to reach the merits of this cause.

Berliner's original application was filed June 4, 1877, and patent 463,569 was issued more than 14 years thereafter. This patent is sufficiently described for the purposes of this case by saying in a general way that it covers the microphone. In addition to this, the American Bell Telephone Company, as assignee of Berliner, holds, or held, a patent issued to Berliner, November 2, 1880, numbered 233,969. It is represented that the patent of November 2, 1880, was a divisional one, growing out of the same original application which supports patent 463,569. It is also represented that this patent covers the invention described and claimed in patent 463,569, under such circumstances that the latter comes within Miller v. Manufacturing Co., 151 U. S. 186, 14 Sup. Ct. 310.

The pith of the case, as stated briefly by the counsel for the United States, is (1) that patent 463,569 is void for illegal delay in its issue, and (2) that it is also void on the ground that the prior patent, 233,969, "was granted upon the same application to the same applicant for the same invention." Each proposition will be stated hereafter more fully, and in the precise form in which it came to the court. Berliner, having no interest, need not be further noticed by us.

As to the first ground of proceeding, the case is found in the following extracts from the bill:

"On June 4, 1877, said Emile Berliner * * * filed in the patent office of the United States an application, executed in due form, asking a grant of letters patent for certain improvements in combined telegraph and telephone. * * * Upon said application such proceedings were held in the patent office that on November 17, 1891, a patent, numbered 463,569, was issued to the respondent the American Bell Telephone Company, as assignee of said Emile Berliner, * * * the title to which patent remains and is now in said American Bell Telephone Company, as owner of the entire interest therein. * * * And your orator alleges that said patent was unlawfully obtained by said respondent the American Bell Telephone Company, and unlawfully issued by the commissioner of patents, and is an illegal grant, and ought of right to be annulled, for reasons which are hereinafter set forth; and as an act of duty and justice towards the citizens of the United States, all whose rights and privileges are unlawfully and unjustly abridged by said patent, your orator brings this bill for the repeal thereof. * * * Your orator shows further on information and belief that after the filing of the application aforesaid by said Berliner, and at some time prior to October 23, 1878, said Berliner sold the invention described in said application and his right to a patent therefor to one of the predecessors and grantors of the respondent company aforesaid, viz. either to said Bell Telephone Company or said National Bell Telephone Company (corporations organized under the laws of Massachusetts), or both, the precise fact in this regard being unknown to your orator. * * * And your orator avers further that the broad claims of said patent 463,569, cover in their scope every form of constant contact telephonic transmitter which it is possible to make. * * * And pointing out the circumstance * * * that from the time of acquiring title to the invention of said Berliner, as aforesaid, until the issue of said patent 463,569, said respondent company and its predecessor or predecessors had control of said application of said Berliner, and at the same time owned the inventions and patents of Blake, Berliner,

and others, under which it was enjoying a monopoly of the use of the broad invention of the constant contact telephonic transmitter, your orator avers that there rested upon said respondent company an extraordinary duty to speed said application by every means known to the law, and that if, by any act or omission of said company, the issue of said patent 463,569 was to any extent delayed beyond the date when it might have been issued (if it could of right be issued at all), such delay ought to and does invalidate said patent. And your orator expressly charges that, so far from performing that duty, said respondent company, by a course of conduct which is hereinafter in part set forth in detail, designedly, and with intent thereby to prolong its monopoly aforesaid, delayed and prolonged the pendency of said application for more than thirteen years after it obtained control of the same as aforesaid."

Then follow various allegations stating in detail the delay in the progress of the application before June 9, 1882. These we omit, because the counsel for the United States now admit that no point is made for that period.

Then come the following:

"Your orator shows further that it is advised that it is claimed and pretended by said respondent company that from and after about June 9, 1882, the progress of said application was delayed in the patent office by the pendency of other applications which interfered or might have interfered with the application of said Berliner, and that for that reason it was impossible for it to procure the issue of said patent 463,569 at an earlier date than that on which the same was issued, which your orator denies, however, to be true; and your orator in that behalf avers the truth to be, on information and belief, that, while after the year 1882 said application was embraced in one other interference, it need not have delayed the progress of said application to any substantial extent, because it was upon a minor feature of invention, which could have been separated by division from said broad claims of invention as other minor matters were; and, further, that it did in fact occupy in the aggregate only three months out of the nine years which elapsed after said last-mentioned date. And, as to other pending applications which might or could have interfered with said application of said Berliner, your orator avers, on information and belief, that there were only two, of which one was an application by Thomas A. Edison, which was owned and controlled by said respondent company itself, and the other an application filed by one Daniel Drawbaugh, July 26, 1880. And your orator avers on information and belief that said application of said Drawbaugh was never, prior to the issue of said patent 463,569, completed or presented for allowance by the patent office in such form as to be allowable, independently of any interference with said application of said Berliner which could or might have been found to exist; and if, as said respondent company claims and pretends, the examiners of the patent office kept said patent 463,569 suspended from issue for nine years, waiting to see whether said Drawbaugh would present his application in such form as to warrant a declaration of interference between it and said application of said Berliner, such procedure on their part was contrary to law and the duty imposed on them, and it was within the power of the respondent company, by timely and proper assertion of its rights before the patent office, to terminate such unlawful delay, and secure final action on said application. * * * But your orator charges that said respondent company, being interested in prolonging such delay as aforesaid, countenanced and acquiesced in the inaction of the examiners of the patent office, and, though it made at long intervals some pretenses on the record of a desire that said application should be taken up and acted upon, it did not during all that time bring the subject of the extraordinary delay in said proceedings to the knowledge of the commissioner of patents, or in any way challenge the right of the examiner to keep said application waiting year after year for a possible interference with some other application, or take any step whatever to promote the advance of said application, all of which course of conduct amounted, as your orator avers, to a consent and agreement on the part of said respondent company to the unlawful and unauthorized postponement of action on said appli-

cation by the examiners of the patent office, and affects the said company with the same responsibility for said delay which would attach to it if the same had been by its express act instead of its express sufferance. * * * Wherefore your orator says the wrong and injury perpetrated upon the people of the United States by the issue of said patent 463,569, 14 years after the application therefor, has come about by the design, machination, and connivance of said respondent company, and by means of the abuse by it of the generosity and liberality of the government of the United States and the patent laws, and in justice and equity said company ought not to derive or receive any profit or advantage therefrom."

There is much additional matter bearing on these last propositions, but we have given enough to show this part of the case. There are also allegations that, prior to acquiring the invention of Berliner, the defendant corporation became the owner of the patent numbered 174,465, issued March 7, 1876, to Alexander Graham Bell, covering the transmission of sound by means of an undulatory current of electricity, and the same considered in The Telephone Cases, 126 U. S. 1, 8 Sup. Ct. 778; that patent 463,569, if valid, will continue without substantial diminution, during the full term thereof, the same close monopoly of the art of telephoning enjoyed under the patent to Bell; and that this is against justice and equity, and contrary to the plain spirit and intent of the patent laws. These are pointed out as circumstances on which the bill bases an alleged extraordinary duty of the defendant corporation to speed the Berliner application. If it were necessary to examine the motives of the American Bell Telephone Company, as bearing on a question of either positive or implied fraud, or on a question whether it did in fact speed the application of Berliner, and its purposes in relation thereto, these facts might become relevant as evidence, as might also the alleged great value of the microphone. But it is clear that all such allegations are irrelevant to the bill itself. So far as the law is concerned, the patent in suit is to be tested independently of the Bell patent. There can be but one law touching alleged delays in the progress of an application through the patent office, and touching the duty of applicants with reference thereto, whether the invention was from the outset seen to be valuable, or only afterwards proves to be so, or always remains of little account. To deny this is to deny that the laws are equal, and would furnish a standard for the determination of the rights of patentees too fickle and imaginative to form a proper basis for the use of a court of law. Therefore, we have not set out these allegations as proper portions of the bill, and do not deem it necessary to make further explanations in reference to them.

The following extracts from the answer of the American Bell Telephone Company sufficiently illustrate its defense on this point:

"In and by that patent, the United States, plaintiff herein, by its secretary of the interior, its commissioner of patents, and its various other officers in its patent office, by it duly appointed, employed, and empowered to make the grant, and to make, conduct, and supervise the examination and other proceedings which preceded it, announced and declared that it had found and adjudged that the said Berliner had duly presented a petition praying for the grant of letters patent for the invention and improvement in said patent, and its said specification described, had assigned the same to this respondent; and that he and this respondent had complied with the various requirements

of law in such case made and provided; and that, upon due examination made, the United States had adjudged said grantee to be justly entitled to said patent under the law. * * * The United States, plaintiff herein, had in fact so adjudged by its duly-authorized officers, after due, full, elaborate, and complete examination touching each and all such matters. Each such examination and decision was made by the officers whom the plaintiff held out as having, and who actually had, jurisdiction to make that examination, and to determine, regulate, supervise, and control the manner and form of the proceedings, and the whole conduct thereof. Those examinations and decisions were made with a full knowledge of all material facts. They included an actual consideration of all the objections set forth in said bill, and of the truth or falsity and legal effect of every matter therein alleged as matter of fact; and the patent was issued in consequence and as the result of conclusions intelligently and deliberately reached upon such examination and adjudication. Its grant was not in any degree the consequence or result of any fraud, accident, or mistake, as in said bill most falsely is alleged, or purports to be alleged, nor was there any violation of law or error in the proceedings upon which it was granted. This respondent and said Berliner, in the initiation and in the prosecution of the application which resulted in said patent, and in all the proceedings with relation thereto, in all respects conformed to and complied with the various requirements of law in such case made and provided; did nothing which in law, justice, or good conscience they ought not to have done; and omitted nothing which in law, justice, or good conscience they ought to have done. All their respective statements and representations were intended by them, and were believed by them, respectively, to express the truth. They disclosed and communicated to the patent office everything which it was their duty to disclose or communicate. They did not conceal nor attempt to conceal from any official of the patent office anything which they were bound to communicate, or which they believed that it was material for him to know. They did not deceive or mislead any such official, nor did they attempt nor intend so to do. They did not take advantage of any ignorance of any such official, nor attempt to do so; nor did they profit by any such ignorance or seek to. They did not commit any abuse of process, proceedings, or forms of law, nor contrive, attempt, nor intend so to do, and were not guilty of any fraud, concealment, imposition, or false suggestion whatever. They did not practice, nor attempt to practice, any fraud, deceit, suppression, or subterfuge, but in all respects conformed to law and to the highest good faith and honesty. * * * Whether Berliner's application was pending for a longer time than was necessary or proper this respondent is not sufficiently informed to fully admit or deny, and therefore requires the plaintiff to produce proof thereof, if material. But this respondent did not designedly, with intent to postpone the expiration of said patent and its rights thereunder, delay or prolong the pendency of the application, nor do any act tending to that end. Neither the pendency nor the progress of the application nor the issue of the patent in suit were delayed by any act, omission, or slowness of either respondent. It never omitted to take promptly every action which it was incumbent on it to take, or the taking of which it believed would hasten that issue. It never failed to prosecute the same promptly, and it used every means known to the law to speed the application, including applications to the commissioner in person as often as they seemed likely to result in speeding the case. It avers that the slowness alleged in the bill was the act of the plaintiff itself. Neither respondent in any way contributed thereto by act or by omission. Neither such delay, nor any action, inaction, or slowness which caused it or contributed to it, was in any way aided, promoted, due to, desired, intended, designed, contrived, countenanced, acquiesced in, or connived at, by either of the respondents; and neither of them is responsible therefor, nor for the consequences and results thereof."

To the answer replication was duly filed and proofs taken. The cause was heard in the circuit court, and there decided in favor of the United States, on each of the points we have briefly stated as being issues in the cause, from which appeal was duly taken to this court.

The case has been so thoroughly argued here on either side that the court has found little difficulty in apprehending it. We deem it prudent to refrain from determining ultimately any questions of fact, except so far as we find it necessary so to do in order to apply the appropriate rules of law. The bill alleges, in portions of it which we have not cited, that Berliner's application was abandoned at one stage of the proceedings. In order to correctly estimate the issue under discussion, it is necessary to note that this is not now relied on. The United States have somewhat variously stated their position, and our first duty is to understand precisely what it is. In the very lucid and careful opinion of the learned judge who heard this case in the circuit court, one statement of it is repeated as follows:

"The proposition is that the Bell Company intentionally delayed the prosecution of the Berliner application, and the issue of the Berliner patent, for the purpose and with the result of prolonging their control of the art of telephony, which would cease with the expiration of the Bell patent in 1893; and that they did this by submitting to delays on the part of the officers of the patent office, which delays they, the Bell Company, had it in their power to prevent, and refrained from preventing, for an unlawful purpose. This conduct is alleged to constitute a fraud practiced upon the public through the commissioner of patents and his assistants; and it is claimed that the patent so obtained by such fraud may be and should be annulled by the decree of the court, on the authority of U. S. v. American Bell Tel. Co., 128 U. S. 315 [9 Sup. Ct. 90], because there is no substantial difference between a fraud practiced upon the commissioner as an agent of the public and a fraud practiced upon the public with the commissioner's connivance or acquiescence."

This is far from precise. It uses the words "intentionally delayed," while it is necessarily conceded that there is no evidence to support that expression in its natural sense, and that the case comes down to a claim that the American Bell Telephone Company submitted to delays which it was in its power to prevent. It continues that the defendant corporation refrained from prevention for an unlawful purpose. The "unlawful purpose" is understood to mean an expectation that its monopoly would be extended through the delays on the part of the patent office. This, in some aspects, it might well regard as advantageous; but to undertake to lay down a rule of law or of fact that acquiescence in the delay of a public official who is bound to perform a certain act involves an unlawful purpose because it may result to the advantage of the applicant omits an important element. If the applicant is under no obligation touching the delay, there is no rule of law by which it can be said that, because he may receive an incidental benefit therefrom, his purpose in relation thereto is unlawful. A man's motives will not make wrongful an act which, in itself, is not wrongful. This came directly in issue, and was so given by Chief Justice Jervis, in Heald v. Carey, 11 C. B. 977, 993; but it is not necessary to cite authorities to this proposition.

This citation further states that there is no substantial difference between a fraud practiced upon a commissioner which is an injury to the public and one practiced on the public with the commissioner's connivance and acquiescence. This is probably a

true statement of the law, because either hypothesis involves positive and affirmative fraud of a public character; but of this there is no claim whatever in the case at bar as it now stands. We must therefore look somewhere else for an accurate statement of the position of the United States. At the hearing at bar the propositions were that the American Bell Telephone Company owed the public some duty in the matter under consideration; that that duty is to be sought in the principle of legal ethics that every man is bound to enjoy his own in such a manner as not to interfere with a like enjoyment of their own by others; that if the exercise of the rights of the American Bell Telephone Company under the Berliner application was liable to work injury to the public, in a way foreseeable by the company, it was bound to take notice of that fact, and conduct its proceedings in such a manner as to avoid that injury, if possible; that, if this situation imposed any duty on the American Bell Telephone Company towards the public, it was a duty commensurate with the interests involved; and that no doctrine of reasonable diligence will reach the case unless reasonable diligence is held to be the utmost diligence; and that it owed the public an extraordinary duty in the matter, which could be discharged only by the greatest possible diligence in the prosecution of its application. It was further claimed that the delays set up in the bill were unwarrantable and illegal; that the attitude of the American Bell Telephone Company towards them was not only one of consent, but of interested consent, of acquiescence, of guilty connivance; that the commissioner was betraying his trust in permitting these delays; that it knew this, and knew the practical effect of what he was doing; and that it was its duty to stir the commissioner to action, instead of refraining from so doing. It was further said that, if the American Bell Telephone Company had bribed the commissioner for holding Berliner's application from year to year for the purpose of prolonging its monopoly, this would plainly be a fraud on the public, through the commissioner; but that to reach the same result by an intentional reliance on his ignorance, incapacity, and neglect of duty, instead of his cupidity, and by conduct in keeping with such reliance, the same injury results to the public, with only the degree less of moral heinousness of behavior on the part of the applicant. We ought to say that all these epithets charging the commissioner or any other officer of the patent office with any conscious violation or neglect of duty, or ignorance and incapacity, are not sufficiently supported by the proofs in the case, unless it can be claimed that they constitute the language which the law applies in consequence of delays which possibly might have been prevented by the public officials. The United States having thus stated its position, we do not find ourselves required to recite the details of the proofs. It is enough to say that the case shows that all the allegations in the answer which we have quoted are sustained, except only that we do not deem it necessary for the purposes of this case to determine fully the condition of the proofs on the proposition that there rested on the American Bell Telephone Company an extraordinary duty to speed its application by every

means known to the law, as alleged in the bill, or to exercise the greatest possible diligence, as claimed at the bar.

During the progress of the arguments, the court anxiously looked for practical illustrations of what was meant by the high degree of diligence referred to, what practically could be done to satisfy its demands, and wherein, if accepted as necessary to relieve the applicant from the charge of a course of conduct unlawful or by implication fraudulent, it differed in its practical requirements from what was in fact done. The court failed to receive light in this direction; and it regards it as an answer to the proposition of the United States on this part of the case that what it did obtain was a mass of theoretical propositions, which, if applied practically, might or might not have involved the case, in its progress through the patent office, in greater complications and difficulties than those which did in truth surround it. In other words, so far as the proofs go, the course of the application was in accordance with the usages of that office, and was such as the officials there, acting in good faith and according to their practical experience, determined at the time to be on the whole the best. What would have been the practical result of the theoretical courses suggested, with an application around which centered so much powerful hostility as gathered about this one, it is impossible to ascertain by any methods of determination given to the courts. If, instead of suggesting theories as to what might have been done, the United States could have pointed out among the usages of the patent office an existing pathway other than that which was adopted, we would have some rule by which to estimate what could have been done in the exercise of extraordinary diligence other than was done.

One proposition of the United States, illustrating generally what they say might have been done, we give in the exact terms stated to us at the bar:

"The duty of the Bell Company was to get its patent with the least possible delay by the exercise of all its legal rights. Whatever it had a right to do to expedite an application in its own interest it was in this case bound to do in the public interest. If a situation arose in which the commissioner was not doing his duty, and in which it would have had a right to challenge his conduct in its own interest, it was its duty to challenge his conduct in the public interest. Its submission in silence to delay directed by the commissioner in violation of his duty was a failure in the discharge of its duty."

In its own interest, the American Bell Telephone Company had a right to go to congress for legislation touching the general course of proceedings in the patent office, as did the commissioner himself in 1889. It might have applied for the removal of subordinates for the purpose of substituting others who would attempt a more radical course of proceedings. It might have applied for the removal of the commissioner himself, and the appointment of a successor who would have turned his energies more in the direction of forwarding the application under discussion. It might have applied to the commissioner for a general revision of the rules of practice of the patent office. The imagination can hardly put a limit to the things it had a right to do. To say, therefore, that it was bound to do in the public interest all that it had right to do in its

own, and that, if it did not do this, it should pay the penalty of a forfeiture of an invention said to be extremely valuable, is a proposition so unreasonable that the mere statement of it by the United States seems to confess the weakness of their case.

Another suggestion of a general character in this same direction was made by the United States as follows:

"The officials of the patent office were guilty of gross dereliction of duty in their treatment of the Berliner application, but there is no reason to believe that anything would have been necessary to secure prompt and proper action by them except a fair, candid, full, strong, and persistent presentation of the facts by the Bell Company, with reasonably ingenious suggestions from it of ways of meeting the difficulties which were encountered in the progress of the application."

This is a merely negative proposition so far as it attempts to reach the defendant corporation without specification, while the case requires an affirmative one with specifications and proofs. But the proposition is that there was on the part of these officials a gross dereliction of duty. Indeed, in the presentation of the case of the United States we have heard very much in censure of the public officials, clothed in the strongest epithets, of which we have already given some instances. We are compelled to say that, if this record suggests any dereliction of official duty, it was in the form of a continued hostility to the American Bell Telephone Company, and of an indisposition to grant the application for the Berliner microphone, with a concurrent disposition to nurse and favor the Drawbaugh application, either for its own direct advantage, or for the purpose of defeating inventions controlled by the defendant corporation. Notwithstanding, as we have already said, the proofs do not convict the officials, they show enough to have warranted the American Bell Telephone Company in guarding itself against the possibility of such a disposition during the nine years between June 9, 1882, and the issuing of the patent now in dispute. Under these circumstances, and after the American Bell Telephone Company and its solicitors had performed the customary duties with reference to the forwarding of its application, including all those things required by statute or by the patent office, the prompt performance of all which is conceded by the United States, it is not for a court of law to say that that corporation, as to all the unofficial methods which it might take, or might omit to take, for the advantage of its case, was not entitled to use its own judgment with reference to the persistency of representation to public officers, especially those whom they had some reason to regard as unfriendly.

But there are more serious difficulties with this proposition. It relates, of course, to unofficial or informal solicitation, including personal interviews. So far as the presentation of the case was concerned, the proofs show that there was at least a reasonable and ordinary amount of this. But what the United States require, as we have already shown, was a high degree of zeal in this direction. Whether, however, the law's measure is that of reasonable diligence or the highest, the courts have no standard by which they can determine what amount of informal solicitation would have

been proper, all the formal channels of communication having been occupied, as they were in this case, or what amount would have been permitted by the public officers concerned; nor is there anything in this record which affords proof to the court that informal solicitations beyond those which were actually used would have been effective. It must be admitted that it is not only necessary for the United States to prove that there was a lack in this direction, but that the lack contributed to the result. The court might guess that additional informal solicitations would have advanced the application, or, perhaps, have retarded it; but there is no proof which enables us to form proper judicial conclusions on this point, and probably, from the nature of the thing, there could be none. If the record showed that the American Bell Telephone Company had failed to make the usual communications, whether oral or written, there might be something which the law could take hold of; but, as the proofs stand, the fact is otherwise.

The United States urge strenuously Machine Co. v. Keith, 101 U. S. 479, 485. This case related to the obligations of a patentee as towards alleged infringers, and not towards the United States or the public at large. It, moreover, differed essentially from the case at bar, because here the United States seeks to establish a rule, heretofore unknown in the general administration of the law, by which a person who has acquired a legal title is sought to be deprived of it on the ground of laches; while Machine Co. v. Keith related strictly to a question of abandonment, not as a conclusion of law, but as a matter of fact. But in Smith v. Vulcanite Co., 93 U. S. 486, where a similar claim of abandonment was set up, it appeared that the caveat was filed in May, 1852. The application for the patent was made in 1855, and was rejected three times, the third time being in 1856. Thus the matter lay until 1864, when a new petition was filed; and the patent was finally granted June 7, 1864, more than 12 years after the caveat was filed, and 9 years after the first application. The question was again purely one of intention, and the circumstances of the delay were met and overcome by the poverty and ill health of the applicant. The court, observing on this case in Machine Co. v. Keith, said, on page 488, that the patentee never relaxed his vigilance, he left nothing undone which he could do, and nobody had been encouraged by any action of his to appropriate his invention. His patent was sustained. It is to be borne in mind that, as the statute then stood with reference to each of these cases, the limitations now found in section 4894 of the Revised Statutes did not exist; so that the question stood on the common law. On the whole, in the cases of Smith v. Vulcanite Co. and Machine Co. v. Keith, in each of which the question was one purely of intent, facts of the character raised by the contention of the United States which we are now considering were clearly relevant, and easily and justly weighed and applied; but in the case at bar, where the proposition relates to the alleged legal duty of an inventor, the application of Machine Co. v. Keith, and by consequent necessity of Smith v. Vulcanite Co., would raise a crop of undefinable discriminations, according to the peculiar personal circum-

stances as to financial ability or inability, health or ill health, of different inventors, not recognized by the law wherever a positive duty is imposed. Indeed, the whole tenor of the case of the United States, so far as it is supported by the proofs, has this same aspect, through the appearance of requiring of the defendant corporation a degree of diligence and astuteness apparently greater than that which would be expected from other inventors.

These, we think, are the only general propositions made to us in illustration of the rule of diligence demanded, and we might properly dispose of the case on this general view of its substantial features; but its importance requires us to look at it somewhat closer, and to test it in detail at certain stages. The United States divide the history of this application into three periods: The first from June 4, 1877, to June 9, 1882; the second from June 9, 1882, to March 19, 1888; and the third from March 19, 1888, to November 17, 1891, when the patent issued.

We find it more convenient to discuss the third period in advance of the second. The United States dispose of it very summarily, and the learned judge of the circuit court was of the opinion, as we understand him, that there was no effort, so far as he could see in the evidence, on the part of the respondent corporation, to prevent the delay covering this period. One proposition of the United States was as follows:

"With the decision of the supreme court in the Drawbaugh Case, the event happened which, by the understanding which had subsisted for six years between the Bell Company, the patent office, and Drawbaugh, was to determine the question of allowance of Berliner's application. The decision was as sweeping and comprehensive as could have been expected. The court held that Drawbaugh's story was, as a whole, a tissue of fraud and falsehood. The Bell Company, assignee of Berliner's invention, and the People's Telephone Company, assignee of Drawbaugh's invention, were parties to the record. If it was possible for the court within the issues to decide the question of priority of invention between Berliner and Drawbaugh, it became res adjudicata by the decree. If it was possible for the opinion of the supreme court to have any persuasive force with the commissioner of patents, that persuasion was overwhelming. * * * As to the third period, the time following the decision of the supreme court (excepting the interval between May 9, 1888, and February 26, 1889, during which time the application was standing upon a rejection by the examiner and appeal to the board), the Bell Company knew that the only obstacle in the way of the issue of the patent was the pendency of Drawbaugh's applications. It knew that the bar of public use against those applications was inseparable, and hence that no interference could ever be declared. It knew that the highest court in the land had decided, in a suit to which both claimants, through their assignees, were parties, that Drawbaugh's claim of prior invention was unfounded. Was there no way in which it could enforce that which it knew, and could so clearly show, to be its right?"

We see no criticism touching the American Bell Telephone Company with reference to this period, except what is suggested in the interrogatory quoted. On the other hand, as we have already remarked, public officials receive the weight of the criticism, the United States having pressed on us the following views:

"No explanation can be given of these shameful proceedings in the patent office that will acquit the commissioner from an imputation of corruption, or an indifference to the rights of the public which would be scarcely less crim-

inal, except that he did not realize what was going on. The application was not before him personally, and it is only charitable to suppose that its existence, the character and scope of its claims, their relation to the art of telephony, and the effect which the delay in the grant of the patent would have in prolonging the monopoly of that art, were never present before his mind together, so as to give him a realizing sense of the gravity of the situation. As for the examiners, that excuse cannot be offered, or any other, unless it be that they had become so much the slaves of routine that they had no conception of duty, except to keep the applications in their hands rolling down ruts which had been worn by custom, and had become oblivious of all considerations of justice and right which exist apart from precedents and rules."

It is also said that a mere suggestion on the record that delay in this application was prolonging the monopoly of the microphone would have commanded instantly the co-operation of every member of the patent office corps in speeding its progress.

We may as well consider at this point, for the whole case, the propositions thus indirectly stated, that the commissioner was not personally advised of the true relations of this application, and that the American Bell Telephone Company was in fault for not bringing them personally to his attention. The record fully contradicts this. It shows beyond question that the Berliner and Edison applications, which went hand in hand, had become so notorious that the knowledge of them permeated the patent office from the head to the foot, and that the contest against them by Drawbaugh was so vigorous that it was impossible that any person, from commissioner to examiners, should not have understood their importance. The record shows by the testimony of four examiners, one assistant examiner, one commissioner, and one assistant commissioner, and by the reports of an additional examiner and five additional commissioners, as well as by three separate decisions of the board of examiners in chief, acting either on the Berliner microphone or Drawbaugh's application, that all these officials and official bodies had personal knowledge of the existence and pith of the controversy, and of the parties to it, and more or less of the details. The testimony cited by the United States touching an alleged agreement to await pending litigation in the suits known as "The Telephone Cases" (126 U. S. 1, 8 Sup. Ct. 778), which will be referred to more at length hereafter, states positively that at the time this alleged arrangement was made, which was in 1882 or 1883, "the whole situation was understood by the commissioner personally." In February, 1889, the commissioner directly interfered in the proceedings, under such circumstances that he could not have failed to appreciate the issues in the case. An examiner testifies that, for certain reasons which he explains, he constantly acquainted the then commissioner personally with all actions of importance which he contemplated, and solicited his views touching them. This commissioner was in office from the spring of 1887 to the spring of 1889. At one point, as already stated, the case shows direct personal interference by the commissioner. A formal request from the examiner to the commissioner for a disposition of the Drawbaugh application, under date of January 19, 1889, bears the following indorsement, under date of February 20, 1889, signed by the com-

missioner personally: "This matter is postponed. If not called up by the commissioner on or before the expiration of six months, the examiner will bring the case to the attention of the commissioner." The paper also bears a further indorsement, made exactly six months and one day subsequent, by the acting commissioner, as follows: "This matter is again postponed until further notice." Another indorsement appears under date of September 30, 1889, also signed by the commissioner: "This matter is postponed to Oct. 22, 1889, when, notice having been given, the order to show cause, dated Jan. 19, 1889, will be heard by the commissioner." That this series of postponements commenced by a personal order of the commissioner appears from the fact shown in the record that the commissioner informed the examiner that the solicitor general, who in this matter was acting as the attorney general of the United States, was conducting a suit against the Bell Telephone Company, being the same as U. S. v. American Bell Tel. Co., 128 U. S. 315, 9 Sup. Ct. 90, already referred to, and desired in the course of that suit to make use of Drawbaugh or some of his witnesses, and that he (the solicitor general) thought it would be prejudicial to his chances of obtaining the testimony desired if the patent office should at the same time prosecute a proceeding against Drawbaugh. This proof, of course, does not legally charge the solicitor general, as it is mere evidence of a conversation as to which he was not a party; but it leaves no doubt that at this point the commissioner took personal responsibility in the matter. The details touching the other postponements covered by the indorsements referred to we have no occasion to investigate. It is plain, therefore, the commissioners were at various crucial points personally acquainted with the magnitude of the controversy, and with some of its details. Knowing its magnitude, they knew, at least in a general way, that detriment to the public interests would come from delay in the progress of the case in the event that it was followed by the issue of a patent. This was all which it was necessary they should know, as it is the pith of the entire complaint of the United States. Having this knowledge, the claim of the United States that the American Bell Telephone Company should have suggested on the record, or anywhere else, that delay in the application was prolonging the monopoly of the microphone, falls, of course, to the ground, unless we accept the extreme proposition that it was the duty of that corporation to keep this fact constantly before the eyes of the commissioner personally.

It is not to be forgotten that among the difficulties which the Bell Telephone Company was forced to face was the fact that its application was twice rejected,—once during the first period named by the United States, and the second, under formidable objections, during the third period. A brief statement of the occurrences during the latter period was specially reported by the examiner to the commissioner under date of October 29, 1891. This report contained the following statement:

"The interfering application, by reason of which this application has been suspended and withheld from issue, contained claims for the same invention

as that herein claimed. It was therefore necessary to declare an interference if the interfering applicant could show that he was entitled to the claims except as regards the question of priority with Berliner. But the claims of the interfering applicant were under rejection for various reasons, and it was necessary that he be given opportunity to overcome the rejection. To this end he prosecuted his application. Finally, my immediate predecessor instituted a public use proceeding under the supervision of the examiner of interferences. This proceeding was sharply contested by the interfering applicant, and resulted against him; my decision based on the findings of the examiner of interferences having been affirmed by the board of examiners in chief, and the decision of the board having been yesterday affirmed by you. This decision removes the only impediment to the allowance of the Berliner application."

The Berliner patent was taken out almost immediately afterwards; that is, November 17, 1891. Subsequently, on December 13, 1892, at the request of the attorney general touching the pending suit, the secretary of the interior obtained a report from the commissioner of patents of the history of the patent. Both the commissioner and the secretary of the interior had before them a brief from the relator at whose suggestion this suit was brought; so that the issues were fully understood by them. The commissioner's report to the secretary of the interior contains an extract from the report of the examiner, to which we have already referred, as follows: "The office delay from October 23, 1883, to November 16, 1888, should not, so far as the records are known to me, have occurred." This examiner was not personally familiar with the unofficial and informal proceedings covering that period. But the report of the commissioner was such that the secretary of the interior answered the attorney general that it was "certainly true that from 1889 the case has been pressed to judgment without any delay that could be avoided." This means undoubtedly, in accordance with the dates given by the examiner, to include the whole of the year 1889, at least so much of it as the officials whose reports we are discussing were in office, which was from the early part of March. While the report of the secretary of the interior cannot be taken formally as governing this court, yet, in view of the facts to which we have referred and of others in the record, we unhesitatingly accept it as our own conclusion. It covers substantially the third period.

This disposes of all questions of diligence so far as this period is concerned, whatever may be the rule. But, for the purpose of further ascertaining in what manner the American Bell Telephone Company could have practically exhibited the degree of diligence required of it by the United States, we inquire, what obligation rested on it with reference to the interference of the solicitor general? He presumably represented the settled policy of the department of justice. In the line of criticism in this case, this supposed interference of the solicitor general has also been severely reprehended; but he is not on trial here, and has not been heard. We are to assume that he was engaged in the honest performance of what was regarded by him as a great public duty, in a legal contest of the gravest character with the American Bell Telephone Company itself, represented here as a wealthy, powerful, and influential antagonist. In reply to a question put from the bench, in what ef-

fective way this corporation could exercise with reference to this particular crisis the degree of diligence required of it by the United States, the answer was, by laying the case in all its relations personally before the solicitor general. The United States seem to assume that the solicitor general, as well as the commissioner, failed to appreciate the grave consequences, as now described, likely to arise from delay in acting on the application touching the Berliner microphone, and that it was the special duty of the defendant corporation to set him right. But, looking at the matter from the position of those accustomed to engage in large and important litigation, we cannot doubt that the counsel for the United States would be forced on reconsideration to agree with the court that, at the crisis to which we refer, any approaches by the American Bell Telephone Company to the solicitor general, having regard to anything which would weaken or hamper the prosecution of the then suit, would have been regarded with suspicion, and would have been entirely beyond and outside of the efforts reasonably expected from solicitors and counsel with reference to any pending hostile proceedings. Like every other proposition in the case having in view an explanation of the practical methods in which the American Bell Telephone Company could have exercised at various stages the extreme degree of diligence asked of it by the United States, this one fails to bear out any test whatsoever.

But the United States say that, during this period to which we are now referring, the commissioner made a ruling which, if availed of by the American Bell Telephone Company, would have promptly solved the pending difficulties. We refer to it, not for the purpose of going over the conclusions we have already stated on this part of the case, but as a further illustration of the ineffectual attempt of the United States to suggest practical methods available to that corporation. The United States point out that in May, 1888, the commissioner ruled that, notwithstanding the pendency of a probable interference or of an interference actually declared, the commissioner might, under the circumstances described in that decision, direct the issue of one of the patents involved. This was so clearly contrary to the long-settled practice of the patent office, and would so directly tend to involve the office in the embarrassing necessity, from time to time, of issuing two patents for the same invention to hostile applicants, that we find no mention of it further in the case, and no suggestion that any of the officials of the patent office ever afterward attempted to act on it. However, the American Bell Telephone Company, in 1886, soon after the decision of The Telephone Cases at the circuit, attempted to accomplish this same result, on the ground that that decision disposed of the Drawbaugh application. The matter came to the personal attention of the commissioner, who, in his reply of April 24, 1886, practically declined to acquiesce in this proposition, and suggested that an interference should be declared, reserving himself from prejudice touching such declaration if it came before him on appeal. But under the settled practice of the patent office, and the construction which that office had long given section 4904 of the Revised Statutes touching inter-

ferences, the declaration of an interference at that time clearly could not have been made. The commissioner was then new in his office, and, as his suggestion was not an order, it was not followed out. The American Bell Telephone Company, having attempted this once, and failed, may well be excused for not attempting it again.

Returning now to the second period named by the United States,—that is to say, from June 9, 1882, until the decision of the supreme court, in the spring of 1888, in The Telephone Cases, reported in 126 U. S. 1, 8 Sup. Ct. 778,—we will note at the outset that the report of the commissioner, accepted by the attorney general, to which we have already referred, reduces this period to one from October 23, 1883, to November 16, 1888; a matter of some five years. This, however, is of no consequence, except so far as it is explanatory of some other facts to which we may refer. June 9, 1882, the Drawbaugh application was still pending in the patent office. It had been rejected on the ground that the Edison carbon microphone and the Bell telephone had been in use more than two years prior to Drawbaugh's application. But Drawbaugh claimed that this public use was without his consent, and therefore did not affect him. It is also conceded by the United States, as well as claimed by the American Bell Telephone Company, that this rejection of Drawbaugh was not final, because, as said by the United States, "it was still open to him to traverse the fact, and have the question settled by public use proceeding." But it is said by the United States that the patent office could easily have disposed of Drawbaugh, because at that time the law was well settled that, under the statute of 1870, two years' public use, even without his consent, was fatal to him; and Manning v. Glue Co., 108 U. S. 462, 2 Sup. Ct. 860, is referred to as settling this point. This case was not decided until May 7, 1883. It did not involve this question; and what was said therein touching it was a dictum, and was never acquiesced in by Drawbaugh's solicitors. Whether the law can now be regarded as settled, in view of Andrews v. Hovey (decided Nov. 14, 1887) 123 U. S. 267, 8 Sup. Ct. 101, in consideration that it discusses the act of 1870, now section 4886 of the Revised Statutes, as well as the act of 1839, we need not consider. The American Bell Telephone Company was compelled, with reference to the progress of this application, to meet the practical condition of things, and we must put ourselves in that position. Therefore, whatever may now be said as to the theoretical side of the law, it is more appropriate to the purposes of this case to observe that Drawbaugh's solicitors did succeed in practically retaining his application under adjudication by the patent office, until near the close of October, 1891, as already stated.

But Drawbaugh made another difficulty, of perhaps a more serious character. The vigor and pertinacity with which the Drawbaugh application was maintained in hostility to the Bell interest went to such an extent that we may well infer from the record that even if the position of the United States, substantially to the effect that the American Bell Telephone Company is to be judged of in its performance of a legal duty according to its pecuniary ability, was sound,

it would be offset and neutralized by the financial resources, skill, and personal importance of whomsoever controlled the Drawbaugh interests. Not only was Drawbaugh pressing his own application, but it is admitted by the United States that he was opposing the issue of a patent on the Berliner microphone, on the ground of prior invention by himself, and was ready to file affidavits in support of his contention. What these affidavits would mean will appear from the fact that the Drawbaugh Case, in all its aspects, as opposed either to Bell, Edison, or Berliner, was a unit, and in either aspect involved the great bulk of the facts considered in The Telephone Cases, 126 U. S., occupying that entire volume (8 Sup. Ct. 778), and finally dividing that court by three judges in favor of Drawbaugh to only four against him. It was claimed by the United States at one point that this litigation did not involve the microphone, but, with a clear inconsistency, the United States, at another point in its argument at bar, rested one of its propositions as to the alleged duty of the commissioner at a certain crisis on the distinct ground that the circuit court had decided that Drawbaugh did not invent the microphone. The fact is that the entire dispute as between Drawbaugh, on one side, and Bell, Edison, and Berliner, on the other, turned on one and the same question, namely, the truth or falsity of Drawbaugh's story; so that, as testified to by the president of the American Bell Telephone Company, if Drawbaugh's story was substantially true, it cut up by the roots all that Edison and Berliner had done. Therefore, the affidavits which the United States say Drawbaugh was ready to file, with those in response, might be equivalent to the substance of the case found in 126 U. S. and 8 Sup. Ct. 778.

At one point in the argument the United States stated that the condition in June, 1882, was as follows:

"The examiner was refusing to issue Berliner's patent because Drawbaugh had an application pending for the same invention. He was refusing to approve Drawbaugh's claims because they were barred by public use. He could not declare an interference until that rejection was overcome, and he knew that it could not be overcome. Here was a deadlock!"

In partial explanation of this apparent deadlock, it is to be said that the practical construction of section 4904 of the Revised Statutes touching interferences, as given it by the patent office, is to the effect that no interference can be declared involving the claims embraced in any application, until those claims have been found to be patentable independently of the possible result of the interference. Therefore, the practice has been, on discovering claims apparently interfering, to hold back both applications until the patentability of each is determined, and then declare an interference. This produces very much the same result, so far as delay is concerned, as would follow if, with an ordinary bill of interpleader, no parties could be made to it, until after the right of each person sought to be made a party had been determined as against all the world except the other intended parties. By the admission of all, the course of proceedings had crystallized into that form, and the American Bell Telephone Company is not subject to just criticism if it accepted it as it found it.

In response to the solicitor of the American Bell Telephone Company the examiner wrote him on June 9, 1882:

"As at present advised, it is believed that the claims presented may be allowed; but final action in this case must be suspended in view of probable interferences with other pending applications, which will be declared as soon as possible."

It is admitted that the "other pending applications" included Drawbaugh. Nothing further was heard in this direction until October 8, 1883, when the solicitor having in charge the Berliner application wrote the commissioner, referring to this letter of June 9, 1882:

"Since then I have been awaiting the official action. I beg to call attention to the case, and ask that it may receive action."

The United States urge strenuously that the official record shows inaction between the dates of June 9, 1882, and October 8, 1883. The proofs of the informal proceedings show otherwise; but this is rendered of no consequence by the reply of the patent office, which came promptly within a few days, as follows:

"In response to applicant's letter filed Oct. 9, 1883, it is stated that further action in this case on the part of the office must be still further postponed, until the conditions of interfering applications will permit the declaration of interference, which seems unavoidable."

This renders unnecessary any consideration of the intervening period last referred to, because all the rules of equity require that it should, under the circumstances, be accepted as the adjudication by the United States, through the only officials to whom the respondent corporation could apply, that efforts during that period on the part of that corporation would have been unavailing. But the substantial complaint of the United States comes down to the proposition that during this period the application was suspended, and the patent held from issue, for "a single, continuous, and wholly insufficient reason." This reason is stated to be the awaiting of the decision of the Drawbaugh suit, embraced in The Telephone Cases, 126 U. S. 1, 8 Sup. Ct. 778, by virtue of an alleged agreement, to which it is said the commissioner of patents, the Bell Company, and Drawbaugh were all parties. The United States claim that this arrangement, whatever it was, was in terms an agreement, and an unlawful one. There was no allegation in the bill to this effect, nor do the proofs support it. There was undoubtedly a common understanding and a common consent. It is testified positively that the commissioner shared this common understanding, and that he personally understood the whole situation. We have already alluded to the testimony of the president of the respondent corporation to the effect that, if Drawbaugh's story was substantially true, it cut up by the roots all that Edison and Berliner had done. He also added that the quickest thing to do was to try the case in the court where it was, and that, by common consent, the Berliner application waited till the determination of that suit. The examiner at one time in charge of these conflicting applications also testified that he felt, and believed it was felt and understood by all parties, that it would be a much quicker and more satisfactory way of determining the

whole question to await the decision of the courts. He also testified that it was the tacit understanding between the office, and, as he understood, the parties in interest, that the proceedings then being had in the courts would be the best solution of the difficulty.

When this agreement, arrangement, or understanding, whatever it was, was first entered into, has not been pointed out to us; but the correspondence, to which we have already referred, between the office and the solicitor of the defendant corporation, running to October, 1883, indicates that it had not taken form at that date, or that it was understood that it was purely of an indefinite character, especially with reference to the time for which it was to run. It may also be questioned whether, when it first took form, it extended beyond awaiting the decision at the circuit. However this may have been, there is nothing in the case to show that the parties undertook to enter into an agreement. The evidence and the reason and probabilities of the thing satisfy us that whatever common consent there was to abide the result of the litigation was the consequence of the independent judgment, formed fairly and honestly,—at least by the officials of the patent office and by the representatives of the American Bell Telephone Company,—that on the whole this was the best thing to do; and the common consent consisted only in the interchange of these views. Now, can it be said that, under the circumstances, this common judgment, and the so-called "common consent" arising from it, were not wise? Before we can condemn, we must put ourselves in the position of the parties at the time, with all the surrounding difficulties, and assume to understand them better than the gentlemen concerned on either side, with the extensive practical experience which all of them possessed. But assuming that it was not wise, that, under the circumstances, the commissioner made an error of judgment, that it was his duty to have proceeded regardless of the pending litigation, and that also the American Bell Telephone Company committed an error in sharing his judgment, is this court to impose on this corporation the penalty of losing its valuable patent on that account, and give the United States, whose officers also shared in the same error, the entire benefit of the penalty? On every principle such a conclusion would be an outrage on justice, and in violation of the fundamental rules by which the law refrains from imposing punishments on parties who honestly exercise their judgments under the existing circumstances, especially circumstances of difficulty. The United States claim also that the position was changed when the decision was made at the circuit in the litigation referred to in December, 1885. In speaking of this litigation while in the circuit court, we will, for convenience, though somewhat inaccurately, describe it as "The Telephone Cases." In direct inconsistency with their proposition, made in another connection, that the microphone was not in issue in this litigation, the United States in this connection insist, as a substantial and important proposition, that it was at this time decided that Drawbaugh never invented the microphone at all. Assuming this all to be true, and that the de-

cision on appeal to the supreme court should not have been awaited, yet there can be no criticism against the American Bell Telephone Company on this score. The examiner testifies that, soon after the decision of the circuit court, its solicitor urged the passage to a patent of both the Berliner and Edison applications. The result of this was that the examiner, who testifies that he acted on his best consideration, made personally the communication to the commissioner, of April 23, 1886, to which we have already referred, asking his direction touching this request. His reply was given on April 24, 1886, to which we have also already referred, not granting the request and suggesting the declaration of an interference. This, under the law as understood at the patent office, was impracticable, as we have already explained. The American Bell Telephone Company had done all that reasonable usage required of it, and after this the case drifted along until the decision of the supreme court was announced in March, 1888, and the third period commenced, which we have already disposed of.

The events which we have recited give us another opportunity of showing the inability of the United States to furnish a practical rule by which to test the high degree of diligence which they require. On being asked what course was practicable at this period to answer their demands in this direction, they seem uncertain what method should have been adopted. The United States at one point say that the commissioner could have read the evidence in the infringement case (meaning The Telephone Cases) for himself, and decided the question of priority on the facts there shown. Of course, a request of the commissioner to do this, or to cause it to be done by any one in the office, would have been fruitless. The principal suggestion of the United States on this score was worked out at great length, and apparently with much labor, but it need be only briefly stated by us. It commences by explaining a practice of the patent office, which came into force February 6, 1883, by which, on an issue of public use, hostile affidavits cannot be filed except subject to cross-examination by the applicant. It then suggests that, on the strength of the applicability of this practice, an issue of prior invention might have been made. It is said this would not have been strictly an adversary proceeding, as it would have been solely for the information of the commissioner; that, therefore, it would have been under his control; and that, instead of permitting the examination of the mass of witnesses who testified in The Telephone Cases, the commissioner might have said to Drawbaugh, "Produce a dozen of those who know most about your invention, examine them in the presence of Berliner, and let him cross-examine them!" or, the United States say, the commissioner might have fixed a limit of time, instead of the number of witnesses, and then there would have been no excuse even for consuming more than 60 days in the investigation. But for this proposed method of proceeding the United States show no hewn path. There is no evidence in the record that any such proceeding ever took place in the patent office. It is likewise merely theoretical. The practical sum-

ming up of all these various suggestions is that the American Bell Telephone Company is in effect censured for not reforming the practice and the officials of the patent office. We think this demand is without parallel or precedent; that the case may justly be stated in this form; and that, when thus put, it shows itself so revolutionary as to require the legal mind to reject it on the mere statement.

The case has been strenuously pressed on the court as one to which should be applied the legal maxim, "Sic utere tuo ut alienum non laedas." But the attempt to apply this merely brings us back to the investigation of the same legal propositions. The United States seem to assume, as is frequently done, that this is a maxim of universal benevolence, and that the word "laedas," and the word "injure," into which it is commonly translated, are each to be used in the general sense, and not in that of the law. This is entirely a mistake. The words are used in this connection in their primary and technical sense. Literally translated, the matter relates only to injuries committed to property; but Broom's Legal Maxims, in the note to page 327, gives as its true substantive meaning, "So use your own property as not to injure the rights of another;" and in the text he states the general rule to the same effect. He sums up his discussion touching this maxim by laying down the principle that one must use and enjoy his own property so as "not to affect injuriously the rights of his fellow subjects." He also says, in the same summing up, that, where rights conflict, we must consider whether their exercise is not restrained by the existence of some duty; "and," he continues, "whether such duty be or be not imposed, must be determined by reference to abstract rules and principles of law." So it is plain that no attempt to apply this maxim would relieve us from the necessity of doing what we have already done; that is to say, from ascertaining from sources outside of the maxim what obligations the law imposed on the American Bell Telephone Company under the circumstances of this case.

We have thus shown, by testing at various points, that the United States give no practical rule for measuring in this case the obligation demanded by them; that is to say, "an extraordinary duty, which could be discharged only by the greatest possible diligence in the prosecution of the application." Therefore, if there was any such obligation, the United States have failed to meet the burden resting on them of proving that any lack of compliance with it had any practical result in producing the delays complained of. It would, indeed, be quite plausible to declare that the American Bell Telephone Company, with all its resources, could have found some way to break the deadlock if it had earnestly desired so to do. This is, in fact, what the United States say. Perhaps this is true. But the courts have never yet been vested with authority to deprive any person or corporation of property or rights on the strength of any such mere assertion, nor without allegations and proofs in a definite and practical form. The lack of these, under the circumstances we have explained, aids the proposition that

there is no such obligation, as claimed by the United States. There is no precedent brought forward by the United States to support their position, nor has this court found any, either in this department of the law or in any other. Nor does the proposition of the United States rest on any principle which can be supported by authority from any quarter; or by any method of reasoning which connects it with any fundamental legal doctrine. By granting a patent for a meritorious invention the United States parts with nothing which it before had, but only recognizes and supports for a limited period the equitable title of the patentee. We think this is the first instance in which either the people or the king, wherever the common law prevails, has sought to revoke by legal proceedings, on the ground of imputed or merely legal fraud, a grant of this character, issued to a subject after full official knowledge of all the facts, where there has been no deceit, collusion, or corruption, and where the subject duly complied with all statutory and departmental requirements, merely because the officers in charge have been dilatory, and the subject failed to use zeal in spurring them on. The law goes quite far enough in protecting the state against the acts and omissions of its agents, without our pushing it to the extreme of adopting this heretofore unheard-of proposition. We do not, however, intend to have it inferred that we have determined that the law requires any degree of diligence beyond a compliance with statutory provisions, official regulations, and the formal demands from time to time of the public officials charged with duties under the patent law. We do not determine that any degree of laches whatever will forfeit a patent once granted, reserving, of course, cases of abandonment, and other cases where, through laches, the equities of strangers have become established, neither of which classes are involved in the suit at bar. Congress, in sections 4894 and 4904 of the Revised Statutes, established certain fixed periods for giving progress to applications for patents, which the supreme court has so far recognized by analogy as to apply the limitation to a bill in equity filed under section 4915 of the Revised Statutes. Gandy v. Marble, 122 U. S. 432, 7 Sup. Ct. 1290. The United States ask us to establish a period of limitations other than fixed by statute, and we do not decide that, under any circumstances, we have any authority so to do. We merely determine that the case of extreme diligence, as made by the United States, cannot be maintained.

While the delay in this case was unusual, it was not unprecedented. We have referred to Smith v. Vulcanite Co., 93 U. S. 486, where the patent was granted nearly 9 years after the application was filed, and nearly 12 years after the caveat was deposited in the patent office. The appellants have shown from the record that, during the two years of 1893 and 1894, 49 patents issued, with an average of 10 years after the applications were filed, 10 of them 10 years or over, and several of them 14 years or over; and they well observe that the number of these long-pending cases is enough to show that something in the patent-office system produces them. Although the case shows that the applications of commissioners

to congress have been fruitless for relief, yet, so far as we can discover, the executive departments must still turn for that purpose in that direction, and not to the courts.

The second ground of complaint of the United States is stated in the following language:

"On September 3, 1880, Berliner filed an application which professed to be a division of his application of June 4, 1887, on which division a patent was granted November 2, 1880, numbered 233,969, which patent was assigned to the Bell Company on April 1, 1881. It is alleged in the bill that this patent covers the invention described and claimed in the patent in suit No. 463,569, and that it exhausted the authority of the commissioner in respect to that invention, and that the commissioner was therefore without jurisdiction to issue the subsequent patent."

At the bar the United States rested on this point on Miller v. Manufacturing Co., 151 U. S. 186, 14 Sup. Ct. 310, already referred to. The principle of this decision is evident, and was stated as early as 1865, in Suffolk Co. v. Hayden, 3 Wall. 315; and it appears from the record that it was recognized by the patent office before Miller v. Manufacturing Co. was decided. We may remark that the facts in the case at bar on their face are not like those of Miller v. Manufacturing Co., as here the two patents claimed to interfere were not issued to the same applicant; and the acquirement, after it issued, by the American Bell Telephone Company of the Berliner patent of November 2, 1880, would not necessarily estop the assignee. Nevertheless, as this point is not made in the answer, it may be that the case raises an estoppel, of which the parties were aware, not brought to the attention of the court. Therefore, we are compelled to investigate this question independently of this suggestion. This statement of the issue renders it unnecessary to refer to the pleadings, except to so much of the answer of the American Bell Telephone Company as alleges that the question now raised by the United States was, in the progress of the application for the patent for the Berliner microphone, made the subject of special consideration by the examiner and the board of examiners in chief. The examiner on this point decided against the American Bell Telephone Company, as assignee of Berliner, but the board reversed the examiner; so that, in consequence thereof, the patent now in dispute was duly and formally issued. The examiner and the board had before them all the facts bearing on this branch of the case which we now have, and understood the law as stated anew in Miller v. Manufacturing Co.; so that the patent was issued under no mistake of either law or fact. The most that can be claimed by the United States is that the officials of the patent office, having all the law and facts before them, erred in the exercise of their free judgment in the determination that the earlier patent did not cover the invention described and claimed in the later one. Even were this so, the result was not a mistake in the sense of the law in its application to the cancellation of deeds and other instruments; but it was merely an erroneous determination of the ultimate fact deduced from the primary facts, all of which were known. As we are clear that this proposition of the United States cannot be sustained on the law, even admitting the facts to be as claimed,

we will not undertake to determine the question of the substantial identity of the respective claims of the two patents, or any of them. We prefer to leave that without prejudice, in the event it hereafter involves other individual or corporate rights.

As we have already said, U. S. v. American Bell Tel. Co., 128 U. S. 315, 9 Sup. Ct. 90, came before the court as a pure case of intentional, positive fraud, and the court there was careful to say, on pages 355 and 356, 128 U. S., and page 90, 9 Sup. Ct., as follows:

"It may be possible that a patent would not be absolutely void where the patentee was not really the first inventor, and the act of congress made provision that any man sued for an infringement of such patent might prove that the patentee was not the original discoverer or inventor. But we do not decide here whether a patent is absolutely void because the patentee is not the first inventor, nor whether a court of equity should set aside a patent where the party had obtained it without fraud or deceit, believing himself to be the first inventor. It is sufficient for the present case, in which, on demurrer, we wish to decide nothing more than is necessary to determine whether the defendants should be called to answer the bill, to say that the charge here is that he knew he was not the first inventor, and that his efforts to procure the patent were fraudulent, because he was aware that he was obtaining a patent to which he was not in law or equity entitled."

Therefore, it must be said that U. S. v. American Bell Tel. Co. does not in terms reach the case at bar. Nevertheless, the principles underlying the assumption of jurisdiction in that case, coupled with other decisions of the supreme court, especially those touching bills in equity to set aside patents under the land laws of the United States (U. S. v. San Jacinto Tin Co., 125 U. S. 273, 285, 8 Sup. Ct. 850), seem to support jurisdiction on the same basis which supports the ordinary bill in equity brought to cancel an instrument obtained through fraud, accident, or mistake, and to give the United States the same broad relief which would be given to an individual. In reference to this proposition, we agree with the United States that a bill of this nature would lie in a case of "mistake," as that word is properly understood in the branch of the law touching this topic, except so far as the peculiar provisions of the patent statutes may limit the general rule. We are also clear that such a bill would lie where there was a clear exercise of excess of power, still using these terms in the proper sense as relating to this branch of jurisdiction.

It is hardly claimed that the circumstances of the case at bar show "mistake" in the proper sense of the word in this connection, and the facts to which we have referred make clear that such a proposition could not be maintained if made. Ordinarily, the mistake which the equity courts relieve is something substantially different from mere error of judgment, based on full knowledge of the facts and law; and, although there may be exceptional cases arising from extreme circumstances, it could not be claimed that this is one of them. The main question, therefore, is whether the issuing of the second patent to the same applicant for the same invention, under such circumstances that it was not clearly manifest the inventions were the same, and that there might be a reasonable difference of opinion on the point of identity, involved, in the view of the

statutes touching patents, such an excess of power as would justify a court in equity in rescinding the second patent thus issued. We cannot put the case more strongly than this in favor of the United States, because, at the best, it must be admitted by the United States that there is a reasonable doubt on the point of identity. It will be seen that this question opens a broad field, because if this court can be called on in equity, on the suggestion of the United States, to rescind a patent merely on this ground, it may in the same way be required to investigate every question which lies behind the issue of a patent, including those of novelty, usefulness, public use, and anticipation. The distinction which the United States seek to make between the case at bar and cases which might involve the other issues, as of novelty, usefulness, public use, and anticipation, are clearly not well founded. Some extreme supposed examples which the counsel put do not help in sustaining these distinctions, but only illustrate the fact, which must be freely admitted, that, with reference to any of these various topics, there may be such exceptional cases as to show a clear error, within the meaning of this branch of the law, thus involving an excess of power. Such examples, for instance, as that of the commissioner issuing two patents to the same applicant in identically the same terms, are easily disposed of without involving any general principles.

We are satisfied that the statutory provisions touching the patent office are sui generis, and contain in themselves peculiarities, which render inapplicable certain rules and decisions otherwise of an analogous character. This fact is well noted in Orchard v. Alexander, 157 U. S. 372, 385, 386, 15 Sup. Ct. 635. Section 4911 of the Revised Statutes provides that if an applicant, except a party to an interference, is dissatisfied with the decision of the commissioner, he may appeal to the supreme court of the District of Columbia; and section 4914 provides that the decision of that court shall govern the further proceedings in the case. Section 4915 also provides that if the patent is refused, either by the commissioner or by the supreme court of the District of Columbia, the applicant may have remedy by a bill in equity, the details of which need not be further explained, except to say that, as we have already said, it was decided in Gandy v. Marble, 122 U. S. 432, 7 Sup. Ct. 1290, the two-years limitation found in section 4894 applies to it. There can be no question that the special and summary appeals thus provided for in behalf of an applicant for a patent reach the case where a second patent is refused, for the reason which, it is claimed in this case, renders the patent in issue void. Butterworth v. Hoe, 112 U. S. 50, 63, 5 Sup. Ct. 25. The statute thus gives the applicant a remedy of a special and summary character, which he can avail himself of when all the facts are fresh and the parties cognizant of them are at hand. Of course, fraud always vitiates, and every special remedy is subject to that general rule; but to assume in this case jurisdiction to annul this patent for the reason we are now considering is to deprive applicants for patents of resort to the special tribunal, under special circumstances, given them by the statute.

This we have no right to do, even though the same statute has not given the United States the same summary appeal. The proceedings in the supreme court of the District of Columbia are between the United States and the applicant, and, by express provision, do not preclude individuals interested to contest a patent. Those under section 4915 have a like limited effect, although they may extend so far as to bar a person holding an alleged interfering patent. Thus, congress has established a special system, ending in a judicial determination, for the purpose of deciding, as between the applicant and the United States, the very issue now before us. We cannot disregard the implied command of the law that we shall not interfere, by any general rules of jurisprudence, with special rights thus expressly provided for. Orchard v. Alexander, already referred to, on pages 385 and 386, 157 U. S., and page 635, 15 Sup. Ct., recognizes this principle, in that it substantially declares that the statute provision to which we have just referred deprives the secretary of the interior of the jurisdiction with reference to the patent office which he possesses with reference to proceedings in the general land office; and, by parity of reasoning, the same provisions likewise clip our jurisdiction.

A further examination of the statute brings out even a more positive conclusion touching this issue. Section 4916 of the Revised Statutes, touching reissues, provides that "whenever any patent is inoperative or invalid," for the reasons therein stated, "the commissioner shall * * * cause a new patent * * * to be issued to the patentee," and so on. By the frame of this statute, the jurisdiction of the commissioner depends nominally on the fact that the patent is inoperative or invalid. As against alleged infringers, and as between alleged interfering patents, the statute has been strictly construed, so far as the powers of the commissioner are concerned, although we are not aware that any issue touching them has arisen as between the United States and a patentee. The expressions cited by the United States from Seymour v. Osborne, 11 Wall. 516, 545, even if applicable to a suit in behalf of the United States, may well be understood to rest on the peculiar form of this section in this particular. But section 4893, authorizing the original issue of patents, is framed in an entirely different manner, and reads:

"On the filing of any such application and the payment of the fees required by law, the commissioner of patents shall cause an examination to be made of the alleged new invention or discovery; and if, on such examination, it shall appear that the claimant is justly entitled to a patent under the law, and that the same is sufficiently useful and important, the commissioner shall issue a patent therefor."

The language is quite positive in making the power of the commissioner to issue a patent dependent on the result of his own examination; that is, on facts as he finds them, and not on facts as they actually exist. Therefore, it is not easy to understand how the determination and act of the commissioner in issuing any patent which, on examination as required by that section, seems to him to be suitable to be issued, can be ultra vires, though, as already said, there may be cases of such glaring error appearing on the face of the transaction as to be exceptional and outside of the ordinary rule.

In several late cases the nature and effect of the determinations of the commissioner based on this section have been stated by the supreme court, although not in such connection as to directly settle the question we are now considering. In Morgan v. Daniels, 153 U. S. 120, 124, 14 Sup. Ct. 772 (a bill in equity resting on section 4915, to which we have already referred), the court said that even a proceeding of that nature, expressly authorized by statute, was an application to the court to set aside the action of one of the executive departments; so that the proceeding was "something in the nature of a suit to set aside a judgment." In Orchard v. Alexander, the court said, on pages 378 and 379, 157 U. S., and page 635, 15 Sup. Ct., that, although the action of a department in a matter of this nature was executive, at the most only quasi judicial, and not a purely judicial act, yet such a determination may be made by statute final and conclusive. In Boyd v. Hay-Tool Co., 158 U. S. 260, 261, 15 Sup. Ct. 837, the court applied these principles to the question of the identity of different patents issued by the patent office. In none of these cases were the United States a party, and expressions of this character cannot always safely be exchanged from opinions filed in suits between individuals to suits of the character at bar, and the reverse; yet they all indicate generally the nature of a finding of the commissioner of patents as the result of the examination which the statute provides shall be made by him.

In land grant cases to which the United States have been a party, the rule has been laid down in the broadest and strongest terms. In U. S. v. Marshall Silver Min. Co., 129 U. S. 579, 588, 9 Sup. Ct. 343, the court, referring to the officials of the land department, said as follows:

> "If the officers of that department of the government have acted within the general scope of their power, and without fraud, the patent which has issued after such proceedings must remain a valid instrument, and the court will not interfere, unless there is such a gross mistake or violation of the law which confers their authority, as to demand a cancellation of the instrument."

In U. S. v. California & O. Land Co., 148 U. S. 31, 43, 13 Sup. Ct. 458, the court fully reaffirmed this statement of the law. In Catholic Bishop of Nesqually v. Gibbon, 158 U. S. 155, 15 Sup. Ct. 779, the court finally laid down the broad rule that, "in the administration of the public lands, the decision of the land department upon questions of fact is conclusive, and only questions of law are reviewable by the courts." That the court intended this to cover issues between the United States and patentees is plain, because it cited in support of this proposition numerous cases of that character; and we use these expressions so far only as they touch that class of issues.

We have shown that the action of the commissioner, so far as this issue we are now considering is concerned, was merely a finding of the ultimate facts from other facts, all of which were known to the officials, and was therefore part of the ordinary work of the office, and the principle which we thus use in the interpretation of section 4893 is one of very general application. It is illustrated in numerous departments of the law, where acts are done by public or corporate

officials, as the result of investigations authorized to be made by themselves, none more noticeable than in the great mass of municipal and other public bonds which have been supported by the courts on the strength of the certificates of local officers, directed to make findings of the preliminary conditions required by statute. We think its application to this case makes it clear that, with the possible extreme exceptions which we have characterized, the statute vests in the commissioner of patents authority to issue all such patents as on examination he deems proper to issue; that none thus issued are issued ultra vires; that all such are within the scope of his powers, within the meaning of the expressions we have cited from the supreme court; and that there is nothing in this case which excepts it from this general rule. But we have pursued the matter already further than was necessary. It is clear, on this part of the case, that we are barred from taking jurisdiction by reason of the statute provisions which give special remedies to an applicant whose patent is refused, and, passing by this, that also the issue of this patent was within the scope of the authority of the commissioner; and no mistake being proven, and no other equitable ground appearing, we cannot revise his action in this suit.

The United States have filed a motion in this court praying that, if we find for the appellants, we will reserve leave to the circuit court to permit an amendment at bar, alleging that the American Bell Telephone Company did directly agree with the representatives of the Drawbaugh application that the determination by the patent office of the question of priority should abide the decision in The Telephone Cases; that these parties, acting in concert, did procure the commissioner of patents to consent to such postponement; and that thus the American Bell Telephone Company, by its own act, procured the postponement of the decision of priority, without necessity or right, in violation of its duty to speed the patent for the microphone. We have already found that, as the record now stands, it contains no proof to sustain an allegation of this character. Therefore, an amendment of this nature would require the opening of the record below for further proofs. It is not at all a case where a complainant has proved his case, but his allegations are found by the appellate court to be inapt. To grant this motion would, under the circumstances, violate all the rules requiring diligence from parties complainant.

The decree of the circuit court is reversed, and the case remanded to that court, with directions to dismiss the bill.

CHEMICAL RUBBER CO. v. RAYMOND RUBBER CO. et al.

(Circuit Court, D. New Jersey. May 15, 1895.)

1. PATENTS—CONSTRUCTION OF CLAIMS.

Claims for treating rubber waste with sulphuric acid, designated as "strong," "of sufficient strength," etc., *held* to be indefinite and insufficient in themselves, and requiring reference to the specifications to ascertain what degree of strength was required.

2. SAME.
Where the specifications of a patent for treating rubber waste with sulphuric acid stated that "diluted" sulphuric acid was useless for the purpose, and that the invention rested upon the discovery that the rubber in the waste would resist the action of "strong" sulphuric acid, and that the strength would depend upon the proportion of fiber in the waste, *held*, that the claims should be construed as covering the use of sulphuric acid of practically the full strength.

3. SAME.
Where the terms used in the specification and claims indicate so clearly a particular meaning that no other can be reasonably attached to them, the patent must be construed in that sense, even if this renders it impracticable and valueless. McClain v. Ortmayer, 12 Sup. Ct. 76, 141 U. S. 419, followed.

4. SAME—PROCESS OF TREATING RUBBER WASTE.
The Mitchell patents, Nos. 300,720 and 249,970, for a method of recovering rubber from waste by treating it with strong sulphuric acid at boiling heat, construed and limited, and *held* not infringed.

This was a bill by the Chemical Rubber Company against the Raymond Rubber Company and others for alleged infringement of certain patents relating to the art of treating rubber waste for the recovery of rubber therefrom.

B. F. Lee, for complainant.
Francis T. Chambers, for defendants.

DALLAS, Circuit Judge. Of the several letters patent mentioned in the bill, two only are now relied upon, viz. patent No. 300,720, dated June 17, 1884 (application filed May 5, 1881), to N. Chapman Mitchell, for recovering rubber from waste, and patent No. 249,970, dated November 21, 1881 (application filed May 19, 1881), to the same patentee, for recovering rubber from rubber waste. It is insisted that all the claims of these two patents have been infringed by the defendants. Patent No. 300,720, expressly embraced muriatic acid as well as sulphuric acid, but by disclaimer filed on January 8, 1894, all mention of muriatic acid was omitted. Waiving, as not material to my consideration of the case, the objection which has been urged against this disclaimer, the claims may be stated in conformity therewith, as follows:

"(1) As an improvement in the art of treating rubber waste for the recovery of the rubber therefrom, boiling said waste in sulphuric acid of a strength sufficient to eliminate and destroy the fibrous material with which the waste is combined, substantially as set forth. (2) The within-described process of eliminating woolen fiber from rubber waste containing the same, said mode consisting in boiling the waste in sulphuric or equivalent acid of sufficient strength to eliminate said woolen fibers, as set forth. (3) As an improvement in the art of treating rubber waste for the recovery of rubber therefrom, the process herein described, said process consisting in first boiling the waste in strong sulphuric acid, and then washing the mass resulting from the acid treatment, all substantially as set forth."

The only claim of patent No. 249,970 is as follows:

"As an improvement in recovering rubber from rubber waste, wherein the rubber waste is boiled in strong sulphuric or muriatic acid, the process of bringing such acid into immediate contact with all portions of the mass, which consists in ejecting steam into the strong acid in the tank containing the mass.

whereby the steam penetrates every portion of the mass and carries the acid with it, as specified."

Several questions have been very ably argued by counsel which it is not necessary for me to discuss, for upon that one of them to which attention has been chiefly directed I have reached a conclusion which is decisive. What significance is to be ascribed to the words "of a strength sufficient," "of sufficient strength," and "strong sulphuric acid," as they occur in the claims of patent No. 300,720; and to the words "strong sulphuric or muriatic acid," as contained in the claim of patent No. 249,970? This inquiry is of controlling importance, because, unless the phrases quoted are to be so interpreted as to include sulphuric acid when very substantially diluted, the defendants have, unquestionably, not infringed. Much stress has been laid upon the fact that the defendants' expert has said that "it is, of course, true that if the claims be read without reference to the specification of the patent they may fairly be considered to be concise descriptions of the process used by the defendants." This witness assumed, however, that the claims should be read in connection with the specification, and was of opinion that, being so read, they "should all be understood to refer to the use of very strong acid," and in this I entirely agree with him. It may be conceded that the defendants use acid of sufficient strength, and, consequently, that what they do is concisely described in the claims; but still the fact remains that the claims themselves neither indicate what strength of acid is sufficient nor define what is meant by strong acid. Upon this most material point they supply no information whatever, and consequently a reference to the specification, which as to this matter is the same in both patents, is of necessity invited for such "exact description" of the invention as is requisite to enable any person skilled in the art to use the same (Rev. St. § 4888); and that such reference was contemplated by the patentee himself is made quite apparent by the circumstance that in the specification the information which the claims do not furnish is fully given. The specification states that subjecting the waste to the action of heated solutions of caustic alkali or diluted sulphuric acid had been found to be valueless; but that the patentee had discovered "that the rubber in the waste will effectually resist the action of strong sulphuric acid heated to a high temperature." Thus we have strong acid opposed to, and contrasted with, diluted acid, and the natural deduction would seem to be that no acid which is substantially diluted can be the strong acid of the patent. Further on, it is said that "the strength of the acid and the quantity employed in respect to the quantity of material treated will depend upon the proportion of fiber and impurities in the waste." This, of course, suggests that where, but only where, less than the usual proportion of fiber is present, a weaker acid may be used, but this may mean that, under such circumstances, the inherently weaker acid—muriatic as compared with sulphuric—can be relied upon; and, be this as it may, it plainly appears, from what is further said in the same connection, that wherever the ordinary

proportion of fiber is to be dealt with, sulphuric acid of practically the full strength of 66 degrees Baumé, which the patentee says he had used in practice, must be employed, and that even to such acid "about one-twentieth of its weight of fluoric"—a stronger—"acid" may be advantageously added, "to facilitate the operation." From these statements, it is, I think, manifest that the sulphuric acid which the patentee intended to be used in the practice of his process is the strong sulphuric acid of commerce. But it is contended that, even if the acid is, at the outset, to be undiluted, yet the instructions of the patent involve its dilution in pursuing the process. This contention, however, is in conflict with the terms of the specification. Its requirement that the acid shall, in the first instance, be of practically full strength, is not more clear than the direction that it shall remain so. "In carrying out my invention," says the specification, "the acid is first deposited in the bottom of a tank or vat, into which the waste is then introduced, and the tank or vat closed." There can be no question as to the meaning of this language; and the procedure which it describes is so absolutely and unqualifiedly enjoined as to forbid any implication that it may be departed from or varied. No water is to be placed in the tank before the acid is put into it, for the acid is "first deposited"; no water is to be added before the introduction of the waste, for, having deposited the acid, the waste is "then introduced"; and water is not to be afterwards added, for, upon the introduction of the waste, the tank is "closed," and, as the specification continues, "the acid is then heated," and the treatment proceeds to its conclusion. Furthermore, we are told that the invention "is based upon the discovery that the rubber in the waste will effectually resist the action of strong sulphuric or muriatic acid heated to a high temperature," and this is said with reference to a French patent (to Faure, No. 91,665, dated April 3, 1871) which calls for "sulphuric acid indicating 53 degrees to 58 degrees Baumé," which, though not quite of the strength which this patentee says that in practice he had used, is still a very strong acid. But, says the patent in suit, "Sulphuric acid, however, if employed at ordinary temperatures, or at any of the temperatures set forth or suggested by Faure, acts injuriously upon the rubber." The conclusion seems to be inevitable that Mitchell's invention, as he understood it, and intended that others should understand it, rested upon his alleged discovery that sulphuric acid of the same strength as suggested by Faure, or even of greater strength, might be used, when heated as Mitchell proposed it should be; and in patent No. 249,970 it is especially mentioned, evidently as showing that the injection of steam "into the strong acid in the tank" would have no harmful effect, that "there can be no appreciable dilution of the acid by condensing steam." Throughout, and in both patents, it is made apparent, not only that dilution of the acid was not intended, but that any appreciable dilution of it would be inadmissible; and I am unable to accept the theory set up for the plaintiff, that a man of competent skill, in carrying out the process, would, of course, assume that a considerable quantity of water was to be added to the specified contents of the tank. This

theory has been vigorously supported by the experts for the complainant, and has been, with equal emphasis, combated by the expert for the defendants. I have read their testimony with care, but need not refer to it in detail. It is sufficient to say that the patent is not simply silent on the subject of adding water, but, upon the natural and reasonable understanding of its terms, it positively precludes the addition of water. The necessity for adding water could be learned only by independent experiments of a nature, not merely unwarranted, but which could not be conducted except in direct defiance of the directions of the specification. In short, I am convinced that any man, however skilled, who should undertake to practice the patented process, would necessarily be led, by its terms, to take the view of it which was urged upon the patent office by the solicitor of the patentee, viz. that it "involves the subjection of the rubber waste to boiling in a strong undiluted commercial acid"; and that, therefore, the use of acid and water would be a material departure from it. It is objected to this construction of the patents that it renders them valueless, and the invention, as claimed, impracticable; but as no other construction can, in my opinion, be reasonably put upon them, any consequence which results, however serious, must be regarded as unavoidable. As "the language of the specification and claim shows clearly what he 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." McClain v. Ortmayer, 141 U. S. 419, 425, 12 Sup. Ct. 76.

The other matters which have been set up in defense do not call for discussion. If the patents are to be limited as I have indicated, the charge of infringement is without foundation; and upon this ground the bill is dismissed.

THE CITY OF CHESTER.

NORFOLK & C. R. CO. v. THE CITY OF CHESTER.

(District Court, E. D. Virginia. June 24, 1895.)

COLLISION—STEAMERS IN HARBOR—CROSSING COURSES.

Only a dire emergency will excuse a steamer navigating a harbor from complying with rule 16, which requires her to keep out of the way of another steamer with which she is on crossing courses, when the latter is on her starboard hand; and she is not excused by the fact that a third steamer is on crossing courses with her, in such a position as to be required to keep out of her way, there being sufficient room for both to avoid danger by a timely observance of the rule.

This was a libel by the Norfolk & Carolina Railroad Company against the steamboat City of Chester to recover damages for a collision.

Sharp & Hughes, for libelant.

Richard Walke and A. P. Thom, for respondent.

HUGHES, District Judge. This libel is brought for damages from a collision in Norfolk harbor on the morning of the 20th of January, 1894, between the steamtug Pinner's Point, belonging to the libelant, and a barge in tow of the steamboat City of Chester, the Pinner's Point and the barge striking each other port to port. The Pinner's Point had left Trugien's wharf, at the Portsmouth side of the harbor, and was making for the Norfolk & Carolina Company's wharf, on the Norfolk side. The Bay Line steamers' wharf and the Boston steamers' wharf are north of the Norfolk & Carolina wharf, for which the Pinner's Point was heading at the time of the collision. South of that wharf are the wharves of the compress company, the Norfolk & Southern Company, Jones & Lee, and Campbell, and next to Campbell's wharf is the ferry slip. The diagram filed in the evidence shows that the distance between the wharf of the Bay Line boats and the ferry slip is about 2,250 feet, or 750 yards. When the Pinner's Point had got out into the harbor, and had straightened her course for the Norfolk & Carolina wharf, and was abreast of the ferry slip, she saw the City of Chester moving up the harbor with her barge in tow, abreast of the Bay Line wharf, about 750 yards off. She at once signaled the City of Chester with one whistle. At that time the steamtug Martha Helen, with three schooners in tow, was abreast of the ferry slip, moving north down the harbor. She and the Pinner's Point were then abreast of each other, and about equidistant from the City of Chester. Signals had passed between the City of Chester and the Martha Helen, when the Pinner's Point blew her one whistle to the City of Chester. The attitude of the three steamers towards each other at that time was that the Pinner's Point was about four points off the starboard bow of the City of Chester, on crossing courses, and that the City of Chester was five or six points off the starboard bow of the Martha Helen, on crossing courses. In these relative positions, the old rule 19 (now 16) of navigation applied, under which it was the duty of the City of Chester to keep out of the way of the Pinner's Point, and of the Martha Helen to keep out of the way of the City of Chester, the duty of the Pinner's Point being to keep her course. The Georgia v. The Luckenbach, 67 Fed. 619; The Luckenbach v. The Georgia, 1 C. C. A. 489, 50 Fed. 129; The Breakwater, 15 Sup. Ct. 99, 155 U. S. 252.

The evidence does not show that the Martha Helen failed to comply with rule 19. She kept out of the way of the City of Chester, and went clear. The presence of the Martha Helen, in the relations she bore to the other two steamers on the occasion, could not have caused any change of duty on the part of the two other steamers. The distance was great enough to prevent an emergency, and I do not see from the evidence that any emergency arose to alter the duty of either of the three steamers. The collision occurred in consequence of the City of Chester's failing to keep out of the way of the Pinner's Point,—failing, in fact, to do anything tending to keep her out of the way of that steamer. The approach of the Martha Helen could not excuse the City of Chester from performing her

duty. The distance between the Helen and the Chester was ample to allow both the Helen to keep out of the way of the Chester, and the Chester to keep out of the way of the Pinner's Point. The Pinner's Point kept her course as directly as was practicable. The Chester failed to port her helm, when signaled by the Pinner's Point, and, by so failing, produced the collision. She could have kept out of the way of the Pinner's Point, and did not.

There is no more important rule of navigation for harbors than rule 19 (now 16). The enforcement of this rule by the courts is an imperative duty. Nothing but the closest and direst emergency can excuse a steamer running in a harbor from scrupulously obeying rule 19 (16). I must enforce it in this case, and hold that the collision complained of was from the fault of the City of Chester.

I will merely allude to one or two matters presented in the evidence. Some of the witnesses express the opinion that the Pinner's Point and the Chester were in the seventh situation when the Pinner's Point blew its one whistle. This is equivalent to contending that the Pinner's Point was abeam of the Chester at that moment. On the contrary, one vessel was abreast of the ferry slip, and the other abreast of the Bay Line wharf, having the first-named steamer five points on her starboard bow, and about 750 yards distant. Obviously, the seventh situation was out of the question.

It is also intimated on behalf of the respondent that the Pinner's Point, in order to avoid the Martha Helen, deviated from her direct course after sounding her signal to the Chester. This fact is not proved, and is not probable. There was no necessity for swerving to port.

The Pinner's Point was full abreast of the Helen when she signaled the Chester, had no tow, was moving at a greater speed than the Helen, and was under no necessity of swerving at all to keep out of the way of the Helen. I think the letter S, which figures in the evidence, is more a thing of fancy than practicable fact. The only influence which the Helen had on the Pinner's Point was to prevent the latter from swerving more to starboard than she was bound to do, and which the failure of the Chester to port her helm might have induced her to do. If the Helen had not been to starboard of the Pinner's Point after the Pinner's Point and the Chester came into relations with each other, the persistent neglect by the Chester of her own duty under rule 19 might have suggested a starboard movement to the Pinner's Point as a means of relieving the situation forced by the City of Chester, but the position of the Helen prevented this. The Pinner's Point held her course under rule 19 and the Chester committed the fault of failing to keep out of her way. I will sign a decree for the libelant.

UNITED STATES et al. v. BOYD et al.

(Circuit Court, W. D. North Carolina. June 17, 1895.)

CHEROKEE INDIANS—CITIZENSHIP.

The Indians belonging to the Eastern Band of Cherokees in the state of North Carolina have never become citizens of the United States, and the federal courts have jurisdiction to entertain a suit brought by the United States, as guardian of such Indians, for the protection of their interests.

This was a suit brought in the name of the United States, and of Sampson Owl and others, Cherokee Indians, against D. T. Boyd and others, to set aside a contract made by the Indian council. Defendants moved to dismiss the bill for want of jurisdiction.

R. B. Glenn, U. S. Atty., and D. A. Covington, Asst. U. S. Atty.

H. G. Ewart, Geo. H. Smathers, W. T. Crawford, J. M. Moody, and Louis M. Bourne, for defendants.

SIMONTON, Circuit Judge. This is a bill filed in the name of the United States of America, and of Sampson Owl and others, Cherokee Indians, suing in their own behalf, etc., against these defendants. The bill, asserting the paramount authority and guardianship of the United States over the Eastern Band of Cherokee Indians, seeks to set aside a contract made by their council, a majority thereof making it, with certain of the defendants, for the sale of timber on the lands owned and occupied by the Cherokees in North Carolina. At the threshold of the case the question is raised as to the jurisdiction of this court, and that question depends upon the relation which the United States bears to these Cherokee Indians. Are they under the guardianship of the United States as tribal Indians are, or are they citizens of the United States, with all the rights, powers, duties, and obligations of citizens? The decision of this question is necessary before discussing any other questions in the cause.

The Cherokee Indians, a powerful and warlike Nation, inhabited the country bounded by the Atlantic Ocean. Pressed back by settlements of white men on the coast, they had established themselves in the mountain regions of Georgia, North Carolina, Alabama, and Tennessee, and were a fruitful source of danger, anxiety, and discontent to the citizens of the United States living in their neighborhood. For many years, the government made strenuous efforts to induce them to leave these settlements, and to immigrate to lands allotted to them to the west of the Mississippi, with partial success only. Finally, by treaty concluded 29th December, 1835, at New Echota, in the state of Georgia, between the United States and the Cherokee Nation, they, as a Nation, consented to go west; and the large majority of them did so. Some of them, however, preferred to remain. Of these, some ——— families settled in the state of North Carolina, and claimed for themselves their due portion of all the personal benefits accruing under the treaty for their claims, improvements, and per capita. Utilizing these claims, they sent an agent to Washington, who obtained the money provided for them, and in-

vested it in lands in the state of North Carolina, some ——— acres in extent, upon which these families of Cherokees settled. They are known as the "Eastern Band of Cherokee Indians." Their agent and attorney, W. H. Thomas, purchasing these lands, took title to them in his own name. As serious complications grew out of this fact between the Indians and the creditors of Thomas and some other parties occupying said lands or asserting outstanding claims upon them, the congress of the United States, by a provision in the act of July 15, 1870, made it the duty of the district attorney and the attorney general of the United States to institute and prosecute a suit or suits in law or equity in the district or circuit courts of the United States for the purpose of ascertaining the rights of the parties, and fully adjusting all matters of controversy. Such a suit was instituted 20 years ago, and the matters involved were, by consent of parties, referred to three arbitrators, "whose award was to be final and a rule of court." After careful and patient investigation and consideration, an award was made, which was fully approved and confirmed by a decree of this court. Many years afterwards a suit in equity was instituted in this court by the attorney general of the United States, in the name of the United States, for the purpose of having fully enforced the terms of the aforesaid award and decree. The progress of this suit was obstructed and greatly delayed by many serious and perplexing difficulties, until the congress of the United States appropriated a large sum of money, sufficient to carry out the terms of compromise agreed upon by the litigant parties, to pay off all liens in the hands of judgment creditors of W. H. Thomas, to settle questions of boundary, and to extinguish all other claims to said lands, so as to give the Indians a good, clear, and definitely located title. By a decretal order of this court, the standing master in chancery was directed to prepare and have duly executed a new deed conveying said lands in fee simple, omitting a clause in the former deed imposing restrictions upon the power of alienation, which had been inserted by the draftsman, without authority of any order or decree of this court. The contract complained of relates to standing timber on these lands.

Are these Cherokee Indians citizens of the United States? They or their fathers were members of the tribe of Cherokee Indians recognized by the government as a Nation. Eastern Band of Cherokee Indians v. U. S., 117 U. S. 288, 6 Sup. Ct. 718. By the treaty of New Echota, individuals and families who were averse to removal with the Nation were suffered to remain in the states in which they were living, if they were qualified to take care of themselves and their property, and were desirous of becoming citizens of the United States. Those who exercised this privilege terminated their connection with the Cherokee Nation. Id. Did this make them citizens of the United States? "The alien and dependent condition of the members of the Indian tribes could not be put off at their own will without the action or assent of the United States. They were never deemed citizens of the United States, except under explicit provisions of treaty or statute to that effect, either declaring a certain tribe, or such members of it as chose to remain behind on the re-

moval of the tribe westward, to be citizens, or authorizing individuals of particular tribes to become citizens on application to an United States court for naturalization, and satisfactory proof of fitness for civilized life." Elk v. Wilkins, 112 U. S. 100, 5 Sup. Ct. 41. There is nothing in the record going to show that these Indians were ever naturalized. Have they been made citizens by treaty? The clause in the treaty relating to those Cherokees who preferred to remain behind the Nation is in these words:

"Art. 12. * * * Such heads of Cherokee families as are desirous to reside within the states of North Carolina, Tennessee, and Alabama, subject to the laws of the same, and who are qualified or calculated to become useful citizens, shall be entitled to a prescriptive right to certain lands."

This does not confer on them citizenship. It only authorizes them to become citizens when it is recognized that they are qualified or calculated to become useful citizens. This presupposes some sort of examination into the question of their qualification, and a favorable decision therein. If the words of the treaty do not make them citizens of the United States, and only gives them the right to become citizens upon showing the desire to that end, then there was but one way for them to attain citizenship, and that is pointed out in the statutes relating to naturalization.

But it is urged with great force that the state of North Carolina recognizes these Cherokees as citizens; that they vote, pay taxes, work roads, and perform all the duties of citizens. But a citizen of the United States takes this privilege as the gift of the general government. It can be acquired only under its laws, and in the mode prescribed by it. City of Minneapolis v. Reum, 56 Fed. 576, 6 C. C. A. 31. "Neither the constitution of a state nor any act of its legislature, however formal or solemn, whatever rights it may confer on these Indians or withhold from them, can withdraw them from the influence of an act of congress which that body has the constitutional right to pass concerning them. Any other doctrine would make the legislature of the state the supreme law of the land, instead of the constitution of the United States and the laws and treaties made in pursuance thereof." U. S. v. Holliday, 3 Wall., at page 419. But it must not be understood that these Cherokee Indians, although not citizens of the United States, and still under pupilage, are independent of the state of North Carolina. They live within her territory. They hold lands under her sovereignty, under her tenure. They are in daily contact with her people. They are not a nation nor a tribe. They can enjoy privileges she may grant. They are subject to her criminal laws. None of the laws applicable to Indian reservations apply to them. All that is decided is that the government of the United States has not yet ceased its guardian care over them, nor released them from pupilage. The federal courts can, still, in the name of the United States, adjudicate their rights. Nor is this without precedent. The American seaman, born a citizen of the United States, or naturalized as such, has extended over him the guardian care of the government, and is a ward of the nation. The statute books abound with acts requiring his contracts to be looked into by officers appointed for that

purpose, and every precaution is taken to guard him against fraud, oppression, and wrong. Rev. St. U. S. § 4554 et seq.

It is contended that the view taken of this pupillary condition of these Cherokee Indians violates the provisions of the constitution and laws of North Carolina, forbidding perpetuities. A perpetuity is the attempt to forbid the alienation of lands under any circumstances, and to provide for their descent or disposition in a fixed, unchangeable way. But the Indians hold these lands to no such purpose. Their realty can be alienated, but the contract is reviewable by the government for one purpose only,—to protect them from fraud or wrong. A condition attached to alienation does not create a perpetuity. A conveyance or devise to A., in trust for a feme covert in fee, with power of sale upon her written request, or subject to her approval, does not create a perpetuity.

There is another consideration. In determining the attitude of the government towards the Indians,—all Indians,—the courts follow the action of the executive and other political departments of the government, whose more special duty it is to determine such affairs. U. S. v. Holliday, supra. Now, congress has repeatedly recognized the distinctive character of these Cherokees as a body,—the Eastern Band Cherokee Indians. It has legislated for their benefit, and has always treated this band as a distinct unit. They are not dealt with as individuals, who gradually are absorbed into the body of the community, but as a band isolated from, cared for apart from, other inhabitants. See 9 Stat. c. 118; 10 Stat. 291, 700; 16 Stat. 362; 18 Stat. 213; 19 Stat. 176; 22 Stat. 302; 27 Stat. 120.

In July, 1868, congress transferred the care of the Indians from the treasury department to that of the interior; and section 3 of this act expressly includes the Eastern or North Carolina Cherokees. The original condition of all the Indians in this country was that of pupilage under the government (Cherokee Nation v. Georgia, 5 Pet. 3); its pupilage continuing until released by the government. The statutes quoted show that it has never been released. The supreme court of North Carolina, in Rollins v. Cherokees, 87 N. C. 229, distinctly recognizes and clearly and forcibly sustains the position taken above. The Case of the Cherokee Trust Funds, 117 U. S. 288, 6 Sup. Ct. 718, does not conflict with these views. That case decides that this Eastern Band of Cherokee Indians is not a part of the Nation of Cherokees with which this government treats, and that they have no recognized separate political existence; but, at the same time, their distinct unity is recognized, and the fostering care of the government over them as such distinct unit. This being so, the United States have the right in their own courts to bring such suits as may be necessary to protect these Indians.

The motion to dismiss the bill on this ground is disallowed. The injunction heretofore granted is continued until the further order of this court.

DICK, District Judge (concurring). The rights of the Eastern Band of Cherokee Indians in and to their lands purchased by their agents with their money obtained from the United States, and their

civil relations with the state and national governments, have been subjects of frequent discussions and litigation in the local and federal courts of this district for more than 20 years. Suits in various forms have been instituted in the federal courts,—in their tribal name as the "Eastern Band of Cherokee Indians," and in the name of the United States for their benefit. These suits gave rise to many difficult and perplexing questions of law and fact, and I sincerely hoped that all these matters of controversy had been finally adjudicated and adjusted by a decree of this court at October term, 1894, carrying into effect a compromise agreed upon by the departments at Washington,—the Indian council and the parties defendant,—and reserving the case on further directions to adjust some matters of detail. I was disappointed in this cherished hope when the suit now before us was instituted, presenting other matters of controversy. At my special request, Judge SIMONTON attended the circuit court at May term in Asheville for the purpose of hearing some preliminary questions in this case. We heard full and able argument of counsel upon a motion of defendants to dismiss for the want of jurisdiction, and, upon full conference, we reserved the question presented for further consideration. We regarded the question as one of great importance, for, if the court has not jurisdiction in this case, then it did not have jurisdiction in previous similar cases, and many orders and decrees heretofore made are void.

The preliminary question presented for our determination is whether the United States have such supervisory authority and power over the North Carolina Cherokees as to become a party plaintiff in a suit in equity in this court, instituted under the direction of the executive departments of the government, for the purpose of annulling or modifying a contract made by the council of such Indians in relation to their lands purchased by their agent with the per capita money and removal and subsistence money to which they were entitled under the treaty of New Echota, upon the alleged grounds that such contract was induced and procured by means of circumventive, undue influence and fraud, or that the contract was grossly injudicious and unconscionable, and without the approval of the secretary of the interior, having supervisory charge of these Indians under an act of congress. In the suit before us the United States do not claim any right that encroaches upon any of the sovereign powers, duties, and obligations of this state. They claim no police power over the Indians as citizens of the United States, or right to punish for crime committed within the territorial limits of this state. They only insist upon the right to appear as a plaintiff in a suit in equity instituted in their circuit court to invoke the jurisdiction of such court in behalf of their wards,—to obtain such relief as may be granted upon the well-recognized principles of equity jurisprudence. They appear as sovereign of this dependent Indian community, as parens patriae of this helpless and injured race, not yet invested with the full rights of American citizenship, and as guardian, by treaty obligations, of these ignorant and injudicious wards, to control their transactions about lands acquired by the

treaty money, and the charitable trust funds bestowed by congress upon a political department of the government to be applied for the benefit of these Indian cestuis que trustent.

The United States claim that, under their constitutional power to regulate commerce with Indian tribes, the word "commerce" embraces trade and traffic, and all contracts with the tribes or individuals composing such tribes; that, so long as Indians remain a distinct people, with an existing tribal or quasi tribal organization, recognized by the political departments of the government, congress has the power to say with whom and on what terms they shall deal, and can place them under the supervisory control of an executive department. U. S. v. Holliday, 3 Wall. 407; The Kansas Indians, 5 Wall. 737; U. S. v. 43 Gallons of Whiskey, 93 U. S. 188. It is further insisted by the district attorney that by the act of July 27, 1868, congress authorized and directed the secretary of the interior and the commissioner of Indian affairs to take the same supervisory charge of the Eastern or North Carolina Cherokees as of other tribes of Indians; and there is a necessary implication of power that if, in the exercise of such supervisory charge, it becomes necessary to resort to a court of equity for remedy and relief, a suit may be properly instituted by such supervisory department in the name of the United States to obtain adequate redress. He cites as a precedent a suit in equity in this court, now pending on further directions, in which the bill was filed by Attorney General Garland, in the name of the United States as plaintiff, for the purpose of enforcing an award made by arbitrators appointed under a decretal order of this court in relation to the rights and title of the North Carolina Cherokees to the lands embraced within the Qualla Boundary,—the lands which are the subject of controversy in the present suit. I am of opinion that, wherever a power is conferred and a duty imposed by statute, everything necessary to accomplish the legislative purpose is given by implication. "A thing which is within the intention of the makers of the statute is as much within the statute as if it were within the letter." U. S. v. Freeman, 3 How. 556-565.

The suit in equity now before us was instituted by the district attorney under the direction of the secretary of the interior and the attorney general, for the purpose of seeking investigation as to the fairness, justice, and expediency of a contract made by the Indian council disposing of timber on the Indian lands in this state without the approval of the secretary of the interior. It seems to me that the only question for the court now to determine is whether the political departments of the government have clearly and distinctly recognized the North Carolina Indians as a tribal organization under the supervisory care and guardianship of the United States, for the court must be governed upon such subject by the action of such departments. I have read with some care the case of the Cherokee Trust Funds, 117 U. S. 288, 6 Sup. Ct. 718, cited and relied upon by counsel for defendants. That case gives an interesting and instructive history of the dealings of the United States

with the Cherokee Indians, but only decides that the North Carolina Cherokees had dissolved their connection with the Cherokee Nation, and were not entitled, while they remain residents and citizens of North Carolina, to a proportionate share of the funds held in trust by the United States for the benefit of the Cherokee Nation. It is true that the North Carolina Cherokees are citizens of this state, and have not been recognized as a separate nation or tribe, with treaty-making power; but it seems to me that the mere fact that they are citizens of this state does not necessarily deprive them of the legitimate guardianship and care of the United States where there is no state or national legislation indicating such a purpose. Their forefathers availed themselves of a provision in the treaty of New Echota, and remained in the state of North Carolina; and the civil laws of the state were extended over them from the period of the removal of the Cherokee Nation to their territory west of the Mississippi river. The North Carolina Cherokees, by reason of their birth and residence, became citizens under the general provisions of the state constitution, and not by any special law conferring the rights of citizenship. The policy of state legislation seems to have recognized their quasi tribal organization, and regarded them as a peculiar class of citizens, worthy of and needing the kindly supervision and care of the state and national governments. For the purpose of securing them against the evil consequences of injudicious contracts with more intelligent and designing white men, a state statute was enacted requiring all contracts, equal to $10 or more, with Cherokee Indians, to be in writing, signed in the presence of two witnesses, who shall subscribe the same. 1 Code N. C. § 1553. This law of the state imposed upon them a restriction which was not imposed upon other citizens, except as to transactions coming within the statute of frauds and a few other cases. On the 2d day of January, 1847, "An act in favor of the Cherokee Chief Junaluska" was duly enacted and ratified by the legislature of this state, conferring upon him all the rights of citizenship, and directing the secretary of state to issue a grant conveying to him in fee simple a valuable tract of land in Cherokee county, without the power of alienation by deed; and it was held in this court that such restriction upon the power of alienation was not inconsistent with the rights of citizenship. Smythe v. Henry, 41 Fed. 705. See, also, Eells v. Ross, 64 Fed. 417, 12 C. C. A. 205. The political departments of the federal government have certainly recognized and treated the Eastern Band of Cherokees as a quasi tribal organization for social and business purposes, and have made liberal appropriations of money, appointed Indian agents to reside among them, and employed efficient means to enlighten their minds, increase their comforts, and guard them against the injurious consequences of their own ignorance and indiscretion, and the frauds, aggressions, and wrongs of unscrupulous white men. The act of congress of July 27, 1868, in express terms placed them in the same situation towards the government as other tribes of Indians. I am strongly inclined to the opinion that the act of congress restored

them to their former tribal relations as wards of the United States, subject to their control, and entitled to their care and protection. The relations of the United States to all Indian tribes are now regulated by acts of congress, and not, as formerly, by treaties. U. S. v. Kagama, 118 U. S. 375–382, 6 Sup. Ct. 1109.

By numerous acts of congress, the legislative department of the government has recognized the Eastern Band of Cherokee Indians residing in North Carolina as being under the supervisory care of the United States. I will cite only a few of these acts. The act of July 15, 1870, authorized and directed the attorney general to institute and prosecute a suit in equity in this court in the name of the Eastern Band of Cherokees for the purpose of securing to them the lands purchased with their treaty money by their agent, W. H. Thomas. At several times acts were passed by congress making liberal appropriations of money for the purpose of carrying on that suit and other subsequent suits in the name of the United States in relation to such lands. In the Cherokee Trust Funds Case, 117 U. S. 288, 6 Sup. Ct. 718, "the suit by petitioners was authorized by an act of congress, and it was brought against the United States and the Cherokee Nation." By act of congress approved August 4, 1892, provision was made for the annual payment of the taxes on the lands of the Eastern Band of Cherokee Indians in North Carolina, and all orders or provisions for the sale of timber on said lands to pay the accrued taxes and incumbrances on the same were revoked. On the ——— day of ———, 189–, congress made an appropriation of a large sum of money for the purpose of effectuating a compromise made by the political department of the government with certain persons claiming lands, adverse to the Indians, within the uncertain, unsettled, and extensive Qualla Boundary, which had long been a subject of vexatious and expensive litigation. The supreme court of North Carolina, in Rollins v. Cherokees, 87 N. C. 229, fully recognized the power and right of the United States to supervise and control the affairs, lands, and contracts of the North Carolina Cherokees. The court refers with approbation to the acts of congress regulating contracts with Indians, and expresses the opinion that such laws apply to contracts made with the North Carolina Indians. From the kind and liberal policy manifested by all the departments of the state government, I am satisfied that North Carolina is not jealous of state rights, or apprehensive that difficulties and conflicts of jurisdiction may arise from an imperium in imperio, controlling to some extent the affairs of her Indian citizens.

I understood the counsel of defendants in their argument to insist, in substance, that the Eastern Band of Cherokees in North Carolina is a corporation duly organized under the laws of this state, and holds its lands in fee simple under a deed executed by the standing master in chancery, under a decree of this court made at October term, 1894; that such deed contains no restriction upon the power of alienation; and that the Indian council, as representatives of the corporation, had full power to make the timber contract involved in this suit. The counsel further show that at the fall term of this court, in 1894, a decree was made directing a deed to be

executed in accordance with an award of arbitrators filed at said term; that some time thereafter a deed was prepared and executed containing a clause restricting the power of alienation which was not in accordance with the said award and decree, was repugnant to the nature of the estate conveyed, and in disregard of article 1, § 31, of the state constitution, in relation to perpetuities; that the decree of October term, 1894, was made upon a supplemental bill in equity, filed by the district attorney under the direction of the secretary of the interior and the attorney general, for the express purpose of having a new deed in fee simple executed by the standing master in chancery, omitting the repugnant clause restricting the power of alienation; that, by such proceeding in this court, the United States fully recognized the right and power of the Eastern Band of Cherokees to make free alienation of their lands, and surrendered or waived control of them as to the timber contract involved in this suit. I am of opinion that the only purpose of the departments in the legal proceedings referred to was to have a deed executed which was in conformity with the award of the arbitrators, the decree of the court, and the laws of the state regulating the conveyance of lands within its limits. These matters relate to the merits involved in this case, and not to the in limine question of jurisdiction now before the court. Judge SIMONTON has expressed some views upon these questions in which I fully concur. I will say, further, that I am strongly inclined to the opinion that the action of the secretary of the interior, the attorney general, and district attorney in procuring, by procedure in this court, execution of the new deed under which the Eastern Band of Cherokees now hold their lands in fee simple as a corporation, neither expressly nor by implication relieved the United States from any obligation of duty imposed, or waived any power conferred by the constitution, treaties, or acts of congress. Eells v. Ross, supra. I am satisfied that the court has jurisdiction of this case. If I had any doubt as to jurisdiction, I would, in a court of equity, be disposed to regard with favor the maxim "boni judicis est ampliare jurisdictionem," to accomplish the ends of substantial justice and fair dealing. Courts of chancery in this country and England have, by a wise and salutary development of the principles of natural justice, built up an extensive, enlightened, and beneficent jurisdiction in equity for the purpose of redressing wrongs, securing rights, and affording remedies adequate to the requirements of justice.

I concur in the order of the circuit judge disallowing the motion, and continuing the injunction heretofore granted until the further order of this court.

FLORIDA CENT. & P. R. CO. v. CUTTING et al.

(Circuit Court of Appeals, Fifth Circuit. June 17, 1895.)

No. 374.

1. APPEAL—ASSIGNMENTS OF ERROR.
Assignments which merely allege error in making certain decrees, without more particularly pointing out in what the error consisted, are not in accordance with the requirements of rule 11 of the circuit court of appeals for the Fifth circuit, and will be stricken from the record on motion.

2. SAME—OBJECTIONS WAIVED—MASTER'S COMPENSATION.
An allowance to a special master being contested on appeal, the court stated that the allowance appeared on the face of the record to be excessive, and that, as the cause must be remanded, opportunity should be allowed to regularly contest the same. The cause having been referred to a different master, the special master proved by his own evidence that he had earned the amount asked. No evidence was offered by the contestants to show the character or amount of his services. The allowance was, however, reduced in a considerable amount. *Held*, that on a second appeal the reduced allowance should not be disturbed.

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

This was a foreclosure suit brought by William Bayard Cutting against the Tavares, Orlando & Atlantic Railroad Company, in which the Florida Central & Peninsular Railroad Company intervened. On a former appeal certain decrees of the circuit court were reversed, and the cause was ordered to be referred to a master for certain purposes stated. 9 C. C. A. 401, 61 Fed. 150. Further proceedings were accordingly had in the circuit court, and the intervener has again appealed from decrees there entered.

John C. Cooper and John A. Henderson, for appellant.

H. Bisbee, C. D. Rinehart, and R. H. Liggett, for appellees.

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

PARDEE, Circuit Judge, This case was before this court on appeal at the last term, when, on consideration, it was remanded to the court below "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." After proceedings in the circuit court, it is again brought up on appeal with the following assignments of error:

"(1) That the court erred in making its order and decree herein dated the 9th day of February, A. D. 1895, on exceptions to master's report in above-stated cause. (2) The court erred in making its order and final decree dated the 2d day of March, A. D. 1895, confirming master's report, and ordering payment in above-stated cause."

The appellees have made the following motion:

"Come now the appellees, by Bisbee & Rinehart, their solicitors, and move to strike from the transcript of record in this cause the assignment of errors found on page 167 of the transcript, on the ground that the assignments of error are not made in accordance with rule 11, 11 C. C. A. cii., 47 Fed. vi. Neither of the two assignments state any particular error, nor indicate to the court or counsel in what respect the court erred. In fact, these assignments are nothing more than that the court erred in deciding the case at all."

This motion is undoubtedly well founded. Appellant has followed with a motion as follows:

"For leave to file further and additional assignments of error in said cause, in the event that the court sustain the motion of W. C. Lewis and others to strike the present assignments from the record; such further and additional assignments of error to cover the same matters as those heretofore assigned as error to the several rulings of the court below, and setting forth the grounds on which the said errors are assigned."

Without reference to the indefinite character of this motion, we deny the same, because the disregard of our rule 11 has become so general that without a decidedly equitable showing in favor thereof, we are no longer disposed to relieve counsel from the effects of their own neglect. As this case has been argued at length, orally and by brief, we will so far examine the record (as rule 11 provides) as is necessary to determine whether there are any plain errors upon the face of the record.

The first one suggested is that the report of the special master is erroneous in disallowing the sum of $613.92 of claims said to have been paid by the purchaser for and on account of obligations incurred by the receiver while operating the property before the sale. The special master found that the proof was not sufficient to show that the claims in question were really obligations of the receiver. On examination of the evidence submitted, we think there is no error in this finding.

The next complaint is that there was error in the report of the master, and carried into the decree appealed from, because a different basis for the allowance of interest was adopted as between the purchasing bondholder and the few outside bondholders. The purchasing bondholder was only allowed interest to May 14, 1891, the date fixed by the decree of confirmation for the purchaser to pay into court the balance of the purchase money, while the few outside bondholders, who have been, during all the delays caused by this litigation, kept out of their proportion of the proceeds, were allowed interest up to the date of the final distribution ordered by the decree herein appealed from. The practical effect of this is to compel the purchasing bondholder to pay interest upon such part of the purchase money as belonged to the outside bondholders from the time fixed by the court for the payment to the date of the decree, during which time, as the record shows, the purchaser has been retaining such portion of the purchase money. While the decree appealed

from in this respect is subject to some criticism, on the whole, we are of opinion that it does substantial justice between the parties.

The next complaint is that the allowance of compensation to Philip Walter, Esq., first special master in the case, is excessive. On the hearing ordered for the purpose of permitting the parties to contest the amount of this allowance, no evidence whatever was offered by the contestants to show what was the character or amount of service rendered by Special Master Walter. Mr. Walter proved by his own evidence that he had earned the compensation asked. The court below reduced his demand from $5,915 to $5,280, allowing the latter sum. The appellant seems to rely wholly upon the remarks by this court on the former appeal, wherein Special Master Walter's allowance for services was contested. We then said:

"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."

Whether or not we continue of the same opinion with regard to the services and compensation in question, we are clear that on an appeal of this kind we ought not to substitute our opinion in place of the evidence, master's report, and decree of the court below.

The learned counsel for appellees have made a strenuous appeal to this court to impose damages upon the appellant for a frivolous appeal, and there are many phases of this case which seem to warrant the imposition of such damages. A majority of the judges, however, are indisposed to say that the appeal is wholly frivolous.

The decree appealed from is affirmed, with costs.

WESTERN UNION TEL. CO. v. HENDERSON, Auditor.

(Circuit Court, D. Indiana. June 13, 1895.)

No. 9,126.

1. CONSTITUTIONAL LAW—SUIT AGAINST STATE.
   A suit against the auditor of a state, to restrain him from certifying and transmitting to the county auditors valuations of the property of complainant, for the purpose of taxation, pursuant to a statute (Act Ind. March 6, 1893)[1] claimed to be unconstitutional, on the ground that the acts sought to be enjoined would create a cloud upon complainant's title, and cause irreparable damage, is not a suit against the state.

2. SAME—ENACTMENT OF STATUTE—INDIANA ACT OF MARCH 6, 1893.
   Held, following the decision of the supreme court of Indiana, that the act of that state of March 6, 1893, relating to taxation, was duly enacted, and violates no provision of the constitution of the state.

3. SAME—INTERSTATE COMMERCE—STATE TARIFF.
   Held, further, that said act is not in violation of the constitution of the United States, as a regulation of commerce or as imposing a duty on im-

[1] For statute, see note at end of case.

ports or exports. W. U. Tel. Co. v. Taggart (Ind. Sup.) 40 N. E. 1051, approved.

This was a suit by the Western Union Telegraph Company against John Henderson, auditor of the state of Indiana, to restrain him from certifying valuations of the property of the complainant. The court granted a temporary restraining order. The defendant moves to dissolve such order, and also demurs to the bill.

Butler, Snow & Butler, for complainant.

W. A. Ketcham, Ind. Atty. Gen., Alonzo G. Smith, Merrill Moores, and Kern & Bailey, for defendant.

BAKER, District Judge. This is a suit in equity by the Western Union Telegraph Company, a corporation created and organized under the laws of the state of New York, and a citizen thereof, against John O. Henderson, auditor of state of the state of Indiana, and a citizen thereof, to restrain the defendant from certifying and transmitting to the several county auditors of the state the valuations of the property of the complainant in said counties for the purposes of taxation as fixed by the state board of tax commissioners under the provisions of an act of the general assembly of the state of Indiana approved March 6, 1893 (Acts 1893, p. 374; 3 Burns' Rev. St. Ind. § 8473 et seq.). The bill alleges that the defendant is threatening and about to certify and transmit said valuations for entry upon the tax duplicates of the several counties of the state, by means whereof an apparent charge against and cloud upon the title of the complainant's property would be wrongfully created, and that by this means great and irreparable damage and injury would be sustained by the complainant. It is alleged that the act of March 6, 1893, was not enacted in accordance with the provisions of the constitution of the state of Indiana; and, if it was so enacted, that it is invalid because in violation of various provisions of the constitution of the state of Indiana and of the constitution of the United States, which provisions are set forth with great particularity in the bill of complaint. It is further insisted that, if the above-mentioned act is not invalid for any of the foregoing reasons, the court ought to grant the injunctive relief prayed for because the state board of tax commissioners has adopted a rule of valuation the necessary result of which is to fix valuations on complainant's property higher than those fixed upon other property in the state. The court granted a temporary restraining order, and now the attorney general of the state moves the court to dissolve the same, and to dismiss the bill for want of equity. The sufficiency of the bill is also presented by a demurrer which asserts that the court is without jurisdiction to entertain the suit, because it is practically a suit against the state, and also on the ground that the bill does not state facts sufficient to constitute a cause of action entitling the complainant to any equitable relief.

The claim that the court is without jurisdiction has been earnestly and elaborately argued by the attorney general of the state both orally and upon a printed brief; and, while the court has at no

time felt any serious doubt of its jurisdiction, it has felt constrained to yield to the request of the attorney general, and examine the cases decided by the supreme court touching the jurisdiction of the circuit courts of the United States where suits are brought against officers of the state to restrain them from doing an alleged tortious or unlawful act under the pretended authority of an unconstitutional statute, or a statute which is claimed to be unconstitutional. The question lying at the threshold of every case in the courts of the United States is whether, on the face of the bill, assuming its allegations to be true, the court has jurisdiction. The cases decided by the supreme court are too numerous to justify a review of all of them, and I shall content myself with an examination of those in which the question of jurisdiction has been most directly and exhaustively considered.

Under the constitution, as it was originally adopted, it was held that a citizen of one state might sue any state other than that of his residence in the courts of the United States. Chisholm v. Georgia, 2 Dall. 419. The result of this decision led to a speedy adoption of the eleventh amendment to the constitution of the United States, which declares that "the judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state." The meaning of this amendment was first drawn in question in the case of Osborn v. Bank, 9 Wheat. 738, 846, which was a suit in equity brought in a court of the United States by the bank against the auditor and treasurer of the state of Ohio to restrain them from seizing the money of the bank and applying the same to the payment of taxes and penalties claimed to be due to the state. The state also asserted title to the money so taken by the defendants as its officers and agents. The question of jurisdiction was argued with conspicuous zeal and ability, and was decided on great deliberation, the court affirming the jurisdiction of the courts of the United States in one of the most masterly opinions ever delivered by that great expounder of the constitution, Chief Justice Marshall. He declared that:

"It may, we think, be laid down as a rule, which admits of no exception, that, in all cases where the jurisdiction depends on the party, it is the party named on the record."

The court added:

"The state not being a party on the record, and the court having jurisdiction over those who are parties on the record, the true question is not one of jurisdiction, but whether, in the exercise of its jurisdiction, the court ought to make a decree against the defendants; whether they are to be considered as having a real interest or as being only nominal parties."

Governor of Georgia v. Madrazo, 1 Pet. 110, was a suit to recover a sum of money, arising from the sale of certain slaves, which had been covered into the treasury of the state, and also to recover the possession of certain other slaves who had been illegally imported into the state, and who were in possession of the governor, pursuant to an act of congress, and also pursuant to an act of the general as-

sembly of the state. It was held that the claim was, in effect, one against the state, and, therefore, that the circuit court of the United States was without jurisdiction. The governor appeared in the case, and filed a claim on behalf of the state to the slaves remaining unsold and to the proceeds of those who were sold. The court, by Mr. Chief Justice Marshall, say:

"The information of the governor of Georgia professes to be filed on behalf of the state, and is in the language of the bill filed by the governor of Georgia in behalf of the State against Brailsford, 2 Dall. 402. If, therefore, the state was properly considered as a party in that case, it may be considered as a party in this."

The chief justice further said:

"In U. S. v. Peters, 3 Dall. 121, the court laid down the principle that, although the claims of the state may be ultimately affected by the decision of a cause, yet, if the state be not necessarily a defendant, the courts of the United States are bound to exercise jurisdiction. In the case of Osborn v. Bank of U. S., 9 Wheat. 738, this question was brought more directly before the court. It was argued with equal zeal and talent, and was decided on great deliberation. In that case the auditor and treasurer of the state were defendants, and the title of the state itself to the subject in contest was asserted. In that case the court said: 'It may, we think, be laid down as a rule, which admits of no exception, that, in all cases where the jurisdiction depends on the party, it is the party named on the record.' The court added: 'The state not being a party on the record, and the court having jurisdiction over those who are parties on the record, the true question is not one of jurisdiction, but whether, in the exercise of its jurisdiction, the court ought to make a decree against the defendants; whether they are to be considered as having a real interest or as being only nominal parties.'"

In the case of Bank v. Wister, 2 Pet. 319, the jurisdiction of the court was questioned on the ground that the state of Kentucky was the sole proprietor of the stock of the bank, for which reason it was insisted that the suit was virtually against the state. This contention was denied, the court saying that the question was no longer an open one; that the case of U. S. Bank v. Planter's Bank of Georgia, 9 Wheat. 904, was a much stronger one for the defendant than the present case, for there the state of Georgia was not only a proprietor, but a corporator.

In the case of Charles River Bridge v. Warren Bridge, 11 Pet. 419, 571, 585, which was a suit by the former to enjoin the latter from erecting a bridge across Charles river, the jurisdiction of the court was challenged on the ground that the suit was brought to invalidate a charter granted by the state of Massachusetts, and it was insisted that the state was the substantial party, though not named on the record, and that the defendants who were named on the record were the agents of the state, and acting under its authority. It was urged that, if jurisdiction was asserted by the court, they would do indirectly what the constitution prohibited them from doing directly. The court (Mr. Justice McLean delivering the opinion) overruled this claim, and asserted the jurisdiction of the court. Mr. Justice Story, with whom Mr. Justice Thompson concurred, while dissenting upon other questions, agreed with the court in asserting its jurisdiction. He declared that "it is no objection to the jurisdiction of the circuit courts of the United States that the defendant is a servant or agent of the state, and the act complained of done under its authority, if it be tortious and unconstitutional."

In the case of Railroad Co. v. Letson, 2 How. 497, 551, which was an action of covenant by the latter against the former, the jurisdiction of the court was questioned on the ground that the state of South Carolina was a member of the corporation, and that the action directly and necessarily affected the interests of a sovereign state. The jurisdiction was asserted, the court saying the true principle is that the jurisdiction of the circuit courts of the United States cannot be denied or taken away on account of a state having an interest in a suit, unless the state is a party on the record. It was added:

"This must be the rule under our system, whether the jurisdiction of the court is denied on account of any interest which a state may have in the subject-matter of the suit, or when it is alleged that jurisdiction does not exist on account of the character of the parties."

The case of Davis v. Gray, 16 Wall. 203, 220, was a suit by the receiver of an insolvent railroad company to which a large grant of land had been made by the state of Texas, seeking to enjoin the officers of the state, who had declared the lands forfeited, from granting them to other persons. The jurisdiction of the court was assailed on the ground that the land in question had been forfeited to the state, and that the officers who were named on the record as defendants represented the state, and had no personal interest in the subject-matter, in which the state alone was concerned. The court, reviewing many earlier cases, asserted its jurisdiction, and declared that three things, among others, were settled in the case of Osborn v. Bank, 9 Wheat. 738:

"(1) A circuit court of the United States in a proper case in equity may enjoin a state officer from executing a state law in conflict with the constitution or a statute of the United States when such execution will violate the rights of the complainant. (2) Where the state is concerned, the state should be made a party, if it can be done. That it cannot be done is a sufficient reason for the omission to do it, and the court may proceed to decree against the officers of the state in all respects as if the state were a party to the record (3) In deciding who are parties to the suit, the court will not look beyond the record. Making a state officer a party does not make the state a party, although her law may have prompted his action, and the state may stand behind him as the real party in interest."

The case of Board v. McComb, 92 U. S. 531, 541, was a suit for a perpetual injunction to restrain the board of liquidation of the state of Louisiana from using the bonds, known as the "consolidated bonds" of the state, for the liquidation of a certain debt claimed to be due from the state to the Louisiana Levee Company, and from using any other state bonds in payment of the pretended debt. The jurisdiction of the court was questioned on the ground that the suit against the officers of the state was one in effect against the state, which alone was interested in the subject-matter. The unanimous opinion of the court was delivered by Mr. Justice Bradley, who observed that on this branch of the subject numerous and well-considered cases decided by the court left little to be said. He observed that the objections to proceeding against state officers by mandamus or injunction were: First, that it was in effect proceeding against the state itself; and secondly, that it interfered with the official discretion vested in the officers. He said it was conceded that neither of these things could be done. He further added:

"A state, without its consent, cannot be sued by an individual, and a court cannot substitute its own discretion for that of the executive officers in matters belonging to the proper jurisdiction of the latter. But it has been well settled that when a plain official duty, requiring no exercise of discretion, is to be performed, and performance is refused, any person who will sustain personal injury by such refusal may have a mandamus to compel its performance; and, when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby for which adequate compensation cannot be had at law may have an injunction to prevent it. In such cases the writs of mandamus and injunction are somewhat correlative to each other. In either case, if the officer plead the authority of an unconstitutional law for the nonperformance or violation of his duty, it will not prevent the issuing of the writ. An unconstitutional law will be treated by the courts as null and void."

The case of U. S. v. Lee, 1 Sup. Ct. 240,[1] was an action involving the title to Arlington Heights, where a national cemetery is located, in which were buried the bodies of many deceased Union soldiers. The action was brought against Kaufman and Strong, who, as agents of the United States, were in possession of the premises. The great question for decision was whether an action for the recovery of land claimed to belong to the United States could be maintained against the agents of the United States who were in possession of it under their authority. Few cases have ever more deeply touched the public feelings. It was argued with zeal and ability, and was decided on great deliberation. The opinion of the court was delivered by Mr. Justice Miller, whose judgments on questions of constitutional law are scarcely inferior in clearness of statement and power of argument to the luminous judgments of Chief Justice Marshall. The court held that the courts of the United States had jurisdiction in such cases, although the United States was the only party interested in the subject-matter.

The case of Louisiana v. Jumel, 107 U. S. 711, 2 Sup. Ct. 128, was a suit in equity by certain owners of a portion of the consolidated bonds of the state of Louisiana for a mandatory injunction to compel the state board of liquidation of the state, consisting of the governor, the lieutenant governor, the auditor, the treasurer, the secretary of state, the speaker of the house of representatives, and the State National Bank of Louisiana, as fiscal agent of the state, to apply any and all moneys and proceeds of taxes in their hands or subject to their control to the payment and retirement of their bonds, as provided for in a certain act of the legislature. A majority of the court (Mr. Chief Justice Waite pronouncing the opinion) held that the circuit court of the United States was without jurisdiction. The judgment was placed upon the ground that the courts of the United States could not compel these officers to withdraw or divert funds from the state treasury, and apply them to the payment of the bonds. The court asserted that there was a distinction between such a case as the one then before it and those cases where the jurisdiction of the courts of the United States had been upheld to prevent an officer of the state from doing a tortious or wrongful act to the injury of an individual, where such tortious or wrongful act was done or threatened under

[1] 106 U. S. 196.

the pretended authority of an unconstitutional act of the state legislature. The dissenting judges were of the opinion that the case fell within the principles adjudged in former decisions of the court. What was sought in this case was to procure a decree negatively to restrain the members of the state board of liquidation from acting pursuant to an unconstitutional law, and affirmatively to compel them to apply the funds of the state to the payment of the bonds in pursuance of a constitutional enactment. It was said by the court that there was nothing in any of the cases formerly decided by it which authorized any such relief as was there asked.

The case of Cunningham v. Railroad Co., 109 U. S. 446, 3 Sup. Ct. 292, 609, was one in which it was held that the relief sought was affirmative in character, and, if granted, the decree would operate directly upon the property rights of the state. The jurisdiction of the court was therefore denied. The court, however, cited and expressly approved the rule announced by Mr. Justice Bradley in the case of Board v. McComb, supra.

The case of Poindexter v. Greenhow (one of the Virginia Coupon Cases) 114 U. S. 270, 5 Sup. Ct. 903, 962, was an action of detinue for the recovery of personal property distrained by the defendant as tax collector of the city of Richmond, Va., for delinquent taxes, in payment of which the plaintiff had duly tendered coupons cut from bonds issued by the state under the funding act of March 30, 1871, by which such coupons were made receivable in payment of taxes. A later statute required all taxes to be paid in lawful money, and, in obedience to it, the collector refused to receive the coupons. The court held that the plaintiff had paid the taxes demanded of him by a lawful tender, and that the defendant had no authority of law thereafter to attempt to enforce other payment by seizing his property. It was objected, however, that the suit of the plaintiff could not be maintained, because it was substantially an action against the state of Virginia to which it had not assented. It was said that the tax collector, who was sued, was an officer and agent of the state, engaged in collecting its revenue, under a valid law, and that the tax he sought to collect from the plaintiff was lawfully due; that consequently, he was guilty of no personal wrong, but acted only in an official capacity, representing the state, and, in refusing to receive the coupons tendered, simply obeyed the commands of his principal, whom he was lawfully bound to obey; and that, if any wrong had been done, it was done by the state in refusing to perform its contract, and for that wrong the state alone was liable, but was exempted from suit by the eleventh amendment to the constitution of the United States, which declares that "the judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state." The court, however, overruled these objections, and maintained the jurisdiction of the court in an exhaustive opinion. The opinion was placed upon the ground that the suit was not in substance or effect a suit against the state.

The opinion of the dissenting judges in Marye v. Parsons (one of the Virginia Coupon Cases) 114 U. S. 335, 336, 5 Sup. Ct. 932, 962, fully sustains the jurisdiction of the court in the case now on hearing. They there say:

"But, then, it will be asked, has a citizen no redress against the unconstitutional acts or laws of the state? Certainly he has. There is no difficulty on the subject. Whenever his life, liberty, or property is threatened, assailed, or invaded by unconstitutional acts, or by an attempt to execute unconstitutional laws, he may defend himself in every proper way, by habeas corpus, by defense to prosecutions, by actions brought on his own behalf, by injunction or mandamus. Any one of these modes of redress, suitable to his case, is open to him. A citizen cannot in any way be harassed, injured, or destroyed by unconstitutional laws without having some legal means of resistance or redress. But this is where the state or its officers moves against him. The right to all these means of protection and redress against unconstitutional oppression and exaction is a very different thing from the right to coerce the state into a fulfillment of its contracts."

The case of Hagood v. Southern, 117 U. S. 52, 6 Sup. Ct. 608, involves the same jurisdictional questions as those raised and decided in the case of Louisiana v. Jumel, supra, the doctrine of which is affirmed and applied. It is held that when a suit is brought in a court of the United States against officers of a state to enforce performance of a contract made by the state, and the controversy is as to the validity and obligation of the contract, and the only remedy sought is the enforcement of the contract made by the state, and the nominal defendants have no personal interest in the subject-matter, but defend only as representing the state, the state is to be deemed the real party against whom the relief is sought, and the suit is substantially within the prohibition of the eleventh amendment to the constitution. The court further pointed out the distinction between cases in which the relief sought was the performance of a plain official duty requiring no exercise of discretion, or where state officers have invaded, or threaten to invade, personal or property rights, and cases like the one before it, in which the relief sought was affirmative official action by state officers in performing an obligation which attached to the state in its political capacity. It was observed that the courts of the United States may take cognizance of cases of the two former classes, but may not of the latter.

The case of In re Ayres, 123 U. S. 443, 8 Sup. Ct. 164, was one where a bill in equity had been filed by aliens against the auditor of the state of Virginia, its attorney general, and various commonwealth attorneys for its counties, seeking to enjoin them from bringing and prosecuting suits in the name and for the use of the state, under the act of its general assembly of May 12, 1887, against taxpayers reported to be delinquent, but who had tendered in payment of the taxes sought to be recovered in such suits tax-receivable coupons cut from bonds of the state. An injunction having been awarded, according to the prayer of the bill, proceedings were taken against the attorney general and two commonwealth attorneys for contempt in disobeying the orders of the court in that respect, and they were fined and committed until the fines should be paid and they should

purge themselves of their contempt by dismissing certain suits. They sued out writs of habeas corpus, and, after a hearing in the supreme court, they were discharged. It was held that the suit was one against the state of Virginia, within the true meaning of the eleventh amendment to the constitution, and was not within the jurisdiction of the courts of the United States; that the injunction granted by the circuit court was null and void; and that the imprisonment of the officers of the state for an alleged contempt of the authority of the court was illegal. The decision in this case conflicts with the case of Osborn v. Bank, 9 Wheat. 738, and many former decisions of the court, in denying the doctrine announced by Mr. Chief Justice Marshall that "it may, we think, be laid down as a rule, which admits of no exception, that, in all cases where jurisdiction depends on the party, it is the party named on the record." The principle declared in this case is that the court will look beyond the parties on the record to the facts disclosed by the bill, and, if it appears therefrom that the relief sought is in effect an affirmative remedy, the practical effect of which is to enforce the performance of a contract by the state, the courts of the United States will be held to be without jurisdiction. The court conceded that rights of person and property, other than contract rights, when invaded or threatened with invasion by an officer of the state under the pretended authority of an unconstitutional statute, might be protected by the courts of the United States by a writ of injunction restraining the commission of the tortious or wrongful act. The officer, when sued for a tortious or wrongful act done or threatened to be done, cannot shield himself behind an unconstitutional enactment. He cannot claim to be acting as a representative of the state except in regard to those acts which are performed under warrant of lawful authority from the state.

The case of Pennoyer v. McConnaughy, 140 U. S. 1, 11 Sup. Ct. 699, was a suit in equity against the members of the board of land commissioners of the state of Oregon brought by a purchaser of swamp and overflowed lands, under an act of the state legislature of October 26, 1870, in order to restrain the defendants from doing acts which the bill alleged were violative of the plaintiff's contract with the state when he purchased the lands, and which were unconstitutional and destructive of his rights and privileges, and which, it was alleged, would work irreparable damage to his property rights so acquired. On February 16, 1887, the legislature of the state passed an act declaring all certificates of sale of swamp or overflowed lands void on which 20 per cent. of the purchase price was not paid prior to January 17, 1879, and requiring the board of commissioners to cancel such certificates. The board of commissioners, acting under the authority of the act of February 16, 1887, was threatening and about to cancel the plaintiff's certificate of purchase, and he filed his bill in equity in the circuit court of the United States for the district of Oregon to restrain them from so doing. The bill was demurred to by the defendants, on the ground that the suit was practically a suit against the state of Oregon, and that the court was denied jurisdiction by the eleventh amendment to the constitution of the

United States. The demurrer was overruled, and the jurisdiction of the court asserted. From a final decree, enjoining the members of the board of commissioners as prayed, an appeal was taken to the supreme court, where the case was elaborately argued, and the decree of the court below was affirmed in an exhaustive opinion delivered by Mr. Justice Lamar. In this case the officers of the state, acting in pursuance of an unconstitutional act of the state legislature, were doing and threatening to do acts which were violative of the contract rights of the plaintiff. While the decree was negative in form, restraining the defendants from violating the contract rights of the plaintiff, in effect it operated to establish his contract rights to the land against the state. The court, classifying suits against officers of the state, observed:

"The first class is where the suit is brought against the officers of the state, as representing the state's action and liability, thus making it, though not a party to the record, the real party against which the judgment will so operate as to compel it to specifically perform its contracts. In re Ayres, 123 U. S. 443, 8 Sup. Ct. 164; Louisiana v. Jumel, 107 U. S. 711, 2 Sup. Ct. 128; Antoni v. Greenhow, 107 U. S. 769, 2 Sup. Ct. 91; Cunningham v. Railroad Co., 109 U. S. 446, 3 Sup. Ct. 292, 609; Hagood v. Southern, 117 U. S. 52, 6 Sup. Ct. 608. [In this class of cases the courts of the United States are without jurisdiction.] The other class is where a suit is brought against defendants who claim to act as officers of the state, and, under the color of an unconstitutional statute, commit acts of wrong and injury to the rights and property of the plaintiff acquired under contract with the state. Such suit, whether brought to recover money or property in the hands of such defendants, unlawfully taken by them in behalf of the state, or for compensation in damages, or in a proper case, where the remedy at law is inadequate, for an injunction to prevent such wrong and injury, or for a mandamus, in a like case, to enforce upon the defendant the performance of a plain, legal duty, purely ministerial, is not, within the meaning of the eleventh amendment, an action against the state. Osborn v. Bank, 9 Wheat. 738; Davis v. Gray, 16 Wall. 203; Tomlinson v. Branch, 15 Wall. 460; Litchfield v. Webster Co., 101 U. S. 773; Allen v. Railroad Co., 114 U. S. 311, 5 Sup. Ct. 925, 962; Board v. McComb, 92 U. S. 531; Poindexter v. Greenhow, 114 U. S. 270, 5 Sup. Ct. 903, 962."

The case of In re Tyler, 149 U. S. 164, 13 Sup. Ct. 785, was a petition for a writ of habeas corpus by Tyler, sheriff of Aiken county, S. C., representing that he was unjustly detained by the United States marshal for the district of South Carolina. One Chamberlain had been appointed receiver of the South Carolina Railroad Company by the order of the circuit court of the United States for the district of South Carolina, and had filed a bill in equity as such receiver against a number of county treasurers and sheriffs of South Carolina, including the petitioner, alleging that they were about to levy upon and seize the property of the railroad company for taxes which were alleged to be unconstitutional and illegal for several reasons specifically alleged, and praying for an injunction, which was granted. The petitioner was fined and committed for contempt in violating the injunction. It was insisted by counsel for the petitioner that the injunction was illegal and void, as it practically operated against the state, and prevented it from collecting the taxes due to it, and on the ground that the officer simply represented and acted in behalf of the state in attempting to collect the taxes by seizure and sale of the property of the railroad company. The court

denied the writ, and asserted the jurisdiction of the court in an elaborate opinion by the present chief justice. After an extended review of the case, the court say:

"And while it was conceded that the principle stated by Chief Justice Marshall in the leading case of Osborn v. Bank, 9 Wheat. 738, that, 'in all cases where jurisdiction depends on the party, it is the party named on the record,' and that 'the eleventh amendment is limited to those suits in which the state is a party to the record,' had been qualified to a certain degree in some of the subsequent decisions of this court, yet it was also rightly declared that the general doctrine there announced, that the circuit courts of the United States will restrain a state officer from executing an unconstitutional statute of the state when to execute it would be to violate rights and privileges of the complainant that had been guarantied by the constitution, and would do irreparable damage and injury to him, has never been departed from."

The case of Reagan v. Trust Co., 154 U. S. 362, 14 Sup. Ct. 1047, was a suit in equity in a circuit court of the United States by a citizen of the state of New York against the members of the state board of railroad commissioners of the state of Texas to restrain the enforcement of certain rates for the transportation of freight and passengers over the railroads of the state, which rates had been established by such commission under an act of the legislature of the state on the ground that the rates so established were unreasonable and unjust. It was held to be within the power of the court to decree that the rates so established were unreasonable and unjust, and to restrain their enforcement.

From this review, it will be seen that while there has not always been harmony in the views of the judges, nor in the decisions of the court, touching the true meaning of the eleventh amendment, it has never been doubted or denied since the decision in the case of Osborn v. Bank, supra, that the circuit courts of the United States were invested with jurisdiction and power to restrain an officer of the state from committing tortious or wrongful acts, violative of the personal or property rights of a party, where such acts are committed or threatened to be committed under and pursuant to the pretended authority of an unconstitutional statute.

The defendant in this case is alleged to be about to commit an act, under and pursuant to a statute alleged to be unconstitutional, which, if committed, would, wrongfully and to its irreparable injury, create an apparent charge and lien upon the complainant's property, in violation of its right to security of property guarantied to it by the constitution. In doing such act the defendant would not be acting for and in behalf of the state, for the reason that the state has not by any valid statute given him authority to perform the act. While he is generally and for all lawful purposes an officer of the state, he ceases to act as the representative of the state whenever he does or attempts to do an act for the doing of which a lawful authority has not been granted by a valid statute. The court, therefore, has jurisdiction of the present case, and must determine the other questions presented by the motion and demurrer to the bill.

The first question raised and argued by counsel for the complainant is that the act of March 6, 1893, under the provisions of which

the valuation and assessment of its property for the purposes of taxation were made, never became a law of the state, for the reason, as shown by the journals of the senate and house of representatives, that the bill was passed by the legislature and sent to the governor within the two days next preceding the final adjournment of the general assembly as fixed by the constitution, in violation of section 14, art. 5, of the said instrument.

This exact question was presented in the case of W. U. Tel. Co. v. Taggart, 40 N. E. 1051, decided on May 14, 1895, by the supreme court of the state of Indiana. The bill in that case was in substance and scope the same as the bill in this court, and the act in question was assailed upon the same grounds as those presented and argued before me. The validity of the same acts of the state board of tax commissioners was drawn in question in both courts. After an extended review of the authorities, the court held that the statute in question was valid. It was said:

"The authentication of the act, in the manner provided in section 25, art. 4, of the constitution (that 'all bills and joint resolutions so passed shall be signed by the presiding officers of the respective houses'), is conclusive evidence that the act was duly passed in conformity with the provisions of the organic law of the state. Under the guaranty of the constitution, the statute, enrolled and filed in the office of the secretary of state, comes to us as by the solemn authentication of the legislature itself, under the hand and seal of its presiding officers. Such authentication imports absolute verity as to the passage of the act, even as in the case of the acts of the court, which are authenticated by its certificate and seal under the hand of its clerk."

This decision conclusively settles, so far as the courts of the United States are concerned, that the act in question was constitutionally enacted.

It was further insisted in that case, as it is in this, that the act[1] in question was invalid—First, because it fails to provide due process of law; secondly, because it denies to the complainant the equal protection of the law; thirdly, because it violates the provisions of the constitution of the United States which prohibit any state from laying any imposts or duties on imports or exports; fourthly, because it is in violation of the provisions of the state constitution which require a uniform and equal rate of taxation; fifthly, because it is in violation of the constitution of the United States, in that it amounts to a regulation of commerce among the states and with foreign countries; sixthly, it is in violation of the constitution of the state, as being in effect a local or special law; and, seventhly, it is in violation of the constitution of the state as conferring judicial powers upon executive and administrative officers. These several objections were carefully examined by the court, and were held to be unfounded. This act is adjudged by the highest judicial tribunal of the state to have been validly enacted, and not to be obnoxious to any constitutional provision. The courts of the United States are bound to accept the statute in question as a binding and constitutional enactment of the state, unless it is invalidated by reason of its conflict with some

[1] For the act of March 6, 1893, see note at end of case.

provision of the constitution of the United States. Its alleged repugnancy to the constitution of the United States was considered with great care in the case of W. U. Tel. Co. v. Taggart, supra, and it was there held that no such repugnancy existed. This conclusion is fully supported by the following decisions of the supreme court of the United States: Railway Co. v. Backus, 154 U. S. 421, 14 Sup Ct. 1114; W. U. Tel. Co. v. Massachusetts, 125 U. S. 530, 8 Sup. Ct. 961; Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, 11 Sup. Ct. 876; Maine v. Grand Trunk Ry. Co., 142 U. S. 217, 12 Sup. Ct. 121, 163; Railroad Co. v. Gibbes, 142 U. S. 386, 12 Sup. Ct. 255; Railway Co. v. Wright, 151 U. S. 470, 14 Sup. Ct. 396.

It is lastly insisted that the state board of tax commissioners adopted a rule of valuation, the necessary result of which was to fix the valuation on complainant's property higher than that fixed upon other property in the state. This claim is equally unfounded. The valuation of its property was fixed upon a mileage basis which has been sustained by the supreme court in the cases above cited.

The bill of complaint is insufficient to entitle the complainant to the relief prayed for. The motion to dissolve the temporary restraining order is therefore sustained, and the bill is dismissed for want of equity, at the costs of the complainant.

NOTE.

An act supplementary to and amendatory of an act entitled "An act concerning taxation, repealing all laws in conflict therewith, and declaring an emergency," approved March 6, 1891, and providing for the taxation of telegraph, telephone, palace car, sleeping car, drawing-room car, dining car, express and fast freight, joint stock associations, companies, copartnerships and corporations transacting business in the state of Indiana, repealing sections 68, 69, 70 and 71 of said act and all laws in conflict therewith, and declaring an emergency."

(Approved March 6, 1893.)

Section 1. Be it enacted by the general assembly of the state of Indiana, that any joint stock association, company, copartnership or corporation, whether incorporated under the laws of this state or any other state, or of any foreign nation, engaged in transmitting to, from, through, in or across the state of Indiana, telegraphic messages, shall be deemed and held to be a telegraph company, and every such telegraph company shall, annually, between the first day of April and the first day of June, make out and deliver to the auditor of state a statement, verified by the oath of the officer or agent of such company making such statement, with reference to the first day of April next preceding, showing: First. The total capital stock of such association, company, copartnership or corporation. Second. The number of shares of capital stock issued and outstanding, and the par or face value of each share. Third. Its principal place of business. Fourth. The market value of said shares of stock on the first day of April next preceding, and if such shares have no market value, then the actual value thereof. Fifth. The real estate, structures, machinery, fixtures and appliances owned by said association, company, copartnership or corporation, and subject to local taxation within the state, and the location and assessed value thereof, in each county or township where the same is assessed for local taxation. Sixth. The specific real estate, together with the permanent improvements thereon, owned by such association, company, copartnership or corporation, situate outside the state of Indiana, and not directly used in the conduct of the business, with a specific description of each such piece, where located, the purpose for which the same is used and

the sum at which the same is assessed for taxation in the locality where situated. Seventh. All mortgages upon the whole or any of its property, together with the dates and amounts thereof. Eighth. (a) The total length of the lines of said association or company. (b) The total length of so much of their lines as is outside the state of Indiana. (c) The length of the lines within each of the counties and townships within the state of Indiana.

Sec. 2. Every telephone company doing business in this state, whether incorporated under the laws of this state, or of any other state, or of any foreign nation, shall annually, between the first day of April and the first day of June, make out and deliver to the auditor of state a statement, verified by the oath of the officer or agent of such company making such statement, with reference to the first day of April next preceding, showing: First. The total capital stock of such association, company, copartnership or corporation. Second. The number of shares of capital stock issued and outstanding and the par or face value of each share. Third. Its principal place of business. Fourth. The market value of said shares of stock on the first day of April next preceding, and if such shares have no market value, then the actual value thereof. Fifth. The real estate, structures, machinery, fixtures and appliances owned by said association, company, copartnership or corporation, and subject to local taxation within the state, and the location and assessed value thereof in each county or township where the same is assessed for local taxation. Sixth. The specific real estate, together with the permanent improvements thereon, owned by such association, company, copartnership or corporation, situate outside the state of Indiana and not used directly in the conduct of the business, with a specific description of each such piece, where located, the purpose for which the same is used, and the sum at which the same is assessed for taxation in the locality where situated. Seventh. All mortgages upon the whole or any of its property together with the dates and amounts thereof. Eighth. (a) The total length of the lines of said association or company. (b) The total length of so much of their lines as is outside the state of Indiana. (c) The length of the lines within each of the counties and townships within the state of Indiana.

Sec. 3. Every joint stock association, company, copartnership or corporation incorporated or acting under the laws of this or any other state, or any foreign nation engaged in conveying to, from, through, in or across this state, or any part thereof, money, packages, gold, silver, plate, merchandise, freight, or other articles, under any contract, express or implied, with any railroad company, or the managers, lessees, agents or receivers thereof, provided such joint stock association, company, copartnership or corporation is not a railroad company, shall be deemed and held to be an express company within the meaning of this act, and every such express company shall annually, between the first day of April and the first day of June, make out and deliver to the auditor of state a statement, verified by the oath of the officer or agent of such association, company, copartnership or corporation making such statement with reference to the first day of April next preceding, showing: First. The total capital stock or capital of said association, company, copartnership or corporation. Second. The number of shares of capital stock issued and outstanding and the par or face value of each share, and, in case no shares of capital stock are issued, in what manner the capital thereof is divided and in what manner such holdings are evidenced. Third. Its principal place of business. Fourth. The market value of the said shares of stock on the first day of April next preceding, and if such shares have no market value, then the actual value thereof; and in case no shares of stock have been issued, state the market value, or the actual value in case there is no market value, of the capital thereof, and the manner in which the same is divided. Fifth. The real estate, structures, machinery, fixtures and appliances owned by said association, company, copartnership or corporation, and subject to local taxation within the state of Indiana, and the location and assessed value thereof in each county or township where the same is assessed for local taxation. Sixth. The specific real estate, together with the improvements thereon, owned by said association, company, copartnership or corporation, situate outside the state of Indiana and not used directly in the conduct of the business, with a specific description of each piece, where located, the purpose for which the same is used, and the sum at

which the same is assessed for taxation in the locality where situated. Seventh. All mortgages upon the whole or any part of its property, together with the dates and amounts thereof. Eighth. (a) The total length of the lines or routes over which such association, company, copartnership or corporation transports such merchandise, freight or express matter. (b) The total length of such lines or routes as are outside the state of Indiana. (c) The length of such lines or routes within each of the counties and townships within the state of Indiana.

Sec. 4. Every joint stock association, company, copartnership or corporation incorporated or acting under the laws of this or any other state, or of any foreign nation, and conveying to, from, through, in or across this state, or any part thereof, passengers or travelers in palace cars, drawing-room cars, sleeping cars, dining cars or chair cars, under any contract, express or implied, with any railroad company, or the managers, lessees, agents or receivers thereof, shall be deemed and held to be a sleeping-car company for the purposes of this act; and every such sleeping-car company doing business in this state shall, annually, between the first day of April and the first day of June, make out and deliver to the auditor of state a statement verified by the oath of the officer or agent of such company making such statement, with reference to the first day of April next preceding, showing: First. The total capital stock of such association, company, copartnership or corporation. Second. The number of shares of capital stock issued and outstanding, and the par or face value of each share. Third. Its principal place of business. Fourth. The market value of said shares of stock on the first day of April next preceding, and if such shares have no market value, then the actual value thereof. Fifth. The real estate, structures, machinery, fixtures and appliances owned by said association, company, copartnership or corporation, and subject to local taxation within the state, and the location and assessed value thereof in each county or township where the same is assessed for local taxation. Sixth. The specified real estate, together with the permanent improvements thereon, owned by such association, company, copartnership or corporation, situate outside the state of Indiana, and not used directly in the conduct of the business, with a specific description of each such piece, where located, the purpose for which the same is used, and the sum at which the same is assessed for taxation in the locality where situated. Seventh. All mortgages upon the whole or any of its property, together with the franchises and amounts thereof. Eighth. (a) The total length of the main lines of all the railroad companies over which said cars are run. (b) The total length of so much of the main lines of the railroad companies over which said cars are run as is outside the state of Indiana. (c) The length of the lines of said railroad companies over which said cars are run within each of the counties and townships within the state of Indiana: provided, that where the railroads, over which said lines run, have double tracks, or a greater number of tracks than a single track, the statement shall only give the mileage as though such tracks were but a single track, and in case the auditor of state shall require it, such statement shall show in detail the number of miles of each or any particular railroad system or division.

Sec. 5. Upon the filing of such statements the auditor of state shall examine them, and each of them, and if he shall deem the same insufficient, or in case he shall deem that other information is requisite, he shall require such officer to make such other and further statements as said auditor of state may call for. In case of the failure or refusal of any association, company, copartnership or corporation to make out and deliver to the auditor of state any statement or statements required by this act, such association, company, copartnership or corporation shall forfeit and pay to the state of Indiana one hundred ($100) dollars for each additional day such report is delayed beyond the first day of June, to be sued and recovered in any proper form of action in the name of the state of Indiana on the relation of the auditor of state, and such penalty, when collected, shall be paid into the general fund of the state.

Sec. 6. Upon the meeting of the state board of tax commissioners for the purpose of assessing railroad and other property, said auditor of state shall lay such statements, with such information as may have been furnished him, before said board of tax commissioners, who shall thereupon value and assess the property of each association, company, copartnership or corporation in the

manner hereinafter set forth, after examining such statements and after ascertaining the value of such properties therefrom, and from such other information as they may have or obtain. For that purpose they may require the agents or officers of said association, company, copartnership or corporation to appear before them with such books, papers or statements as they may require, or they may require additional statements to be made to them, and may compel the attendance of witnesses, in case they shall deem it necessary, to enable them to ascertain the true cash value of such property.

Sec. 7. Said state board of tax commissioners shall first ascertain the true cash value of the entire property owned by said association, company, copartnership or corporation from said statements or otherwise, for that purpose taking the aggregate value of all the shares of capital stock, in case said shares have a market value, and in case they have none, taking the actual value thereof or of the capital of said association, company, copartnership or corporation, in whatever manner the same is divided, in case no shares of capital stock have been issued: provided, however, that in case the whole or any portion of the property of such association, company, copartnership or corporation shall be incumbered by a mortgage or mortgages, such board shall ascertain the true cash value of such property by adding to the market value of the aggregate shares of stock or to the value of the capital, in case there shall be no such shares, the aggregate amounts of such mortgage or mortgages, and the result shall be deemed and treated as the true cash value of the property of such association, company, copartnership or corporation. Such board of tax commissioners shall, for the purpose of ascertaining the true cash value of the property within the state of Indiana, next ascertain from such statements or otherwise, the assessed value for taxation, in the localities where the same is situated, of the several pieces of real estate situate without the state of Indiana and not specifically used in the general business of such associations, companies, copartnerships or corporations, which said assessed values for taxation shall be by said board deducted from the gross value of the property as above ascertained. Said state board of tax commissioners shall next ascertain and assess the true cash value of the property of such associations, companies, copartnerships or corporations within the state of Indiana, by taking the proportion of the whole aggregate value of said associations, companies, copartnerships or corporations, as above ascertained, after deducting the assessed value of such real estate without the state, which the length of the lines of said associations, companies, copartnerships or corporations, in the case of telegraph and telephone companies, within the state of Indiana, bears to the total length of the lines thereof; and in the case of palace, drawing-room, sleeping, dining or chair car companies, the proportion shall be the proportion of such aggregate value, after such deductions, which the length of the lines within the state, over which said cars are run, bears to the length of the whole lines over which said cars are run; and in the case of express companies, the proportion shall be the proportion of the whole aggregate value, after such deductions, which the length of the lines or routes, within the state of Indiana, bears to the whole length of the lines or routes of such associations, companies, copartnerships or corporations, and such amount, so ascertained, shall be deemed and held as the entire value of the property of said associations, companies, copartnerships or corporations within the state of Indiana. From the entire value of the property within the state so ascertained, there shall be deducted, by said board, the assessed value for taxation of all the real estate, structures, machinery and appliances within the state and subject to local taxation in the counties and townships, as hereinbefore described in item No. 5 of sections 1, 2, 3, and 4 of this act, and the residue of such value so ascertained, after deducting therefrom the assessed value of such local properties, shall be by said board assessed to said association.

Sec. 8. Said board of tax commissioners shall thereupon ascertain the value per mile of the property within the state by dividing the total value, as above ascertained, after deducting the specific properties locally assessed within the state by the number of miles within the state, and the result shall be deemed and held as the value per mile of the property of such association, company, copartnership or corporation within the state of Indiana.

Sec. 9. Said board of tax commissioners shall thereupon for the purpose of

determining what amount shall be assessed by it to said association, company, copartnership or corporation in each county in the state, through, across, into or over which the line of said association, company, copartnership or corporation extends, multiply the value per mile as above ascertained by the number of miles in each of such counties as reported in said statements, or as otherwise ascertained, and the result thereof shall be by said board certified to the auditor of state, who shall thereupon certify the same to the auditors respectively of the several counties through, into, over or across which the lines or routes of said association, company, copartnership or corporation extend, and such auditors shall apportion the amount certified for their counties respectively among the several townships into, through, over or across which such lines or routes extend in proportion to the length of the lines in such townships.

Sec. 10. To enable said county auditors to properly apportion the assessments between the several townships, they are authorized to require the agent of said association or company to report, to them respectively, under oath, the length of the lines in each township, and the auditor shall thereupon add to the value so apportioned the assessed valuation of the real estate, structures, machinery, fixtures and appliances situated in any township, and extend the taxes thereon upon the duplicate, as in other cases.

Sec. 11. In case any such association, copartnership or corporation as named in this supplemental and amendatory act shall fail or refuse to pay any taxes assessed against it in any county or township in the state, in addition to other remedies provided by law for the collection of taxes, an action may be prosecuted in the name of the state of Indiana by the prosecuting attorneys of the different judicial circuits of the state, on the relation of the auditors of the different counties of this state, and the judgment in said action shall include a penalty of fifty per cent. of the amount of taxes so assessed and unpaid, together with reasonable attorney's fees for the prosecution of such action, which action may be prosecuted in any county into, through, over or across which the line or route of any such association, copartnership, company or corporation shall extend, or any county where such association, company, copartnership or corporation, shall have an office or agent for the transaction of business. In case such association, company, copartnership or corporation shall have refused to pay the whole of the taxes assessed against the same by said state board of tax commissioners, or in case such association, company, copartnership or corporation shall have refused to pay the taxes or any portion thereof assessed to it in any particular county or counties, township or townships, such action may include the whole or any portion of the taxes so unpaid in any county or counties, township or townships, but the attorney-general may, at his option, unite in one action the entire amount of the tax due, or may bring separate actions in each separate county or township, or join counties and townships, as he may prefer. All collection of taxes for or on account of any particular county made in any such suit or suits, shall be by said auditor of state accounted for as a credit to the respective counties for or on account of which such collections were made by said auditor of state, at the next ensuing settlement with such county, but the penalty so collected shall be credited to the general fund of the state; and upon such settlement being made, the treasurers of the several counties shall, at their next settlements, enter credits upon the proper duplicates in their offices, and at the next settlement with such county report the amount so received by him in his settlement with the state, and proper entries shall be made with reference thereto: provided, however, that in any such action the amount of the assessment fixed by said state board of tax commissioners and apportioned to such county, or apportioned by the county auditor to any particular township, shall not be controverted.

Sec. 12. Inasmuch as the provisions of this act are intended to take the place of sections 68, 69, 70 and 71 of the act entitled "An act concerning taxation, repealing all laws in conflict therewith and declaring an emergency," approved March 6, 1891, such sections and each of them and all other laws and parts of laws in conflict with this act are hereby repealed: provided, that all moneys now due the state, or which may become due on the 1st day of April, 1893, or at any other time, on account of any assessment or charge made

against any of the joint stock associations, persons, companies or corporations on account of per cent. on gross or net earnings for the preceding year or years, and all penalties and charges thereon growing out of any failure to make reports on payments as now required by the provisions of the aforesaid repealed sections shall be paid and collected under the provisions of said repealed sections the same as if said sections were not repealed, and any suit brought for the recovery of such money, taxes or penalties shall be begun under the provisions of said repealed sections and prosecuted to final judgment thereunder in all respects the same as if said sections were continued in full force; and it is hereby expressly provided that all the rights of the state accrued, or which may accrue on the 1st day of April, 1893, on account of receipts for the preceding years, are hereby saved from the operation of the aforesaid repealing clause.

Sec. 13. Whereas an emergency exists for the immediate taking effect of this act, the same shall be in force from and after its passage.

ROGGENKAMP v. ROGGENKAMP et al.

(Circuit Court of Appeals, Eighth Circuit. June 3, 1895.)

No. 541.

1. CONSTRUCTIVE TRUSTS—PURCHASE OF LAND UNDER CONTRACT OF DECEASED PERSON—RIGHTS OF HEIRS.

   On the death of a person in possession of lands under a contract of purchase, leaving a widow and minor son, his father, with his widow's consent, took possession of the property, sold the personalty, paid the debts, and, by virtue of the contract, paid the balance due for the lands, and took title in his own name. *Held*, that he, or any one purchasing from him with notice of the facts, took the title in trust for the heir, whether the money to complete the purchase was paid from the proceeds of the son's personal estate or from the father's own funds.

2. EXECUTOR DE SON TORT—RIGHTS AND LIABILITIES.

   One who, without direction of the proper court, or of a will of a deceased person, intermeddles with his personal estate, and performs acts of administration, will be compelled to account for its disposition and value; but in all acts which are not for his own benefit, and which a lawful executor or administrator might do, he is protected. He cannot be charged beyond the assets which come to his hands, and against these he may set off the just debts which he has paid.

3. SAME — CONSTRUCTIVE TRUSTS — ACCOUNTING — BONA FIDE PURCHASERS—PARTIES.

   One in possession of lands under a contract of purchase died intestate, owing most of the purchase money, and leaving a widow and minor son and a small amount of personalty. With the consent of the widow, and to save the expense of a regular administration, the intestate's father took possession of his property, sold the personalty, and paid his debts. He also completed the purchase of the land, took title in himself, and held for his own benefit. After some years, a suit was brought against him by the heir, which resulted in a decree declaring a trust, ordering him to convey, and holding that the heir's guardian was entitled to recover rental value, less taxes paid and improvements made. Defendant had contended that he used all the proceeds of the personalty, together with money of his own, in paying the intestate's debts, and that he paid for the land entirely with his own money. The record on appeal showed that, prior to the commencement of the suit, he had sold the land, and shortly after it was begun, and before any notice of lis pendens was filed, conveyed the same; but, nevertheless, the purchaser was not made a party to the suit. *Held*, that the decree was erroneous; that the title in the hands of the purchaser was not affected by the decree; that, if complainant desired to recover the land, he might make the purchaser a defendant, if this could be done

without ousting the jurisdiction; that if it could not, or if it should appear that he was a bona fide purchaser for value without notice, then an accounting could be had against the original defendant, wherein the latter would be entitled to be credited not only with taxes and improvements, but with the money, if any, which he had paid from his individual funds in purchasing the land and paying the debts.

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

On March 6, 1894, the circuit court for the district of Nebraska rendered a decree to the effect that William Roggenkamp, the appellant in this case, held the title to 40 acres of land in trust for, and that he should convey the same to, the appellee John Roggenkamp, Jr., a minor, and that the appellee Emma Simons, as his guardian, was entitled to recover from the appellant the rental value of this tract of land, less the taxes he had paid and the value of the improvements he had made upon it during the time between April, 1883, and April, 1893. The appeal challenges this decree. The facts upon which it rests are these: In April, 1883, John Roggenkamp, Sr., died, intestate. He was the son of the appellant, the father of the appellee John Roggenkamp, Jr., and the husband of the appellee Emma Simons, who has since his death been again married. Before his death he had purchased of one McClay a contract from the Burlington & Missouri Railroad Company in Nebraska, for the tract of land in question, and had paid $172, and had agreed to pay about $1,000 more for the title to the land. He was residing upon this land with his wife and child when he died. His son, John Roggenkamp, Jr., was his only heir at law. At the time of his death he owed about $2,000 in addition to the $1,000 required to pay for this tract of land, and he had some farming implements, a small amount of stock, some corn and wheat, and his right to this tract of land, but no other property. No one applied for the appointment of an administrator of his estate, and none was appointed. The appellant took his widow and child to his residence, a few miles distant, and they lived there about six months, when the widow returned with her child to her parents. For the purpose of saving the expense of administration through the court, the appellant, with the consent of the widow, took all the personal property of his deceased son, except some of the furniture of the house and two cows, which the widow retained, and sold it for the best price he could obtain, and paid the debts of the deceased. He also completed the purchase of the 40 acres of land, took the title to it in his own name, and from the death of his son until 1891 paid the taxes upon it, made some improvements upon it, and received the rents and profits from it. In 1890 he made a contract to convey this land to one John Bratt, who is not a party to this suit; and on November 24, 1891, he conveyed it to him. The decree was rendered on the ground that the appellant had purchased the land with the proceeds of the personal property of the deceased, and that he therefore held it as trustee for the heir.

Newton C. Abbott, William A. Selleck, and Arthur W. Lane filed brief for appellant.

John M. Stewart, Stephen B. Pound, and Lionel C. Burr filed brief for appellees.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

The fundamental principle on which this decree is based is sound. One who appropriates to himself the benefit of an interest or equity in real estate that has descended to a minor heir thereby constitutes himself a trustee for the heir. He charges the title in himself, and in those who hold under him with notice, with a trust in favor of the heir that a court of equity will enforce; and he renders himself personally liable to account for the rents, profits, and proceeds of

the land which he thus acquires. When the appellant used the contract for the purchase of this land that his son held at his death, to obtain the title for himself, he became a trustee for the minor heir, John Roggenkamp, Jr., and the title to the land stood charged with that trust as long as it remained in his name, or in the name of any one who held under him with notice of these facts, whether he used the personal property of his son's estate to pay for the land or not. So far as the decree charges the title the appellant has to this land with this trust, therefore, it is right. Musham v. Musham, 87 Ill. 80; Stow v. Kimball, 28 Ill. 93; Schaffner v. Grutzmacher, 6 Iowa, 137; Fox v. Doherty, 30 Iowa, 334; Sentill v. Robeson, 2 Jones, Eq. 510; Graves v. Pinchback, 47 Ark. 470, 1 S. W. 682; Hall v. Vanness, 49 Pa. St. 457.

There is more doubt, however, whether the evidence in this record warrants the measure of relief given by the decree. The appellant seems to have taken the real and personal property which his son left at his death to pay the son's debts, and to save the expense of administration through the probate court, rather than to profit by it himself. He alleges that he expended the proceeds of all the personal property in paying these debts and that he paid more than $1,000 of his own money to perfect the title to the land. If this be true, he is entitled to charge against the land the amount that he paid from his own funds to perfect the title, and the heir should be required to allow this amount before he recovers the land.

Under the common law, one who intermeddles with the personal property of a deceased person, and disposes of it, or does any other act of administration of the assets without the authority or direction of the proper court, or of the will of the deceased, thereby constitutes himself an executor de son tort. He cannot by his wrongful act acquire any benefit for himself. The rightful executor or administrator or any creditor or legatee may maintain an action against him for the property of the deceased which he has taken, and may compel him to account for its disposition and value; but in all acts that are not for his own benefit and that a lawful executor might do he is protected. He cannot be charged beyond the assets which come to his hands, and against these he may set off the just debts which he has paid. 1 Williams, Ex'rs, pp. 296, 305, 308; Bacon v. Parker, 12 Conn. 213; Emery v. Berry, 28 N. H. 473; Bellows v. Goodall, 32 N. H. 97; Glenn v. Smith, 2 Gill & J. 493; Weeks v. Gibbs, 9 Mass. 74; Winn v. Slaughter, 5 Heisk. 191; Tobey v. Miller, 54 Me. 480; Olmsted v. Clark, 30 Conn. 108.

It is unnecessary to inquire in this case whether or not an intermeddler with the personal estate of a deceased person becomes an executor de son tort, and liable to account at the suit of a creditor or legatee under the statutes of the state of Nebraska. It is certain that the appellant, by undertaking to administer the estate of his deceased son without the sanction of the probate court, made himself liable to account to the rightful administrator for the value of the personal property he obtained from that estate. Consol. St. Neb. 1891, § 1244. But it would have been a perfect defense to a suit by the administrator for such an accounting that the appellant

had paid all the just debts of the deceased, and that he had exhausted all the assets he had received from the estate in paying these debts. The heir had no right to or equity in the personal property of his father, as against a stranger, superior to those of the lawful administrator. He alleged in this suit that the appellant had appropriated the proceeds of the personal property of the estate to the purchase of the land he sought to recover. The appellant denied this, averred that he had used all the property of the deceased and some of his own to pay the just debts of the deceased, and that he paid for this land with his own money. The appellant was entitled to a fair accounting that would determine this issue, and find what balance, if any, of the value of the personal property he received, remained in his hands after he was credited with the payments he made on just debts of the deceased. He was not liable to be charged with the use of any more property of the deceased in the purchase of this land than the amount of such a balance. We have searched the record in this case in vain for the statement of such an account, or of evidence that an accounting upon this basis has been had in the court below, and we are unwilling to affirm the decree without it.

There is another respect in which the record is singularly defective. The holder of the legal title to the land is an indispensable party to a suit to annul, or to compel the conveyance of, that title. U. S. v. Winona & St. P. R. Co., 67 Fed. 948. This suit was commenced on September 14, 1891. There is a statement in the brief of the appellee that a notice of lis pendens was then filed in the proper office in the county in which the land is situated, but the record does not disclose that fact. It does appear from the record, however, that on November 10, 1890, one John P. Bratt purchased this and other lands from the appellant; that on March 1, 1891, he took possession of them; that he had paid $7,884 on account of this purchase before this suit was commenced; and that the appellant conveyed the legal title to the land here in controversy to him on November 24, 1891. It goes without saying that the title to this land held by Bratt cannot be affected by a decree in a suit to which he is not a party, and of which he had no notice before he paid for and took his title. For these reasons, the decree below must be reversed. If the appellee John Roggenkamp, Jr., desires to recover this land, he should be permitted to make John P. Bratt a party defendant, if that can be done without ousting the jurisdiction of the court below. If he does so, and the evidence then establishes the fact that Bratt took the title with notice, the appellee Roggenkamp may recover the land on equitable terms. If, on the other hand, Bratt cannot be made a party to this suit, or if the evidence establishes the fact that he was a bona fide purchaser for value without notice, then the guardian of John Roggenkamp, Jr., may have an accounting with the appellant, in which he should be charged with the amounts he has received, and credited with the amounts he has expended on account of this land.

It is indispensable to a just determination of this suit that the matter of the accounting should be referred to a master, with in-

structions to hear evidence, and to state an itemized account against the appellant, in which he shall be charged with the value of each item of the personal property of his deceased son that he sold or converted to his own use, and in which he shall be credited with the various amounts which he paid on account of the just debts of the deceased. If, after confirmation by the court, the balance of this account is against the appellant, and is less than the amount which he paid for the land, the master should state another account, in which he should charge the appellant with this balance, with the rental value of the land from 1883 until he sold it in 1891, with the amount he then received for the land or its value, and with interest on all of these items, and should credit him with the amount he paid for the land, the taxes he paid upon it, and the value of the improvements he made upon it, with interest upon these items. After these reports of the master have been received and confirmed by the court, the suit should proceed to final hearing and decree.

The decree is accordingly reversed, without costs, and the cause remanded, with directions to proceed in a manner not inconsistent with the views expressed in this opinion.

SOUTHERN PAC. R. CO. v. GROECK et al.

(Circuit Court, S. D. California. May 13, 1895.)

No. 347.

1. DEMURRER—FACTS JUDICIALLY NOTICED.

The rule that, for the purpose of disposing of a demurrer, such facts as are well pleaded are taken to be true, does not apply where, by a public record, of which the court takes judicial notice, the facts are shown to be otherwise.

2. PUBLIC LANDS—GRANT TO RAILROAD—WITHDRAWAL FROM ENTRY.

By an act passed July 27, 1866, congress granted to the S. P. Co., in aid of the construction of its railroad, the alternate odd-numbered sections of public land, to the amount of 10 per mile, on each side of the road, not reserved, sold, or otherwise appropriated, and in compensation for any land reserved, sold, or otherwise appropriated, within the granted limits, other lands to be selected in the alternate odd-numbered sections, not more than 10 miles beyond the granted limits. The act provided that "the president of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the * * * road after the general route shall be fixed * * * and the odd sections * * * shall not be liable to sale or entry or pre-emption before or after they are surveyed * * *." *Held*, that the law making the grant itself operated to withdraw from sale, pre-emption, homestead entry, or other disposition, the odd-numbered sections of land within both the granted and the indemnity limits. Buttz v. Railroad Co., 7 Sup. Ct. 100, 119 U. S. 72, and St. Paul & P. R. Co. v. Northern Pac. R. Co., 11 Sup. Ct. 389, 139 U. S. 18, followed.

3. SAME—EQUITY—LACHES.

The general route of the road was fixed, and a map thereof filed, in 1867. The land within the indemnity limits was insufficient to make up the losses within the granted limits, and this fact was known as early as 1883. In 1885 one G. settled upon a part of the land within the indemnity limits, and filed a declaratory statement thereon. The S. P. Co. contested G.'s right to the land, in the land office and by appeal, but the land was patented to G. in 1890. In 1891 the S. P. Co. selected the same land, and offered all the fees for securing a patent, but the officers of the land office

refused to approve the selection. In 1892 the S. P. Co. brought suit in equity to establish its claim to the land, this being more than the period of the local statute of limitations since G.'s entry on the land. *Held*, that the S. P. Co. was guilty of laches in enforcing its claim, which deprived it of the right to relief in equity.

This was a suit by the Southern Pacific Railroad Company against Otto Groeck and others to establish the complainant's ownership of certain land, and compel a conveyance thereof. Defendants demurred to the bill.

J. D. Redding, for complainant.
W. B. Wallace, for defendants.

ROSS, Circuit Judge. The land in controversy having been patented to the defendant Groeck under the pre-emption laws of the United States, the complainant, claiming to be entitled to it by virtue of a congressional grant, seeks by this suit to obtain a decree that the title conveyed by the patent is held in trust for it, to compel the conveyance thereof to the complainant, and to enjoin the defendants from asserting any title thereunder. The grant under which the complainant claims the land is that of July 27, 1866 (14 Stat. 292), by which, among other things, the Southern Pacific Railroad Company was authorized to connect with the Atlantic & Pacific Railroad at such point near the boundary line of the state of California as it should deem most suitable for a railroad line to San Francisco, and, subject to certain conditions, exceptions, and limitations, was granted every alternate section of public land, not mineral, designated by odd numbers, to the amount of 10 alternate sections per mile on each side of said road, to which the United States should have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights at the time such road should be designated by a plat thereof filed in the office of the commissioner of the general land office; and where, prior to said time, any of said sections or parts of sections should be granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, the act provided that other lands should "be selected by said company in lieu thereof, under the direction of the secretary of the interior, in alternate sections designated by odd numbers, not more than ten miles beyond the limits of said alternate sections, and not including reserved numbers." The exceptions contained in the act are not applicable to this case, and need not, therefore, be referred to. The bill alleges, among other things, that on the 24th of November, 1866, the complainant, by its board of directors, accepted the grant upon the terms and conditions contained in it, which acceptance was filed with the secretary of the interior December 27, 1866, and that, on the 3d day of January, 1867, complainant filed with the secretary a map of the route of its road, as located and surveyed, which map was accepted by the secretary, and on the same day transmitted by him to the commissioner of the general land office, to be filed in that office, which was done on that day; that on the 22d of March, 1867, the commissioner transmitted a copy of the map to the register and receiver of the local land office at Vi-

salia, Cal., in which district the land in controversy is situated, and that the register of the local land office acknowledged its receipt by letter of date March 30, 1867; that on the 19th day of March, 1867, the secretary of the interior addressed to the commissioner of the general land office this letter:

"Department of the Interior.

"Washington, D. C., March 19, 1867.

"Sir: Under date of January 3, 1867, a map showing the designated route of the Southern Pacific Railroad in California, filed under the act of congress approved July 27, 1866, was sent to you for appropriate action. If a withdrawal of lands has not been ordered on account of said road, you will cause the necessary instructions to be issued to the local land offices to withhold the odd sections within the granted limits of twenty miles on each side of said road, as shown on the map before mentioned, and also withdraw the odd sections outside of the twenty miles and within thirty miles on each side, from which the indemnity for lands disposed of within the granted limits is to be taken. The even sections within the twenty-mile limits will, under the Act 3d March, 1853, 'An act to extend pre-emption rights to certain lands therein mentioned,' be increased to $2.50 per acre, and subject to the provisions of the pre-emption and homestead laws at that price. Mineral lands, other than coal and iron, are excluded from this grant. I do not think it necessary at this time to pass upon the question as to whether this railroad company have adopted the route of any other railroad. Any identity of grant arising out of conflict of location under the first proviso in the third section of the act will be reserved for future consideration. The withdrawal will be ordered to take effect upon the receipt of your instructions at the local office.

"Very respectfully, your obt. servant, O. H. Browning, Secretary.

"Hon. Jas. S. Wilson, Commissioner of the General Land Office."

And the bill alleges that the odd-sectioned lands within 30 miles of the said route of the complainant's road "have ever since so remained withheld and withdrawn." The bill also sets forth the joint resolution of congress of June 28, 1870 (16 Stat. 382), by which complainant was authorized to "construct its road and telegraph lines as near as may be on the route indicated by the map filed by said company in the department of the interior on the 3d day of January, 1867," and alleges that the road was built by the complainant upon the line as shown upon that map, and, as constructed, ran through Tulare county, which is within the district of lands subject to sale at Visalia, Cal., and was completed within the time limited by the acts of congress, which fact was duly reported to the president, and by him accepted and approved; that the land in controversy is more than 20, but within 30, miles of the complainant's road, as so located and constructed, and that when its route was definitely fixed the said land had not been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of or appropriated by the United States for any purpose, but that the United States then had full title thereto; that the entire indemnity limits under the grant to the complainant are insufficient to supply the losses sustained by it within the granted limits, and that the commissioner of the general land office, in his annual report to the president and to the interior department for the year 1883, "has attested and certified to the fact that the land within the indemnity limits in said act of July 27, 1866, will by no means supply the loss of lands within the twenty-mile limits to said railroad company under said act";

that the respondent Groeck filed a declaratory statement, No. 7,974, upon the land in controversy, alleging settlement thereon September 2, 1885; that complainant contested Groeck's right to the land in the local land office, as also, by appeal, throughout the department of the interior, but that that department, disregarding the law, awarded the land to Groeck, and on the 11th day of April, 1890, a patent therefor was issued to him. The bill further alleges that on the 13th of January, 1891, complainant selected the land in controversy in its indemnity list No. 43, at the land office in Visalia, which office refused to approve the selection, although complainant offered all the fees for the purpose of listing, selecting, and securing a patent for the land, and that a like refusal has been made by the commissioner of the general land office, and by the secretary of the interior.

Although the bill alleges that the order of withdrawal of the odd sections within 30 miles of the route of the complainant's road, as delineated on the map filed by it January 3, 1867, made by Secretary Browning, March 19, 1867, has ever since remained in force, and although, for the purpose of disposing of a demurrer, the rule is that such facts as are well pleaded are to be taken as true, yet where, by a public record, of which the court takes judicial notice, the fact is shown to be otherwise, the general rule should not, I think, be held to apply. The acts of the secretary of the interior done in the performance of his official duty are matters of which the courts may take judicial notice. Caha v. U. S., 152 U. S. 211, 221, 222, 14 Sup. Ct. 513. And a reference to the records of the department of the interior shows that the order of withdrawal made by Secretary Browning on the 19th of March, 1867, was revoked, and the lands included in that order directed to be restored to the public domain by an order made by his successor, Secretary Cox, on the 2d day of November, 1869, as appears from a certified copy of that order on file in another case in this court. The reason assigned by Secretary Cox for his action in that particular was that in locating the route of its road the complainant company "had entirely disregarded its charter from the state of California, which, in the act of congress of July 27, 1866, making the grant of lands, is given as its authority to build a road in California"; and it was doubtless due to that fact that the subsequent acts of the legislature of the state of California, set out in complainant's bill, changing the charter of the company, and authorizing it to change its route, were passed, as also the joint resolution of congress of June 28, 1870, authorizing it to build upon the route delineated on the map filed by it January 3, 1867. From this statement it will be seen that at the time the line of complainant's road was definitely fixed the land in controversy, which was without the primary, but within the indemnity, limits of the grant, was public land, to which the United States had full title; that at the time the defendant Groeck first settled upon the land there was no order of the interior department in force withdrawing it from sale, pre-emption, or homestead entry; and that at the time of the defendant Groeck's settlement upon the land there had been no attempt on complainant's part to select it

in lieu of any land lost to it within the primary limits of its grant, or at all, although complainant contested Groeck's right to pre-empt the land before the local office, as also, by appeal, before the commissioner of the general land office and the secretary of the interior. If, however, the law making the grant itself operated to withdraw the odd sections within the indemnity limits of the grant from sale, pre-emption, homestead entry, or other disposition, it is obvious that no order of the secretary was needed to work that result. And that the statute itself did so operate was held by this court in the case of Railroad Co. v. Araiza, 57 Fed. 98, following, as the court thought, the ruling of the supreme court in the cases of Buttz v. Railroad Co., 119 U. S. 72, 7 Sup. Ct. 100, and St. Paul & P. R. Co. v. Northern Pac. R. Co., 139 U. S. 18, 11 Sup. Ct. 389. The Araiza Case was, however, rightly decided upon the facts as there made to appear, regardless of the construction of the act of congress; for in that case the attention of the court was not called to the fact that the order made by Secretary of the Interior Browning on March 19, 1867, directing the withdrawal of the odd sections within the indemnity as well as the primary limits of the grant for the benefit of the grantee, was on November 2, 1869, revoked by order of Secretary Cox. On the contrary, it appeared in the Araiza Case, as stated by the court (57 Fed. 101), that at the time the defendant in that case first went upon the land the order withdrawing it from sale, pre-emption, or homestead entry was in force. For that reason, if for no other, it was there properly held that the defendant acquired no right by her entry. That such an order of withdrawal, while in force, is sufficient to defeat a settlement for the purpose of pre-emption or homestead entry, even if it shall afterwards be found to have been wrongfully made, was decided by the supreme court in the very recent case of Wood v. Beach (decided March 4, 1895) 156 U. S. 548, 15 Sup. Ct. 410.

In the present case, however, it is made to appear that there was no order of withdrawal made by the interior department in force at the time of the settlement by the defendant Groeck upon the land in controversy. Was it withdrawn from such settlement by operation of the statue itself? The act of July 27, 1866, did not direct the secretary of the interior to make any order withdrawing the lands that might fall within the grant from sale, pre-emption, homestead entry, or other disposition. But, by its sixth section, it provided "that the president of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad, and the odd sections of land hereby granted shall not be liable to sale or entry or pre-emption before or after they are surveyed, except by said company, as provided in this act; but the provisions of the act of September, eighteen hundred and forty-one, granting pre-emption rights, and the acts amendatory thereof, and of the act entitled 'An act to secure homesteads to actual settlers on the public domain,' approved May twentieth, eighteen hundred and sixty-two, shall be, and the same are hereby extended to all other lands on

the said line of said road when surveyed, excepting those hereby granted to said company."

The ruling of this court in the Araiza Case, above cited, that the act of congress making the grant to the complainant company itself operated to withdraw, for the benefit of the grantee, from sale, pre-emption, or homestead entry, the odd sections of land situated within the indemnity as well as within the primary limits of the grant, was, as has been said, based upon the ruling of the supreme court of the United States in the cases of Buttz v. Railroad Co., 119 U. S. 55, 7 Sup. Ct. 100, and St. Paul & P. R. Co. v. Northern Pac. R. Co., 139 U. S. 1, 11 Sup. Ct. 389. It is now insisted on the part of the defendants that this court, in the Araiza Case, wrongly construed those decisions of the supreme court; that the land involved in the Buttz Case was situated in the then territory of Dakota, and that, as the grant to the Northern Pacific Railroad Company was for 20 odd sections of land on each side of the road where it passes through a territory, the primary limits of the grant in the territories extended 40 miles on each side of the road, and therefore the land involved in the Buttz Case was within the primary limits of the grant to the Northern Pacific Railroad Company; and that the decision of the supreme court in that case that the act of congress itself operated to withdraw the odd sections of land situated within 40 miles of the line of the road applied only to lands within the primary limits of the grant. It is true that in Dakota (Dakota then being a territory) the primary limits of the grant to the Northern Pacific Company extended 40 miles on each side of the road, and that the particular piece of land involved in the Buttz Case was within those limits. But the supreme court, as will be seen from its opinion, was construing the act of congress making the grant to the Northern Pacific Railroad Company, the contemplated as well as the completed route of which passed through a state, where the grant was limited to 10 odd sections a mile on each side of the road, as well as through territories where it was for 20 odd sections a mile on each side of the road. "The act of congress," said the court (119 U. S. 71, 7 Sup. Ct. 100), "not only contemplates the filing by the company, in the office of the commissioner of the general land office, of a map showing the definite location of the line of its road, and limits the grant to such alternate odd sections as have not, at that time, been reserved, sold, granted, or otherwise appropriated, and are free from pre-emption, grant, or other claims or rights, but it also contemplates a preliminary designation of the general route of the road, and the exclusion from sale, entry, or pre-emption of the adjoining odd sections, within 40 miles on each side, until the definite location is made." This was said with reference to the grant as a whole, and was not limited to any particular section of the road, whether located in a territory or in a state. The court proceeded:

"The third [sixth] section declares that after the general route shall be fixed the president shall cause the lands to be surveyed, for forty miles in width, on both sides of the entire line, as fast as may be required for the construction of the road, and that the odd sections granted shall not be liable to sale, entry, or pre-emption, before or after they are surveyed, except by the company. The general route may be considered as fixed when its general course and direction

are determined after an actual examination of the country, or from a knowledge of it, and is designated by a line on a map showing the general features of the adjacent country, and the places through or by which it will pass. The officers of the land department are expected to exercise supervision over the matter, so as to require good faith on the part of the company in designating the general route, and not to accept an arbitrary and capricious selection of the line, irrespective of the character of the country through which the road is to be constructed. When the general route of the road is thus fixed in good faith, and information thereof given to the land department by filing the map thereof with the commissioner of the general land office, or the secretary of the interior, the law withdraws from sale or pre-emption the odd sections, to the extent of forty miles on each side. The object of the law in this particular is plain. It is to preserve the land for the company to which, in aid of the construction of the road, it is granted. Although the act does not require the officers of the land department to give notice to the local land officers of the withdrawal of the odd sections from sale or pre-emption, it has been the practice of the department, in such cases, to formally withdraw them. It cannot be otherwise than the exercise of a wise precaution by the department to give such information to the local land officers as may serve to guide aright those seeking settlements on the public lands, and thus prevent settlements and expenditures connected with them which would afterwards prove to be useless. Nor is there anything inconsistent with this view of the sixth section as to the general route, in the clause in the third section making the grant operative only upon such odd sections as have not been reserved, sold, granted, or otherwise appropriated, and to which pre-emption and other rights and claims have not attached when a map of the definite location has been filed. The third section does not embrace sales and pre-emptions in cases where the sixth section declares that the land shall not be subject to sale or pre-emption. The two sections must be so construed as to give effect to both, if that be practicable."

In the later case of St. Paul & P. R. Co. v. Northern Pac. R. Co., 139 U. S. 17, 11 Sup. Ct. 389, where the land involved was situated in the state of Minnesota, and where the primary limits of the grant to the Northern Pacific Company extended only 20 miles on each side of the road, the supreme court, in considering the same grant, said:

"The withdrawal made by the secretary of the interior of lands within the forty-mile limit on the 13th of August, 1870, preserved the lands for the benefit of the Northern Pacific Railroad from the operation of any subsequent grants to other companies not specifically declared to cover the premises. The Northern Pacific act directed that the president should cause the lands to be surveyed forty miles in width on both sides of the entire line of the road, after the general route should be fixed, and as fast as might be required by the construction of the road, and provided that the odd sections of lands granted should not be liable to sale, entry, or pre-emption before or after they were surveyed, except by the company. They were therefore excepted by that legislation from grants, independently of the withdrawal by the secretary of the interior. His action informally announcing their withdrawal was only giving publicity to what the law itself declared. The object of the withdrawal was to preserve the land unincumbered until the completion and acceptance of the road."

And, after referring to what the court had ruled in the previous case of Buttz v. Railroad Co. in respect to the withdrawal of the lands, added:

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

And the court, in the St. Paul & P. R. Co. Case, further held, in answer to the objection that no evidence was produced of any selection by the secretary of the interior from the indemnity lands to make up for the deficiencies found in the lands within the place limits, that:

"It is sufficient to observe that all the lands within the indemnity limits only made up in part for these deficiencies. There was therefore no occasion for the exercise of the judgment of the secretary in selecting them, for they were all appropriated."

It does not seem to me that the language used by the supreme court in these cases admits of any other construction than that the odd sections included within the indemnity as well as the primary limits of the grant to the Northern Pacific Company were withdrawn, for the benefit of the grantee, from sale, pre-emption, homestead entry, or other disposition. Indeed, one of the counsel for the defendants, in one of the briefs filed in this case, admits that in the case last cited the supreme court held "that, as between railroads, the withdrawal from operation of law upon filing map of general route under the senior grant operated to except all the lands in the indemnity as well as primary limits from the operation of the junior grant," but, he adds, "this must be true as between railroads, in view of the terms of the grant excluding lands previously granted, reserved, or claimed at the time of filing map of definite location by the railroad at the time of the junior grant." This latter observation of counsel is answered by the decision of the supreme court in the Buttz Case that there is nothing inconsistent with its view of the sixth section of the act "in the clause in the third section making the grant operative only upon such odd sections as have not been reserved, sold, granted, or otherwise appropriated, and to which pre-emption and other rights and claims have not attached when the map of the definite location has been filed. The third section does not embrace sales and pre-emptions in cases where the sixth section declares that lands shall not be subject to sale or pre-emption." A withdrawal, however made, before the line of road is definitely fixed, is, as said by this court in the Araiza Case, "as applicable to lands within the indemnity limits as to those within the primary limits of the grant; for up to that time the grant is no more attached to specific tracts of the one class of lands than of the other, neither being in any way identified." The sixth section of the act of July 2, 1864 (13 Stat. 365), making the grant to the Northern Pacific Company, being in substance, and almost literally, the same as the sixth section of the act of July 27, 1866, making the grant to the Southern Pacific Railroad Company, the language of the supreme court above quoted is equally applicable to the act in question here (U. S. v. Southern Pac. R. Co., 146 U. S. 600, 13 Sup. Ct. 152), and renders necessary, in my opinion, the conclusion announced in Railroad Co. v. Araiza, supra.

If, as counsel for defendants insist should be done, the ruling of the supreme court referred to—that where, as here, the loss of lands within the granted limits is so great that all the lands included within the indemnity limits are insufficient to make good the loss, there is no occasion for the exercise of the judgment of the secretary of the interior in selecting from them, because, in such case, they are all appropriated—be regarded as unnecessary to the decision in that case, still, in the present case, according to the averments of the bill, the complainant sought to select the land in controversy in lieu of land lost to it within the primary limits

of the grant, at the same time tendering all lawful fees, which selection was by the land department refused. Such refusal, if the right exists, entitled the company to resort to a court of equity for relief. Van Wyck v. Knevals, 106 U. S. 360, 1 Sup Ct. 336; Smelting Co. v. Kemp, 104 U. S. 636. But such application must be seasonably made (Curtner v. U. S., 149 U. S. 676, 13 Sup. Ct. 985, 1041); and it is here contended that it was not. This attempt on the part of the complainant to select the land in controversy was not made until the 13th day of January, 1891, although it contested defendant Groeck's right to the land in the local land office, as also, by appeal, throughout the department of the interior. This ineffectual effort in the department of the interior against the allowance of Groeck's entry was neither a selection of the land by complainant, nor, under the decision of the supreme court in Curtner v. U. S., supra, can it be held to relieve complainant of the plea of laches in the assertion of its rights. According to the averments of the bill, the land in controversy was withdrawn for complainant's benefit as early as 1867. On September 2, 1885, it was settled upon by the defendant Groeck; was patented to him by the United States April 11, 1890; and yet complainant never sought to select it until January 13, 1891,—nearly 25 years after the withdrawal of the land for complainant's benefit, and more than 5 years after the defendant Groeck's adverse entry upon it, according to the averments of the bill, which bill was not filed until more than a year thereafter, to wit, February 11, 1892. The bill contains no allegation as to when it was first discovered that all of the lands within the indemnity limits of the grant were insufficient to make good the loss sustained by complainant of lands within the primary limits, but it does allege that that fact was attested and certified to by the commissioner of the general land office in his annual report for the year 1883 to the president and to the department of the interior. Applying the rule announced by the supreme court in the case of St. Paul & P. R. Co. v. Northern Pac. R. Co., supra, to that fact, it is apparent that complainant's cause of suit existed at least as early as September 2, 1885, when defendant Groeck made his adverse settlement upon the land as a pre-emptor. Yet complainant waited until February 11, 1892, before bringing this suit to establish its claim to the land,—more than 6½ years,—a period considerably longer than that prescribed by the statute of California for the bringing of an action for the recovery of real property. Code Civ. Proc. Cal. §§ 318, 319, 343, 738. Nor does the bill show any reason why its right of selection was not sooner exercised. As already said, it shows that as early as the year 1867 the lands included within the indemnity limits of its grant were withdrawn for complainant's benefit; but whether its right of selection was deferred by reason of the failure of the government to make a survey of the lands, or whether, for any other cause, complainant's failure to make the selection within a reasonable time was excused, is nowhere shown. The fact remains that it was not until February 11, 1892, that complainant came into a court of equity to enforce its rights to the land in question. Unless there be some excuse not disclosed by the bill

as presented, it waited too long. As said by this court in De Estrada v. Water Co., 46 Fed. 280:

"It is true that the statutes of limitations applicable to actions at law do not apply to suits in equity, but courts of equity are governed by the analogies of such statutes. Norris v. Haggin, 136 U. S. 386, 10 Sup. Ct. 942. 'A court of equity,' said Lord Camden, 'has always refused its aid to stale demands where the party slept upon his rights, and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith, and reasonable diligence. Where these are wanting the court is passive, and does nothing. Laches and neglect are always discountenanced, and therefore, from the beginning of this jurisdiction, there was always a limitation to suits in this court.' "

This doctrine has been repeatedly recognized and acted on by the supreme court. Curtner v. U. S., 149 U. S. 676, 13 Sup. Ct. 985, 1041; Speidel v. Henrici, 120 U. S. 377, 7 Sup. Ct. 610, and cases there cited. Demurrer sustained, with leave to the complainant to amend within the usual time, if it shall be so advised.

HOBBS v. STATE TRUST CO. et al.

(Circuit Court of Appeals, Fifth Circuit. June 4, 1895.)

No. 346.

1. VENDOR'S LIEN—EMINENT DOMAIN.
   A railway company which had made a mortgage covering after-acquired property began proceedings to condemn land of H. The compensation awarded not being paid, H. began a suit to restrain the railway company. A compromise sum was then agreed on, but not paid, and the court in H.'s suit decreed a lien in H.'s favor on his land taken by the railway company, and ordered it sold. H. bought it in at the sale. Afterwards, in a foreclosure suit by the mortgagee of the railway, the mortgage was declared a valid lien on H.'s land, and it was ordered to be sold. *Held* error; that H. retained a valid vendor's lien and acquired a perfect title by the sale in his suit.
2. EQUITY PRACTICE—BILL OF REVIEW.
   The rule that before a bill of review can be filed the decree sought to be reviewed must be obeyed and performed, does not apply to a party who is not required by the decree to do anything.

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

This was a bill of review filed by Thomas M. Hobbs against the State Trust Company and others to review and reverse a decree rendered in a suit by the State Trust Company against the Decatur, Chesapeake & New Orleans Railway Company and Thomas M. Hobbs for the foreclosure of a mortgage. The circuit court dismissed the bill. Complainant appeals. Reversed.

The Decatur, Chesapeake & New Orleans Railway Company on June 25, 1889, executed a deed of trust to the American Loan & Trust Company on all of its property, rights, and privileges then or thereafter acquired, as security for three millions of bonds running for 40 years, with interest coupons attached. $1,300,000 of these bonds were issued. In consequence of default in the payment of interest, the American Loan & Trust Company, trustee, on December 15, 1890, filed its bill in the United States circuit court for the Northern district of Alabama against the Decatur, Chesapeake & New Orleans Railway Company for the foreclosure of the deed of trust, the sale of the property, and the rights and privileges therein described, and the payment of the outstand-

ing bonds. On January 5, 1891, a decree was rendered accordingly. This decree not having been executed, on August 3, 1891, the State Trust Company of New York, the successor of the American Loan & Trust Company as such trustee in the deed of trust, filed its supplemental bill in the above suit, reiterating many of the matters in the original bill, and setting up that the appellant, Thomas M. Hobbs, and others claimed some lien or interest in the premises, for which they were made parties defendant, and praying that the lien of the deed of trust be declared superior to all others, that the defendants be forever barred, and that a foreclosure of the deed of trust be had for the benefit of the bondholders. Thereupon, the appellant, Thomas M. Hobbs, filed his answer to the original and supplemental bills, and therein averred that on August 1, 1890, the Decatur, Chesapeake & New Orleans Railway Company filed its application in the probate court of Limestone county, Ala., for the condemnation of right of way 100 feet wide in, through, and over his (the appellant's) land in Limestone county, Ala.; that thereupon answer was filed, the jury was impaneled, a trial was had, the damages were assessed at $8,196.33, and a judgment of condemnation was rendered August 18, 1890, all in conformity to the statutes of Alabama; that payment of these damages not being made, as required by the constitution of Alabama, the appellant, on September 1, 1890, filed his bill in the chancery court of Limestone county, Ala., against the Decatur, Chesapeake & New Orleans Railway Company et al., and obtained a preliminary injunction restraining the defendants therein from taking the right of way until payment of the damages was made; and that thereupon, on September 3, 1890, a compromise was made by the appellant with the Decatur, Chesapeake & New Orleans Railway Company, by which such damages were fixed at $2,500, payment of which was to be made by September 15, 1890. Said Hobbs further answered that the Decatur, Chesapeake & New Orleans Railway Company having failed in the payment of the compromise sum, the appellant at the March term, 1891, of the chancery court of Limestone county, Ala., by amendment to his bill, brought the compromise before the court, and thereupon by decree the court declared a lien on the right of way in his favor to the extent of $2,500; that on April 13, 1891, the register, after due advertisement, made sale of the right of way at public auction to the appellant, the highest bidder, executed to him a deed, and placed him in possession,—all of which was duly confirmed by the court; that the rails and ties had been laid in and on the right of way and were a part of the real estate; and that the deed of trust was not filed in Alabama for record, nor did the appellant have any notice of it whatever, until after September 27, 1890. In the said answer the said Hobbs specifically averred as follows: "After this defendant thus bought the right of way on April 15, 1891, he severed, removed, and sold the rails thereon, as he had a right to do, they having become real estate when thus laid in the track, roadbed, and earth." To the said answer were attached exhibits showing transcript of the proceedings before the probate court of Limestone county, Ala., instituted by the Decatur, Chesapeake & New Orleans Railway Company, to condemn the lands of Hobbs for the use of said railway company as a right of way, and the proceedings had in the chancery court for the Northwestern division in the Fifth district of Alabama, wherein the amount of the compromise between the railway company and said Hobbs was declared to be a lien upon the lands covered by the right of way for the amount of $2,500, and the same were ordered sold to satisfy said lien, etc. Issue was joined upon the said answer, and thereafter the cause was heard, and a decree pronounced, to the effect that the mortgage made by the Decatur, Chesapeake & New Orleans Railway Company to the American Loan & Trust Company was a valid and subsisting mortgage and constituted a first lien upon the mortgaged premises, property, and franchises described in said mortgage, and further decreeing a foreclosure of the lien and a sale of the railway property to satisfy the same.

The present case is one made by a bill of review filed April 6, 1893, by Thomas Maclin Hobbs, complainant below, appellant here, wherein the foregoing proceedings in cause No. 166 are recited, and the charge made that the said decree of foreclosure is erroneous, in this: That it makes the lien of the mortgage or deed of trust, therein referred to, superior to the lien or right of complainant, Thomas M. Hobbs, as to certain described lands; and asserting

that the said decree should have saved, reserved, and excepted the said described lands as the property of the said Hobbs, and that the said decree should have declared that the title of the said Hobbs to the lands described was and is superior to the title conveyed by and held under said mortgage or deed of trust. The said bill prays that the said decree may be reviewed, reversed, and set aside, and that the right of way of the said Decatur, Chesapeake & New Orleans Railway Company through the lands of orator be declared not subject to the lien of said mortgage or deed of trust, but that the title of complainant in and to the same be declared to be superior, etc. On August 5, 1893, the Decatur, Chesapeake & New Orleans Railway Company appeared by its solicitor and moved the court to dismiss the bill of review for want of equity, assigning: (1) It affirmatively appears that the decree of this honorable court in cause No. 166 now sought to be reviewed is not erroneous, because the said complainant herein, Thomas M. Hobbs, in his answer in said cause No. 166, and in the fifth paragraph thereof, admitted that he severed, removed, and sold the rails on said right of way, and this court has the right to assume that he had thus been fully paid for said right of way. (2) The complainant does not now offer to pay for said rails, or otherwise to do equity. On the 22d day of August, 1893, the State Trust Company, made defendant to the bill of review, appeared and filed an answer, averring the same matters set up by the railway company in its motion to dismiss for want of equity, and further answering that under the decree sought to be reviewed the right of way purchased by the Decatur, Chesapeake & New Orleans Railway Company of the complainant has been sold and conveyed to the Middle Tennessee & Alabama Company, which company is now the owner of said right of way, including all the rights and franchises of the Decatur, Chesapeake & New Orleans Railway Company; and on the same day the said trust company filed a demurrer to the bill of review, and for causes of demurrer assigned: "(1) That it appeareth, by complainant's own showing by said bill, that he is not entitled to the relief prayed by the bill against the defendant in this suit. (2) That it appeareth from the face of said bill that the decree of this court in cause No. 166 on the equity docket thereof is not erroneous, as alleged in the complainant's bill filed herein. (3) That it appeareth from the bill filed herein that the plaintiff does not offer to do equity, in this, that he does not offer to pay the value which in his answer to said original bill in cause No. 166, and in the fifth paragraph thereof, he admits that he severed, removed, and sold from said right of way. (4) The said plaintiff does not now offer to pay for the value of the rails which he severed, removed, and sold from the right of way, as set forth and admitted in his said answer in said cause." Without any further proceedings by way of setting down the demurrer for argument, setting down the cause for hearing on the bill and answer, putting the answer at issue by replication, or by taking any evidence, the cause appears to have been brought before the court and argued, whereupon the court on the 23d day of April, 1894, dismissed the bill.

On this appeal, the errors complained of in the court below are as follows: "(1) In rendering a decree dismissing the bill herein. (2) In not granting complainant the relief prayed for in his bill. (3) In failing to review and reverse the original decree sought to be reviewed and reversed. (4) In failing to declare the lien and right of Thomas M. Hobbs superior to the lien and right of the mortgage or deed of trust sought to be foreclosed by the original bill, in and to the lands described in the paragraph of the bill herein immediately, the prayer of said bill being the last, or fifth, paragraph. In failing to decree that the said lands referred to in said bill, or so much of the right of way, roadbed, track, etc., of said Decatur, Chesapeake & New Orleans Railway Company as ran in and through the property of the said Thomas M. Hobbs, in Limestone county, Ala., should have been saved, reserved, and excepted from the operation of the decree in the original case foreclosing said mortgage or deed of trust. (5) In failing to decree that the title of Thomas M. Hobbs to the lands referred to in the last paragraph (5) of the bill herein was and is superior to the title conveyed by and held under, and sought to be enforced through, the said mortgage or deed of trust sought to be enforced in the original suit. (6) In failing to review and reverse and set aside the decree in the original case foreclosing said mortgage or deed of trust in so far as to declare

the title of Thomas M. Hobbs superior to that of any other defendant or party in said cause."

Wm. Richardson and R. A. McClellan, for appellant.
Lawrence Cooper, for appellees.

Before PARDEE and McCORMICK, Circuit Judges.

PARDEE, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

From the record we are unable to say on what issue this cause was disposed of in the court below, but as presented in the briefs of counsel (there was no oral argument) the question here is the same as though a general demurrer for want of equity in the bill was sustained; and, further, we notice that in the original decree sought to be reviewed in the present bill of review no question of fact was or is in dispute, and that it is practically conceded that in the original cause the facts were that the Decatur, Chesapeake & New Orleans Railway Company commenced proceedings in the probate court of Limestone county, Ala., for the condemnation of a right of way for its roadbed over and through Hobbs' land, resulting in a jury trial, in which the jury ascertained and assessed Hobbs' damages and compensation for such right of way at the sum of $8,196.33, on which judgment of condemnation was rendered in conformity to the laws of the state; that thereafter, the damages and compensation so as aforesaid assessed not being paid, and the railway company notwithstanding going on with its work, Hobbs filed his bill in the chancery court of Limestone county, Ala., obtaining thereon a preliminary injunction restraining the railway company and its agents from taking the right of way or building the roadbed thereon till such damages had been paid, and thereupon a compromise was made between the railway company and Hobbs, in writing, whereby Hobbs was to convey said right of way for the sum of $2,500 as his compensation and damages in the premises, the same to be paid September 15, 1890; that no part of this $2,500 having been paid, Hobbs brought the compromise before the chancery court of Limestone county, had it enforced by a decree which recognized his vendor's lien in the sum of $2,500 and interest upon the land covered by the right of way, and ordered the same to be sold to pay said sum; and this decree not having been paid off, the register, after legal notice, sold the right of way, with the roadbed, rails, and ties thereon, to the highest bidder for cash, at the courthouse door in Limestone county, Hobbs becoming the purchaser at the amount of such lien, interest, and costs, and taking a deed for the property from the register; and that thereafter Hobbs removed and sold the rails on such right of way for his own account.

The erroneous ruling of law complained of by the appellant Hobbs in the original decree sought to be reviewed is that the decree of the chancery court of Limestone county recognizing appellant's vendor's lien, under which, by regular proceedings, the appellant had become the purchaser and the owner of the right of way across his own land, was treated as absolutely null. That this ruling was er-

roneous as a matter of law we do not think can be disputed. The facts, as conceded, do not show that the appellant ever actually parted with the title to the land in controversy, but do show that he opposed at every step the proceedings of the railway company to take his land without previous compensation. If, however, it be taken for granted that by the proceedings of compromise he consented to convey title upon condition that the amount of the compromise should be paid, it seems clear to us that when the amount was not paid he had a right to go into a court of competent jurisdiction, assert his vendor's lien, and have the same foreclosed. When he did this, and at the foreclosure sale became the purchaser, it appears to us that thereby he acquired a full and complete title to the land in controversy, subject to the statutory right of the railway company to redeem. At no stage of the proceedings does it appear that the appellant Hobbs lost or waived his superior vendor's lien on the land, so that the lien of the mortgage granted by the Decatur, Chesapeake & New Orleans Railway Company to the American Loan & Trust Company could attach to his prejudice, even if it is not correct to hold, in view of the whole proceedings, that in equity the appellant never parted with the title, but retained the same from the beginning.

The main argument in this court is to the effect that when the appellant, after he became the purchaser under the decree of sale on the foreclosure of the vendor's lien, sold the rails and ties found on the right of way for his own account, he thereby did something inequitable, which precluded a court of equity from recognizing his legal title to the land in controversy. It does not appear that he was asked to account for, or that any account was taken of, the sum realized for the sale of rails and ties, and all that can be gathered as to the amount so realized is an assertion that the sum was more than the value of the right of way. We are unable to see any force in this argument. When the appellant became the purchaser at the foreclosure sale, he became the owner of the land and its appurtenances, and it would seem that he had the right to deal with them as he saw fit, subject only to a right to redeem under the statute of the state; but whether he had or not, it is clear to us that no liability which he may have subsequently incurred to account to the railway company for rails and ties sold or appropriated by him would operate to defeat his title to the land itself. Counsel for appellees cites authority to the effect that before a bill of review can be filed the decree sought to be reviewed must be first obeyed and performed. Conceding the rule contended for, we fail to see its applicability in the present case. The decree complained of appears to have left nothing for Hobbs (now the complainant in the bill of review) to perform, not even, so far as the record goes, adjudging costs against him.

An attack is also made upon the proceedings in the chancery court, —not that jurisdiction in that court is wholly denied, but the claim is that the proceedings were not regular, in that the amendment by which the compromise was brought before the court was improper, and the proceedings had thereunder were not in accordance with the recognized equity practice in the state of Alabama. We take it

that the chancery court acquired jurisdiction by the bill filed for an injunction, and that thereafter it would naturally have jurisdiction to reject, or to affirm and enforce, any compromise made by the parties therein when brought to its attention. That the trust company, plaintiff in the original suit, was not a party to the proceedings in the chancery court is not suggested; but, even if it were, we are inclined to the opinion that until the title of the railway company attached to the right of way in question the trustee under the mortgage was without interest, and therefore not a necessary party to the proceedings, to say nothing of the fact that the proceedings were instituted in the chancery court before the mortgage to the trust company was recorded in Alabama. The circuit court erred in dismissing the bill of review, and the decree appealed from is reversed, and the cause is remanded to the circuit court, with instructions to overrule the demurrers of the Decatur, Chesapeake & New Orleans Railway Company and of the State Trust Company, and thereafter proceed in conformity with the views expressed herein and as equity may require.

FIDELITY INSURANCE, TRUST & SAFE-DEPOSIT CO. v. ROANOKE IRON CO.

(Circuit Court, W. D. Virginia. March 18, 1895.)

CORPORATIONS—RECEIVER'S CERTIFICATES.

A court of equity has no power, without the consent of all lien creditors, to authorize the receiver of an insolvent private corporation, whose business is not affected with any public interest, to issue certificates which will be a paramount lien upon its property, for the purpose of carrying on its business, unless it be necessary to do so in order to preserve the existence of the property or franchises.

This was a suit by the Fidelity Insurance, Trust & Safe-Deposit Company against the Roanoke Iron Company for the foreclosure of a mortgage. The receiver of the property of the defendant company petitioned for leave to issue receiver's certificates, for the purpose of carrying on the business of the company. Denied.

Watts, Robertson & Robertson and Penn & Cocke, for petitioner.

J. W. St. Clair and Griffin & Glasgow, for some of the lien creditors opposing.

PAUL, District Judge. The receiver in this cause has presented a petition to the court praying for authority to issue receiver's certificates to the amount of $100,000, for the purpose of recommencing and carrying on the business of producing iron from the ore at the works of the defendant company. He has submitted to the court an itemized estimate, upon which he claims that, if authorized to issue the certificates as prayed for, he can make iron at the defendant company's works for $7.11 per ton, including all items of the cost of production. He further claims that such iron can be sold at the works at $7.85 per ton, making a profit of 74 cents per ton on the iron produced. He states that the output of the furnace for the last year of its operation was 47,037 tons; that there is no

reason why the furnace should not do equally as well; and claims that the profits would therefore be: For pig iron, $34,800; for rolling mill, $10,000; to which he adds what he denominates "store profits," amounting to $2,500, and "rents," $1,200,—making an aggregate of net profits amounting to $48,500. The petition of the receiver is opposed by a considerable number of the creditors of the defendant company holding first-mortgage bonds and supply liens on the property, who resist the issuance of receiver's certificates to have priority over their liens.

It is not necessary to discuss the facts as presented in the receiver's statement. The court is confronted by the very important question as to its authority to issue receiver's certificates, without the consent of all the lien creditors, to enable the receiver of a private corporation to carry on the business of the insolvent company. This is a question which has not heretofore been discussed or decided in the circuit court of this district. As there are now a number of private corporations in this district in the hands of receivers, the question is one of great importance, and the court will consider it with a view to its settlement, so far, at least, as this court is concerned.

Receiver's certificates must necessarily have priority over all the liens of other creditors, thus displacing all prior liens to the extent of the amount of such certificates issued. The authority of a court of equity to issue receiver's certificates for the purpose of carrying on the business of a corporation of whose property the court has taken control is of very recent origin, and is the outgrowth of the necessity of keeping in active operation a railroad corporation that has been brought into the possession and control of a court of equity by the appointment of a receiver. As applied to railroad corporations, no question can be raised, in view of the numerous decisions of the supreme and other federal courts of the United States. It has received full and ample discussion in the leading cases, and the conclusion of this doctrine, as stated by Mr. Justice Bradley, in Wallace v. Loomis, 97 U. S. 146, is that: "The power of a court of equity to appoint managing receivers of such property as a railroad, when taken under its charge as a trust fund for the payment of incumbrances, and to authorize such receivers to raise money necessary for the preservation and management of the property, and make the same chargeable as a lien thereon for its repayment, cannot, at this day, be seriously disputed. It is a part of that jurisdiction, always exercised by the courts, by which it is its duty to protect and preserve the trust fund in its hands. It is undoubtedly a power to be exercised with great caution, and, if possible, with the consent or acquiescence of the parties interested in the fund." See, also, Fosdick v. Schall, 99 U. S. 235; Barton v. Barbour, 104 U. S. 126; Miltenberger v. Railroad Co., 106 U. S. 286, 1 Sup. Ct. 140; Trust Co. v. Souther, 107 U. S. 591, 2 Sup. Ct. 295; Burnham v. Bowen, 111 U. S. 776, 4 Sup. Ct. 675; Union Trust Co. v. Illinois M. Ry. Co., 117 U. S. 434, 6 Sup. Ct. 809. But, even in regard to a railroad property in the hands of a court of equity, as was said by Chief Justice Waite in Shaw v. Railroad Co., 100 U. S. 612:

"The power of the courts ought never to be used in enabling railroad mortgagees to protect their securities by borrowing money to complete unfinished roads, except under extraordinary circumstances. It is always better to do what was done here whenever it can be done; that is to say, reorganize the enterprise on the basis of existing mortgages as stock, or something which is equivalent, and by a new mortgage, with a lien superior to the old, raise the money which is required, without asking the courts to engage in the business of railroad building. The result, so far as incumbering the mortgage security is concerned, is the same substantially in both cases, while the reorganization places the whole enterprise in the hands of those immediately interested in its successful prosecution." In all the cases cited the trust fund consisted of railroad property which the public convenience and necessities, and not merely the private interests of stockholders and bondholders, required should be kept up as a going concern. The principle on which the doctrine rests is that railroad companies are considered public corporations which are not controlled and managed alone for the personal benefit of the individual stockholders. A railroad is an enterprise in which all the people living in the territory through which it runs have an interest. It is created by the will of all the people of the state, as expressed through their representatives, and it exercises its powers and franchises only by their permission. Its extensive uses, and the vast benefits it is intended to confer on the people of the state by whose laws it is created, make it indispensable to the welfare and comfort of the general public that it be preserved and kept in continuous operation. It would be a serious calamity to the people of any section of the country to allow a railroad of any importance, constructed for their benefit, to be stopped in its operations for lack of means to keep it alive and pay its running expenses. We cannot deduce from these reasons for exercising this extraordinary power of a court of equity in dealing with the interests of a railroad company any authority for the court to deal in the same way with a private corporation. The latter is created solely with reference to the pecuniary advantage of the individuals who take part in its creation and enjoy the benefits to accrue from the profits arising out of its operations. The public has no interest in its existence or continuance, other than what may accrue to the people of the particular locality in which a mill, factory, or furnace may be established. This is too vague and indefinite to be the subject of the care and protection of a court of equity. This question has yet to come before the supreme court of the United States for direct and final decision. Counsel for the receiver have cited in argument High, Rec. § 312, which says, in substance, that the question of the power of a court of equity in administering the assets of an insolvent corporation, other than a railway company, by the appointment of a receiver to issue receiver's certificates, creating a lien thereon to have priority of mortgage indebtedness, has given rise to some conflict of authority, and is not yet so definitely determined as to be free from doubt. The other authorities quoted, Jerome v. McCarter, 94 U. S. 734, and Kent v. Iron Co., 144 U. S. 75, 12 Sup.

Ct. 650, both cases growing out of the same conditions, so far as concerns the question before the court, do not sustain the position contended for. In Jerome v. McCarter, 94 U. S. 734, the receiver's certificates were issued for the distinct purpose of preserving the property and franchises of the company. The lands, granted by an act of congress and covered by the mortgage, reverted to the United States, unless the ship canal should be finished within a fixed period, and the period was passing away, and the certificates were issued in order to complete the canal and save the property. So imperative was the necessity that the lien creditors, all of whom were in court, made no objection to the issuing of the certificates. Nor did they contest their right of priority in the court below or in the supreme court. The question was raised by the assignees in bankruptcy of the insolvent company, who had no interest in the property other than what should remain after satisfying all the lien debts, including the receiver's certificates. The same position is taken by the court in Kent v. Iron Co., 144 U. S. 75, 12 Sup. Ct. 650. The distinction between railroad and private corporations has been considered and passed upon by several of the circuit courts of the United States. In Bound v. Railway Co., 50 Fed. 312, Simonton, J., said: "Railroads are of public concern not simply because they benefit the public. The sovereign power has contributed to their construction in a way in which none but the sovereign can contribute, and they are devoted to a public use. It does not follow, because other kinds of property are of great benefit to the public and are devoted to a public use, that they also come within this category, and as such that the courts will see that they are maintained." The same view was held by this court in Seventh Nat. Bank v. Shenandoah Iron Co., 35 Fed. 436. In Farmer's Loan & Trust Co. v. Grape Creek Coal Co., 50 Fed. 481, it was held that: "In a suit to foreclose a mortgage on the property of a coal-mining company, the court has no power, as against the objections of even a small minority of the bondholders of the mortgage bonds, to authorize a receiver appointed in the suit to issue certificates which shall be a first lien on the mortgaged property, in order to enable him to continue the operation of the mines." Syllabus. In this case, Gresham, J., after quoting from Kneeland v. Trust Co., 136 U. S. 89, 10 Sup. Ct. 950, says: "In the language above quoted, there is a plain implication that the limited power which courts may exercise in displacing the liens of railroad mortgages should not and cannot be extended to mortgages executed by private corporations. * * * Extensive as are the powers of courts of equity, they do not authorize a chancellor to thus impair the force of solemn obligations and destroy vested rights. Instead of displacing mortgages and other liens upon the property of private corporations and natural persons, it is the duty of courts to uphold and enforce them against all subsequent incumbrances." The court has given the question careful consideration; and in view of the principles on which the authority of courts of equity to order the issuance of receiver's certificates in any case rests, and in view of the weight of the authorities cited, the court is clearly of opinion that it has no power to authorize a re-

ceiver of a private corporation to issue certificates to be a paramount lien for the purpose of carrying on the business of an insolvent corporation, when all the lien creditors do not consent thereto, unless it be necessary to do so in order to preserve the existence of the corporate property and its franchises. Such is not the condition in this case, and the prayer of the petition is denied.

KEIPER et al. v. MILLER.

(Circuit Court, E. D. Pennsylvania. June 12, 1895.)

No. 26.

CHAMPERTY.

Upon the trial of a suit for infringement of a patent, it appeared that the suit was brought by an assignee, to whom the patent had been assigned, 14 years after its issue, and when it was known to have been infringed, under an agreement that such assignee should prosecute suits against infringers, at his own expense, and divide the recoveries with the patentee. *Held*, that such agreement constituted champerty, and that the bill should be dismissed.

This was a suit by Henry B. Keiper and Lanious B. Keiper against Charles Miller to restrain the infringement of a patent. The cause was heard on the pleadings and proofs.

Jerome Carty and R. A. Parker, for complainants.
Butterworth & Dowell, for defendant.

DALLAS, Circuit Judge. The complainants base their claim of title to the patent in suit upon an assignment by the patentee, Samuel M. Brua, expressed to be for a nominal consideration, and made about 14 years after the patent had been issued. This assignment does not disclose the actual transaction to which it relates. It was not made in execution of a sale of the patent, but under an agreement that the legal title thereto should be vested in the assignee for the purpose of enabling him to settle with, or to proceed against, infringers, for the benefit of the patentee, as well as of the assignee, but wholly at the expense of the latter. This suit is prosecuted in pursuance of that agreement. The testimony of Mr. Brua himself satisfies me of this. He admits that he has "an interest in the result of this case, dependent upon the success of the complainants." Being repeatedly asked to state what that interest is, he declined to answer, upon the objection and instruction of complainants' counsel that the question was "incompetent, irrelevant, and immaterial." I do not think that this objection was well taken; but whether it was or was not is not very important, inasmuch as, in my opinion, enough has been shown to require the conclusion that "the suit in the present case has been instituted by a volunteer, on speculation," or, at least, to cast upon the complainants the burden of proving the contrary. The facts are peculiarly within their knowledge, and the evidence under their control, yet they not only failed to show them, but interposed to prevent their disclosure by the defendant's examination of their own witness. It would be difficult to

point out every particular portion of the testimony of this unwilling witness which has led me to the conclusion that I have reached; but the effect of it as a whole is very clear to me, and I have given it the most minute and thoughtful attention. Mr. Brua was asked one question which it is to be much regretted he did not answer, for it covered the whole matter, and a reply to it would have avoided the necessity of exploring a long and tedious examination for the discovery of a single fact which he might have stated, either way, in a single word. That question was, "You have some arrangement, have you not, with the complainants, by which they took an assignment of the patent, and bring suit, and defray the expense, and give you a certain per cent. if anything is recovered?" This he refused to answer, in consequence of the objection and instruction of the complainants' counsel; but he had previously said that it was his presentation of his patent (infringements of which had been long known to him) to Mr. Keiper (the assignee) that started the matter; meaning by this "that he (Keiper) brought this matter before the public * * * by offering to settle if they desired to do so. If not, he would bring suit against the millers to test the validity of the patent." Mr. Keiper "started the matter,"—brought this dormant patent into active and aggressive notice, and the question is: Upon what agreement with the patentee did he do this? Keiper, not Brua, was to settle or to bring suits. That is plain. Still, it does not appear that Brua was to part with his patent, except to enable Keiper to do this, and to give him the control of settlements and suits. The proportion of the "collections" which Brua was to receive he has refused to tell, but that he was to receive some proportion of them he has distinctly avowed; and that he was to be considered a substantial party to all proceedings instituted by Keiper appears upon a fair scrutiny of the answers made by Mr. Brua on cross-examination, of which I extract the following:

"XQ. 201. Is your agreement with the complainants as to the amount you are entitled to receive, whatever it is, in writing, or is it merely in parol, or verbal? A. I decline to answer this question. XQ. 202. Whatever bargain you had in that behalf was entered into at or before you assigned the patent, and before these suits were brought. Am I right about that? A. Whatever was done was done before suit was brought. XQ. 203. Have you any views or say as to the terms upon which alleged infringers may settle? A. That don't belong to my part of the matter. I am never consulted in that matter; not as a general thing. XQ. 204. But you do have a say as to the terms upon which alleged infringers may settle, do you not? A. I am at liberty to give my opinion in that matter. XQ. 205. That is, under the terms of your agreement with the complainants, you have this privilege? A. No; I don't know that I would have that privilege. XQ. 206. You stated above that you are not consulted, as a general thing, as to the terms upon which alleged infringers may settle. Do you mean to say now that you have nothing to say regarding settlements with alleged infringers? A. I would say that the parties making collections are not under any obligations to consult me about what infringers should pay. XQ. 207. Have you not told one or more parties that Mr. Keiper's signature alone is not sufficient to effect a settlement, but that your signature is required to all such papers? (Objected to, unless counsel embodies in the question, and calls to the attention of the witness, the specific times and the names of parties to whom such assertions were made, together with all attending circumstances.) A. I may have had a conversation with a member of the association (the Cumberland Valley Millers' Protective Asso-

ciation). He seemed to signify that the parties would not prosecute only certain people. I told him that we were obliged to prosecute every one, unless they would settle satisfactorily."

It is unnecessary to exhaustively discuss the evidence bearing upon this matter, or to refer at all to certain other facts to which the defendant's counsel have, not without pertinence, adverted in this connection. It is enough to say that, upon all the proofs, I am unable to escape the conviction that this suit has been brought in pursuance of a bargain between the complainants and Brua, the patentee, to divide the recovery between them, if they should prevail, and the former to carry on the suit at their own expense. Such a bargain constitutes champerty (Kent, Comm. p. 485, note d); and the following observations of Judge Shipman in Gregerson v. Imlay, 4 Blatchf. 504, Fed. Cas. No. 5,795, are directly in point:

"This is not the case of an assignment of an interest in an individual claim, or a sale of property in esse which is involved in a legal controversy, but it is an attempted transfer of an interest in indefinite litigious rights, and in claims for unliquidated damages, arising out of torts, indefinite in number and amount, and limited only by territorial boundaries, covering nearly the entire country. Passing by other grave questions that suggest doubts as to the validity of such a contract, it is sufficient to say that it is one that no court of equity should countenance, inasmuch as it is tainted with champerty and maintenance. This view of the duty of courts of equity is fully supported by the chief baron of the exchequer in the case of Prosser v. Edmonds, 1 Younge & C. Exch. 481, where he remarks that such courts should lend no countenance to agreements which partake in any manner of champerty, although they might be barely valid at law. * * * To arm one individual with exclusive and unlimited power over the claims of another for unliquidated damages arising out of numerous torts, with power to sue and press the claims to judgment in all courts, in the name of the injured party, not for a fixed or a reasonable compensation to be determined by the amount of labor performed and the expense incurred, but for what might prove an enormous bounty proportioned to the amount that might be recovered, while at the same time the other party is stripped of all power to adjust, settle, or discharge those claims, of the justice of which he ought to be the better judge, would be detrimental of the peace of society and the safety of individuals, and against public policy."

It is true that, in the case in which this language was used, the question arose upon an application by one of the parties to the champertous agreement for a provisional injunction to restrain the violation of that agreement by the other party thereto; whereas, in the present case, the unlawfulness of the agreement is set up by a third party, to defeat a suit which is prosecuted in accordance with its terms, and with the acquiescence of both parties to it. This, however, makes no difference. The views expressed by Judge Shipman, in which I fully concur, are, in my opinion, equally applicable to the present case as to that which was before him. It may be conceded that, as argued for complainants, an arrangement that counsel shall receive part of the proceeds of a suit in which he is professionally employed will not prevent a recovery therein; but where the title which the plaintiff relies upon, and upon which his right to sue is dependent, is tainted with champerty, the case presented is a very different one, for there the court is quite as plainly asked to uphold the obnoxious contract as upon a motion (as in Gregerson v. Imlay) to restrain its violation.

In Burnes v. Scott, 117 U. S. 589, 6 Sup. Ct. 865, the question was, "not whether a champertous contract between counsel and client is void, but whether the making of such a contract can be set up in bar of a recovery on the cause of action to which the champertous contract relates." This question was answered in the negative; but the title of the plaintiff in that case was not infected with champerty, and the supreme court referred with apparent approval to the opinion of the vice chancellor in Hilton v. Woods, L. R. 4 Eq. 432, where the law is stated, and the distinction which I have made is clearly pointed out, as follows:

"But it was strenuously argued by the counsel for the defendant that the bargain between the plaintiff and Mr. Wright, under which this suit was instituted, amounted to champerty and maintenance, and consequently disqualified the plaintiff to sue, and that I was therefore bound to dismiss the bill, or to make the plaintiff pay the costs of the suit, or that I ought not, at all events, to give him any costs. I have carefully examined all the authorities which were referred to in support of this argument, and they clearly establish that whenever the right of the plaintiff, in respect of which he sues, is derived under a title founded on champerty or maintenance, his suit will on that account necessarily fail. But no authority was cited, nor have I met with any, which goes the length of deciding that, where a plaintiff has an original and good title to property, he becomes disqualified to sue by having entered into an improper bargain with his solicitor as to the mode of remunerating him for his professional services in the suit or otherwise. It is clear that the bargain between the plaintiff and Mr. Wright amounted to maintenance; and if the latter had been the plaintiff, suing by virtue of a title derived under that contract, it would have been my duty to dismiss the bill."

It is not necessary to cite the many additional authorities, English and American, by which this view of the law is supported. I have no doubt of its correctness; and, as I have said, it seems to have met the approval of the supreme court of the United States in Burnes v. Scott, supra. In my opinion, it rules this case.

Bill dismissed, with costs.

DIXON v. WESTERN UNION TEL. CO.

(Circuit Court, D. Indiana. June 18, 1895.)

No. 9,207.

1. PLEADING—NEGLIGENCE—UNSAFE APPLIANCES.
   A complaint, in an action for personal injuries resulting from the insufficiency or unsafe condition of the appliances furnished by an employer to his servant, which does not allege that such insufficiency was known, or might have been known, to the employer, and was unknown to the servant, is fatally defective.

2. NEGLIGENCE—RISKS OF EMPLOYMENT.
   Plaintiff, who was in the employ of a telegraph company, engaged with others in stringing wires on its poles, was instructed to climb a pole belonging to another company, to get certain wires out of the way. Plaintiff climbed the pole by means of iron spikes driven into it, did his work, and, while descending, fell, in consequence of one of the spikes being insufficiently secured or loosened by the rotting of the wood. *Held*, that the danger from which the accident resulted was one of the risks of plaintiff's employment, which was assumed by him, and for which his employer was not liable.

3. SAME—LIABILITY OF EMPLOYER—INDIANA STATUTE.
The statute of Indiana (Act March 4, 1893) providing that "every * * * corporation, * * * shall be liable in damages for personal injury suffered by any employé while in its service, * * * where such injury resulted from the act or omission of any person done or made in obedience to any rule, regulation or by-law of such corporation, or in obedience to the particular instructions given by any person delegated with the authority of the corporation, * * *" does not impose liability upon the employer for injuries resulting from the act or omission of the person injured.

This was an action by Thomas W. Dixon against the Western Union Telegraph Company for personal injuries. The defendant demurred to the second paragraph of the complaint. Sustained.

Finch & Finch and Dunn & Love, for plaintiff.

Butler, Snow & Butler and Chambers, Pickens & Moores, for defendant.

BAKER, District Judge. The defendant has filed its demurrer to the second paragraph of the plaintiff's complaint, alleging that it does not state facts sufficient to constitute a cause of action. The paragraph shows the requisite diversity of citizenship to give the court jurisdiction, and then proceeds to allege, in substance, that the defendant owns divers lines and wires running on poles through the streets and highways of the city of Indianapolis, in the state of Indiana; that it employs a large number of men, whose duties, among others, are to string the wires on said poles, and to repair the same, and to set up and erect poles upon which to string said wires; that the plaintiff, who was a robust, strong, and healthy man, was employed by the defendant on or about November 1, 1894, to work for it in setting up and erecting poles, and stringing wires thereon; that he was placed, with a gang of men similarly employed, under one Edward Hyland, who was placed by the defendant over said gang of men, as boss or foreman, and who had power to employ and discharge hands, and to govern said gang in their work, and to represent and act for the defendant in all matters pertaining to the work of said gang of men; that the plaintiff was subject to the orders of said foreman, and was bound to obey, and did obey, his orders; that on December 2, 1894, the plaintiff, while in the discharge of his duties, was directed by said foreman, who was at the time acting for the defendant, and was delegated with authority by it in that behalf, to climb a certain telephone or telegraph pole near to which they were working, and to remove and raise a certain wire or wires which interfered with the setting up and erection of a certain pole upon which said gang was engaged; that, to enable a person to climb said pole, there were spikes driven into it, at intervals, on each side thereof, which projected out a sufficient distance to enable one to catch hold thereof, and to place the feet thereon, as a ladder; that the plaintiff, in obedience to the particular instructions of said foreman, did climb said pole, using the spikes in climbing; that said spikes had not been driven into said pole a sufficient distance, or the wood into which the spikes were driven was rotten and infirm, thereby rendering the use of said spikes in climbing unsafe and dangerous; that the unsafe and dangerous condition of the spikes was not

obvious to the plaintiff when he started to climb said pole, and he was not aware of the unsafe and dangerous condition thereof; that in descending said pole, using said spikes as steps and handholds, one of them, by reason of the insecure manner in which it was driven into said pole, or by reason of the rotten and infirm condition of the wood, pulled out from said pole, whereby the plaintiff was precipitated therefrom to the ground below, a distance of about 30 feet, sustaining severe and permanent injuries, which will cripple him for life; that in climbing and descending said pole the plaintiff exercised due care for his personal safety; and that his fall was wholly without any fault or negligence on his part.

The employer is not an insurer of the safety and sufficiency of the tools, machinery, or appliances furnished to the employé for his use, nor is he a guarantor of the safety of the place where or upon or about which the employé is required to work. The duty cast by law upon the employer is to use ordinary and reasonable care to furnish safe and sufficient tools, machinery, and working places. If he has done this, he has performed the full measure of his duty. The employé, in order to recover for defects in the appliances or working places of the business, must allege and prove that the appliance was defective, or the working place insecure; that the employer had notice or knowledge thereof, or that by the exercise of ordinary and reasonable care he might have had such notice or knowledge; and that the employé did not know of the defect, and had not equal means of knowing with the employer. Wood, Mast. & Serv. § 414. The result of the authorities in this state, which are too numerous to justify citation, is thus summarized in the recent case of Coal Co. v. Albani (Ind. App.) 40 N. E. 702:

"In suits by the servant against the master for his negligent failure to furnish a safe place or safe machinery or appliances for the servant's task, the law must now be regarded as settled in Indiana, by repeated adjudications, that knowledge is an independent element of liability, not included in the general averment of negligence. Where, therefore, as here, a recovery is sought for the master's neglect of his duty with reference to safe places or appliances, knowledge of the defect by the master, and want of knowledge by the servant, must be affirmatively shown by the complaint."

In the case of Railroad Co. v. Myers, 11 C. C. A. 439, 63 Fed. 793, the circuit court of appeals, citing many decisions of the supreme court of the United States, thus state the rule:

"The master's duty requires him to exercise ordinary and reasonable care, having regard to the hazards of the service, to furnish his servant with reasonably safe appliances, machinery, tools, and working places, and also to exercise ordinary and reasonable care at all times to keep them in a reasonably safe condition of repair. He is under no absolute obligation to furnish safe instrumentalities and working places, nor is his duty an absolute one to keep them in a safe condition of repair. He is not an insurer of their safety."

The paragraph in question does not allege that the defendant had notice or knowledge of the unsafe and dangerous condition of the pole, nor that it might have had such notice or knowledge by the exercise of ordinary care. Tested by the settled rule of law applicable to a case where the master furnishes appliances or working places for his servant, the paragraph is insufficient.

The pole in question, however, did not belong to the defendant. The use of it was casual, and incidental to the nature of the service in which the plaintiff was employed. In a large city, where telephone, telegraph, electric light, and electric railway poles and wires are numerous, in the erection of new poles and wires it is often necessary to climb poles already erected, in order to raise or remove wires which would interfere with the erection of additional poles and wires. It was a part of the plaintiff's duty to climb such poles, and to raise and remove obstructing wires. The work in which he was engaged could not otherwise have been accomplished, and the usual and ordinary risks of such service were assumed by the plaintiff. He had all the opportunity which any inspector could have had, to know whether the spikes had been driven into the pole securely, or whether the wood had become rotten and decayed. He learned, or might have learned, when he went up the pole, whether or not the spikes were securely fastened in the wood. He saw and used them in going up, and a careful inspection, to insure his personal safety, was the first thing which ought to have been suggested to him. He knew that the pole which he was about to climb did not belong to the defendant, and that it could not know the condition of the spikes, further than its foreman could ascertain it by an inspection of them standing on the ground. No fault or negligence of the foreman is charged in this particular. The plaintiff was acting within the scope of his employment, in going, as a pioneer, into a place of danger, which he knew his employer had not inspected, and could not inspect, except by causing him, or some other employé, to perform that duty. He was a man of mature age, and needed no instruction to warn him of his danger or his duty. He knew that no one knew the condition of the pole or the spikes better than he did, and that no one could know better than he the sufficiency of the spikes to bear his weight. If he gave the matter a thought, he knew that he must rely upon his own judgment, in placing his weight upon the spikes, and that before doing so he ought to test them, to see if they were sufficiently secure to trust his weight upon them. Under such circumstances he had no right to rely on the judgment or inspection of his foreman. Flood v. Telegraph Co., 131 N. Y. 603, 30 N. E. 196; Telephone Co. v. Loomis, 87 Tenn. 504, 11 S. W. 356; Garragan v. Iron-Works Co., 158 Mass. 596, 33 N. E. 652; Junior v. Power Co. (Mo. Sup.) 29 S. W. 988; Griffin v. Railway Co., 124 Ind. 326, 24 N. E. 888; Railroad Co. v. Gruff, 132 Ind. 13, 31 N. E. 460.

The paragraph in question must be held insufficient, unless, as claimed by counsel for the plaintiff, it states a cause of action within the terms of an act of the general assembly of this state approved March 4, 1893 (Acts 1893, p. 294, § 1). The first section of this act, so far as material, reads:

"That every railroad, or other corporation, except municipal, operating in this state, shall be liable in damages for personal injury suffered by any employé while in its service, the employé so injured being in the exercise of due care and diligence, in the following cases: * * * Third. Where such injury resulted from the act or omission of any person done or made in obedience to any rule, regulation or by-law of such corporation, or in obedience to the

particular instructions given by any person delegated with the authority of the corporation in that behalf."

Counsel for the plaintiff insist that this clause of the statute gives a right of action to an employé who has sustained an injury, without his fault, arising from the performance of any service rendered in obedience to the rules and regulations of the corporation, or in obedience to the particular instructions of any person delegated with the authority of the corporation in that behalf, without regard to the question of negligence or want of care of the corporation or its foreman. The contention is that the injury complained of resulted from the act of the plaintiff, done in obedience to the particular instructions given by the foreman, who had been delegated with authority in that behalf. According to the construction contended for, the clause would read:

"That every railroad or other corporation, except municipal, operating in this state, shall be liable in damages for personal injury suffered by any employé while in its service, the employé so injured being in the exercise of due care and diligence, in the following cases: * * * Third. Where such injury resulted from the act or omission of the person injured or any other person, done or made in obedience to any rule, regulation, or by-law, of such corporation, or in obedience to the particular instructions given by any person delegated with the authority of the corporation in that behalf."

The phrase, "where such injury resulted from the act or omission of any person," is broad enough to embrace the injured person. The expression "any person," in its usual and ordinary sense, is inclusive, and embraces every employé. This clause of the statute is not free from ambiguity. While the language employed is capable of a construction as broad as is contended for, it will not be given such construction, if to do so would lead to absurd or unjust consequences. The natural import of the words of a statute, according to the common use of them when applied to the subject-matter, is to be regarded as expressing the intention of the legislature, unless it is repugnant to the acknowledged principles of justice and sound public policy, in which case the words ought to be enlarged or restrained so as to comport with those principles, unless the intention of the legislature is clearly and manifestly repugnant to them. Opinion of the Justices, 7 Mass. 523; Hittinger v. Westford, 135 Mass. 258. The construction contended for would make every corporation, except municipal, an insurer of the safety of its employés from injury in all cases where they were injured without their fault, while acting in obedience to the rules or instructions of their employer. It would subject the industries of the state to hazards and burdens of new and dangerous proportions. Its mischiefs would prove far-reaching, and its injustice would be great. No corporation could safely conduct its business, if it were required to become an absolute insurer of the safety of its employés. No principles of justice or sound policy can be invoked in support of a construction which would condemn the employer to compensate an employé for an injury for which the employer was in no wise in fault. The statute is susceptible of a construction which does no violence to the language employed, and which will protect the just rights of the employé, and at the same time hold the employer to respond in

damages for injuries resulting from its fault or negligence, or from the fault or negligence of any person delegated with authority to represent it. The true construction of the clause requires the words "any person" to be limited so as not to include the person injured. Thus construed, the clause would read:

"Where such injury resulted from the act or omission of any person (except the person injured) done or made: (1) in obedience to any rule, regulation, or by-law of such corporation; or (2) in obedience to the particular instructions given by any person delegated with the authority of the corporation in that behalf."

This construction makes the statute harmonious, and gives effect to every word and member of it. Under this construction, the effect of this clause is to prevent the corporation from setting up the defense that the injury to the plaintiff was caused by the act or omission of a coemployé, when such coemployé was acting in obedience to the rules, regulations, or by-laws of the corporation, or in obedience to the particular instructions given by any person delegated with the authority of the corporation in that behalf. In my opinion this clause of the statute ought to receive no broader construction. Thus construed, the paragraph is insufficient. The injury complained of did not result from the act or omission of a fellow servant, done or made in obedience to any rule, regulation, or by-law of the corporation, or in obedience to the particular instructions of the defendant's foreman, nor is it shown to have resulted from any fault or want of care of either. The demurrer is therefore sustained, to which ruling the plaintiff excepts.

CENTRAL TRUST CO. OF NEW YORK v. EAST TENNESSEE, V. & G. R. CO. (OLIVER, Intervener).

(Circuit Court, N. D. Georgia. June 1, 1895.)

No. 688.

NEGLIGENCE—INEVITABLE ACCIDENT.

An engine was thrown from the track by running over some calves which sprang upon the track almost immediately in front of the moving engine, which ran for some distance along the ties, and then turned over. *Held*, that the receivers operating the road could not be held responsible for injuries to the engineer primarily caused by this inevitable accident, even though they had failed to exercise due care in selecting the brakemen, whose inefficiency was alleged to have caused the overturning of the engine.

This was an intervening petition filed by J. W. Oliver, in the suit of the Central Trust Company of New York against the East Tennessee, Virginia & Georgia Railroad Company, claiming damages for personal injuries. The petition was referred to a master, who reported adversely to the petitioner. Exceptions to the master's report were duly filed.

King & Anderson, for intervener.
De Lacy & Bishop, for defendant.

NEWMAN, District Judge. There is one conclusion to which the special master came in this case which must control it independently of questions raised by other exceptions to the master's report. That conclusion is that the injury to the intervener was the result of an unavoidable accident, against which no sort of diligence could have been effective. The accident which resulted in the injury for which this suit was brought was caused by the engine striking some calves on the track, causing the derailment of the engine and its overturning, by which the intervener, who was the engineer, was injured. It appears from the testimony of the intervener that the calves sprang on the track almost immediately in front of the moving engine,—"in the headlight," as he expressed it. The engine ran over the calves, and was caused thereby to mount the rails, and, after running some distance on the cross-ties, to leave the track, and turn over.

It has already been determined in this case, and also in former cases where the same question was raised, that an employé, such as this engineer, could not recover against a receiver of a railroad for an injury caused by the negligence of a fellow servant, as a brakeman would be to the engineer. The right to recover, after the adjudication of this question, has been placed by the intervener on the ground that the brakemen, whose negligence it is claimed was the cause of the overturning of the engine, were unskillful and incompetent, and that the receivers were responsible for having such men in their employ. The master has found this question of the receivers having incompetent employés against the intervener, and has reported that the evidence does not sustain the charge. It is not altogether certain from the evidence, as reported by the master, that he is correct in this view, and it is not entirely clear from the evidence that the men were fitted for the positions or that due care was exercised in their selection. It may be, however, that the finding of the master is not, on the other hand, so clearly erroneous as to justify the court in sustaining the exception on this ground, if it stood alone. But, be that as it may, and independently of it, it would be mere surmise to say that the negligence of the brakemen at the time or any general incompetency or unskillfulness on their part was the cause of the engine turning over and injuring the intervener. It is not contended, as I understand it, that the derailment of the engine could have been prevented even if the brakes had been applied in the quickest and most skillful manner, but that the engine would not have upset if this had been done. It can only be conjectured that the highest diligence and the greatest skill on the part of the brakemen might have prevented the unfortunate result. Certainly, from this evidence and the report of the special master, the court would not be justified in sustaining the exception, and setting aside the report, so far as the report is made on the ground that this was an unavoidable accident, for which the receivers were not responsible. The exceptions will be overruled, and the report confirmed.

MUSE et al. v. ARLINGTON HOTEL CO.

(Circuit Court, E. D. Arkansas. June 1, 1895.)

1. PUBLIC LANDS—SPANISH GRANT.
The regulations of Gov. O'Reilly in the province of Louisiana of February 18, 1770 (section 12), provided that all grants should be made in the name of the king by the governor general, who would at the same time appoint a surveyor to fix the bounds thereof, both in front and depth, in the presence of the judge ordinary of the district and of two adjoining settlers, who should be present at the survey; that such four persons should sign the procés verbal made thereof; that the surveyor should make three copies of the same, one of which should be deposited in the office of the scrivener of the government, another directed to the governor general, and the third to the proprietor, to be annexed to the title of his grant. *Held*, that no title was conveyed by a paper purporting to be a Spanish grant, made while such regulations were in force, by the governor of such province, "of a tract of land of one square league, situated in the district of Arcansas, on the north side of the River Ouachita, at about two leagues and one-half distant from said River Ouachita, and understanding this land is to be measured so as to include the site or locality known by the name of 'Hot Waters,' as is besides expressed by the figurative plan and certificate of said surveyor, Trudeau, above named; and recognizing this mode of measurement, we approve of this survey, using the faculty which the king has placed in us, and assign in his royal name unto the said" grantee "the said league of land," etc., in the absence of any actual survey on the ground, and the filing of a copy thereof in the office of the scrivener of the government, and an actual putting of the grantee in pedal possession according to the form and proceedings then prevailing in Spain and such province.

2. LIMITATIONS—ACTION TO RECOVER LAND GRANTED BY SPAIN.
Act May 26, 1824 (4 Stat. 52), entitled "An act enabling the claimants of land within the limits of the state of Missouri and territory of Arkansas to institute proceedings to try the validity of their claims," permitted all persons claiming under French and Spanish grants to file petitions in various courts named, in order to have their titles confirmed, and provided that any claim to lands "within the purview of this act which shall not be brought by petition before the said courts within two years from the passing of this act, or which, after being brought before the said courts, shall, on account of the neglect or delay of the claimants, not be prosecuted to a final decision within three years, shall be forever barred," etc. Such act was several times extended; the last time for five years, by Act June 17, 1844 (5 Stat. 676). *Held*, that such statute bars an action brought in 1894 for a tract of land including the hot springs in the city of Hot Springs, Ark., by the heirs of a grantee of an alleged Spanish grant, dated February 22, 1788.

3. SAME.
Such action is also barred by Act Cong. June 11, 1870 (16 Stat. 149), known as the "Hot Springs Act," which gives all persons claiming title, either legal or equitable, "to the whole or any part of the four sections of land constituting what is known as the 'Hot Springs Reservation,' in Hot Springs county, in the state of Arkansas," an opportunity to institute suit in the nature of a bill in equity against the United States in the court of claims, "and prosecute to final decision any suit that may be necessary to settle the same: provided that no such suit shall be brought at any time after the expiration of 90 days from the passage of this act, and all claims to any part of such reservation upon which suit shall be not brought under the provision of this act within that time shall be forever barred."

4. PUBLIC LANDS—GRANT—ABANDONMENT—PRESUMPTION FROM LAPSE OF TIME.
A claim by a grantee of an alleged Spanish grant, dated February 22, 1788, or his heirs, to a tract of land including the hot springs in the city of Hot Springs, Ark., will be presumed to have been abandoned, in an

action brought by such heirs in 1894, to recover such tract of land, though it appears that such heirs brought a suit in the name of an assignee under Act May 26, 1824, for confirmation of the claim, which was dismissed for noncompliance with an order for the production of the original papers.

5. ESTOPPEL IN PAIS.

In 1788 the hot springs were on lands occupied and owned by Indians. After the cession in 1818 the United States bought up the title of the Indians. In 1832 it reserved the property from entry and sale. Between such time and 1894 the government spent large sums for hospitals and improving and beautifying such property. A prosperous city was built about the springs, and by the joint labor and money of private citizens, such city, and the government, streets were laid out, parks established, churches and schoolhouses erected, railway connections created, and millions of dollars expended in hotels. *Held*, that the grantee of an alleged Spanish grant of the tract of land including the hot springs, dated 1788, and his heirs, none of whom ever paid anything for such grant, or any taxes on the land, or spent any money in making the many enduring and costly improvements thereon, are estopped from claiming an adverse title to such land.

This is an action of ejectment, brought on the 25th day of July, 1894, by the plaintiffs, as heirs of Juan Filhiol, against the defendant, for a tract of land including the hot springs in the city of Hot Springs, in this state. The plaintiffs rely for title on certain documents, copies of which are filed with the complaint, and are made exhibits hereto, and which are as follows:

1. A paper, made Exhibit A, purporting to be a Spanish grant, translated from the Spanish language to the English, in the following words:

"(From the Land Archives.)

"The governor intendent of the provinces of Louisiana and Florida West, inspector of troops, etc. Considering the anterior surveys made by the surveyor of this province, Don Carlos Trudeau, concerning the possession given to Don Juan Filhiol, commandant of this post of the Ouachita, of a tract of land of one square league, situated in the district of Arcansas, on the north side of the River Ouachita, at about two leagues and one-half distant from said River Ouachita, and understanding that this land is to be measured so as to include the site or locality known by the name of 'Hot Waters,' as is besides expressed by the figurative plan and certificate of said surveyor, Trudeau, above named, and recognizing this mode of measurement, we approve of this survey, using the faculty which the king has placed in us, and assign in his royal name unto the said Juan Filhiol the said league of land, in order that he may dispose of the same and the usufruct thereof as his own. We give these presents under our own hand, sealed with the seal of our arms, and attested by the undersigned, secretary of his majesty in this government and intendents.

"In New Orleans, on the 22nd of February, 1788. Estevan Miro.

"By mandate of his excellence.

"Andres Lopez Armesto.

"Registered."

2. A paper purporting to be a survey, also translated from the Spanish language, marked "Exhibit B," in the following words:

"Don Carlos Trudeau, land and particular surveyor of the province of Louisiana, in consequence of a memorial signed on the 12th of December of the year 1787 by Don Juan Filhiol, commandant of the post of Ouachita, and by order of his excellency, Don Estevan Miro, brigadier of the R. Ex. Gob., intendent of the province of Louisiana, West Florida, etc., dated the 22nd of February, 1788, directing me to give possession to the aforesaid commandant of a tract of land of one league square, situated in the district of Arkansas, to include that spot known by the name of the 'Warm Waters'; and in conformity with the aforesaid order I certify having measured in favor of the aforesaid commandant, Don Juan Filhiol, the league of land indicated in the memorial situated on the north side of Ouachita river, in the district of Arkansas, at about two leagues and a half distant from said river, to be verified by the figurative plan which

accompanies, in conformity with —— of the 6th of the present month of December, and of the current year, 1788.

"[Signed] Carlos Trudeau."

Exhibit C to the complaint appears to be a deed from John Filhiol to Narcisso Bourgeat, conveying "a tract of land 84 arpents front and 42 in depth on each side of the stream called the source of the hot springs, about two leagues from where it flows into the Ouachita river, having the source of the hot springs as a center, the boundary lines on the east and west running parallel to their full depth, bounded on both sides by public lands, being the same property acquired by me from Stephan Miro, then governor of these provinces, under date of December 12th, 1787." This deed is not dated, but on it there is indorsed an acceptance of it, dated November 25, 1803.

Then follows Exhibit D, which purports to be a retrocession by Narcisso Bourgeat to John Filhiol of "one league square, situated at the mouth of the Hot Springs creek, where it flows into the Ouachita, being the same property which he sold to me by act passed before Vincent Fernandez Texiero, then commandant of Ouachita post," dated July 17, 1806, signed by Narcisso Bourgeat.

The defendant demurred to the complaint because (1) it states no cause of action; (2) because, if plaintiffs have any remedy, it must be pursued in equity, and not at law. The defendant also filed exceptions to the documentary evidence as follows: "Comes said defendant, and excepts to the so-called 'land grant,' made an exhibit of evidence marked 'Exhibit A' to complaint, because (1) the said instrument does not purport to be official, or to come from any official depository. And said defendant excepts also to the paper purporting to be a survey made by Don Carlos Trudeau, marked 'Exhibit B,' to the complaint, because (1) it does not purport to be official; (2) it does not purport to come from any official depository; (3) because it shows no such survey as is required by law to sustain the pretended Spanish grant set up in said complaint. And the said defendant excepts to the instrument purporting to be a conveyance by John Filhiol, marked 'Exhibit C' to said complaint, because (1) the said deed does not purport to have been signed by the grantor therein; (2) because the same does not describe the land set forth in the complaint herein; (3) the said deed does not purport to come from any official source, or ever to have been filed in any office; (4) it is not authenticated as required by law. The defendant also excepts to the instrument purporting to be a retrocession by Narcisso Bourgeat, a copy of which is marked 'Exhibit D' to the complaint herein, because (1) it is not authenticated in a manner required by law; (2) it does not purport to come from any official source; (3) it does not purport to come from any official depository of conveyances of lands; (4) it does not describe the lands mentioned in the complaint."

C. H. Boatner, E. W. Rector, Dan W. Jones, and Mr. McCain, for plaintiffs.

Rose, Hemmingway & Rose, for defendant.

WILLIAMS, District Judge. By the statute of Arkansas the pleadings in the action of ejectment are very nearly assimilated to those of a suit in equity to quiet title. The pleading is special, and not general. In his complaint the plaintiff must set forth "all deeds and other written evidences of title on which he relies for the maintenance of his suit, and shall file copies of the same, as far as the same can be obtained, as exhibits therewith, and shall state such facts as shall show a prima facie title in himself to the land in controversy." Sand. & H. Dig. § 2578. All objections to exhibits must be made by exceptions to their admissibility before the trial. Id. § 2579. The object of this statute is to prevent surprise to either party; also to prevent, as far as may be, the discussion of questions of evidence during the trial, so that trials

may be rendered more expeditious, and that the attention of juries may not be diverted from their exclusive province. I do not find it necessary to notice the exceptions to the deed from Filhiol to Bourgeat, or the subsequent deed from the latter to the former. In the view of the case that I have taken, it is of no importance to consider whether the deed from Filhiol to Bourgeat, or the deed from Bourgeat to Filhiol, describes the same land referred to in the alleged grant, as contended for by the plaintiffs; for, if so, it is evident that the title of the plaintiffs is not affected by these conveyances, and that by the reconveyance Filhiol could only have acquired the same title that he held in the first instance. As the stream cannot rise higher than its source, and Filhiol could not grant any greater estate than he possessed, his title could not be improved by a conveyance to another and a reconveyance to himself. It is, however, necessary to consider the exceptions to the alleged grant by Gov. Miro, and the alleged survey of Trudeau. At the time that the alleged grant in this case was made, the regulations of Gov. O'Reilly of February 18, 1770, were in force in the province of Louisiana, the twelfth section of which reads as follows:

"All grants shall be made in the name of the king by the governor general of the province, who will at the same time appoint a surveyor to fix the bounds thereof, both in front and depth, in the presence of the judge ordinary of the district and of two adjoining settlers, who shall be present at the survey. The above-mentioned four persons shall sign the process verbal, which shall be made thereof. The surveyor shall make three copies of the same, one of which shall be deposited in the office of the scrivener of the government, another shall be directed to the governor general, and a third to the proprietor to be annexed to the title of his grant." Copied also in U. S. v. Boisdore, 11 How. 76. Also in volume 5, Am. St. Papers, pp. 289, 290.

These regulations were approved by the royal order of the king of Spain of August 24, 1770, after which they had the force of statutes which no official had the right to disregard. U. S. v. Moore, 12 How. 217. The Spaniards "were a formal people, and their officials were usually careful in the administration of their public affairs." White v. U. S., 1 Wall. 680. Some degree of conformity with laws thus actually in force must be shown by the plaintiff, "otherwise there can be no protection against imposition and fraud in these cases." U. S. v. Teschmaker, 22 How. 405. The applicant for a Spanish grant presented to the governor a petition, or "requete," as it was called, accompanied by what was called a "figurative" or "conjectural" map or plan of the land desired. This map was not made from an actual survey, but served to indicate in a general way the location of the land sought to be acquired, so that the officials might know whether it was vacant or not, and something of its real or prospective value. Without some such information, the governor could not act advisedly in making or in refusing the grant. In all cases there was an actual survey on the ground before the title of the crown was divested, followed by an actual putting the grantee in pedal possession; a proceeding which was the equivalent of delivery of seisin at common law, both ceremonies being derived from the feudal law. The figurative plan has sometimes been

called a "chamber survey" (Hunnicutt v. Peyton, 102 U. S. 361), because it was made in an office or other place remote from the land indicated (Scull v. U. S., 98 U. S. 420). The grant upon this chamber survey delivered out for actual survey "meant, not as with us, a perfect title, but an incipient right, which, when surveyed, required confirmation by the governor." U. S. v. Boisdore, 11 How. 99. Until an actual survey was made on the ground, the grant or concession was only a floating and unlocated claim. U. S. v. Hanson, 16 Pet. 200. The actual survey consisted of "running lines with compass and chain, establishing corners, marking trees and other objects on the ground, giving bearings and distances, and making field notes and plats of the works. These are the ingredients of an actual survey." Winter v. U. S., Hempst. 362, Fed. Cas. No. 17,895. Until actual survey made, no specific parcel of land was segregated from the public domain; and unless such a survey was made before the cession of Louisiana to the United States, no title passed to Filhiol, his heirs or grantees. In U. S. v. Lawton, 5 How. 26, the court, speaking on this subject, expressed the law as follows:

"It follows that the description, when applied to the facts, is too vague and indefinite for any survey to be made, and that, therefore, the claimants can take nothing under the concession, and that it is our duty to order the decree of the superior court of East Florida to be reversed, and the petition to be dismissed. We would remark, in addition, that this concession, in its leading features, cannot be distinguished from various others that have heretofore been brought before this court for adjudication, where no specific land was granted, or intended to be granted, but it was left to the petitioner to have a survey made of the land in the district referred to by the concession, by the surveyor general of the province, in due form, on the ground, and to cause the plat and certificate of such survey to be recorded by the surveyor general, by which additional public act the land granted was severed from the king's domain, but remained part of it until the survey was made and recorded. Until this was done, the warrant was a floating warrant of survey, not recognized by the government of Spain before the cession, nor by this government since, as conferring an individual title to any specific parcel of land on the petitioner."

Such an inchoate claim as Filhiol possessed at the time of the cession was of no kind of validity as against the United States, and, even if it had been expressly confirmed by act of congress, it would have derived its validity alone from that act, "and not from any French or Spanish element which entered into its previous existence." Dent v. Emmeger, 14 Wall. 312. Though the land had been actually surveyed as required by the regulations of Gov. O'Reilly, still the claim would have had no validity, unless a copy of the survey had been filed in the office of the scrivener of the government, as therein provided. "But the examination of the surveyor, the actual survey, and the return of the plat were conditions precedent, and he had no equity against the government, and no just claim to a grant until they were performed." Fremont v. U. S., 17 How. 554. On this subject the supreme court say:

"This concession was an incomplete grant, and did not vest a perfect title to the property in the grantee, according to the Spanish usages and regulations, until a survey was made by the proper official authority, and the party thus put in possession, together, also, with a compliance with other conditions,

if contained in the grant, or in any general regulations respecting the disposition of the public domain. Possession, with definite and fixed boundaries, was essential to enable him to procure from the proper Spanish authority a complete title." U. S. v. Hughes, 13 How. 2; U. S. v. Hanson, 16 Pet. 199.

If these are the rules to be applied where the grant in itself says nothing about a survey, they must have a more obvious application where the concession itself specifically requires such an actual survey to be made and returned. The grant in this case expressly provides "that this land is to be measured so as to include the site or locality known by the name of 'Hot Waters.'" Not only was an actual survey on the ground required by the law, but the grant itself made such an actual survey a condition precedent to any investiture of title. The governor approved the "figurative" survey of Trudeau, but he, as was certainly meet and proper, required that the land referred to should be measured and identified by an actual survey, which should leave nothing to conjecture. No right, legal or equitable, vested in the petitioner until survey was made and returned according to law. "The original concession granted on his petition was a naked authority or permission, and nothing more." Fremont v. U. S., 17 How. 554; Peralta v. U. S., 3 Wall. 440. Not only was it necessary that the actual survey should be made, but it and the survey must have been returned and filed as provided in the regulations of O'Reilly; otherwise there was no valid grant. In the Peralta Case, supra, the court said:

"Written documentary evidence, no matter how formal and complete, or how well supported by the testimony of witnesses, will not suffice if it is obtained from private hands, and there is nothing in the public records of the country to show that such evidence ever existed. But it may be said that the archives of the country may be lost or destroyed, and, if so, that the party in interest should not suffer. This is true; and if the claimant can show, to the satisfaction of the court, that the grant was made in conformity to law, and recorded, and that the record of it has been lost or destroyed, he will then be permitted to introduce secondary evidence of it. But the absence of record evidence is necessarily fatal, unless that absence can be accounted for."

See, also, U. S. v. Wiggins, 14 Pet. 350; U. S. v. Kingsley, 12 Pet. 476; Chouteau v. Molony, 16 How. 234; U. S. v. Cambuston, 20 How. 59; U. S. v. Castro, 24 How. 346; U. S. v. Knight, 1 Black, 227; U. S. v. Castillero, 2 Black, 163; Hornsby v. U. S., 10 Wall. 224; U. S. v. Power, 11 How. 577; U. S. v. Pico, 22 How. 406; U. S. v. Vallejo, Id. 416; U. S. v. Bolton, 23 How. 341; U. S. v. Vallejo, 1 Black, 541; U. S. v. Sutter, 21 How. 175; U. S. v. Hanson, 16 Pet. 199; Glenn v. U. S., 13 How. 250.

In this case, as in De la Croix v. Chamberlain, 12 Wheat. 601, the requirement mentioned in the grant being that there should be an actual survey, the title could in no event be perfected or completed until such survey was made and returned according to the provisions of the Spanish laws. See, also, Purvis v. Harmanson, 4 La. Ann. 421. This survey could not "be done by conjecture. Lines and corners must be established by the finding so as to close the survey." Denise v. Ruggles, 16 How. 243; Hunnicutt v. Peyton, 102 U. S. 359. From a careful review of the authorities, which are numerous, and in perfect harmony, it is clear that the

grant in this case "was not so separated by survey, or by any such distinctive calls as will admit of a survey." U. S. v. Miranda, 16 Pet. 153; U. S. v. Boisdoré, 11 How. 99.

The treaty between the United States and France concerning the cession of Louisiana to the United States, adopted April 30, 1803, whereby the United States bound itself to protect the rights of the inhabitants of the province, has no application to merely inchoate claims, which were not binding on the governments of either Spain or France, but which existed only in entreaty. The treaty added nothing to the law of nations on the subject, and precisely the same rule has always been applied to inchoate entries made under the laws of the United States. Frisbie v. Whitney, 9 Wall. 192; Yosemite Valley Case, 15 Wall. 87; Shepley v. Cowan, 91 U. S. 330; Hot Springs Cases, 92 U. S. 713. So, the title of Filhiol, being incomplete at the time of the cession, the treaty "imposes upon the United States no obligation to make a title to lands of which the grantee had neither an actual seisin nor a seisin in law." U. S. v. Miranda, 16 Pet. 153; U. S. v. Hughes, 13 How. 2. In this case there is no pretense that there was ever anything in any Spanish record that could show any compliance with the Spanish laws in respect of the grant in question. Therefore the grant must be held to be ineffectual to convey any title, legal or equitable. White v. U. S., 1 Wall. 680. The necessity of an inquiry as to whether the contemporary Spanish law has been conformed to is emphasized by consideration of the case of U. S. v. King, 3 How. 773, where a suit was brought on a Spanish grant that had been forged; to the case of U. S. v. Samperyac, Hempst. 118, 7 Pet. 222, in which it was shown that 117 decrees rendered in the superior court of the territory of Arkansas were set aside on bills of review because such decrees had all been based on forged grants, and other cases growing out of similar frauds. At any rate the questions now under consideration are all settled by decisions of the supreme court of the United States.

The grant under examination, without a subsequent actual survey on the ground, describes no land whatever that can be identified. "A tract of land of one square league" does not, as a term of description, suggest any boundary whatever. The fact that the tract is described as "one league square" refers only to contents, and not to shape. No one familiar with Spanish grants would infer that the tract was to be square. The map of the United States published under the direction of the commissioner of the general land office purports to show in red colors all the Spanish and Mexican grants in our country. A glance at this map will disclose that such grants have been in all sorts of shapes, apparently at the will of the grantee; that only a few are square or in the form of a parallelogram, and that hardly any of them are laid off with any special reference to the cardinal points of the compass. A tract of land "about two leagues and one-half distant from said River Ouachita" is in the highest degree indefinite. The exact distance from the river is not mentioned, nor is there anything to indicate any point on the river to serve as a place of

beginning. It seems to have been suggested that the hot springs should be regarded as the center of the tract, but no such inference can be drawn. Lecompte v. U. S., 11 How. 125. It is a rule of "universal application in the construction of grants, which is essential to their validity, that the thing so granted should be so described as to be capable of being distinguished from other things of the same kind, or be capable of being ascertained by extraneous testimony." Buyck v. U. S., 15 Pet. 225. In that case it was said by the court that "it was not possible to locate any land, as no part was granted." The court added that "the public domain cannot be granted by the courts." This rule has been frequently applied in other cases based on Spanish grants. Hunnicutt v. Peyton, 102 U. S. 359; U. S. v. Castillero, 2 Black, 20. In Vilemont v. U. S., 13 How. 267, the court said: "Nor is it possible to make a decree fixing any one side line, or any one place of beginning, for a specified tract of land." In Villabolos v. U. S., 10 How. 556, the court said: "In cases of a vague description this court has uniformly held that no particular land was severed from the public domain by the grant, and that no survey could be ordered by the courts of justice." In Scull v. U. S., 98 U. S. 413, a map was attached to the figurative survey. A surveyor testified that from that map he could survey the land, and mark out its metes and bounds, and claimed that he had made an accurate survey of the land claimed; but the court held that there was no valid grant. In U. S. v. Boisdore, 11 How. 93, the claim was held to be void for the want of an actual survey. The court said that, if the identity of the land could not be fixed, and it could not be ascertained that any specific tract was severed from the public domain by the grant at the time that Spain ceded Louisiana, "then the claim cannot be ripened into a complete title by our decree, as we only have power to adjudge what particular tract of land was granted. Our action is judicial. We have no authority to exercise political jurisdiction, and to grant, as the governors of Spain had, and as congress has." See, also, U. S. v. Delespine, 15 Pet. 319. In Buyck v. U. S., Id. 225, the court said:

"We apply to the case the laws and ordinances of the government under which the claims originated, and that rule which must be of universal application in the construction of grants, which is essential to their validity, that the thing granted should be so described as to be capable of being distinguished from other things of the same kind, or be capable of being ascertained by extraneous testimony."

Only perfect titles were protected by the law of nations and by the treaty between France and the United States, and there could be no perfect title without an actual survey made previous to the cession of Louisiana. Dent v. Emmeger, 14 Wall. 312. So indispensable was an accurate survey that it has often been held that decrees confirming Spanish or Mexican grants under the various acts of congress allowing confirmations were void if the grants and surveys would not enable the courts to ascertain the specific boundaries of the tracts referred to. Ledoux v. Black, 18 How. 473; Menard v. Massey, 8 How. 293; Snyder v. Sickles, 98 U. S. 203; West v.

Cochran, 17 How. 403; Landes v. Brant, 10 How. 348; U. S. v. Halleck, 1 Wall. 439. In Stanford v. Taylor, 18 How. 412, the court said:

"The law is settled that, where there is a specific tract of land confirmed according to ascertained boundaries, the confirmee takes a title on which he may sue in ejectment. The case of Bissell v. Penrose, 8 How. 317, lays down the true rule. But where the claim has no certain limits, and the judgment of confirmation carries along with it the condition that the land shall be surveyed, and severed from the public domain and the lands of others, then it is not open to controversy that the title attaches to no land; nor has a court of justice any authority in law to ascertain and establish its boundaries, this being reserved to the executive department. The case of West v. Cochran, 17 How. 403, need only be referred to as settling this point. And the question here is whether the concession to Perry is indefinite and vague, and subject to be located at different places. It is to be forty by forty arpens in extent. It is to lie along the River Des Peres, from the north to the south; and to be bounded on the one side by the lands of Louis Robert, and on the other by the domain of the king. On which side of Roberts' land it is to lie we are not informed, further than that it is to lie along the river from north to south. The record shows that, if surveyed west of Roberts' tract, the forty by forty arpens includes the River Des Peres, but, if surveyed east of Roberts' land, it will not include the river. The uncertainty of out-boundary in this instance is too manifest, in our opinion, to require discussion to show that a public survey is required to attach the concession to any land."

To the same effect, see Lafayette v. Blanc, 3 La. Ann. 59.

The whole doctrine is summed up in what was said by Miller, J., in the Scull Case, supra:

"The title must be complete under the foreign government. The land must have been identified by an actual survey with metes and bounds, or the description in the grant must be such that judgment can be rendered with precision by such metes and bounds, natural or otherwise. There must be nothing left to doubt or discretion in its location. If there is no previous actual survey which a surveyor can follow, and find each line and its length, there must be such a description of natural objects for boundaries that he can do the same thing de novo. The separation from the public domain must not be a new or conjectural separation, with any element of discretion or uncertainty."

Nor does the certificate of the surveyor Trudeau help the matter. This merely recites a survey "to be verified by the accompanying figurative plan," but a recital in a grant that prerequisites had been complied with is not sufficient ground for a presumption that they have been observed. Fuentes v. U. S., 22 How. 443. The certificate of survey in this case is of no probative value whatever. It refers to no landmarks, natural or artificial, gives no lines of boundary, no metes, identifies nothing. It adds not a ray of light to the grant itself. In U. S. v. Castant, 12 How. 439, the boundaries were described by Trudeau "with great precision," and possession had been delivered by him to the grantee. Though the certificate of Trudeau in this case shows that he was directed by the governor in his grant to put Filhiol in possession of the land (which, however, is not true), it does not show that he had done so. The delivery of possession under the Spanish law was a formal and indispensable requisite. In U. S. v. Davenport, 15 How. 5, it is shown how the ceremony was performed. The official went on the land in the presence of the grantee and of witnesses, and took the grantee "by the right hand,

walked with him a number of paces from north to south, and the same from east to west, and, he letting go his hand, the grantee walked about at pleasure on the said territory of La Nana, pulling up weeds, and made holes in the ground, planted posts, cut down bushes, took up clods of earth and threw them on the ground, and did many other things in token of the possession in which he had been placed, in the name of his majesty, of said lands, with the boundaries and extension as prayed for." Nothing of the sort seems to have been done in this case. The certificate of Trudeau refers to the petition or memorial upon which Filhiol's grant was based, and to an accompanying figurative plan. Neither of these is produced, nor is the loss of either shown, nor are the contents of either alleged. It is easy to account for the fact that Trudeau does not certify any actual survey, or any delivery of possession. In 1788 the nearest white settlements to the hot springs were insignificant and remote. The lands were occupied by the Indians. To reach them would require a journey of many days, involving privation and terror. The lands had then no commercial value. Hence there was a total noncompliance with the regulations of O'Reilly. The Spanish laws prevailing at that time in the territory of Louisiana in regard to the Indian tribes were far more humane than any laws that have ever existed in this country. 5 Am. St. Papers, pp. 226, 232, 234. Yet it has always been held that the Indian right of occupancy in the United States was sacred until extinguished by cession to the federal government. U. S. v. Cook, 19 Wall. 591; Leavenworth, etc., R. Co. v. U. S., 92 U. S. 742; Cherokee Nation v. Georgia, 5 Pet. 1. So all Spanish grants "were made subject to the rights of Indian occupancy. They did not take effect until that occupancy had ceased, and whilst it continued it was not in the power of the Spanish governor to authorize any one to interfere with it." Chouteau v. Molony, 16 How. 239. Hence it is easy to account for the fact that in this case there was no survey, and no delivery of possession. The Indian title to the lands in controversy was not extinguished until the year 1818. At that time the pretended title of Filhiol had long since lapsed, because it was not possible to perfect it after the cession of Louisiana. The grant imposed "upon the United States no obligation to make a title to lands of which the grantee had neither an actual seisin nor a seisin in law." U. S. v. Miranda, 16 Pet. 153. "No survey of the land was ever made. The duty imposed upon the grantee to produce the plat and demarkation in proper time was never performed. This was a condition he assumed upon himself. The execution and return of the survey to the proper office in such case could only sever the land granted from the public domain. No particular land having been severed from the public domain, * * * his was the familiar case of one having a claim on a large section of the country unlocated. * * * In grants of land with uncertain designations, to be made on a large district of country, they must have been severed from the public domain by survey, or be void for want of identity." Id.; Carondelet v. St. Louis, 1 Black, 179. In Scull v. U. S., 98 U. S. 419, it was held that in suits brought to enforce rights growing out of Spanish claims the plain-

tiff must show "a title completed under the foreign governments, evidenced by written grant, actual survey, or investiture of possession." See, also, U. S. v. Hughes, 13 How. 1; U. S. v. Boisdore, 11 How. 92. Not only must there have been an actual survey by metes and bounds, but the grant itself, "with the memorials and other papers, whatsoever they might be, which had induced the governor to make the grant," must have been registered in the land office. Chouteau v. Molony, 16 How. 240. This rule is necessary, so "as to make the antedating of any given grant irreconcilable with the proof; otherwise there can be no protection against imposition and fraud in these cases." U. S. v. Teschmaker, 22 How. 405; U. S. v. Pico, Id. 406; U. S. v. Vallejo, Id. 416; U. S. v. Bolton, 23 How. 341; U. S. v. Power, 11 How. 577. The same doctrine has been applied to floating claims arising under the New Madrid acts. Hot Springs Cases, 92 U. S. 713, and cases there cited. In Fremont v. U. S., 17 How. 554, the court, in speaking of Spanish grants, said:

"These grants were almost uniformly made upon condition of settlement, or some other improvement, by which the interests of the colony, it was supposed, would be promoted. But until the survey was made, no interest, legal or equitable, passed in the land. The original concession granted on his petition was a naked authority or permission, and nothing more. But when he had incurred the expense and trouble of the survey, under the assurances contained in the concession, he had a just and equitable claim to the land thus marked out by lines, subject to the conditions upon which he had originally asked for the grant. But the examination of the surveyor, the actual survey, and the return of the plat were conditions precedent, and he had no equity against the government, and no just claim to a grant, until they were performed; for he had paid nothing, and done nothing, which gave him a claim upon the conscience and good faith of the government."

In order to avoid the force of these numerous cases, learned counsel for plaintiffs favored the court during the argument with plats purporting to indicate the land granted. These were made either by themselves or at their instance. They could only at best duplicate the plan or map to which Trudeau refers in his certificate, and which is not produced. For this effect they are not even persuasive in the most remote degree. They are based on four assumptions: First, that the hot springs are to be taken as the center of the tract; second, that the lines of the tract must have been contemplated as running east and west and north and south; third, that the tract must have been intended to be laid off in a square; and, fourth, that Trudeau must have intended to lay off the tract, and did lay it off, as thus indicated. Thus we have a conjectural reproduction of what was only a figurative survey. This is piling conjecture upon conjecture, neither of which is supported by any presumption of law or fact. It is needless to say that such vague speculations cannot be used as muniments of title.

We are referred by counsel for plaintiffs to Strother v. Lucas, 12 Pet. 438, where the court say:

"He who would controvert a grant executed by the lawful authority with all the solemnities required by law, takes on himself the burden of showing that the officer has transcended the powers conferred upon him, or that the transaction is tainted with fraud."

But in this case there is no showing that the acts required by law to be performed, viz. the making of an actual survey on the ground, the certification and approval of the same, the delivery of possession, were ever performed at all.

For the reasons stated, the court is of opinion that the grant and survey pleaded by the plaintiffs are not admissible in evidence in this cause, and hence the exceptions to them are sustained.

We are now called upon to consider the sufficiency of the demurrer to the complaint. Does the complaint state a prima facie cause of action? "When a complaint fails to state a fact which is essential to the cause of action, objection to it should be taken by demurrer." Fagg v. Martin, 53 Ark. 453, 14 S. W. 647; Wilson v. Spring, 38 Ark. 181. The court is of the opinion that the demurrer should be sustained for the following reasons:

1. The claim is barred under the act of congress of May 26, 1824, entitled "An act enabling the claimants to lands within the limits of the state of Missouri and territory of Arkansas to institute proceedings to try the validity of their claims." 4 Stat. 52. This act permitted all persons claiming under French and Spanish grants to file petitions in various courts therein designated in order to have their titles confirmed. The fifth section is as follows:

"And be it further enacted, that any claim to lands, tenements or hereditaments, within the purview of this act, which shall not be brought by petition before the said courts, within two years from the passing of this act, or which, after being brought before the said courts, shall, on account of the neglect or delay of the claimant, not be prosecuted to a final decision within three years, shall be forever barred, both at law and [in] equity, and no other action at common law, or proceeding in equity, shall ever thereafter be sustained in any court whatever, in relation to said claims."

In respect hereof our attention is invited by counsel for the plaintiffs to the case of U. S. v. Percheman, 7 Pet. 90. But in that case the commissioners had no power save to report to congress. They were not, as the court declared, "a court exercising judicial power and deciding finally on titles." This act was several times extended; the last time for five years, by act of June 17, 1844 (5 Stat. 676). It does not appear from the complaint that Filhiol or any of his heirs or grantees ever complied with the terms of this act. But counsel for plaintiffs say that the act in question can have no application to perfect titles. Conceding that to be so, we cannot find that the claim sued upon was at any time a perfect title. In fact it lacked almost every essential element of perfection. We can only use the words of the supreme court:

"Claimant calls this a grant, and it is his privilege to do so; but it is in vain for him to expect that this court can give its sanction to any such manifest error." U. S. v. Castillero, 2 Black, 163.

2. The claim is barred by the act of congress known as the "Hot Springs Act." Under the provision of the act of June 11, 1870 (16 Stat. 149), all persons claiming title, either legal or equitable, "to the whole or any part of the four sections of land constituting what is known as the 'Hot Springs Reservation,' in Hot Springs county, in the state of Arkansas," had an opportunity to institute suit, in the nature of a bill in equity, against the United

States in the court of claims, "and prosecute to final decision any suit that may be necessary to settle the same; provided, that no such suits shall be brought at any time after the expiration of ninety days from the passage of this act, and all claims to any part of said reservation upon which suit shall be not brought under the provision of this act within that time shall be forever barred." No valid reason can be shown why this statute did not apply to the Filhiol claim as well as to other claims. There is an alleged loss of the grant and survey, but that would not suspend or change the effect of the statute. In no case is the running of a statute of limitation suspended by causes not mentioned in the act itself. Braun v. Saurwein, 10 Wall. 218; Montgomery v. Hernandez, 12 Wheat. 129; Erwin v. Turner, 6 Ark. 14; Bank v. Morris, 13 Ark. 291; Pryor v. Ryburn, 16 Ark. 671; Smith v. Macon, 20 Ark. 18; Railway Co. v. B'Shears, 59 Ark. 244 27 S. W. 2.

3. After so great a lapse of time, the claim, if originally valid, must be considered as having been abandoned. In U. S. v. Hughes, 13 How. 3, a delay of 40 years to bring suit to enforce a Spanish claim was held to be fatal. In U. S. v. Philadelphia, 11 How. 652, a delay of 40 years was held to be a constructive abandonment. In Fuentes v. U. S., 22 How. 460, the court came to the same conclusion, though the delay could not have been for more than 50 years. In U. S. v. Repentigney, 5 Wall. 211, an abandonment was presumed from a delay to bring suit for more than 100 years, during which time the claimants had been in possession for more than 4 years. In U. S. v. Moore, 12 How. 222, the same presumption was raised where the plaintiffs had delayed to sue for nearly 50 years. In Valliere v. U. S., Hempst. 338, Fed. Cas. No. 16,822, the same presumption was indulged where the delay was for more than 50 years. It does, indeed, appear that the heirs of Filhiol brought a suit for confirmation in the name of James Ball, as assignee, in the superior court of Arkansas territory, under the act of May 26, 1824, which was pending at the time that the various suits on the forged grants mentioned in U. S. v. Samperyac, supra, were also pending; that a question of forgery in the Ball Case was also raised, and that, on a rule being made by the court for the production of the original papers, and on noncompliance therewith, the suit was dismissed (Frauds in Land Titles in Arkansas, 5 Ann. St. Papers, 364, 365, 366, 430, 338); but this is certainly no adequate showing of diligence. The American State Papers, having been published under authority of law, are evidence of whatever they contain. Watkins v. Holman, 16 Pet. 50, 55; Bryan v. Forsythe, 19 How. 334. I could not be more or less impressed, in passing on the exceptions, with the circumstances that both the survey and the grant are apparently written by the same hand, on the same kind of paper, and with the same ink; that both contain words badly spelled, and ungrammatical phrases, showing that they were gotten up by illiterate persons; and that, though the grant purports to be attested by the armorial seal of the governor, yet there is no impression of a seal of any kind, but merely a seal of wax, evidently made to adhere to the paper by the application of

some smooth surface. It is said by counsel for plaintiffs that by the Spanish law no seal was required to such a grant as this, and that a flourish at the end of the signature, such as appears in this instance, might be used instead. Conceding this to be so, it is still singular that the grant should explicitly state that it was "sealed with the seal of our arms," and that a blank seal should be attached. The alleged long loss of the papers "artistically described in the testimony," as was said in a case growing out of a like grant (in U. S. v. Castillero, 2 Black, 185), seemed also to be a suspicious circumstance. In U. S. v. Vallejo, 1 Black, 541, it was held that "a false note of the attesting secretary at the bottom of the grant that it had been registered is a serious objection to the claim under it." A like note appears at the bottom of the grant in this case, though there is no pretense that the grant was ever registered. It would be a mere affectation to pretend that thoughts of this kind, growing out of the well-known history of Spanish claims in Arkansas, have not intruded themselves on the mind of the court. Indeed, they have a certain bearing on the point under consideration, for they afford some very plausible reasons to account for the long delay of the claimants in asserting their rights in the courts; some reason why they twice at an interval of several years importuned congress for special legislation which might seem to be some sort of a recognition of the validity, or at least of the merits, of their claim; reasons why they should have brought a tentative suit in the court of claims for rents on these lands, and why, eventually, after the lapse of so long a time, after the death of all witnesses who knew anything about the matters in dispute, final resort should be had to this court. But, though this view of the case has been pressed in argument, the court does not find it necessary to do more than advert to it for the sole purpose of vindicating the principles of law involved in this controversy, the expression of the collective wisdom and foresight of generations, which renders success in cases of this sort hopeless.

It must also be conceded that the present suit makes no appeal to our sense of justice. As shown by the facts alleged in the complaint, Juan Filhiol never paid anything for the land sued for. He never paid even the trival fee necessary to be paid in order to have his grant registered. He never complied with the terms of the grant, or with the requirements of the laws in force at the time that, as alleged, the lands were donated to him. The taxes that have accrued on the property covered by the grant during so many years, with accrued interest, must amount to a very large sum, of which it is extremely improbable that the plaintiffs have paid anything. In 1788 the hot springs were upon lands occupied and owned by a tribe of Indians, and were far from any European settlement. They were in the midst of an unbroken wilderness, and they could be reached from such places as New Orleans or St. Louis only after many days of arduous travel through a country where there were only rude Indian trails instead of roads. Such a journey would have been attended by perils and by every kind of discomfort. It could only be made by men in robust health and in the full vigor of

life. Before the application of steam to navigation, our water courses would have impeded, rather than assisted, the traveler. The country had but few white inhabitants. New Orleans was only a small town, and St. Louis was an obscure village on the extreme margin of the vast and unexplored wilderness stretching from the Mississippi river to the Pacific. Only De Soto, in 1541, and a few later explorers of the white race, had ever seen the springs. Their medicinal qualities, a hundred and six years ago, were unknown; but, having been ascertained after the cession in 1818, the United States government bought up the title of the Indians. In 1832, recognizing the great importance of the springs to the general public, it reserved the property from entry and sale forever; and for their use it now holds it in trust, if not in deed, for the heirs of Filhiol. In the meantime, before the commencement of this suit, a thriving and prosperous city had been built up around the springs. The federal government had spent large sums for hospitals and in improving and beautifying its property. By the joint labor and money of private citizens, the municipality, and the federal government, streets had been laid out, parks had been established, churches and schoolhouses had been erected, and railway connections with the rest of the continent had been created. In hotels alone provision had been made for guests and for the traveling public at an expense of millions of dollars. Many of the citizens and others have made these investments largely because they supposed that the springs themselves would be perpetually under the control of the federal government, and would be managed with its usual fairness and generosity. If they should be decreed to be private property, the event would simply be a public and private calamity of incalculable magnitude. They would become an unending monopoly; their control the subject-matter for greed, avarice, selfishness, extortion, and all the whims and caprices of private individuals under no responsibility to the public; owners who might, if they though fit, wholly exclude others from the healing waters, or impose such conditions upon access to them as would be intolerable. The plaintiffs, however, after so long a delay, during which time they have never spent a cent in the great work of making these many enduring and costly improvements, now ask that they may reap where they have not sown. But it has often been held that if one sees another making costly improvements on his lands, believing them to be his own, without any assertion of title, he will be estopped from claiming an adverse title. Erwin v. Lowry, 7 How. 172; Kirk v. Hamilton, 102 U. S. 68; Close v. Glenwood Cemetery, 107 U. S. 466, 2 Sup. Ct. 267; Jowers v. Phelps, 33 Ark. 465. No stronger case than the present, as coming within this principle, is likely to occur.

On the grounds stated, the demurrer to the complaint is sustained, and an order will be entered that, unless the plaintiffs amend within 30 days from this date, this suit shall be dismissed.

KELLY et al. v. STATE OF GEORGIA et al.

(District Court, S. D. Georgia, W. D. May 30, 1895.)

1. HABEAS CORPUS—KILLING BY DEPUTY MARSHAL MAKING ARREST.
Sections 753–761 of the Revised Statutes, controlling the writ of habeas corpus considered and applied for the protection of deputy marshals, who necessarily killed, while attempting to arrest, a party indicted for conspiracy and murder.

2. SAME.
In re Neagle, 135 U. S. 1, 10 Sup. Ct. 658, discussed and followed.

3. SAME.
The dissenting opinion of the chief justice and associate justice in that case does not controvert the right to habeas corpus when the act involved is done in pursuance of a law of the United States or an order of a court of the United States.

4. SAME—ARREST BY STATE AUTHORITIES—JURISDICTION OF FEDERAL COURTS.
When deputy marshals of the United States are attempting to execute a warrant of arrest of parties charged with conspiracy and murder, where the offense is indictable under the laws of the United States, and are met with such violent resistance as compels them to take the life of the party resisting, either in their own self-defense, or for the purpose of executing the warrant, and the deputies, as a consequence, are arrested for murder by the state authorities, the courts of the United States have jurisdiction to issue the writ of habeas corpus, and, on the return, to summarily hear the evidence, and dispose of the accusation against the officers, as law and justice may require.

5. SAME.
This is true, notwithstanding there is no provision of law for trial by jury in the enactments of congress providing for the writ of habeas corpus and the procedure thereunder.

6. UNITED STATES MARSHALS—WHEN JUSTIFIED IN KILLING—PROTECTION BY FEDERAL COURTS.
Where a party defendant to a bill in equity in the United States court refuses to respect the subpoena, writ of injunction, or attachments issued appropriately by said court, and, when arrested under attachment, violently resists with deadly weapons the arresting officers; is rescued by a mob of his friends; takes the life of an employé of the party in whose favor the injunction issued, while said employé is working on lands in controversy; is indicted for this murder; leaves his home; dwells habitually in the woods and swamps, and with his two sons, all habitually armed with deadly weapons, sends messages of defiance and disrespect to the officers of the law, and that he will kill them if an effort is made to arrest him; and, when finally summoned to surrender by the arresting officer, opens fire with a magazine rifle on the officer making the summons, and a duel ensues, in which several shots are exchanged and the accused is finally killed,—the killing is justifiable, the officer has committed no offense whatever, and is entitled to and will receive the protection of the United States courts against any prosecution brought against him elsewhere for alleged offenses growing out of the performance of his duty in pursuance of the laws of the United States and the orders of the court.

7. SAME—HABEAS CORPUS—SUPREMACY OF FEDERAL LAWS.
The laws of the United States (sections 753–761, Rev. St., inclusive), providing for the issuance, trial, and disposition of proceedings by habeas corpus, are the supreme law of the land. They extend to every foot of its soil, and, under the circumstances described above, are controlling, as expressive of the sovereignty of the United States, in a matter within the bounds of its jurisdiction. A judgment of acquittal by the courts of the United States thereunder will, as to the issues involved, protect the relators from prosecution or molestation elsewhere.

William T. Gary, U. S. Atty., and Marion Erwin, for relators.
Thomas Eason, Sol. Gen., and J. W. Preston, for respondents.

SPEER, District Judge (orally). I regret that anything has been said in the argument of this case which tends to take it out of the category of ordinary judicial investigation. It is in that view that the court considers it. It is true that, pending the trial, there has been some bitterness of publication, with regard to the action of the court in granting the writ, and some bitterness of denunciation of the officers, but in the main the cause has been treated fairly by the press, and if it has been treated unfairly in any particular, it will be no more proper to hold fair journalism responsible than it would be to hold the good people of Telfair county responsible for the character and conduct of such a man as the evidence demonstrates Lucius Williams to have been. I am here to obey the law of my country. That commands the issuance of the writ of habeas corpus, when applied for by any person who is in custody "for an act done or omitted in pursuance of a law of the United States, or of an order, process or decree of a court or a judge thereof." That is announced in section 753 of the Revised Statutes, and is an epitome of the law upon the subject, from the 24th day of September, 1789, down to a very recent date. When the writ is issued, the duty of the judge is marked out with equal clearness. "The court, or justice, or judge shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments and thereupon to dispose of the party as law and justice require." Section 761, Rev. St.

Now, that is the law; and it is not only law, but it is the paramount law. Not only is it declared to be paramount law by the constitution of the United States, which of course every intelligent mind concedes is controlling upon the action of the court, but it is the law as stated in the initial paragraph of that admirable codification, the Code of Georgia. Section 1 declares: The laws of general operation of this state are "as the supreme law, the constitution of the United States, the laws of the United States in pursuance thereof, and all treaties made under the authority of the United States." In subordination to this supreme law are the laws of the state of Georgia, first as expressed by its constitution, and then as expressed by its statutory enactments not in conflict with its constitution. It appears, then, unquestionably, that I am acting in obedience to law. Well, am I acting in accordance with the formal procedure of the law? There is no doubt about that. The decisions of the supreme court, from an early period in the history of our country, and a multitude of decisions of the circuit and district courts of the United States, have approved and sanctioned the precise proceeding we have before us. These questions have been already passed upon and decided here in a ruling on the plea to the jurisdiction and demurrer interposed in the progress of the case, and therefore it is not necessary to state them more elaborately at this time. I will, however, call the attention of counsel to the fact that the authority of the United States is not re-

stricted, as they supposed, to dockyards, arsenals, and the like, but the sovereignty of this nation extends to every foot of its soil. This has been so repeatedly and so lucidly stated by the courts of highest authority that the informed lawyer can no longer doubt it. In the case of Ex parte Siebold, 100 U. S. 371, Justice Bradley, in rendering the opinion of the court, declares:

"Here, again, we are met with the theory that the government of the United States does not rest upon the soil and territory of the country. We think that this theory is founded on an entire misconception of the nature and powers of that government. We hold it to be an incontrovertible principle that the government of the United States, by means of physical force, exercised through its official agents, executes on every foot of American soil the powers and functions that belong to it. This necessarily involves the power to command obedience to its laws, and hence the power to keep the peace to that extent. This power to enforce its laws, and to execute its functions in all places, does not derogate from the power of the state to execute its laws at the same time and in the same places. The one does not exclude the other, except where both cannot be executed at the same time. In that case the words of the constitution itself show which is to yield: 'This constitution and all laws which shall be made in pursuance thereof shall be the supreme law of the land.' Without the concurrent sovereignty referred to, the national government would be nothing but an advisory government. Its executive power would be absolutely nullified. Why do we have marshals at all if they cannot physically lay their hands on persons and things in the performance of their proper duties? What functions can they perform if they cannot use force? In executing the processes of the courts, must they call on the nearest constable for protection? Must they rely on him to use the requisite compulsion, and keep the peace, whilst they are soliciting and entreating the parties and bystanders to allow the law to take its course? This is the necessary consequence of the positions that are assumed. If we indulge in such impracticable views as these, and keep on refining and refining, we shall drive the national government out of the United States, and relegate it to the District of Columbia, or, perhaps, to some foreign soil. We shall bring it back to a condition of greater helplessness than of the old confederation. It must execute its powers, or it is no government. It must execute them on the land as well as on the sea, on things as well as on persons. And, to do this, it must necessarily have power to command obedience, preserve order, and keep the peace, and no person or power in this land has the right to resist or question its authority so long as it keeps within the bounds of its jurisdiction."

That case is expressly approved by the court in the last case upon the subject (In re Neagle, reported in 135 U. S. 1, 10 Sup. Ct. 658), and in summing up the argument in that case, Justice Miller, for the court, said:

"It would seem as if the argument might close here. If the duty of the United States to protect its officers from violence, even to death, in discharge of the duties which its laws impose upon them, be established, and congress has made the habeas corpus one of the means by which this provision is made efficient, and if the facts of this case show that the prisoner was acting both under the law and the direction of his superior officers of the department of justice, we can see no reason why this writ should not be made to serve its purpose for the present case."

Nor is there, as stated by counsel for the state, any dissent from this conclusion, even by those judges who are supposed by some to take a more limited and literal view of the power vested in the United States by the constitution, and to attach more importance to the sovereignty of the states than do other judges who are more disposed to treat the implied powers of the constitution as operative

and effective. In the Case of Neagle, Justice Lamar and Chief Justice Fuller use this language in their dissenting opinion,—language which indicates that these eminent jurists do not dissent from any question which affects the rights of these prisoners at the bar:

"Many of the propositions advanced on the behalf of the appellee, and urged with impressive force, we do not challenge. We do not question, for instance, the soundness of the elaborate discussion of the history of the offices and functions of the writ of habeas corpus, and its operation under section 753 of the Revised Statutes (which I have just read), or the propriety of its use in the manner and for the purposes for which it has been used in any case where the prisoner is under arrest for an act done in pursuance of the laws of the United States."

Can it be denied that, prima facie, these relators have acted in pursuance of a law of the United States? Here are accusations for murder, presented before a commissioner, and for other crimes against national authority. Here is an indictment of the grand jury of this court charging the same offenses. The warrants were intrusted to these relators. They are officers of the executive department of the government. Not only do the constituted authorities of the land charge that the laws of the United States have been violated by the men whom these deputies were trying to arrest, but the laws of the United States directed the deputies to make the arrest, and therefore they acted in "pursuance of the laws of the United States."

"Nor do we contend," continues Justice Lamar, "that any objection arises to such use of the writ, and based merely on that fact, in cases where no provision is made by the federal law for the trial and conviction of the accused."

And that is the refutation of the proposition, pressed by counsel for the state here, that there is now no opportunity for trial by jury of the accused, that this proceeding is subversive of the rights of the state. The law is that the right of trial by jury is not the right of the government, but is the right of the accused. The constitution of the United States declares that "the accused shall enjoy the right to a speedy and public trial by an impartial jury." Amendment 6. It, then, is not the right of the government, either of the state or of the United States, to insist that in all criminal cases there shall be a trial by jury. It is the right of the accused, and they have not demanded it. This precise question, also, was passed on by the supreme court of the United States in the case I hold in my hand (In re Neagle), approving the language of Judge Kane (in Ex parte Jenkins, 2 Wall. Jr. 543, Fed. Cas. No. 7,259):

"It has been urged," said that judge, "that my order, if it shall withdraw the relators from the prosecution pending against them in the state court, will prevent their trial by jury at all. It will not be an anomaly, however, if the action of this court shall interfere with the trial of these prisoners by a jury. Our constitution secures that mode of trial as a right to the accused, but they nowhere recognize it as a right of the government, either state or federal."

The relators, then, were acting in pursuance of a law of the United States when they went to execute the warrants of arrest on Lucius Williams and his sons. They were, moreover, acting in obedience to the order of this court, issued appropriately, and expressed by its warrants. They claim that, in obedience to law and

the order of this court, they were forced to kill this man, who was charged with the highest crime known to the law. Will the country permit the doors of its courts to be shut in their faces when they say that they properly acted in obedience to its laws and the order of its court? Are they not entitled to a hearing here? If they are so entitled, the court has jurisdiction to hear and to proceed, in obedience to the law as expressed in section 761 of the Revised Statutes, to do with these men as "law and justice require." Now, what do law and justice require?

This case is the culmination of a tremendous litigation, imposing for more than ten years tremendous responsibility and tremendous anxiety upon this court, resulting from the fact that years ago the late William E. Dodge bought large bodies of land in this state, about which his children have been compelled to appeal to the courts for protection. These lands were conveyed by him to his son, George E. Dodge, and by George E. Dodge to Norman W. Dodge. All of this appears from the record before the court. These were residents of the state of New York. A number of persons, residents of the state of Georgia, were charged with numerous acts of fraud and forgery and violence, with the purpose to deprive these nonresidents of the benefits of their investments in this state. The case had been brought before I had the honor of presiding in this court, and was pending when I entered upon the performance of my judicial duties. It was tried. The trial lasted through many days. It was thoroughly and ably argued and fully considered. A final decree was rendered sustaining the title of Mr. Dodge to every foot of this land. Dodge v. Briggs, 27 Fed. 160. No appeal was taken from the decision of the court. It was, therefore, final. The decree itself, in the further progress of litigation with other parties, was carried before the supreme court of the state of Georgia, and that court added its high sanction to the decision of this court, and held that the decree perfected the title of Norman W. Dodge in the land described in the decree and order of the court and in his evidence of title. The decree itself enjoined the defendants to that bill from interfering with the lands of Mr. Dodge. For a time the decree was obeyed. But finally a gigantic system of forgery of deeds, and a fraudulent seizure of the land with the attempt to establish prescriptive titles, was begun. This was done at the instigation of and by Luther A. Hall, a party to the original case before this court, and who had been expressly enjoined. The matter was brought to the attention of the court, and, in a trial lasting many days, the character of this man's conduct was investigated. The court found him guilty and sentenced him, for contempt of the decree, to five months' imprisonment in Chatham county jail. While in that jail, as it appeared from the evidence in the trial which ensued, he concocted a conspiracy for the murder of a most amiable, excellent, and valuable citizen, John C. Forsyth, the agent of Norman W. Dodge, who had been conducting the litigation. The conspiracy, as the bill of indictment charged and the jury found, was to prevent and hinder Mr. Dodge from exercising the right to pursue his remedies in the United States courts. The case is fully reported in U. S. v. Lancaster

(two reports), 44 Fed. 885–932. A number of persons took part in that conspiracy. Forsyth was murdered under circumstances of the most heinous, pathetic, and pitiable character. At his quiet, happy home, in the bosom of his devoted family, with his wife and children around him, after the evening meal, his brains were blown out by the hand of a hired assassin, who fired through the window, and it appears in the testimony in this case at bar that the man Lucius Williams contributed $200 to the payment of the assassins. A number of conspirators were brought before the court. They were convicted and sentenced to various terms of imprisonment in the Ohio state penitentiary, most of them for life. One of these men was Luther A. Hall. who, in success at the bar, and ability, and learning, particularly on the subject of ejectment, was somewhat notable. Another was Wright Lancaster, the sheriff of the very county in which this homicide was committed about which this inquiry is pending. Lucius Williams was not charged in that indictment with connection with the conspiracy, but it appeared on the trial of that case that he had forged a number of the deeds which were used for the purpose of attacking the title of Mr. Dodge, in violation of the injunction of the court, and the court, in its summation of the evidence to the jury, referred to that fact, and some of the forged deeds taken from the record of that trial were introduced here.

Several years elapsed. The title of Mr. Dodge in the same lands was, it is alleged, assailed by other parties. He filed a bill of peace against some three or four hundred defendants, alleging circumstances of trespass and wrong which he now insists claim the attention of the court for his relief. In that case not one single contested question has yet been decided. It is pending before the court. Lucius Williams was a party defendant to that bill, and, when the officers went to serve him with the original writ of subpoena, he refused to accept service and informed the officer, in violent and truculent language, that he had no respect for the court and did not intend to accept service or obey its orders. Rule day came,—the day on which he should have filed his answer. He made no appearance. In the orderly progress of the case, judgment pro confesso, that is to say, judgment by default, was taken against him. No injunction had been granted when the bill was originally filed. After service of subpoena upon him, he then proceeded, as the court was advised by the sworn petition of the plaintiff, ran off his hands, cut trees across his tramway, and otherwise threatened violence to his agents and employés. But, even then, so careful was the court to give him every right to which he was entitled that only a rule nisi was issued against him to appear and show cause why he should not be enjoined from committing acts of violence or trespass pending the final determination of the suit. When the young deputy went to serve the rule he was met with a string of profanity which the court will not repeat in this presence. The deputy was told, if he ever attempted to serve any papers from this court upon him, his life would be taken, and that if any officer of the court came there to arrest him or his sons it would be a question of who could shoot

first as to who should live. Acts of violence were again committed, which were brought to the attention of the court by affidavits, and the court this time issued an attachment for the arrest of Williams, together with a rule nisi to show cause why he should not be punished for contempt. Two of the most conservative and cool-headed officers of the court were sent last fall to effect the arrest under the attachment. At a moment when Lucius Williams had laid aside his Winchester, the officers rushed upon him and arrested him, and slipped a handcuff on one of his wrists, and then ensued a scene of violence, struggle, and resistance, and a display of indescribable profanity and utter disregard of his own life on the part of this man, which the evidence in this case has disclosed, and which has never been, I presume, exceeded on any occasion of like character. Williams finally got out his knife, and although the officer held his pistol to his breast and told him he would kill him if he attempted to cut, the prisoner did not cease for one moment in his efforts to stab the officer, who finally by a quick blow of the pistol struck the knife from Williams' hands. The officer was John A. Kelly, one of the relators. But runners had been sent out by Williams' friends. They gathered in sympathy with this desperate man. The brave and considerate officers proceeded a short distance with their prisoners, when they were surrounded by an armed mob, with Winchesters, double-barreled shotguns, and pistols leveled at them from every side; they were compelled to surrender their prisoners or lose their own lives. The officers, then, by cool and brave discretion, and by a stratagem, evaded the mob, and reported the facts to the court. The attorney general sent a large force to arrest the parties who had rescued Williams, but after the most strenuous efforts, owing to the remote and difficult country, and the impossibility of identification, the attempt failed. Only one man, a son-in-law of Lucius Williams, was identified and convicted. The injunction was yet of force with regard to this land. A short time thereafter, Mr. Dodge employed laborers to proceed with cutting his timber. Two or three men came to the land where the hands were at work, and one of them shot a poor, innocent negro to death,—a negro whose only offense was that he was standing on a log cutting, at the obedience of a man who had employed him. He was shot through the body and died next day. Lucius Williams, in cruel and merciless language, boasted of the deed as his. The grand jury of this court, composed of men of high character, returned an indictment against Lucius Williams and his two sons for that offense. So notable had become this case that the attorney general—the head of the law department of the government—issued a reward for the arrest of these parties, and other rewards were added by parties to the case. The officers, however, in the absence of such reward, had not ceased their efforts to accomplish the arrest. But finally one of the prisoners at the bar, John A. Kelly, went to the neighborhood and remained there a long time,—26 days, with but a short intermission. Lucius Williams and his sons were lurking in the woods. They were frequently seen armed to the teeth with shotguns, Winchester rifles, and a large revolver. They had their retreat in the depths of Ocmul-

gee swamp. Lucius Williams made open declaration that if the officers attempted to arrest him, he would kill them. This was brought to the attention of Kelly, in command of the deputies, three in all, but that officer did not cease in his effort to perform his duty. On the day of the homicide he was, with three deputies, watching the house of one of the defendants in the murder case, a son of Lucius Williams, and he saw the three men, armed as usual, approach the house. He determined to make the arrest, and in the effort the life of Lucius Williams was taken, and upon that act the issue now before the court is formed.

The court need say no more with regard to the criminal and lawless character of Lucius Williams, except that it appeared from the records in his own county that, in 1889, he was indicted by a grand jury thereof for the offense of forgery of a deed or deeds relating to the title of these lands, or some of them; that the case has not been tried to the present time. A copy of the indictment is before the court. A witness testified that he was an habitual forger,—that he had known him to be engaged in forging for 18 years. His method was to send off for suitable paper, write the spurious deeds himself, usually have them attested by a witness and then by one of his sons-in-law, two of whom had successively been justice of the peace, and then by tobacco, coffee, and other appliances to "age" them, and give them a color which would indicate that they were ancient documents. One of these deeds was offered in evidence. It was attested by the witness who testified to the facts, and officially attested by the son-in-law of Lucius Williams, a magistrate, and is now in evidence before the court, with other deeds of a similar character.

Previously, in the same expedition, a special effort was made to arrest this man. The same officers made their way in the night through miles of the dense and overflowed Ocmulgee swamp. They found his camp on an island, his tent, blankets, and canoe. He was absent. They crossed to the forest and watched his trail, on which he must return. He came, discovered them, ran, was pursued, and fired on. He returned the fire, and made his escape. These officers of the court then knew it was a life and death matter to arrest this desperado. Deputy Kelly testified that they carefully approached the house from the position of concealment in which they had been, and, sending around two of his assistants to the left of the house, he took his position near a small cotton or buggy house, as it is indifferently called, on the other side of the road, and in a diagonal direction, about 40 yards from the house in which Lucius Williams was. I may say in passing that the two men who volunteered to go as deputies to arrest this man were his nephews, and it appears otherwise in the evidence that, because one of them had sworn to an affidavit intended to support the title of Mr. Dodge, and to assist him in the litigation in this case, Lucius Williams, on two occasions, with great difficulty, was prevented from taking the life of one or both of them. On one occasion he had left the house of witness Wells at daybreak, and, when discovered, had concealed himself in a corner of the worm fence, had drawn the grass over him, and, armed with a Winches-

ter rifle, was waiting for his victim to come along the road on which the young man was compelled to pass. At another time, at the witness' house, he was present when the sons of Lucius Williams were compelled to throw themselves upon their father and by violence prevent him from murdering, with his rifle, one or both of these nephews, who were coming over the hill in the direction of the house. All this goes to show the desperate character of the man whom these officers were proceeding to arrest. The testimony of Mr. Kelly, given in a manner in which the court does not hesitate to say would carry conviction of its truthfulness to any mind not engaged to discredit it, or not otherwise biased, was that he walked to the corner of the cotton house, that the dwelling was to the right, that Lucius Williams and one of his sons were lying on the veranda. It was immediately after dinner,—according to the testimony of the wife of John Williams, 15 minutes after dinner. These parties, Williams and his son, had eaten dinner, and had gone out on the veranda,—were lying down there. This had taken place while Kelly's assistants were making their way from the point of their concealment to the left of the dwelling. Kelly testifies that he had taken his position, and stationed Garrison at the other corner of the cotton house, where he had a range with his rifle on the door of the house. Garrison was armed with a Winchester rifle, Kelly with a 10-gauge, double-barreled, breech-loading shotgun, loaded with 20 buckshot to the barrel. He stated that he called loudly: "Mr. Williams, Gentlemen, get up from there and surrender." "Mr. Williams, I am here to arrest you. You know who I am. Get up and surrender." He stated that Williams looked over the railing, and then arose with his gun in his hands. Kelly said to him: "Put down that gun, Mr. Williams. I will not hurt you. Surrender." At that time a girl rushed to the door. Holding his gun with his right hand, the deputy waved the girl back in the house. "Get back; get off the porch," he exclaimed. She ran back. At that instant he said Williams was approaching the door with his gun presented. Williams threw his gun to his shoulder and fired. Kelly returned the fire, and he thought he saw the result of the fire. He testified that the shots were simultaneous. Williams disappeared in the house. In the rail in the fence, within a foot or two of where Kelly stood, was the mark of a rifle ball, which might have been 44-caliber, breaking through one rail, knocking out a piece of the rail, going through a soft rail, and cutting down a stalk of corn behind. On the front of the house, all about where Kelly's testimony placed Williams, as high as his head, were the marks of Kelly's buckshot. John M. Williams was on the porch, according to the testimony of Kelly, and ran into the house on his "all fours." The deputy had a warrant to arrest John M. Williams, as he and Lucius Williams were both indicted for murder. He could have killed him, but would not do it because he was not armed, and was making an effort to escape. Firing then began on the left-hand side of the house. John M. Williams was in the house, indicted for murder and armed, or with the capacity of being armed, for the weapons he had borne for

months were there in the house. Lucius L. Williams, according to the testimony, was in the house. Another was in there, a man of the name of Grace. Steve Williams was in the house. A shotgun, two rifles, and a heavy revolver were in there. The house was encompassed on two sides by officers, the firing continued. Kelly states he saw somebody come to a window on the left-hand side of the door with a shotgun in his hands. He fired at it and, to use his own expression, he heard a "lumbering" of the gun as it fell. A Winchester rifle is put in evidence, with a buckshot in the stock, and the window panes were found shattered, and a shot in the widow sill. The buckshot striking the rifle must have knocked the gun from the hand of the person holding it. Hearing the firing continue on the left of the house, thinking perhaps his men needed help, Kelly stated that he climbed a ladder, which was at the rear of the buggy house, and attempted to look over it at the surrounding country to see how the battle progressed. The ladder did not reach quite to the top of the house. By standing on the top round of the ladder, and holding to the gable end of the house, he could look over it. He left his gun at the foot of the ladder and carried only a pistol with him. He came down from the ladder, and, as he attained the ground and proceeded to take up his gun, a shot came from the left of the veranda of the house in front, —to the right as he stood. Kelly said, in his testimony, "That shot nearly killed me." He returned the fire and missed Lucius Williams, who had fired. The buckshot from Kelly's gun was found in the corner post of the veranda and in the banisters next to it. He then states that he saw Lucius Williams creeping back toward the chimney and loading his gun. Presently this desperate man again came forward, screening himself as much as possible by the banisters. Kelly could see his feet. He could not fire through the banisters, because he said he did not have a shot to throw away. He knew it was a battle to the death. According to the testimony of this witness, Williams came stealthily to the corner, and attempted to draw a bead on his intended victim, the officer of the law. In order to do so, being a right-handed man, he was compelled to throw his left side toward where Kelly stood. The corner upright post of the veranda made this necessary. Williams fired one shot and missed. He worked the lever of his rifle, and was again taking aim. Kelly states that he took deliberate aim at him and fired. Williams fell backward, and his gun went off in the air. Kelly saw him no more until a few minutes afterwards, when he was lying in a pool of blood at the back of the house.

The court has attentively considered the evidence, anxiously and carefully, and, except a doubtful opinion of a physician as to the course of a shot, which may or may not have been deflected by some bone or integument of the body, there is not a syllable of evidence in the case that contradicts Kelly on any material point. Take, for instance, the testimony of Grace. Kelly did not see him on the front porch, and therefore testified he was not there, but in the excitement he might not have seen him, and perjury should not, therefore, be imputed to Kelly. He testified that he was lying there

asleep. He did not know whether Lucius Williams was asleep or not. He did not know whether he went to sleep before Lucius Williams did, or whether Lucius Williams, if he did go to sleep at all, went to sleep before he did, but the fluid from a quid of tobacco in his mouth, as he slept, choked him, and he awaked, to use his own expression, "to spit out of the veranda." At that moment, with his back towards Lucius Williams, who, he testified, had been lying very near him,—as I remember the testimony, within two feet of him. He heard some one say "Lady, get off the porch," and immediately heard a shot. This he said was from the corner of the cotton house. He then said he could not tell where it came from. When asked, he said it seemed in front of him. He did not know whether there was a shot behind him or not. He did not see Lucius Williams any more on the porch at the time. Considerably alarmed for his own safety, he testified that he ran into the house, and ran to the other end of the hall, and, standing there, he looked back, and then saw Lucius Williams standing in the front doorway in a shooting position, directing his gun towards the cotton house. There is no conflict there. Might it not have been true that both men fired at the same time? Kelly so testifies. This man Grace testified that he did not know what awakened him. Might it not be true that the call of Kelly to surrender awakened him, and not the quid of tobacco? Can a man who is sleeping tell with certainty, when several causes might have awakened him, what was the actual cause? Lucius Williams was behind him, and must have had his gun, for the witness Grace afterwards saw him in the doorway with his gun.

What other conflict is there with that witness? None whatever. The young lady, Miss Vickery, testified that she went to the door. She did not hear anybody out there. She said all three men were asleep when she came to the door. It may be remarked that there must have been something very soporific about that dinner that all three should be asleep in 15 minutes after they had left the table. This young woman testifies she was sent for a book. She did not go for the book, but for some reason, she doesn't know what, she went to the front door and looked out. Is it not natural to suppose she heard Kelly calling on Williams to surrender, although she thinks not? Why should she, sent for one thing, go to the door and look out? She elsewhere stated that she did not know whether the Williamses were asleep or not. She heard an expression from Kelly, "Go back lady; go back," and she ran into the hall as quick as she could go, and then she heard a shot. Can it be that Kelly shot Williams lying on the floor, and shot him in the face, according to the contention of counsel for the state? It was four feet from the door to the window, and this young woman was standing in the middle of the door. Williams was lying against the window, with his feet towards the door of the veranda, and his head must have been eight feet, at least, from Miss Vickery, and, according to the testimony of Cameron, he was in full view of a man 35 or 40 yards away from where Kelly stood. Why should this desperate murderer, Kelly, have found it necessary to warn this young lady if he

had intended to shoot the sleeping man? Indeed, would not the outcry have defeated his purpose by awakening his victim? He had no such purpose. Williams was approaching the door. This might have been after Miss Vickery ran in, for Kelly, like a brave man, although in deadly danger of Williams' rifle, was careful to warn the young woman. Miss Vickery did not hear him say anything except the warning to her, and Mrs. Williams, who was in the dining room at the rear of the house, did not hear him say anything. He swears positively that he did call to Lucius Williams, and awakened him, and that afterwards the shooting began. This is positive, and there is nothing to contradict it. They all testify that when Williams came through the house there was a wound on his face. All testify that Williams came into the door through the house with his gun in his hand. According to the testimony of the doctor, the wound in his face ranged upward and backward. Kelly was on the ground down a gradual slant. Williams was on the veranda, according to the testimony of Kelly, with his gun in a shooting position. The shot struck him while in a standing position, and would necessarily have ranged upward and backward. And it does not need that he should have been in a lying position to have received the wound. According to the testimony of the doctor there were three other wounds, any one of which was mortal. They were on the left side, one in front, one on the side, and one on the back. The physician testified that, in his opinion, the wound on the back could not have been received when Williams was firing from the corner of the veranda at Kelly. That is a conclusion; in that the court differs with him. But he testifies that it could not have been made while Williams was lying down on the porch. And he testifies, also, that the other wounds might have been received while Williams was at the corner of the veranda firing in that position, and all three wounds were mortal. But, suppose Kelly fired at this desperate man as he ran into the house. He would be then acting strictly in conformity to the law. This was not a duel under the Code. Nor was it an occasion of military punctilio, like that where the commander of the household troops of France exclaimed, "Gentlemen of the English guard, fire first." Here are officers of the law, with warrants charging these prisoners with murder. They could not stand back. Their duty was to go forward, and to take these men, but at the same time they were not obliged to forego necessary precaution to save their own lives.

The testimony of Miss Vickery, instead of contradicting Kelly, confirms what he said. The wounds in Williams' body confirm what he said. The blood stains on Williams' rifle confirm the testimony of the officer. The testimony of all the witnesses is that the first two shots, which the learned counsel state were received in Williams' face, did not stop him. Then even this man might have made his escape through the back door of the house, across the fields to the woods. That was not his purpose. He was like an Apache Indian driven to his last stand. He determined to die right there, as he had declared time and again he would do, or to kill Kelly, instead of fleeing, as he might have done, and as Grace did.

He stealthily stepped around to the left-hand side of the house, with the magazine of his rifle loaded with cartridges, to take advantage of Kelly when he was off his guard, and put him to death if he could by his skill as a marksman. Then he met his death as a result of his resistance to the law. There was never a case in which an officer was necessarily in greater danger, or who, in a case where such conduct was obligatory, acted with a more cool and conservative regard for the law and for his duty. I might go on with the other witnesses. It is not necessary. So certain and clear is the mind of the court with regard to the innocence of these men, so certain am I that they did nothing but that which the law commanded them to do, that I will not longer discuss it. The other officers who were with him were deputies. They are under the same protection as himself, and with three desperate men outlawing themselves, armed to the teeth, who had resisted and evaded the law for months, men for whom the government of the United States had offered rewards in order to secure their arrest, the officers were entitled to treat that house as a fortress, and to fire upon it to keep down the fire of the parties inside, and thus effect the arrests which it was their bounden duty to do. The testimony of the shots confirm this. Not one shot was there which would justify the conclusion that Williams was fired upon while on the floor. The testimony of Cameron places the nearest shot to the floor in the window sill as $13\frac{1}{4}$ inches, and the buckshot scattered from there up. He did not know whether they reached the top of the house or not. And as Williams sprang to the door and fired his shot, pausing for a moment when Kelly fired, there were seven buckshot right where Williams was stated to be. There were two in his face, and others scattered around. Why, then, is there any reason to send these men for their trial for murder into the county where this homicide was necessarily committed by the officers of the law? The court sees none. The law commands us to protect the officers of the court in the discharge of their duty. The proceeding is effective. It is regular. The hearing has been full and ample. The parties charged are not guilty of the offense of murder, or any other offense. They have proceeded with due discretion and caution in the performance of their duty, and in the exercise of the power intrusted to me by the laws of my country to dispose of these parties as law and justice may require, I order their discharge and also direct that, in the order, it be recited that they shall not be further interfered with by any one for the same alleged offense.

NATIONAL CO. et al. v. BELCHER.

SAME v. MORSE et al.

(Circuit Court, E. D. Pennsylvania. June 25, 1895.)

Nos. 34 and 2.

1. PATENTS—INVENTION AND ANTICIPATION.
   A construction which had been very nearly approached but never reached by prior inventors *held* to be patentable, in view of the facts that it met a recognized want and was extensively adopted, and that the patent had long been acquiesced in by the trade.
2. SAME—DAMAGES AND PROFITS—NOTICE OF PATENT.
   There can be no recovery for damages, and no accounting for profits, where complainant has failed to allege either that the patented devices were marked "Patented," or that actual notice of the patent was given to defendants, as required by Rev. St. § 4900. Dunlap v. Schofield, 14 Sup. Ct. 576, 152 U. S. 244, followed.
3. SAME—INVENTION—MECHANICAL SKILL—ANTICIPATION.
   Where a prior patent was placed in the hands of a machinist and model maker, with instructions to show a certain modification indicated in the specification thereof, and from the drawings and specifications he constructed a model fully disclosing the invention claimed by the patent in suit, testifying that he experienced no difficulty in doing it because the drawing and specifications made it plain, *held*, in the absence of contrary evidence, that this showed that only mechanical skill was required to produce the device of the patent in suit.
4. SAME—ELEVATOR PUMPS.
   The Hinkle patent, No. 183,055, for an improvement in air chambers for forcing water for operating elevators, construed, and *held* void by reason of anticipation.
5. SAME—ELEVATORS.
   The Otis patent, No. 228,107, for regulating the motion of elevators and preventing accidents, *held* valid and infringed as to claims 3, 4, 6, and 7.
6. SAME—ELEVATORS.
   The Reynolds patents, Nos. 317,202, 456,122, and 458,917, for devices for controlling the operation of elevators, *held* void,—the first as to claim 1, the second as to claims 1 and 2, and the third as to claims 2 and 3.

These were bills by the National Company and Otis Brothers & Company against Thomas H. Belcher, and against Edwin F. Morse and Carlton F. Williams, respectively, for infringement of certain patents relating to elevators.

Edwin H. Brown and J. H. Raymond, for complainants.
Ernest Howard Hunter, for defendants.

DALLAS, Circuit Judge. In pursuance of a stipulation filed, these two cases have been heard together, and upon the same proofs. They each involve the same five patents.

1. The patent to Philip Hinkle, No. 183,055, dated October 10, 1876, is for "improvement in air chambers for forcing water for operating elevators," etc. The claim in question in this suit is as follows: "(1) In an hydraulic hoisting device, an air and water chamber, A, interposed between and communicating with the elevator cylinder and a pressure generator, substantially as described." In the specification it is said: "I may employ a pump, or such construction that when there is a determined amount of pressure in the chamber A the pump shuts off, but when the pressure lowers

the pump again starts." This is the only mention which is anywhere made of any particular kind of pump or construction, and it amounts to nothing more than a suggestion which may or may not be followed. Complainants' expert says that "the patentee proposes to provide the pump of such construction that a determined amount of pressure in the tank chamber, A, will automatically stop the pump, the pump being started again when the pressure in the chamber becomes lower"; but for this statement there is no other foundation than the language which I have quoted from the specification. Whether the patentee, if he had in his claim specifically designated the automatically acting pump here referred to, would have strengthened his position is at least doubtful; but, as it is very plain that the claim does not call for any peculiar form or construction of "pressure generator," inquiry as to whether a claim so constructed might have been made and sustained would be profitless. As it stands, this claim has been met by overwhelming evidence of anticipation, and therefore I am constrained to hold that it is invalid.

2. The patent to Charles R. Otis, No. 228,107, dated May 25, 1880, is for an invention which, as stated in the specification, "consists in means * * * for preventing accidents from the breaking or slipping of the hoisting rope of an elevating apparatus, or from the cage acquiring an undue velocity from any cause, the invention further consisting in means for automatically restoring the parts to an operative position after the movement of the cage has been arrested or reduced." Four of the seven claims of this patent are involved. These are as follows:

"(3) The combination, with an elevator cage having appliances for arresting or retarding the movement thereof, of mechanism for throwing said appliances into operation on an undue increase of speed, and devices for automatically restoring the said appliances to their first position as the speed is reduced or motion arrested or reversed, substantially as set forth. (4) The combination, with a cage and its arresting appliances, of the cable, k, connected thereto and traveling therewith, governor operated by said cable, a clamp operated by the governor to automatically grip and release the cable, substantially as set forth." "(6) The combination of the cage, its detents, the cable, k, and its retarding appliances, and the spring interposed between the operating arm of the stopping or retarding devices, and a bearing on the cable, substantially as set forth. (7) The combination of the cage, its arresting devices, operated from a crank or arm, a cable traveling with the cage and connected to said arm, governor operated by the movement of the cable, and jaws arranged adjacent to the cable, to act directly thereon, and connected to the governor, to be opened and closed thereby."

The 10 prior patents discussed by the learned counsel of the defendants have been carefully examined. They certainly do show that before this Otis patent was applied for much thought had been directed to securing safety in the operation of elevators, and that the trend of the inventive efforts of others had been in the same general direction as that of Mr. Otis. His construction, however, though very nearly approached, had never been reached, and upon its introduction the contrivance of the patent in suit was adopted in preference to anything which had preceded it, and was and is largely used. His achievement, now that it has been realized,

may not appear to have been a very difficult one to accomplish, but that it met a recognized want, and was regarded as being new as well as useful is quite persuasively shown by its extensive adoption and the prolonged acquiescence of the trade in his monopoly. The claim which is most seriously attacked is the third, and the reference by which that attack is most plausibly maintained is to a patent issued to John Fensom, No. 151,014, dated May 19, 1874, for "improvement in elevators." But by that patent, although its appliances for arresting the movement of the cage may, after service, fall out of operative position, there are disclosed no "devices for automatically restoring the said appliances to their first position as the speed is reduced or motion arrested or reversed," and the employment of such devices constitutes a material element of the third claim of the patent in suit. Infringement has been clearly shown. These are all combination claims, and though some of the corresponding parts in the respondents' arrangement are not precisely identical with those of the patent, yet it is obvious that they have the same purpose in the combination, and effect that purpose in substantially the same manner. Upon the authority of Dunlap v. Schofield, 152 U. S. 244, 14 Sup. Ct. 576, I sustain the point made for respondents, that "there can be no recovery for damages and no accounting for profits, because the complainant has failed to allege in the bill of complaint either that the patented devices were marked 'Patented,' or that actual notice of that fact was given to the defendants, as required by section 4900, Rev. St." In Allen v. Deacon, 21 Fed. 122, it was held, in a suit in equity, that, in the absence of marking or notice, neither damages nor profits can be recovered.

3. The patent to George H. Reynolds, No. 317,202, dated May 5, 1885, is "for means for controlling the operation of elevators." The only claim involved in this suit is as follows:

"(1) The combination, with the car or cab and its controlling valve, of a lever or hand gear on the car or cab, and occupying a stationary position relatively thereto as it travels, sheaves, g g^1, and bearings therefor arranged at the bottom of the shaft and adapted to move upward and downward, other sheaves, h h, at the top of the shaft, flexible connections passing around these sheaves from the top to the bottom of the shaft, and connected at their one end with the said lever or hand gear on the car or cab, and connections between the valve and the movable bearings for the sheaves, g g^1, at the bottom of the shaft, through which the movement of the lever or hand gear on the car and the rising movement of one or other of the sheaves, g g^1, will effect the shifting of the valve, substantially as herein described."

This claim was before the circuit court for the Northern district of Illinois, in the case of Crane Elevator Co. v. Standard Elevator Co., but the opinion filed by that court is silent upon the question of the patent's validity. That question is therefore an open one, and, as such, has now been considered. It is, however, unnecessary to discuss the evidence bearing upon it, except as it relates to a single matter upon which I have reached a decisive conclusion. A German patent, No. 18,400, to D. Lampe, for "gearing for lifts," published June 3, 1882, contains this statement: "For moving cocks, valves, slide valves, pistons which have not a tendency to go into

the cut-off position, the mechanism is doubled, whereby the loose rollers are set upon a two-armed lever, which then can act directly as cock key or beam." That patent was placed in the hands of a machinist and model maker, with instruction "merely to show, by the construction of a model, a modification, as described, of a double endless rope to operate the model as described in the specification, according to his judgment, as therein described; only to show the operation of the modification of doubling the hand rope to move stop valves or other devices at the bottom of the shaft, as described in the specification." He had no further instructions, and received no drawings other than those which accompanied the Lampe patent; and, upon information derived wholly from that patent and the specification annexed to it, he constructed a model which fully discloses the invention claimed in the claim in suit. The learned counsel for the respondents contend that it is impossible that this model could have been produced by the exercise of mechanical skill merely, and with no other instructions than to illustrate the modification suggested by Lampe, comprising double cables; and that, therefore, either the testimony to that effect is false, or else that the person by whom the model was made also made the same invention that Reynolds had made. I cannot accede to this. The evidence of the model maker is not controverted otherwise than by argument, and is supported by the testimony of other witnesses. The ability he displayed in making this model may astonish the unskilled, but, in view of the positive and uncontradicted evidence, it cannot be regarded as transcending possibility; and that it was not inventive in character is, I think, placed beyond question by his own testimony that he "did not experience any difficulty in the mechanism; the drawings and specifications made it plain." That he had, himself, made some inventions is true; but in doing this piece of work he was, as he tells us, a mere imitator; the drawings and specifications of Lampe, not his own inventive faculty, supplied all that was requisite for his purpose. The necessary result is that the Lampe patent must be regarded as establishing that the first claim of the Reynolds patent, No. 317,202, is void for lack of invention and patentable novelty of its subject-matter.

4. The patent to George H. Reynolds, No. 456,122, dated July 14, 1891, is for "controlling device for elevators." Its two claims, both of which are involved in this suit, are as follows:

"(1) In a controlling device for elevators, the combination of a car, two cables attached positively at each of their ends to travel with the car, and connected with the controlling device, and an operating device upon the car to positively take up and pay out said cables to shift positively the controlling device, substantially as set forth. (2) In controlling devices for elevators, the combination of a car, traveling cables connected positively at each of their ends to the car, and passing over stationary pulleys at one end of the well, and around movable pulleys connected to the controlling device at the other end of the well, and means for positively contracting and relaxing the bights of the cables, substantially as set forth."

These claims were adjudged to be valid by the circuit court in Illinois in Crane Elevator Co. v. Standard Elevator Co., supra, but

I believe that if the additional evidence which has now been adduced had been submitted to that court, its decision would have been different. The Lampe patent was produced in that case, but the model made thereunder, which I have already discussed, was not presented. This new matter is applicable to patent No. 456,122 as well as to patent No. 317,202, and, as it shows that the Lampe patent supplied all the information necessary to enable a skilled mechanic to do all that was claimed by Reynolds in patent No. 456,122, it is a complete anticipation of that patent also.

5. The patent to George H. Reynolds, No. 458,917, dated September 1, 1891, is for "controlling device for elevators." Its second and third claims are involved in this suit, and are as follows:

"(2) In an elevator control, mechanism having two control cables attached to and running with the car, in combination with yieldingly supported pulleys, as F F, adapted to rise and fall together, substantially as described. (3) In a cable-operating mechanism for elevators comprising two control cables attached to the car, a weighted lever having sheaves, over which the cables run, for regulating and maintaining the tension of the cables, substantially as shown and described."

This patent, as to its claims 1 and 3, was adjudged invalid by the circuit court for the Northern district of Illinois, in another case between the Crane Company and the Standard Company. Claim 2 was not considered; but, if the first and third claims are invalid, it would seem that the second must necessarily be so. The brief of complainants appears to impliedly concede this, but insists that this case "is much stronger than the former case." As respects the argument and manner of presentation this may be so, but if any new evidence has been introduced here, which would, if presented in the Illinois case, have affected its decision, it has not been pointed out, and I have not observed it. Therefore, following the judgment I have referred to, and without expressing any independent opinion, I hold that this patent is invalid.

Let a decree be prepared in accordance with this opinion in each case.

HUSTEDE et al. v. ATLANTIC REFINING CO.

(District Court, E. D. Pennsylvania. July 5, 1895.)

No. 5.

LIABILITY OF WHARFINGERS—FIRE COMMUNICATED TO VESSEL BY FLOATING OIL.

A vessel going for a cargo of oil to an oil wharf, where the water is always and unavoidably partially covered with floating oil, assumes the risks incident thereto, and the wharfinger is not liable for damage occasioned to her by fire communicated from premises not owned by him, by means of floating oil that escaped from sources over which he had no control.

This was a libel by Hustede and others, owners of the steamer Felix, against the Atlantic Refining Company, to recover damages caused to the vessel by fire while lying at defendant's dock.

Henry Flanders and Edward F. Pugh, for libelants.

John G. Johnson, for respondent.

BUTLER, District Judge. The respondent is engaged in refining, and dealing in oil, at Point Breeze, Philadelphia, having two plants located on the side of the Schuylkill river, about half a mile apart, (the one above the other) connected by lines of pipe, placed under ground about 100 feet back from the river, and about 50 feet above it, through which oil is passed. It maintains wharves in the vicinity, of its works for the accommodation of vessels engaged in the trade, charging compensation for their use.

About midway between the plants a pump house of the Point Breeze Gas Works is located, at the water's edge, the works of which are driven by steam. It is built upon piles, with a wharf in front, cribbed on the water side.

On the 28th of October the Felix, under charter to carry oil from Philadelphia, and subject to the respondent's orders as respects loading, was by the latter's direction docked at its lower wharf.

The water in that vicinity, and for a considerable distance above and below Point Breeze, was at the time, and ever since the commerce in oil there became large has been, partially covered with oil, the quantity increasing with the increase of the trade, which for many years past has been large, others besides the respondent (including many carriers by water) being engaged in the business.

On the morning of October 30th, while the Felix awaited her cargo, a fire was started in the pump house, (preceded by an explosion) which was carried so rapidly down the river that it communicated with the Felix and other vessels around her, before she could be removed; in consequence of which she was substantially lost. It is not necessary to state more particularly the manner in which the loss occurred.

The suit is brought to recover for this loss. The cause of action, as I understand it, is founded substantially on an alleged failure of duty by the respondent as wharfinger, first in that it started the fire, by communicating oil to the pump house furnace; and if it did not so start the fire, then second, that it allowed oil to escape into the river, by means of which the fire was carried below and the Felix destroyed. It is charged that the escape of oil resulted from carelessness; but it is claimed that the respondent is liable for its escape and the consequences, whether this charge is true or not.

Thus two primary questions of fact (omitting the allegation of negligence) are raised, the burden of proof respecting which is on the libelants: First. Did the respondent start the fire? Second. Did the oil in the river escape from its pipes?

I have examined the testimony with care and am not satisfied that the libelants' allegation in either respect is proved; indeed I think the weight of evidence is the other way. As a discussion of the testimony would be a useless as well as burdensome task, I will do no more than state my conclusions with a brief and general reference to the reasons on which they are founded.

As respects the first question it is not pretended that any one knows certainly how the fire started. The libelants' allegation rests on inference. Oil is said to have been seen running out from the cribbing of the wharf and the bank; and it is therefore conjectured

that the pipes leaked, and that the oil from them ran into the pump house, came in contact with the furnace fire and caused the explosion. There is no room for doubt that oil was seen coming from the cribbing—though I believe the amount is greatly exaggerated by the libelants' witnesses who speak of it—but it is much more reasonable to believe that it was carried there by the wind and tide, than that it came from the pipes. As the wind blew eastward and the water rose with the tide the oil on its surface would be carried up and into the bank and cribbing; and as the water receded the oil would trickle out and down, and continue to do so for a considerable time after the water had disappeared. No oil was seen in the gas house before the fire, nor was any sign of its presence there found upon subsequent examination. Witnesses say that such signs and traces would have been left if it had been there. Some of the libelants' witnesses speak of the presence of oil "vapor" there before the fire. This testimony however is not very satisfactory, and it is not suggested that this "vapor" caused the explosion. If oil had come in, those in charge must, it would seem, have discovered it and called attention to the subject. Its presence would have created serious danger and alarm; and the frequent previous explosions about the furnace and flues had so awakened inquiry for their cause that the presence of oil, even in the smallest quantity, could not have been overlooked. No suggestion of its presence was made until after this fire. Indeed it seems virtually impossible that oil should have leaked from the pipes in sufficient quantity to pass through the intervening impediments, and enter there in view of the care shown to have been exercised in guarding against leakage, and of the testimony respecting the condition of the pipes when subsequently uncovered, and the condition of the ground around them at that time. To have gone there from the pipes it must have passed through considerably more than 100 feet of earth, and a thick retaining wall built back of the house, or passed under its foundation as well as that of the house, and then come up through a tightly cemented floor. If the presence of oil were shown, it would seem much more reasonable to believe that it came from the river by washing in under the wharf, and through or under the wall of the house on that side. The water and oil found in the well near the pump house constructed before the fire, as also that found in the trench and holes dug in the edge of the bank at the time of the fire, and subsequently, doubtless came from the river. The openings made further back showed no oil.

There is no direct evidence that the explosion was caused by oil from any source. Other highly inflammable substances were deposited in the river in that vicinity, by the gas works, which might as readily have caused it as oil, if brought into contact with the furnace fire. As before stated, explosions had occurred there many times before, without a suggestion that they resulted from oil. Their cause was sought for and attributed to defective construction of gas flues, and "back draft" caused thereby. So confident was the belief in this theory that the construction was changed; but while the change seemed to diminish the number of explosions it did not en-

tirely avoid them. It seems to be much more reasonable to believe that the explosion which started this fire was caused by "back draft" than by oil. Indeed it was first attributed to this cause.

The trifling leak shown to have occurred in one of the pipes a few days before the fire, cannot have had any connection with the explosion. The oil would probably show at the surface, through the filling over the pipe, sooner than elsewhere: and as soon as it was discoverable there the pipe was closed. Of course it is evidence that oil pipes may leak, (which hardly requires proof) but the promptness with which this leak was stopped shows the vigilance of those in charge of this business.

As respects the second question what has been said in considering the first applies with equal force here. The evidence that oil was seen coming from the wharf cribbing and bank, standing alone and unexplained, might support the allegation that it ran from the pipes. Difficult as it would be to believe this, for the reasons before stated, the conclusion would probably be unavoidable. When, however, it is seen that oil is at all times floating on the river, which the tide and wind must carry up and into the cribbing and bank, the conclusion ceases to be either unavoidable or reasonable.

The libelants seem to suggest that the respondent's duty as wharfinger, required it to guard the vessel against danger from oil in the river from other sources, over which it had no control. Possibly I have misunderstood the argument in this respect. Certainly such was not its duty. The respondent was required to keep the wharf in as safe a condition as was reasonably practicable under existing circumstances—as safe as such wharves can, with ordinary care, be kept. It was an oil wharf, a place for loading and unloading such merchandise; and the testimony shows that the waters about such wharves are always, and unavoidably, partially covered with oil—resulting from the washing of tanks, escape in loading, and other similar causes. The Felix undertook to carry oil, which she could only get by going to such a wharf. She must have expected to find oil on the water there, and she saw it there as she approached. Whatever risk arose from its presence, (without the respondent's fault,) she assumed for the sake of the expected profit.

In this view of the facts the important questions of law discussed by counsel need not be considered. The libel must be dismissed, with costs.

UNITED ELECTRIC SECURITIES CO. v. LOUISIANA ELECTRIC LIGHT CO. et al.

(Circuit Court, E. D. Louisiana. June 28, 1895.)

1. JURISDICTION OF FEDERAL COURTS—CITIZENSHIP OF PARTIES—INTERVENERS IN EQUITY.
   Where jurisdiction rests upon the diverse citizenship of complainant and defendant, and, during the proceedings, a third party, who is a citizen of the same state with defendant, intervenes, the court will have no jurisdiction of his controversy with defendant, unless the controversy between complainant and defendant is one which draws to the court the possession and control of defendant's property, in which the intervener claims some interest.
2. CORPORATIONS—RIGHTS OF PURCHASERS OF STOCK.
   As a general rule, a purchaser of stock in a corporation is not allowed to attack the prior acts and management of the company.
3. SAME—APPOINTMENT OF RECEIVERS.
   A court of equity will not appoint a receiver to take the property of a corporation out of the hands of the managers elected by the stockholders, except as a last resort, and when it is absolutely necessary for the preservation of the trust fund. Where, therefore, it appears that the appointment of a receiver, with the extraordinary expenses incident thereto, would probably render the corporation insolvent, the court will endeavor to give relief by enjoining the managers from the further execution of contracts resulting in the diversion of corporate funds, and from committing other acts of mismanagement.

This was a bill by the United Electric Securities Company, of the state of Maine, against the Louisiana Electric Light Company for the appointment of a receiver and other relief. The American Loan & Trust Company, of Massachusetts, and the New Orleans Traction Company, of Louisiana, have come into the case as interveners.

Fenner, Henderson & Fenner and Denégre & Denégre, for United Electric Securities Co., American Loan & Trust Co., and New Orleans Traction Co.

R. C. Bell, Thomas J. Semmes, and R. S. Taylor, for Louisiana Electric Light Co.

PARDEE, Circuit Judge. As the restraining order already issued in this case maintains the statu quo, I had intended to take the record, and, after thoroughly digesting it, file an elaborate opinion covering the law and the facts; but being advised that other matters are pressing affecting the interests of the Louisiana Electric Light Company and the preservation of the trust fund, I have concluded to announce my already formulated views of the case, and file hereafter, if necessary, a full exposition of the equities involved.

At the outset, it is to be noticed that the question now before the court is in relation to the steps which the court ought to take with a view of preserving the rights of parties and the safety of the trust fund pendente lite. Of course, the court does not now undertake to settle and determine the rights of parties, and decree relief, as might be its duty upon a hearing on the merits of the case. At this time, therefore, I will not make any decided and conclusive finding as to the rights of parties, except as they appear upon the ex parte showing that has been made in the case.

It is next proper to notice the exact status of the case as to the jurisdiction and parties. The suit is brought by the Electric Securities Company, a citizen of the state of Maine, against the Louisiana Electric Light Company, a citizen of the state of Louisiana, and in the suit the American Loan & Trust Company, of Massachusetts, and the New Orleans Traction Company, of Louisiana, have intervened, adopting, as interveners, the charges made and contained in the complainant's bill. The American Loan & Trust Company, as trustee under the first mortgage granted by the Louisiana Electric Light Company, asserts no interest in the case, outside of its interest as trustee; and as the case made shows no outstanding default on the part of the Louisiana Electric Light Company under the mortgage, no further consideration of the American Loan & Trust Company's position in this suit is necessary. The New Orleans Traction Company is a citizen of the same state as the New Orleans Electric Light Company, and it is therefore plain that this court has no jurisdiction over controversies between these two, unless the jurisdiction of the court attaches by reason of the controversy between the Electric Securities Company and the Louisiana Electric Light Company. The jurisdiction of the court must, therefore, depend upon the controversy between the securities company and the light company; and, unless there is such controversy, and one, too, that draws to the court the possession and control of the property of the light company, the case or controversy of the traction company with the electric light company must be left out of consideration.

The Electric Securities Company complains in a double capacity,—as a creditor and as a stockholder. Under the showing made in the case, it seem to be too plain for dispute, that, as a creditor, the Electric Securities Company has no such controversy with the light company as would justify the court in interfering with the property and management of the Louisiana Electric Light Company. There seems to be no doubt that all the interest due on bonds secured by the first mortgage under the trust of the American Loan & Trust Company is paid up, and that there is no other default under the mortgage which would authorize an interference on the part of the trustee, or any bondholder. The case shows that the Louisiana Electric Light Company has property covered by the mortgage worth nearly a million of dollars, without considering in any way its business and good will as a going concern; that it is able to earn a net revenue on its present business more than twice sufficient to pay accruing interest, so that it must be acknowledged that unless hereafter the trustee and the bondholders shall be negligent in asserting their rights under the mortgage, which, by the way, is full of provisions to protect the bondholders, the bonds held by the Electric Securities Company are as secure as bonds of a private corporation can be made. The controversy, then, must depend upon the rights of the Electric Securities Company as a stockholder in the Louisiana Electric Light Company. Although in the bill it is charged that $425,000 of stock issued to the Fort Wayne Company on the organization of the Louisiana Electric Light Company was issued without consideration, in which case it would be fictitious stock, and void

under the constitution and laws of Louisiana; and although the showing here is that one-half of that same stock is owned by the Electric Securities Company, and forms the basis of its standing before this court as a stockholder; and although there is an affidavit on file, made by a former officer of the company, showing that at the time the Electric Securities Company acquired the stock he knew it was watered, and this affidavit is not contradicted,—yet I am disposed to consider that, notwithstanding the stock may have been illegally issued, still the Electric Securities Company may be able to show that it is a bona fide holder; and if not, then the court may find, as strongly appears on the showing now made, that the said stock was not originally illegally issued, and that it has been at all times valid stock. I may say, further, that, as a general proposition, the purchaser of stock in a corporation is not allowed to attack the acts and management of the company prior to the acquisition of his stock; otherwise, we might have a case where stock duly represented in a corporation consented to and participated in bad management and waste, and, after reaping the benefits from such transactions, could be easily passed into the hands of a subsequent purchaser, who could make his harvest by appearing and contesting the very acts and conduct which his vendor had consented to. However all this may be, for the purposes of this case I take it that the Electric Securities Company is a bona fide stockholder of the Louisiana Electric Light Company, and entitled to be heard in this case.

The matters complained of in the bill are some of them so far explained by the showing made that it is very doubtful if they ought to be made the basis for any relief at this time; but there are other transactions complained of, which are not sufficiently explained, and which leave upon my mind the impression that the directors of the Louisiana Electric Light Company have, by mismanagement, and by dealings in which some of the active directors were representing more their own individual interests than the interests of the electric light company, involved the light company in contracts, partly executed, which ought to be set aside, either as fraudulent or ultra vires. The showing also leaves the impression upon my mind that, unless the court shall interfere in behalf of the stockholders, the present board of directors may, between now and the next election of directors, further involve and entangle the light company in contracts amounting to waste and endangering the trust fund.

The relief asked by the complainant, the Electric Securities Company, is that the court shall appoint a receiver and take the entire property and its management out of the hands of the present board of directors; and, if this were the only way in which relief could be granted, it would probably be the duty of the court to grant such application. So far as the matters complained of, actually set forth in the bill as constituting the basis of mismanagement, it seems to me that full relief can be given by an injunction which shall stay the further execution of those contracts and compel the present directors to appropriate the revenues of the company to the payment of legitimate operating expenses and the liquidation of conceded floating indebtedness. Such an injunction, accompanied by a restrain-

ing order against the making of outside contracts and financial dealing disconnected with the operation of the property, and directing the defendants to give the complainant and its agents and attorneys access to the books and papers of the electric light company, so that they can inform themselves of the past management of the same, will fully protect the Electric Securities Company as a stockholder. To go further, and in the present financial condition of the company appoint a receiver, would probably be extending the relief to such an extent as to entirely eliminate any interest the complainant may have as a stockholder; for it seems to me to be perfectly clear that, in this stage of the finances of the Louisiana Electric Light Company, the appointment of a receiver, with his usual army of retainers and his usually large expenses, accompanied by the necessary loss of credit, will, without question, render the electric light company insolvent beyond remedy, and will compel a foreclosure under the two mortgages, to the irretrievable injury of all stockholders and unsecured creditors. I understand the practice in courts of equity, in dealing with cases of this kind at the suit of a stockholder, is never to resort to the extreme remedy of taking the property out of the hands of the managers chosen and elected by the stockholders, except as a last resort, and when considered to be absolutely necessary for the preservation of the trust fund. Now, is the case presented here one of that character? I do not think so, provided the present financial difficulties can be tided over. The company has a magnificent plant, costing in the neighborhood of $2,000,000, conceded to be worth, as it stands, in the neighborhood of $1,000,000, with a paying business, which, with judicious management, even burdened with the traction contract, will produce a net revenue of over $100,000. The company has a monopoly, in fact, of the whole lighting business in the city of New Orleans. This business can be doubled, perhaps trebled, with ordinary expense, so that the net revenues of the company can be increased two or three fold. As an enterprise, so long as it can meet its fixed charges, so as to stay the hands of bondholders, it cannot be said to be insolvent. Its financial troubles at this time arise from the fact that there is a judgment against it in favor of the Bass Foundry & Machine Works, which, after long litigation in the courts, is now exigible, and under which the very life of the electric plant—the engines—can be seized and sold. This claim amounts to at least $30,000, perhaps $35,000. Although the interest due June 1, 1895, on the bonds of the company appears to have been paid, there will be due under the mortgage to the American Loan & Trust Company by July 1 a sum sufficient to redeem $15,000 of the bonds of the company. The situation is further complicated by the fact that large sums to be earned by the company in furnishing lights for the next eight months, under the contract with the city of New Orleans, have been anticipated by transfers to secure other debts and as collateral, so that no further funds can be safely borrowed upon the faith of expected revenues. If the debt due under the judgment of the Bass Foundry & Machine Works and the amount necessary for the sinking fund for the first mortgage cannot be met or provided for by the present management,

then I am inclined to the opinion that the court must intervene for the protection of the property. Of course, under these circumstances, the appointment of a receiver means that a large sum must be raised at once, and by the aid of receiver's certificates, to meet the present demands, which even the court can no longer delay. It means, in addition to this, that the large floating debt now due by the electric light company, and incurred in operating the property within the last six months, and not due to the Fort Wayne company, McDonald & Hart, must be provided for, because only upon such provision can adequate supplies be obtained for the future operation of the property. The matter of appointing a receiver, then, comes to this: Such appointment is not necessary, provided the present directors are in such a position as to satisfy the court that, under the limitations to be imposed by the court preventing them from alienating or incumbering the property, and from paying out and disposing of the revenues other than as required in due course of operating the property to carry on the business according to the charter, and in the interest of all the stockholders, and enjoining all changes of the status quo in connection with the matters specifically charged in complainant's bill, they can provide for the $15,000 necessary for the sinking fund under the first mortgage, and stay or otherwise provide for the judgment in favor of the Bass Foundry & Machine Works until after the next regular election of directors. If they can so satisfy the court, no receiver will be appointed, but an injunction will issue. If they cannot so satisfy the court, a receiver will be appointed. In either case, the court does not relinquish its control of the property, and probably will not, if the present bill is maintained, until after the next election for directors.

As to the controversy presented by the New Orleans Traction Company, all that need be said is that, so far as relief is herein granted by injunction to the securities company the same necessarily inures to the benefit of the traction company as a stockholder. Whether any relief can be hereafter granted the traction company as a bondholder depends on the course the case may take, and probably upon due intervention by the trustee for all the consolidated first mortgage bonds.

GRAY et al. v. QUICKSILVER MIN. CO.

(Circuit Court, N. D. California. June 24, 1895.)

1. ADMINISTRATOR'S SALE—PURCHASE BY ADMINISTRATOR'S EMPLOYER.
   Defendant, a creditor of an intestate estate, and hence entitled to name an administrator thereof (Prob. Act Cal. § 52), procured the appointment of one of its employés as administrator, and indirectly became purchaser at the administrator's sale. *Held*, that such employé could properly act as administrator, and that, though defendant paid the expenses of administration, it did not become administrator within the California laws prohibiting an administrator from purchasing directly or indirectly the estate he represents.

2. SAME—EVIDENCE OF FRAUD.
   An employé of defendant, at its request, was appointed administrator of an estate of which it was a creditor, consisting of an interest in mining property. Such interest was of uncertain value, and was disputed by

claimants under the same title as decedent, and by defendant claiming under an adverse title. It was appraised at $11,100, and sold for $27,755 to an officer of defendant, and, through a nominal purchaser, conveyed to defendant. Letters written by such officer pending administration showed the desire to avoid publicity, and hasten sale and confirmation thereof before his bid could be raised, and stated that the price paid by defendant was low. *Held* that, though the circumstances of the administration and sale challenged inquiry, they did not amount to fraud.

3. LIMITATION OF ACTIONS—ADMINISTRATOR'S SALE.
The statute requiring a suit to recover land sold at an administrator's sale to be brought within three years does not apply when there is no person who can bring suit.

Bill by Jane M. Gray and others against the Quicksilver Mining Company for a decree declaring defendant to be a trustee for plaintiffs of certain mining property.

Pierson & Mitchell, for complainants.
Wm. Matthews and E. J. Pringle, for respondent.

McKENNA, Circuit Judge (orally). This is an action to declare defendant trustee of the plaintiffs, or the estate of their intestate, of certain mines and minerals situate on the Rancho De Los Capitancillos (what is known as the "Almaden Mine"). Both plaintiffs and defendant claim from the Mexican government, through a grant by the latter to one Justo Larios, which grant was patented by the United States in the name of Charles Fossatt, by patent dated February 3, 1865. The patent to the mines and minerals became separated from the title to the land, or was attempted to be separated, by Grove C. Cook, grantee of Justo Larios, calling himself "allodial owner" of the rancho, by conveying by deed dated April 1, 1848, to plaintiffs' intestate, John B. Gray, and one Knowles Taylor, in the proportions of two-fifths and three-fifths, respectively, "together [to quote deed] with the right of way, water, grazing for cattle; * * * also land sufficient for establishing smelting works, building houses, and all other purposes necessary for the secure and profitable carrying on of the aforementioned mines."

A trust was declared and created in this property by an instrument dated March 21, 1850, in which it was recited, after setting out certain conveyances, as follows:

"And whereas, other parties or persons than the beforenamed Knowles Taylor and John B. Gray have interest in said purchases, and it being desirable and proper to work said lands, mines, minerals, and ores, and prosecute the business connected therewith; and whereas, the title to said lands, mines, minerals, ores, rights, privileges, interests, and benefits, and their appurtenances, is now standing in the name of said Knowles Taylor and John B. Gray, in the following proportions, to wit, three-fifths part in the name of said Knowles Taylor, and two-fifths part in the name of the said John B. Gray; and it being desirable that each party in interest and ownership should have now this written declaration and conveyance of his interest, or portion in said lands, mines, minerals, ores, rights, privileges, interests, benefits, and the appurtenances of every kind pertaining thereto: Now, know all men by these presents, that we, the said Knowles Taylor and Eliza L., his wife, and the said John Bowie Gray and Jane M., his wife, for and in consideration of the premises and of the sum of one dollar to each of us paid by the parties thereto of the second part, at and before the ensealing and delivery of these presents, the receipt whereof we and each of us hereby acknowledge, and in further con-

sideration of the payment heretofore made by each of the said parties of the second part of their respective relative proportion of the purchase money of said property, mines, minerals, ores, et cetera, and of all expenses incident thereto, have granted, bargained, sold, conveyed, and transferred, and by these presents do grant, bargain, sell, assign, convey, and transfer, unto the said Robert J. Walker, Knowles Taylor, and John Bowie Gray, trustees, as hereinafter mentioned, all and singular the aforedescribed lands, mines, minerals, ores, rights, privileges, interests, benefits, and the appurtenances of every kind which pertain thereto, and by the recited indentures or conveyances aforesaid were conveyed and transferred to the said Knowles Taylor and John B. Gray, together with all the estate, right of dower, title, interest. property, claim, and demand whatsoever of the said Knowles Taylor and Eliza L., his wife, and the said John Bowie Gray and Jane M., his wife, as well at law as in equity, of, in, and to, and out of the same, and every part thereof, from and after the date hereof, and by this indenture, and for the purposes and uses as hereinafter set forth and declared, to be held and possessed by the said Robert J. Walker, Knowles Taylor, and John B. Gray, as associate trustees, their heirs and the survivor of them, his heirs and assigns, forever, as joint tenants, and not as tenants in common, upon the special trust and confidence, however, and for no other purpose than is herein set forth and declared. * * * It is further agreed that with a view to ascertain results and settle controversies, if any should arise, no one of the parties interested will, within any period of two years from this date, sell any portion of his interest in said property, mines, minerals, et cetera, to any person not a party to this agreement. The estate, rights, privileges, benefits, and property of the said parties as hereinbefore set forth and granted, or hereafter shall be obtained, shall be and remain vested in the said trustees and their successors, their heirs and assigns, in joint tenancy as aforesaid, but subject to the control and direction of the parties by a vote of not less than two-thirds of the whole number of shares in the affirmative, with the rights of the said two-thirds of the whole number of shares, by the vote in the affirmative of filling any vacancy or vacancies that may occur in the board of said trustees by resignation, death, or otherwise, and to alter these trusts. The objects, designs, and business of the said parties shall be the proper management and administration of the said estate, property, mines, minerals, ores, rights, privileges, benefits, and all other matters and things relating and appertaining thereto, so as to make the said lands and mines active and productive, that the parties may receive the best possible benefit and profit annually therefrom. The whole affair and business of the said parties herein shall be directed and governed, prosecuted and managed, by the said trustees, or by a majority of them, their successors, their heirs and assigns. And the said trustees, or a majority of them, are hereby authorized and empowered to appoint such agent or agents in the management of the business, and to fix the compensation of such agent or agents, as they shall think proper."

In January, 1853, Taylor died, leaving Walker and Gray surviving; and on June 2, 1861, Gray died in New York, intestate, leaving plaintiffs as his only heirs at law. Walker is also dead. Prior to his death, he conveyed his individual interest under the trust deed,—that is, his interest separate from that as trustee,—and the defendant became the owner of it. The defendant also claims to be the successor to the title and interest of Forbes, Baron & Co., the old Almaden Company, and the evidence seems to establish that the latter occupied and exclusively worked the mines for years, in hostility to the Laurencel & Eldridge title, under which plaintiffs claim. On the 10th of October, 1863, Christopher E. Hawley presented a petition to the probate court of the county of Santa Clara, setting forth the death of John Bowie Gray; the fact that the names, ages, and residences of the heirs were unknown to him; that the deceased died intestate, owning in fee at the time of his

death $111^{2}/_{100}$ equal undivided four-hundredth parts of, in, and to all the "mines, minerals, and ores, of whatever character or description, that were found on the 1st day of April, A. D. 1848, or that have since been found, or that hereafter may be found, in the tract of land in said state and county in the rancho called 'De Los Capitancillos,' formerly granted to Justo Larios, together with certain rights, privileges, and appurtenances as the same were granted by Grove C. Cook and wife to Knowles Taylor and said deceased John Bowie Gray, by conveyance dated the 1st day of April, 1848; the said property described in said conveyance with certain other property having been by a certain indenture conveyed to Knowles Taylor, John Bowie Gray, and R. J. Walker in trust," etc. He was appointed November 10, 1863, and qualified February 25, 1864, by giving a bond of $16,200, and letters of administration issued to him on the 25th. Notice to creditors was ordered, and appraisers were appointed, and estate duly appraised at $11,100, on May 2, 1864. Claims aggregating $106,529.24 were presented and duly allowed; and, after due proceedings were had, the interest of said Gray in said mines and minerals was sold to Henry O. Lyons for $27,755, which sale was confirmed by the probate court, and deed executed. Lyons deeded to Butterworth, and the latter to defendant. Hawley was the engineer of the defendant company, and Butterworth was its superintendent.

The claims presented against the estate were as follows: Sidney L. Johnson, $48,617.93; Quicksilver Mining Company, $49,579.31; George Flemming, $916.87; Andrew Glassell, $7,416. Sidney L. Johnson's claim was composed of the principal and interest of four notes of $5,000 each, given by one Middleton to Gray, and by the latter to Robert J. Walker, and a note of $10,000 given by Gray to Middleton, and indorsed by the latter to Walker. The $5,000 notes were secured by a mortgage, executed in favor of Walker, by Gray, Middleton, and Walker. There was also attached to the claim, as a voucher, a complaint in a suit brought by Robert J. Walker against Henry H. Taylor, John W. Middleton, et al. This complaint recited the conveyance from Grove C. Cook to Gray and Taylor. The declaration of trust in the property, quoting the substance of the trust deed, states the papers upon which the purchase was made, and the difficulties and controversies over the title and lawsuits conducted by Walker, "at the wish [to quote the complaint] of Gray," for which he was to be liberally compensated, and also states the necessity and fact of employing other counsel, the incurring of indebtedness, and disbursing large sums of money. The legal controversies over and in defense of the property are enumerated in the complaint. The amount claimed by complainant for services and expenses is $189,490.37, and it is prayed to be recovered against defendants, according to their respective interests, and be a lien on the property. An itemized account is attached to the complaint. A claim was also presented by Samuel F. Butterworth, as president of the Quicksilver Mining Company, the defendant. In this claim the Quicksilver Mining Company claimed as assignee of Robert J. Walker, and refers to the complaint in Walker

v. Taylor et al., supra. The amount claimed as Gray's proportion of the indebtedness is $49,579.31. Glassell's claim was for principal and interest on a note and mortgage executed by Gray.

The plaintiffs introduced the following letters:

A letter from S. F. Butterworth to C. A. Bradley, dated September, 1864:

"On my arrival I found that nothing had been done by the administrator of estates of Gray and Taylor. I immediately had our claim acquired from Walker allowed by the administrator and by the probate judge. I also purchased from Glassell, formerly attorney of Gray, and a troublesome fellow, his claim against Gray's estate, amounting to some $8,000, for $1,000, and thereby secured his aid. After the allowance of these claims, I had an order published to show cause why the estate should not be sold to pay debts. The time to show cause expires this month, and then I will have the order of sale, and, after the usual advertisement, the sale. I have no doubt but that I shall be able to purchase at the sale all of the rights and interests of Gray and Taylor in minerals of Fossatt for less than our claim."

A letter from Mr. S. F. Butterworth to William Bond, dated November 2, 1864:

"Please inform Mr. Bradley that on the 29th of October I purchased all of the interests of the estates of Gray and Taylor in the minerals of the Fossatt Ranch. The claims of the company against the Gray estate amount to $60,000, approved by the administrator and surrogate. I bid $38,000. * * * I hope to have these sales confirmed by the probate judge this month, and then I shall be relieved from a great anxiety. If, before the probate court holds its next term, this month, any one comes in and offers ten per cent. more than my bid, the offer may be taken by the judge, or there may be a new sale. For this reason I used the name of Judge Lyons in making the purchase; and, if any one bids the ten per cent., I can come in and bid over him. I hope to escape all this, as I have conducted the proceedings all very quietly, and yet strictly in accordance with the requirements of the statute."

A letter from Mr. Butterworth to William Bond, dated December 12, 1864:

"Since my last, the administrator's sale of the interests of Gray and Taylor in the Fossatt Ranch and the minerals therein has been confirmed, and the deed executed to the company. I bid for Gray's interest the sum of $27,775, and, as we are the creditors, we pay in cash only the administrator's fees and other necessary expenses of sale. I purchased some time ago the mortgage of Glassell, amounting to $10,000, for $1,000. I did this to quiet him,—a busy attorney,—and to enable me to bid a large amount, if necessary. I think the company very fortunate in obtaining the interest so cheaply, and congratulate myself on the mode and manner of their acquisition."

A letter from S. F. Butterworth to R. F. Peckham, dated March 25, 1865:

"Received yours of the 24th inst. I do not think it necessary to wait for the names of the Gray and Taylor heirs. Let the proceedings be instituted and carried through as speedily as possible."

Hawley testifies that he became administrator at the instance of Butterworth. The memories of all witnesses were imperfect, and hence their testimony was vague and uncertain, but it may be inferred that the Quicksilver Mining Company had become the owner or interested in the claim presented by Sidney L. Johnson against the estate. Johnson, however, seems to have taken an interest in the proceedings, as Judge Rhodes testifies. The judge's recollection, however, like that of other witnesses, was dim to almost

extinction. At first, he did not remember the original employment, but said a gentleman came to his office in San José, who claimed to be S. F. Butterworth, and inquired about the progress of the administration, and, upon being questioned about his interest, said, "It is our matter," or, "These proceedings were for us." But, when the name of Sidney L. Johnson was mentioned to him (Judge Rhodes), he replied that he knew him well, and, stating that his memory was refreshed, testified: "I think my employment came through him, and the name of Janin is connected with it in some way as well." Janin claimed to be a creditor of Gray, and presented a claim against the estate, which was rejected. A further citation of the evidence is unnecessary to the points I shall consider.

It is contended by plaintiffs that this evidence shows that the defendant was the administrator of the estate of Gray, and its purchase from Lyons, who purchased at the administrator's sale, was an infringement of its duty, and particularly of the California laws, which prohibit an executor or an administrator, directly or indirectly, from purchasing any property of the estate he represented.

In Boyd v. Blankman, 29 Cal. 19, it was held that in such case the sale was not void, but the administrator could be held as trustee of the title. This, however, is but the general principle applicable to a trustee dealing with his trust, carefully expressed by the statute; and the claim of the plaintiffs under it is answered by the supreme court in Clark v. Trust Co., 100 U. S. 149. The facts of this case were as follows: One McGhan and wife conveyed the premises in controversy to one Edward Clark, in trust for Mrs. McGhan. Clark and the McGhans conveyed the property to one Daniel Eaton, to secure the payment of a debt of the McGhans to the Freedman's Savings & Trust Company for the sum of $10,000. Upon default of the provisions of the conveyance, it was provided that the property should be sold at public auction, to pay the obligation incurred. Default was made, and the property was sold, the company becoming the purchasers for $13,000. Eaton, the trustee in the conveyance, was the actuary of the Freedman's Savings & Trust Company; and the sale was assailed upon this, as well as upon unfairness in the proceedings and inadequacy of price. It will be observed the relations of the parties in this case are similar to the relations of the parties in the case at bar. Eaton was an officer of the Freedman's Savings & Trust Company. Hawley was an employé of the Quicksilver Mining Company. What Eaton did was for the company. What Hawley did, it is alleged, was for the Quicksilver Mining Company. The sale in both cases was made at public auction,—in the one case, to the company directly; in the other, to the Quicksilver Mining Company indirectly, Lyons being the purchaser, Butterworth receiving from him, and the company from Butterworth. The supreme court said:

"Touching this objection, it is sufficient to say that the deed was not made to Eaton in his capacity of an officer of the company, nor did he act in that capacity when exerting the authority conferred upon him. The fact that he held official relations to that company did not incapacitate him from accepting the trust set out in the deed of June 22, 1870, or discharging the duties thereby imposed. It is true that his relations to the company would make it the duty

of a court to scrutinize very closely all that he did in the execution of a trust, but we find nothing in the evidence to justify the belief that he acted otherwise than honestly and faithfully in the discharge of his duty. The evidence does not justify the charge that he bid off the property for the company."

If, therefore, an employé of a corporation may have a separate individuality (a proposition seemingly plain), it follows, necessarily, that he may be an administrator of an estate, and keep his individuality; nor does it matter, in the aspect we are now considering, that he took the office at the request of the corporation, or that the latter advanced the expenses of the administration. Among those who were entitled to administration under the law (section 52, Prob. Act; page 448, Laws 1851) in force at the time of the administration of the Gray estate were creditors; and, by the same law (section 66), administration could be granted to any competent person, although not entitled, at the request of a person entitled. Such a request certainly did not confuse or confound the identity of the parties, and make him an administrator who was not so in fact, by irresistible inference of law. Nor can I conceive of any good which would be served by it; while it is easy to conceive the embarrassment, and even detriment, of it. If fraud, in fact, be committed, through means of the administration, as was done in Herndon v. Kuykendall's Heirs, 58 Tex. 341 (cited by plaintiffs' counsel), the remedy is obvious and ample.

As to fraud in fact in the administration of Gray's estate, or in the sale of the property, I can find no evidence. As we have already seen, there are circumstances in this case, as there were in Clark v. Trust Co., supra, which challenge inquiry; but inquiry shows only, in addition, the letters of Butterworth. These, however, are explicable on other grounds than fraud. They, undoubtedly, display interest and zeal, but these cannot be assumed to be sinister without the support of other circumstances, however easy and plausible it may be to so represent them. Indeed, there is nothing which appears so, except the references to Glassell, who had been the attorney of Gray. A careful search through the testimony has convinced me that such references were but the expression of a superserviceable zeal, eager to exaggerate itself. There is not a particle of testimony which reflects on the fidelity of Glassell to Gray, or on the bona fides of the note and mortgage which he held against him. For the payment of the latter, he had a right to resort to the estate; and his action, instead of being an evidence of fraud, is an evidence of good faith. If Gray's interest was as valuable as it is claimed to have been, it must have been apparent to Glassell, and it is not conceivable in such case that he would have sold either his claim or his honor for $1,000. His claim alone amounted to $7,416, secured by a mortgage. Not cupidity, but a natural and proper prudence, would have demanded more than $1,000, even if he had rated his integrity at nothing.

There is no proof of dishonesty in the claims presented by the defendant, or in the administration proceedings. Aside from the connection of Hawley with the defendants, there is nothing to impugn his personal or official integrity or care, and it is conceded that the counsel who were employed could not have been used to

effect a fraudulent end. Nor could they have been deceived. Besides, Judge Rhodes, who commenced the proceedings, was early informed by Mr. Butterworth of the interest of the defendant in the administration proceedings, and, in consequence, explained to him what he (the judge) had done, and what he proposed to do. Judge Rhodes' memory is very imperfect as to who employed him originally, as I have already remarked, but he thought it was Sidney L. Johnson, and he remembered the name Janin. The latter, as appears from the record, claimed to be a creditor. Mr. Johnson, it will be remembered, was Mr. Walker's representative in California, and presented a claim against the Gray estate, and afterwards filed a voucher acknowledging the payment of the claim. It is not intimated that Johnson was dishonest in what he did; and, besides, he was one of plaintiffs' witnesses, and if the minerals in the mine were of very great value, as it is asserted, and as they undoubtedly were, it does not follow that Gray's claim to them was of great value.

It was appraised at $11,100, and was sold for $27,755. The sale was affirmed by the probate judge, presumably after a proper hearing. There is nothing to justify a doubt of the honesty of this action. But, besides, the title of Gray was disputed, and disputable not only by persons who claimed under the same title as he, but by the defendant, who claimed under an adverse title. The defendant was in possession, and had been for some years, holding against everybody, and is represented as a wealthy and powerful corporation. A claim so embarrassed and opposed may well have been considered worth not more than $11,100 in the judgment of the appraisers, or $27,755 in the judgment of the court. If confirmation be needed of the doubts which beset Gray's claim, it may be had in his own actions, and the actions of his heirs after his death, and in the correspondence with their lawyers. I think, therefore, that there was no fraud in the administration proceedings or in the sale of the property.

There were other questions discussed by counsel, but those I have passed on necessarily preceded them in consideration, except, perhaps, the charge of laches made by the defendant's counsel, and the statute of limitations. Without reciting the evidence or stopping to consider the authorities, it is enough to say that I have carefully considered both, and have concluded that the claim of laches is good against all the plaintiffs except Margaret Gray Dickinson; and this was the view my learned predecessor, Judge Sawyer, took, and expressed in passing on the demurrer to her bill, and this is a proper case for its application. All the chief actors are dead, and those who were connected with them in various relations who yet live have memories so defective and dim as to make dangerous any judgment from their testimony.

It is further urged by defendant that Margaret Gray Dickinson is barred by the limitation of time expressed in the California laws, as follows:

"No action for the recovery of any real estate sold by an executor or administrator under the provisions of this chapter shall be maintained by any heir or other person claiming under the deceased testator or intestate, unless it be commenced within three years next after the sale." Section 190.

This has been held by the supreme court of the state to apply to all sales, whether valid, voidable, or void. But, to start a statute of limitations, there must be some one against whom time can run. This is not denied by defendant's counsel, but they urge the administrator was such person, and that it made no difference that in the particular instance he was the person to sue and to be sued. I am not inclined to adopt quite so refined and abstract a view. It would virtually deny relief, and it is easily conceived that the bond of the administrator would be no adequate substitute. Time had not, therefore, run against Margaret Gray Dickinson; and, because it had not, it was necessary to pass on the validity of the probate proceedings and sale. These being valid, it follows that the bill of complainants must be dismissed.

CENTRAL TRUST CO. OF NEW YORK v. CHATTANOOGA, R. & C. R. CO. (MILLER & GARMONY, Interveners).

(Circuit Court, E. D. Tennessee. S. D. July 11, 1895.)

1. RECEIVERS—EXEMPTION FROM GARNISHMENT.
Though a receiver appointed by a court of equity is by statute exempt from garnishment in his own state the federal courts of another state will not refuse to entertain garnishment against him on a petition properly presented by citizens within the jurisdiction, when no objection to the jurisdiction on other grounds exists.

2. SAME—EFFECT OF STATE LAWS.
A state law exempting a receiver appointed by a court of equity from garnishment applies to the state courts only, and has no extraterritorial force.

3. SAME.
Independently of statute, a receiver is not subject to garnishment except by consent of the court appointing him.

4. GARNISHMENT—JURISDICTION.
Garnishment is a form of attachment, and property cannot be made subject thereto unless it is within the jurisdiction of the court.

5. SAME—PERSONAL SERVICE.
Attachment in the form of garnishment cannot be maintained in the United States courts without personal service on the principal defendant, or his voluntary appearance.

6. RECEIVERS OF FEDERAL COURTS—GARNISHMENT PROCEEDINGS.
Garnishment proceedings are not suits against the receiver for "any act or transaction of his," within the meaning of judiciary act of March 3, 1887, as corrected by Act Aug. 13, 1888 (25 Stat. 433), allowing receivers of federal courts to be sued for such acts in carrying on the business connected with the property, without leave of the appointing court.

7. SITUS OF DEBT.
For the purpose of jurisdiction, the situs of a debt or other chose in action follows the domicile of the creditor.

8. JURISDICTION OF FEDERAL COURTS—EFFECT OF STATE STATUTE.
Rev. St. § 915, providing that in the United States courts plaintiff shall be entitled to remedies by attachment or otherwise against defendant's property similar to those allowed to the state courts by the state laws, does not confer on the United States courts jurisdiction of suits by foreign attachment, or jurisdiction over a nonresident not served with process, though state courts have such jurisdiction under state laws.

9. GARNISHMENT—JURISDICTION—NONRESIDENT PARTIES.
Where both the garnishee and the principal debtor are nonresidents, and the debt is payable in the state of their residence, there is no property

within the state subject to attachment in garnishment proceedings in either the state or United States courts.

10. SAME—RAILROAD COMPANY AS GARNISHEE.
Such rule applies to garnishment of the wages due by a foreign railroad corporation to its employés, also residents of another state, under contract of employment made in such state, and is not affected by the fact that such corporation, without being incorporated in the state, extends its line therein, and is subject to suit by process on its local agents.

11. SAME—CLAIM FOR WAGES.
In the absence of contract to the contrary, a debt for wages due from one nonresident to another nonresident living in the same state is payable by legal implication in such state, and is not subject to garnishment in another state.

Action by the Central Trust Company of New York against the Chattanooga, Rome & Columbus Railroad Company, in which a receiver was appointed. Petition in intervention by Miller & Garmony to attach by garnishment proceedings the wages of certain employés of such receiver.

T. P. Chamlee, for interveners.
J. H. Barr, for receiver.

CLARK, District Judge. This case is now before the court on intervening petition by Miller & Garmony, creditors of certain employés of the receiver of defendant company, appointed in the cause, with power, among other things, to operate the railroad. The defendant company is a corporation organized under the laws of the state of Georgia, with its line of railway extending a short distance into the state of Tennessee, so as to reach the city of Chattanooga. The receiver was appointed in the United States circuit court at Atlanta, Ga., where the principal case is pending, and the same person was appointed under an ancillary bill filed in this court. The petition seeks to attach by garnishment the wages due said employés, the statutory ground for attachment being alleged, namely, nonresidence of all the defendants, except one, as to whom the case is dismissed. The receiver, as well as the employés, are citizens and residents of the state of Georgia, and interveners citizens and residents of the state of Tennessee. The laborers whose wages are sought to be reached are employed and paid in the state of Georgia. The receiver answered the petition, showing wages due the nonresidents, and the amount thereof. No personal service was had on the other nonresident defendants, and no substituted service has been resorted to, and none could be, in a case like this, as will hereafter more fully appear.

Under the statutory law of Georgia, receivers appointed by a court of equity are not subject to garnishment, and laborers' wages are wholly exempt from liability to garnishment. These are the undisputed facts, and the case therefore turns on questions of law. It is insisted that, as the receiver is exempt from suit in his own state, and must account to the court having jurisdiction of the principal case, a suit such as this should not be entertained by this court. I have no doubt, however, of the right and jurisdiction of this court to hear and adjudicate upon all claims of the kind here in issue, when properly presented by citizens within the jurisdiction, when no objection to jurisdiction on other grounds

exists. This court would so control all suits as not to interfere with the proper jurisdiction and proceeding in the principal case, nor with the proper discharge of his duties by the receiver under order of the court in that case. On suggestion, any difficulty of that kind would be promptly obviated. And the statutory exemption from garnishment by the receiver, I think, is applicable to the state courts only, aside from its want of extraterritorial force. Independently of statute, the receiver is not subject to garnishment, except by consent of the court appointing him. High, Rec. (3d Ed.) § 151, and cases. It is argued, however, that by the judiciary act of March 3, 1887, as corrected by the act of August 13, 1888 (25 Stat. 433),[1] receivers of a railway company, appointed by a court of the United States, may be garnished in a state court, and Irwin v. McKechnie (Minn.) 59 N. W. 987, is cited as sustaining this position, and the supreme court of Minnesota does so hold. The garnishment suit here, however, being in the court appointing the receiver, and not in a state court, the bearing of that case on the question is not really very material, and the act of congress has been construed otherwise, and this question otherwise settled for this circuit. In a case before both circuit judges for this circuit and District Judge Barr, it was, upon full consideration, held that a garnishment proceeding was not within the terms of the act of congress (Central Trust Co. of New York v. East Tennessee, V. & G. Ry. Co., 59 Fed. 523), and this case was approved on the same point in Comer v. Felton, 10 C. C. A. 28, 61 Fed. 731, by the circuit court of appeals. There are jurisdictional objections, however, of serious import, and these are now to be examined, and in this inquiry into jurisdiction the court is not limited by the formal issues or argument.

The garnishee, as well as the principal debtors, being nonresidents, and the debts payable in another state, the question arises, has the court jurisdiction (there being no personal service) by seizure of property of the nonresident? In considering this question, it is to be constantly borne in mind that garnishment is a form of attachment. As was said by Maxwell, C. J., in Insurance Co. v. Hettler, 37 Neb. 849, 56 N. W. 711:

"Garnishment is an attachment by means of which money or property of a debtor in the hands of third parties, which cannot be levied upon, may be subjected to the payment of the creditor's claim. To subject the property to attachment it must be within the jurisdiction of the court; otherwise it would be powerless to condemn it, order a sale, and apply the proceeds to the payment of the judgment in favor of the creditor."

This is clearly the nature of garnishment on attachment in this state. Mill. & V. Code, §§ 4219, 4222; Caruth. Hist. Lawsuit, § 86. And in regard to an attachment, and in a case involving the attachment law of this state, the supreme court of the United States, in Cooper v. Reynolds, 10 Wall. 318, said:

"Its essential purpose or nature is to establish, by the judgment of the court, a demand or claim against the defendant, and to subject his property lying within the territorial jurisdiction of the court to the payment of that demand."

---

[1] The act provides that a receiver of a federal court may be sued for "acts or transactions of his" in carrying on the business in connection with the property, without leave of the appointing court.

And in the absence of personal service on the defendant within the jurisdiction the court said:

"Second. The court, in such a suit, cannot proceed, unless the officer finds some property of defendant on which to levy the writ of attachment. A return that none can be found is the end of the case, and deprives the court of further jurisdiction, though the publication may have been duly made, and proven in court. Now, in this class of cases, on what does the jurisdiction of the court depend? It seems to us that the seizure of the property, or that which, in this case, is the same in effect, the levy of the writ of attachment on it, is the one essential requisite to jurisdiction, as it unquestionably is in proceedings purely in rem. Without this, the court can proceed no further; with it, the court can proceed to subject that property to the demand of plaintiff. If the writ of attachment is the lawful writ of the court, issued in proper form, under the seal of the court, and if it is by the proper officer levied upon property liable to the attachment, when such writ is returned into court, the power of the court over the res is established."

And in the subsequent case of Pennoyer v. Neff, 95 U. S. 723, the court, through Mr. Justice Field, announced the rule as follows:

"It is in virtue of the state's jurisdiction over the property of the nonresident situated within its limits that its tribunals can inquire into that nonresident's obligations to its own citizens, and the inquiry can then be carried only to the extent necessary to control the disposition of the property. If the nonresident have no property in the state, there is nothing upon which the tribunals can adjudicate. These views are not new. They have been frequently expressed, with more or less distinctness, in opinions of eminent judges, and have been carried into adjudications in numerous cases."

This doctrine is now firmly established. Hart v. Sansom, 110 U. S. 151, 3 Sup. Ct. 586; Arndt v. Grigg, 134 U. S. 316, 10 Sup. Ct. 557; Grover v. Machine Co., 137 U. S. 287, 11 Sup. Ct. 92; Wilson v. Seligman, 144 U. S. 44, 12 Sup. Ct. 541; Scott v. McNeal, 154 U. S. 34, 14 Sup. Ct. 1108; Goldey v. Morning News, 156 U. S. 518, 15 Sup. Ct. 559; Fitzsimmons v. Johnson, 90 Tenn. 416, 17 S. W. 100.

This result of the adjudged cases is to be recognized in considering the jurisdiction and validity of proceedings of this kind, and it is to be observed that the principles announced are general in application to all courts, state and federal, for, as will be seen further on, the courts of the United States, in the exercise of original jurisdiction, are more restricted in such cases, and the mere seizure of property of a nonresident is not sufficient to enable them to assume jurisdiction. It is not to be overlooked that attachment and garnishment suits against nonresidents alone are now being considered, and that the remedy is in this country a statutory one, analogous to the custom of foreign attachment, and is not a remedy belonging to the common law. It being essential that, in the absence of personal service within the jurisdiction, an actual seizure of, or levy on, property of the absent defendant within the jurisdiction be had, and that until this is done the jurisdiction is not established, and no substituted service authorized, the question of the situs of the property or res is one of paramount importance. This inquiry could present no difficulty in respect to real estate, and little or none in regard to tangible personal property having an actual situs. But, for the purpose of jurisdiction, the situs of a debt or other chose in action is a question upon which there is a diversity of judicial opinion. There is, of course, no actual visible, and only a legal or constructive, situs. Does the debt follow the creditor and his

domicile or the debtor and his domicile? The legal title and right are clearly in the creditor, and, by analogy to the principle that constructive possession is with the rightful owner, we should expect that the chose in action, particularly a debt, follows the person of the creditor. And such is the established rule. Tappan v. Bank, 19 Wall. 490; Kirtland v. Hotchkiss, 100 U. S. 491; State Tax on Foreign-Held Bonds, 15 Wall. 300; Cannon v. Apperson, 14 Lea, 555; Mayor of Gallatin v. Alexander, 10 Lea, 475; Douglass v. Insurance Co., 138 N. Y. 209, 33 N. E. 938; Insurance Co. v. Hettler, 37 Neb. 849, 56 N. W. 711; Railroad Co. v. Dooley, 78 Ala. 524; Railroad Co. v. Smith (Miss.) 12 South. 461; Railroad Co. v. Chumley, 92 Ala. 317, 9 South. 286; Railroad Co. v. Maggard (Colo. App.) 39 Pac. 985; Railway Co. v. Sharitt (Kan. Sup.) 23 Pac. 430, 19 Am. St. Rep. 145, and note. In State Tax on Foreign-Held Bonds, supra, the question depended upon the situs of debts due from a corporation of Pennsylvania, in the form of bonds, secured by mortgage upon property situated in that state, to nonresidents. The argument was that the situs was with the debtor corporation. But the court (page 319) said:

"Corporations may be taxed, like natural persons, upon their property and business. But debts owing by corporations, like debts owing by individuals, are not property of the debtors in any sense. They are obligations of the debtors, and only possess value in the hands of the creditors. With them they are property, and in their hands they may be taxed. To call debts property of the debtors is simply to misuse terms. All the property there can be, in the nature of things, in debts of corporations, belongs to the creditors, to whom they are payable, and follows their domicile, wherever that may be. Their debts can have no locality separate from the parties to whom they are due. This principle might be stated in many different ways, and supported by citations from numerous adjudications, but no number of authorities, and no forms of expression, could add anything to its obvious truth, which is recognized upon its simple statement."

The decision of the supreme court of Pennsylvania was rested in part upon the view that, the bonds being secured by mortgage on property within the state, fixed their situs there, and the court (page 323) replied to this suggestion as follows:

"Such being the character of a mortgage in Pennsylvania, it cannot be said, as was justly observed by counsel, that the nonresident holder and owner of a bond secured by a mortgage in that state owns any real estate there. A mortgage being there a mere chose in action, it only confers upon the holder, or the party for whose benefit the mortgage is given, a right to proceed against the property mortgaged, upon a given contingency, to enforce by its sale the payment of his demand. This right has no locality independent of the party in whom it resides. It may undoubtedly be taxed by the state when held by a resident therein, but when held by a nonresident it is as much beyond the jurisdiction of the state as the person of the owner."

In Railroad Co. v. Dooley, already referred to, the garnishee was a corporation organized under the laws of Kentucky, and its employé was a citizen of the same state, employed and paid there. The company operated a line of railroad through Alabama, and had an office and agent at Mobile, though this fact and the character of the agency and agent's duties did not distinctly appear in the record. Jane Dooley, a resident of the state of Alabama, brought suit by attachment in the court of Alabama on a debt due from the

nonresident employé, and had garnishment writ served on the company's local agent, who answered for the company, showing an indebtedness for wages. Judgment of the city court against the garnishee was reversed. Chief Justice Stone expressed the opinion of the supreme court in the following language:

"Garnishment, like attachment, is a species of proceeding in rem. It acquires jurisdiction of the person pro hac vice, by seizing his property, goods, or choses in action. If it cannot acquire jurisdiction or control of the res, it needs must fail to acquire, through such res, jurisdiction of the person; for jurisdiction of the person is acquired only through the res, or thing. The debt in this case was contracted in Kentucky, the labor performed in Kentucky, for a corporation and by a laborer each resident in the state of Kentucky. The situs of a debt, in the absence of stipulation to the contrary, is the domicile of the creditor. A court in Alabama cannot obtain legal control of the res, or make any binding disposition of it; for process of attachment, under our statute, cannot change rights of property situated without the state. Hence, if it had been shown that the Louisville & Nashville Railroad Company was doing business in the state of Alabama, by operating a railroad or railroads within its borders, this could not help the plaintiff in this suit."

In Douglass v. Insurance Co., 138 N. Y. 209, 33 N. E. 938, the facts were that the insurance company, a corporation formed under the laws of the state of New York, was indebted to Douglass, a citizen of New York state, the insured, on account of a loss. The insurance company had an agent in Massachusetts, appointed under the laws of that state, upon whom process might be served, and was engaged in carrying on business in that state. Alley and other creditors of Douglass brought suit in Massachusetts jointly against the insurance company and Douglass, and the attachment or trustee process was served on the local agent and was levied on the debt. This was set up as a defense to the suit in New York on the policy by the insured, and the question was whether the Massachusetts court (that suit having been first instituted) had jurisdiction, and it was held that it had not. The court, speaking by Andrews, C. J., said:

"But attachment suits partake of the nature of suits in rem, and are distinctly such when they proceed without jurisdiction having been acquired of the person of the debtor in the attachment. Real and personal property may be subjected to seizure and sale for the payment of debts of the owner, according to the laws of the state or sovereignty where the property is, having regard to the fundamental condition that due process of law shall precede the appropriation."

And further (page 219, 138 N. Y., and page 940, 33 N. E.):

"But, we repeat, no court can acquire jurisdiction in attachment proceedings unless the res is either actually or constructively within the jurisdiction, and we are of the opinion that the attempt to execute an attachment in Massachusetts upon the debts owing to the plaintiff by the insurance company by serving upon the agent of the corporation there, and without having acquired jurisdiction of the plaintiff, must fail, for the reason that the debtor, the insurance company, was in no just or legal sense a resident of Massachusetts, and had no domicile there, and was not the agent of the plaintiff, and that in contemplation of law the company and the debt were at the time of the issuing of the attachment in the state of New York, and not in the state of Massachusetts. This court has had occasion heretofore to consider the effect of the act of a foreign corporation constituting an agent in another state, upon whom proceedings may be served, done in compliance with the laws of such state in pursuance of a condition imposed, and to enable the corporation to do business in such state. It has been held that by such act the corporation does not change its domicile of origin, or its residence."

And the supreme court of Mississippi, on facts similar to those in the Alabama case, reached the same conclusion as the supreme court of that state. There is, as stated, a want of harmony in the decisions of the state courts of last resort. But the supreme court of Mississippi, in the case named, referred to this as follows:

"There is some real conflict, and much confusion, not reaching the proportion of actual conflict, in the decisions on this subject. Much of the confusion and some of the conflict has arisen out of a misapprehension of the real nature of the question. With a clear misapprehension of the character of the controversy, several of the courts of last resort in the United States have misled themselves and misled others inveighing against supposed attempts to give extraterritorial effect to exemption laws. The suggestion that this is the question involved is wide of the mark. It is really this question: Shall the state give its exemption laws interterritorial force in cases like the one at bar? Shall railroad corporations doing business and resident in this state be regarded and treated in this and like cases just as natural persons? The natural person resident in this state is not garnishable in a foreign jurisdiction for a debt due and payable here. This is declared, and advisedly, to be settled law, in Bush v. Nance, 61 Miss. 237. The appellant is a resident of this state, and the fact that it may also be a corporation and resident in other states may not operate to abrogate our exemption laws, founded in beneficent public policy, in so far as railroad corporations may be affected by them. Furthermore, it is demonstrably certain that the situs of the debt sued for in this action is in Mississippi. The creditor and debtor are both resident here. The contract creating the debt was made here. By its terms, payment is to be made here. The garnishee in the foreign attachment proceeding is resident here. Can it be seriously contended that the courts of this state have not exclusive jurisdiction of the debt, and that the courts of other states are without jurisdiction, and that the sum disclosed by the garnishee in a foreign attachment, as due in the state of his residence and the residence of his creditor, is not liable to condemnation in such proceedings? In this case the debt is not within the jurisdiction of the foreign court, but here, at the residence of the creditor, and the place of payment under the control of its creation." Railroad Co. v. Smith (Miss.) 12 South. 461.

The opinion of the court of appeals of Colorado in the case cited is an able and critical discussion of the subject, reviewing the cases. It is there pointed out by Judge Reed that the decision is in accord with those of the highest courts of the states of Massachusetts, Maine, New Hampshire, New York, Connecticut, Nebraska, Kansas, Michigan, Illinois, Alabama, Mississippi. It is to be remembered that this question of jurisdiction, and for that purpose the situs of the res, is vital and fundamental. And, where a strictly jurisdictional fact is wanting, it cannot be supplied by mere assertion or assumption. The fact must legally and rightfully exist. Or, as the court declared in Everett v. Walker (Colo. App.) 36 Pac. 616, in an able discussion of this question:

"It is as impossible by judicial construction as by legislative enactment to declare that property out of the state, having a domicile with the creditor or the debtor, is within the limits of the sovereignty for the purposes of a levy. Upon either consideration the judgment is right. The affidavit did not justify the substituted service, and the writ did not impound the debt which the insurance company owed to Mrs. Walker."

The essential truth of the proposition must be considered. For example, if a debt is property belonging to and with the creditor only, it cannot be made property in the possession of the debtor by misuse of terms, or by declaring it to be so. Assuming that substantial facts and their effect are changed by misuse of terms or by mere declaration, is a not uncommon error in argument, and was

referred to in Brown v. Maryland, 12 Wheat. 444, Chief Justice Marshall saying:

"It is impossible to conceal from ourselves that this is varying the form without varying the substance."

And again, in Pollock v. Trust Co., 157 U. S. 583, 15 Sup. Ct. 673, Chief Justice Fuller observing:

"If, by calling a tax indirect when it is essentially direct, the rule of protection could be frittered away, one of the great landmarks defining the boundary between the nation and the states of which it is composed would have disappeared, and with it one of the bulwarks of private rights and private property."

And in this class of cases there is nothing to justify a strained interpretation to sustain jurisdiction. Garnishment suits, oftener than otherwise, affect wages exempt by the laws of the nonresident's state, and the success of the suit carries privation into the homes of the helpless. These exemption laws are enacted from the highest motives of humanity, and should not be defeated by unwarranted assumption of power. In view of this injustice some courts give full effect to the exemption laws of other states, as was done in Mason v. Beebee, 44 Fed. 556, and Railroad Co. v. Dougan, 142 Ill. 248, 31 N. E. 594; and in a note to Railroad Co. v. Smith (Miss.) 19 L. R. A. 577, 12 South. 461, cases on both sides of this question will be found collected.

Coming back now to the question, it has been seen that in the case under consideration and in the leading cases cited the garnishee and principal debtor were both nonresidents, and the place of employment and payment were in another state. It is stated in some of the cases that by statute as well as by contract the situs of the debt may be separated from the person of the creditor, and fixed at the domicile of the debtor or elsewhere. This is recognized in Douglass v. Insurance Co. in regard to a statute, and in respect to a contract in the case of Railroad Co. v. Maggard, the court saying:

"As between the plaintiff and defendant, the debt beyond question followed the domicile of the plaintiff. That was its situs. But the indebtedness of the garnishee to the defendant did not follow the plaintiff. Its situs was by contract fixed where the services were performed, and the payment to be made; and, if such claim or indebtedness is property, in contemplation of the statute, the situs of such property was in Kansas, and not in Colorado. Care must be taken not to confound the indebtedness due from the defendant to the plaintiff with that due the defendant from the garnishee. They have no relation to each other whatever. Each has its proper situs, regulated by law or contract or both. The courts of the state could not abrogate the contract of the garnishee with the defendant, and compel a different performance."

The plaintiffs refer to the cases of Railroad Co. v. Barnhill, 91 Tenn. 395, 19 S. W. 21, and Holland v. Railroad Co., 16 Lea, 414, as sustaining their contention. Both cases were decided upon substantially the same facts, but the question was discussed at length only in the Barnhill Case. The eminent judge delivering the opinion states the case as follows:

"The facts upon which the defense is made are as follows: That the Mobile & Ohio Railroad Company was chartered originally by the state of Alabama, then by the state of Mississippi, and then by the state of Tennessee; that the indebtedness of the company 'to Joyner is for labor performed wholly within

the state of Mississippi,' and under contract made in that state, and that he is a citizen of that state. Barnhill is a resident of Tennessee; and the garnishment process, which is in due form, was regularly served on the station agent of the railroad company at Ramer, in McNairy county, this state."

These cases are distinguishable from the one under consideration in the fact that the garnishee corporation had also been created a corporation of the state of Tennessee, and was, therefore, as the court thought, a resident and citizen of Tennessee, and not, in the court's view, a nonresident; and it would seem that the decision in both cases was distinctly rested upon this fact. In the case at bar there is no question that the garnishee is a nonresident. To sustain jurisdiction, it would seem the court in the Barnhill Case necessarily held that the situs of the debt was with the garnishee debtor, and not the creditor; and such view has been taken by other courts of high authority, and the decision in the Barnhill Case by a court of deserved distinction furnishes to that line of cases an authority of great weight. It is believed that the decision as to the situs of the debt is against the weight of authority, especially recent and well-considered cases; but it is not necessary to extend the inquiry on that point, for in a conflict of opinion in state courts I would decidedly incline to an agreement with the court of highest authority in the state. It is believed, however, that the opinion in the case is not in harmony with the ruling in the courts of the United States in respect to the point on which the decision was distinctly based, as well as the result. I think the question will possibly admit of further examination. In Railroad Co. v. Barnhill, importance is apparently attached to the fact that the principal debtor might have come to Tennessee and sued the company for his wages in the courts of Tennessee. But the action on any debt is transitory, and suit may be maintained in any jurisdiction where process can be served on the debtor. This is a question quite apart from the situs of the debt, where seizure of property takes the place of regular process as the basis of jurisdiction. In cases like this the question is not where the plaintiff may sue, but where the defendant's property is for the purpose of levy in the absence of personal process served. And again, could the servant have sued the Tennessee corporation? The court in this case, as in Holland v. Railroad Co., refers to decisions of the supreme court of the United States to sustain the position that, while the railroad company was originally created under the laws of Alabama, it had also been created a corporation and citizen of the states of Tennessee and Mississippi; and Memphis & C. R. Co. v. Alabama, 107 U. S. 581, 2 Sup. Ct. 432, is cited as an authority. But does the court give full effect to this and similar decisions? It is to be borne in mind that the corporation in such cases remains a citizen of the state originally creating it, and becomes a new corporation of each state subsequently creating it, and that in each state it is a separate corporation of that state only, and a distinct legal entity and corporation from the corporation of the same or a different name in each other state. Mr. Justice Gray, delivering the opinion of the court in the case just referred to, used this language:

"The defendant, being a corporation of the state of Alabama, has no existence in this state as a legal entity or person, except under and by force of its

incorporation by this state; and, although also incorporated in the state of Tennessee, must, as to all its doings within the state of Alabama, be considered a citizen of Alabama, which cannot sue or be sued by another citizen of Alabama in the courts of the United States. Ohio & Mississippi R. Co. v. Wheeler, 1 Black, 286; Railway Co. v. Whitton, 13 Wall. 270, 283."

And this proposition is clearly brought out and applied in Nashua & L. R. Corp. v. Boston & L. R. Corp., 136 U. S. 356, 10 Sup. Ct. 1004, and by the circuit court of appeals in the recent case of Railroad Co. v. Roberson, 9 C. C. A. 646, 61 Fed. 592. And in the earlier case of Railroad Co. v. Vance, 96 U. S. 450, Mr. Justice Harlan, stating the same proposition, said:

"The Indianapolis & 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."

The Nashville, Chattanooga & St. Louis Railway, a Tennessee corporation, became lessee of the Western & Atlantic Railroad, a line of railway owned by the state of Georgia, and the lessee corporation was by statute of that state made a corporation of Georgia also, under the name of the Western & Atlantic Railroad Company. The supreme court of Georgia held that the corporation in Georgia was a new and distinct corporation, and that for a tort committed in the operation of the railroad that corporation alone was liable, and suit could not be maintained against the Tennessee corporation (Railway Co. v. Edwards, 16 S. E. 347); and this decision was followed in Railroad Co. v. Roberson. The corporation, then, in Mississippi was distinct from that of Tennessee, as much so for jurisdictional purposes as if it never had been created a corporation in Tennessee; and as to all its acts and doings in Mississippi, and as to a transaction with an employé in which service was rendered wholly within that state, and the wages due there, it was a foreign corporation, and is to be so treated; and Joyner had no contract with the Tennessee corporation and no right of action against it. And the distinct and separate character of these corporations in the different states is not lost or changed by the fact that they are under the same management. In Nashua & L. R. Corp. v. Boston & L. R. Corp., the court (page 373) says:

"Identity of name, powers, and purposes does not create an identity of origin or existence, any more than any other statutes, alike in language, passed by different legislative bodies, can properly be said to owe their existence to both. To each statute, and to the corporation created by it, there can be but one legislative paternity."

And (page 375):

"There are many decisions, both of the federal and state courts, which establish the rule that, however closely two corporations of different states may unite their interests, and though even the stockholders of one may become the stockholders of the other, and their business be conducted by the same directors, the separate identity of each as a corporation of the state by which it was created, and as a citizen of the state, is not thereby lost."

The case was, then, for all legal purposes, it would seem, exactly like the one at bar, both garnishee and principal debtor being nonresidents, and there was no property or res within the jurisdiction.

This must be so, or confusion and conflict would ensue; for if, on the facts in the Barnhill Case, the res was within the jurisdiction of the Tennessee court, and subject to seizure, it was equally so in Alabama, and, a fortiori, so in Mississippi. It certainly cannot be maintained that the situs of this debt was at the same time in all of these states, and, as the supreme court of Colorado in the recent case cited stated:

"If such fund could be reached by service of garnishment papers in this state, it must be obvious that the plaintiff could have attached by garnishee proceedings at any station on its line where it had an agent, upon the theory that the claim was ambulatory, and had a situs in the office of each agent, regardless of location."

And so in Alabama. I have not thought it necessary to refer to the contract in the Barnhill Case, as fixing the situs in Mississippi, nor to extend the inquiry at all in that direction.

The case in hand, being instituted in this court, involves the question how far the remedy by attachment is available in the courts of the United States in the exercise of original jurisdiction. It avoids possible confusion to keep in mind the distinction between cases wherein the validity of attachment proceedings in state courts is considered, as in Cooper v. Reynolds and Pennoyer v. Neff, and those in which the question of the extent to which the courts of the United States can entertain jurisdiction of an attachment suit is discussed, as in Toland v. Sprague, 12 Pet. 300, and Ex parte Railroad Co., 103 U. S. 794. No legislation of congress has provided or attempted to provide an attachment remedy in the federal courts like those existing by statute in the states, except to the extent noticed further on. And the provision, "But no person shall be arrested in one district for trial in another in any civil action before a circuit or district court," has been continued without interruption in all the judiciary acts from that of 1789 to the corrected act of 1888. Process served on the defendant within the district, or voluntary appearance, is necessary, and the process of foreign attachment cannot give jurisdiction without such service or appearance. Toland v. Sprague, 12 Pet. 300; Pollard v. Dwight, 4 Cranch, 424; Chaffee v. Hayward, 20 How. 208. The decision in Toland v. Sprague was not questioned as being the settled rule until the act of 1872, re-enacted in the Revised Statutes (section 915), which is as follows:

"Sec. 915. In common-law cases in the circuit and district courts the plaintiff shall be entitled to similar remedies, by attachment or other process, against the property of the defendant, which are now provided by the laws of the state in which such court is held for the courts thereof; and such circuit or district courts may, from time to time, by general rules, adopt such state laws as may be in force in the states where they are held in relation to attachments and other process: provided, that similar preliminary affidavits or proofs, and similar security, as required by such state laws, shall be first furnished by the party seeking such attachment or other remedy."

It has been held, however, that this act does not confer upon United States courts jurisdiction to entertain suits by the process of foreign attachment, and that the statute and any rule adopting the state laws do not give a circuit or district court power thus to

acquire jurisdiction over a person not a resident of the district, nor served with process therein. Ex parte Railroad, 103 U. S. 794; Chittenden v. Darden, Fed. Cas. No. 2,688; Anderson v. Shaffer, 10 Fed. 266; Boston Electric Co. v. Electric Gaslighting Co., 23 Fed. 838; Harland v. United Lines Tel. Co., 40 Fed. 308; Treadwell v. Seymour, 41 Fed. 581. The restriction has been held not to apply to a suit removed into a circuit court of the United States from the state court. Bank v. Pagenstecher, 44 Fed. 706. This limited power of the courts of the United States alone might have been examined, and the case under consideration adjudged, under that aspect of the question. But the facts to be stated justified, it was thought, a somewhat extended examination of the subject, and a review of the leading cases. The United States circuit court for this district is held in the city of Chattanooga, situated near the line of Tennessee and the corner lines of Georgia and Alabama, and questions of the character here involved are presented often. It is well known personally to older members of the bar of this city that prior to 1870, when a citizen of the state of Georgia found the exemption laws of his own state an obstruction to execution against his poor neighbor, he only waited patiently and vigilantly until the neighbor came to this city to market produce or barter transported by wagon, and then appeared promptly on the ground with an attachment issued from the state courts based on nonresidence. Seizure and sacrifice of property, with expense and wrong of the most repugnant form, followed. The general assembly interfered, and the act passed is found in section 4193 of the Code (Mill. & V.) as follows:

"4193. When the debtor and creditor are both nonresidents of this state, and residents of the same state, the creditor shall not have attachment against the property of his debtor unless he swear that the property of the debtor has been fraudulently removed to this state to evade the process of law in the state of their domicile or residence."

This statute to a large extent suppressed the existing abuse. Another similar perversion of legal process still exists in the local justice of the peace courts, in violation of the intent and purpose of the act. Where a citizen of Georgia has a debt against another citizen of the same state in the employment of a corporation operating a railway into this state, and desires to evade the exemption laws and the above statute, the debt is transferred pro forma to a friend or collection agent in this city, and garnishment proceeding in the name of the latter is instituted, with notice to the foreign corporation's local agent. The amount is small, and the expense of coming to this state to defend is considerable, and out of all proportion to the debt involved. The laborer is practically powerless. There is here an entire want of everything real and substantial to support jurisdiction. The case goes practically without defense, and sheer confiscation and petty oppression result.

In the Nebraska case, referring to the fact that an unwarranted exercise of jurisdiction in these cases may result in compelling the garnishee to pay the debt twice, Judge Maxwell characterized the result as "abhorrent to our sense of justice," and these terms fitly de-

scribe the abuse just mentioned. And on the facts of the Barnhill Case, while the supreme court of Alabama, following its own decisions, would have denied jurisdiction, the supreme court of Mississippi, consistently with its own rulings, would have sustained its own jurisdiction, and the proceedings in Tennessee, being, in that court's opinion, without jurisdiction, would have been no bar to a recovery by Joyner, and the garnishee could be thus compelled to pay a second time; and in an affair of magnitude this is probably what would happen. In Joyner's case it is not difficult to suppose that he would practically be put to an election between his rights and his position, and in such alternative, the amount being small, would give up the former. The courts holding the better opinion on the question, in dealing with these cases, recognize and give effect to the proposition that the principal parties to the litigation are the plaintiff on one side and the principal debtor on the other, and that the position of the garnishee is practically that of a mere trustee. In some of the cases sustaining jurisdiction, the discussion treats the garnishee as if sued in respect of a liability of the garnishee's own, while the real defendant to be seriously affected by the result is given a secondary position. In such cases process statutes are cited which affect the mode of acquiring jurisdiction of the foreign corporation in respect to a right asserted against it alone, and thus quite a strong case is made against the garnishee. As the case turns on the question of jurisdiction, I do not find it necessary to consider the point of giving effect in the Tennessee forum to the exemption laws of the state of Georgia, and the question is apparently settled in this state. Carson v. Railroad Co., 88 Tenn. 646, 13 S. W. 588.

The conclusions reached are:

1. That a suit by attachment in the ordinary or garnishment form cannot be maintained in the courts of the United States without personal service on the principal defendant or his voluntary appearance.

2. That, where both garnishee and the principal debtor are nonresidents of this state, and the debt, such as wages due, is payable in the state of their residence, there is no property within the state, and the courts of the state and the courts of the United States for such state are without jurisdiction to proceed by attachment, and a judgment based on such attachment is an absolute nullity. And this rule applies fully to the case of wages due by a corporation of another state to its employé, a resident of such other state, under contract of employment there made, and is not affected by the fact that a foreign railway corporation, without being incorporated in this state, extends its railroad into this state, and is subject to suit by process on its local agents.

3. That a debt in ordinary form, or in the form of wages due from one nonresident of the state to another nonresident of the same state, is payable as matter of law or by legal implication in such other state in the absence of a place fixed by the contract, and in such case there is no property in the state subject to levy or seizure.

The petition is, for want of jurisdiction upon both grounds, dismissed, with costs.

IMPERIAL FIRE INS. CO. OF LONDON v. HOME INS. CO. OF NEW ORLEANS.

ROYAL INS. CO. OF LIVERPOOL v. SAME.

(Circuit Court of Appeals, Fifth Circuit. June 17, 1895.)

Nos. 370 and 371.

1. REINSURANCE—DESCRIPTION OF RISK.

The H. Ins. Co. applied to the I. Ins. Co. and the R. Ins. Co. for reinsurance of a part of its risk upon cotton. Thereupon policies were issued to it by the I. and R. companies reinsuring part of its risk on the property, described by a slip, pasted on the policies, as "cotton in bales their own or held by them in trust or on commission"; such slip also containing an agreement that the company should be liable only for such proportion of the loss as the sum insured bears to the cash value of the whole property insured. Another slip was also attached to the policies, providing that they should be subject to the same risks, conditions, valuations, indorsements, assignments, and mode of settlement as were or should be assumed or adopted by the H. Ins. Co., and the loss, if any, should be payable pro rata at the same time and in the same manner as by that company. The policies of reinsurance ran for a year, and many of the policies issued by the H. Co. were issued subsequent to the reinsurance, as was contemplated at the time. Part of such policies contained the coinsurance clause, and part did not. *Held*, that the limitation contained in the first-mentioned slip had no application to reinsurance; that, by the provision in the second slip that the policies of reinsurance should be subject to the same risks, etc., as were assumed by the H. Co., the reinsuring companies agreed to be bound by any contract it might make, and that such reinsuring companies were responsible for the loss suffered by the H. Co. on its policies without the coinsurance clause, as well as those containing it. Per McCormick, Circuit Judge, and Bruce, District Judge.

2. SAME.

Held, that the words "subject to coinsurance clause," in the applications of the H. Co., were a material part of the description of the risk upon which reinsurance was sought, and that the reinsuring companies were not liable for the loss sustained by the H. Co. on policies not containing that clause. Per Pardee, Circuit Judge, dissenting.

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

These were actions by the Home Insurance Company of New Orleans against the Imperial Fire Insurance Company of London and the Royal Insurance Company of Liverpool upon policies of reinsurance. Judgment was rendered for the plaintiff in the circuit court. Defendants appeal. Affirmed.

E. H. Farrar, B. F. Jonas, E. B. Kruttschnitt, Hewes T. Gurley, W. A. Blount, A. C. Blount, Jr., and D. B. H. Chaffe, for appellants.

R. H. Browne, B. F. Choate, and Thomas J. Semmes, for appellee.

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

McCORMICK, Circuit Judge. These cases will be considered together in this opinion. The appellants, the Royal Insurance Company of Liverpool and the Imperial Fire Insurance Company of London, will be referred to, respectively, as the Royal and the Imperial, and the Home Insurance Company of New Orleans, the appellee in each case, will be referred to as the appellee.

In November and December, 1891, the appellee applied to the appellants for reinsurance, and duly received the respective policies which are the subjects of this litigation. The applications to the Royal were made on printed forms, with certain blanks filled in writing. The application to the Imperial does not appear to have been in writing, but was substantially to the same effect as those made to the Royal, the features of which material to note here were and are that the applicant warranted to retain $25,000, and described the property applicant had insured as "cotton subject to coinsurance clause." The Royal has now abandoned any contention on the retention clause. The Imperial still insists on its construction of that clause, but the proof abundantly supports the action of the circuit court on the issues made on the warranty by the Home to retain $25,000 or more on the risk. During the life of these policies of coinsurance, a large amount of the cotton was destroyed by fire. At the time of the fire, the appellee had written and in force, on the cotton subject to the fire, policies with the coinsurance clause to the amount of $97,700, and policies without the coinsurance clause to the amount of $25,000. The loss on the cotton covered by the first-named class of these policies was $38,707.58, and the loss on the other exceeded the amount of the policies. There is substantially no issue as to what were the actual facts as to the contracts and the loss; and there can be no dispute that, if the contention of the appellee as to the construction of the contract of coinsurance is correct, the decree of the circuit court should be affirmed. Having found that its construction of the retention clause is correct, it only remains to consider the other clauses of the policies on which issue is joined. The judgment and decree of the circuit court construe these clauses in favor of the appellee, and a majority of the judges of this court concur in that conclusion. The questions here involved are so well stated, and the authorities, so far as any authority exists bearing on the question, are so soundly applied, and the argument so full, fair, and well expressed in the brief of counsel for the appellee, that, in justice to ourselves and to him, we must adopt and use his reasoning almost literally, and to substantially the full extent that he has advanced it, there being left little or nothing to add to or qualify what he has said:

It is urged that the defendants are not liable for the losses paid by the plaintiff to Frankenbush and Borland, because the policies issued to them did not contain the coinsurance clause. It is urged that the two slips pasted on the policies of reinsurance are descriptive of the risk assumed by the reinsurer. The defendants are driven to take this ground because the reinsurer has insured the liability of the original insurer, whatever that be, unless in the contract of reinsurance there can be found some clause whereby the reinsurer stipulated that it assumed no risk, unless the original insurance contract contained the co-insurance clause. It is observed that the policies of reinsurance bear the following dates: That of the Imperial is dated November 23, 1891, and those of the Royal dated November 12, 1891, and December 26, 1891. The Frankenbush and Borland policies are dated: October 12, 1891; November 19, 1891; February 9, 1892; February 11, 1892; February 26, 1892. Only one of the policies is dated before those of the Royal, and only two are dated before that of the Imperial. Three of them are dated after all of the policies of reinsurance were issued. The description of the risk in the reinsurance policies is that the Home Insurance Company are insured on $10,000 of their liability as insurers under their various policies, issued to various parties, for various

amounts, and covering as follows: Ten thousand dollars on cotton in bales their own or held by them in trust or on commission while contained in the yard No. 1, Shippers' Press, New Orleans, La. A part of this description is clearly inapplicable to the reinsurance, for the words "their own or held in trust or on commission" have no meaning as between the insurer and the reinsurer. The cotton itself was not the subject of insurance as between the insurer and reinsurer, but as between them the subject of insurance was the liability of the insurer, as an insurer, on cotton in yard No. 1, Shippers' Press, owned or held in trust by the original insured. Now, this policy was issued to last for a year, and was intended to cover any liability that the insurer during the year might assume as insurer of cotton in the designated press. It was not restricted to liability then existing, but extended to future liability which might be incurred by the Home Insurance Company on cotton in the Shippers' Press, yard 1. What was the stipulation as to the risk assumed by the reinsurer? He agreed to cover any risk which the insurer might be willing to take, for that is the meaning of the words, "This policy to be subject to the same risks, conditions, valuations, indorsements, and modes of settlement as are or may be assumed and adopted by the reinsured, and the loss, if any, payable pro rata at the same time and in the same manner as by said company," etc. Any printed stipulation having reference to the property itself, or the cash value thereof, cannot be applied to the contract of reinsurance between the reinsurer and the reinsured, because the property is not the subject-matter of their contract.

It is true that the contract of reinsurance must apply to the subject-matter of insurance specified in the original policy; that is to say, to cotton in Shippers' Press, yard 1, and to risks of the same kind as those specified in the original policy. In other words, if the original policy is a contract of insurance against loss by fire, the reinsurance must be against loss by fire, and not against loss by tempests or storms on land or at sea. But the specific risk in the policy of reinsurance need not be identical with that in the original policy; that is to say, an original insurance may be effected on a vessel for six months, with use of all of the ports of the world except those of Texas. The reinsurance may be for a single voyage within the bounds not prohibited, and for a less amount. This was decided in the case of Philadelphia Ins. Co. v. Washington Ins. Co., 23 Pa. St. 250. Such is the law in the absence of stipulations contained in the lower printed slip annexed to the policies sued on. That slip provides that this policy is to be subject to the same risks, conditions, and valuations, indorsements, etc., that are or may be assumed or accepted by the original insurer. Hence reinsurance under these policies is reinsurance against any of the fire risks assumed by the original insurer, in any of its policies on cotton in Shipper's Press, yard 1, and on the same conditions as those contained in any of the original policies issued by the original insurer, to the original assured, on cotton thus located. This clause gives to the original insurer the privilege of taking such risks on cotton in the designated place as it may choose. The reinsurer says: "I will reinsure whatever contract you make, and, to protect me from any imprudence on your part, you must retain at least $25,000 on the same risk." This is the view taken of this clause by the supreme court of Massachusetts in Manufacturers' Fire & Marine Ins. Co. v. Western Assur. Co., 145 Mass. 424, 14 N. E. 632. The court said: "It is often doubtful how far provisions which relate to the conduct of an assured person as general owner of that which is the subject of the contract shall be given effect in a policy to indemnify against a risk which the assured has taken upon the property of another. * * * The nature of the risk against which it insured, if there was no special stipulation pertaining to it, would suggest troublesome questions with reference to the applicability of these provisions of this peculiar kind of insurance, some of which it might be necessary to decide." But, in connection with the statement of the risk, the following sentence was inserted, which relieves the court of this difficulty: "This policy to be subject to the same risks, conditions, valuations," etc., "as are or may be assumed or accepted by the insured company," etc. The language of the clause is almost identical with the language used in the lower slip or rider attached to the policies sued on in these cases. The court said: "By this language the defendant bound itself by what had been done, and by what might be assumed and adopted by the plaintiff, properly pertaining to the risk which

it was reinsuring. This agreement rendered nugatory many printed portions of the policy in which it was inserted. This was special and peculiar, pertaining directly to the subject-matter of the contract, and it controlled those parts of the policy which were inconsistent with it. It assumed knowledge on the part of the defendant of all the terms and conditions of the plaintiff's policy, and it implied that the plaintiff, as original insurer, might properly assume or adopt risks, conditions, etc., without materially changing the nature of the liability created by the original policy." This was a case of reinsurance of a fire risk on a particular factory, which had been assumed by the reinsured company, and the number of the policy designating the risk was inserted in the contract of reinsurance. The court of appeals of New York, in the case of Jackson v. Insurance Co., 99 N. Y. 129, 1 N. E. 539, confirms the doctrine of the Massachusetts court. Justice Danforth says: "The reinsurer had no property right in the subject insured by them, but, by underwriting the policy, rendered themselves liable to loss from fire, and they thereby acquired an insurable interest to the extent of that liability. But it was in relation to the peril only against which they had insured. It is that to which their request for reinsurance applied. By it they in effect say, as insurers: 'We have undertaken to carry a risk which as taken by us is as follows: It amounts to $4,500, and we ask indemnity against a portion of it.' It is not pretended that they did not state the risk literally as they had taken it, and it was in fact described in their policy in terms similar to those used in the policy of reinsurance. The case may, indeed, be taken in like manner as if they had exhibited to the defendants the original policy, and the defendants had indorsed upon it an assumption of the risk of $1,500." In both of these cases the reinsurance applied to a specific original policy of insurance, designated by number in the contract of reinsurance. In those cases the original contract of insurance had been made before the reinsurance contract. In this case most of the original insurance was subsequent to the contract of reinsurance, and none of the policies of insurance originally issued, prior to the contract of reinsurance, are designated by numbers or otherwise. The original policies of insurance are not only not described in the contract of reinsurance, but the contract covers a period of one year, and it contemplated subsequent insurance. It also contemplated that existing policies might expire, and new policies be made. Other insurance was permitted by the reinsurer.

How was it possible to describe these future contracts of insurance, intended to be covered by the reinsurance? They could not be described except as to the species of property, and the locality thereof, and therefore the reinsurer said to the reinsured: "We will protect you against any loss on cotton in Shipper's Press, yard 1, which you may assume as insurer; and we agree to accept the terms and conditions you may make with your customers, but you must not throw the entire risk on us. Although we permit you to make other reinsurance, yet you must retain, as insurer, a liability of at least $25,000 on the risk which we take; and, in case of loss, we fix the proportions in which we are to make payment. For that purpose, we put in the following stipulation: 'This policy to be subject to the same risks,' etc., 'as are or may be assumed by the reinsured company, and the loss, if any, payable pro rata at the same time and in the same manner as by said company,'" etc. The court of appeals of New York, in Blackstone v. Insurance Co., 56 N. Y. 107, say that, "by virtue of this clause, the defendant is not bound to pay the full amount reinsured by its policy, but only such proportion of the amount of the loss as is in the ratio of the amount of reinsurance to the amount originally insured. Thus, the defendant's reinsurance being for half of the amount of the original insurance, the defendant is to pay half of the loss." The agreement to pay pro rata with the original insurer whatever liability may be assumed is entirely inconsistent with the clause providing for a different basis of liability, and it has no application to reinsurance, which does not cover property, but covers only the insurable interest of the reinsured, growing out of his liability as insurer. In the Massachusetts case (145 Mass. 424, 14 N. E. 632) it was held that the clause requiring the written consent of the company to a change in the title or possession of the property insured had no application to a reinsurer, and no notice of such change need be given to him. It sufficed if such change was assented to by the original insurer. In Uzielli v. Insurance Co., 15 Q. B. Div. 13, it was held that the reinsurer was not en-

titled to notice of abandonment, though the primitive insured may have abandoned to his insurer. The court quote Phillips on Insurance and Hastie v. De Peyster, 3 Caines, 196. In that case Chief Justice Kent says: "The reinsurer has no connection or concern with the first insurance, and is at all times bound to indemnify his own assured when the other can show that he has been damnified in consequence of the first insurance." Mr. Justice Livingston says there was no privity at all between the primitive assured and the reinsurer. In the Uzielli Case, just referred to, it was held that the suing and laboring clause in an original insurance policy and in the policy of reinsurance has no application to reinsurers. That clause provides that, in case of loss or misfortune, it shall be lawful for the assured, his agents, factors, etc., to sue, labor, and travel in and about the safeguard, defense, and recovery of the goods, etc., and the ship, without prejudice to this insurance, to the charges whereof the insurers agree to contribute. In that case the reinsurance was for £1,000, but the loss, as between the insurer and the assured, was 112 per cent., because the loss was 88 per cent., and the expenses incurred, when added to the loss, made the original insurer responsible for 112 per cent., that is to say, 88 per cent. of the sum underwritten, plus the expenses. The court said: "The plaintiffs seek to recover 88 per cent., which the French company have paid for a total loss, and they seek to recover more under the suing and laboring clause in the policy. Now, in the policy sued on, the ship, as between the plaintiffs and the defendants, is insured at £1,000. The policy itself is declared to be a reinsurance, and also it contains the suing and laboring clause. If it were not for the clause whereby the defendants were rendered subject to the same terms, clauses, and conditions as were contained in the original policy, and were to pay as might be paid thereon, the plaintiffs, in my opinion, would be entitled to recover only 88 per cent., etc. * * * The plaintiffs rely, however, upon the special clause, whereby the defendants have undertaken to pay as the French company shall have paid; and under this clause they are entitled to recover any sum not exceeding £1,000." The special clause referred to is, in the main, similar to that contained in the lower slip of the policies sued on. The defendants in this English case were reinsurers of the French company, which itself was a reinsurer of English underwriters. In this case it will be observed that, though the suing and laboring clause was a part of the policy of reinsurance, the court held it had no application to the reinsurers. Why? For no other reason than that the reinsurer does not insure the owner of the ship, but the insurable interest of the insurer. Hence that interest is the loss that the insurer might suffer under the policy issued by him, and the master of the rolls said the suing and laboring in that case for the safeguard of the ship was not by the assured under the policy of reinsurance, but by the assured under the original policy, for the ship was not insured under the reinsurance policy. So totally distinct is the original insurance from the reinsurance that the premium of reinsurance may be less or greater than that of the original insurance, as well as the extent of the risk.

The most instructive case on the subject is the most recent,—Faneuil Hall Ins. Co. v. Liverpool & L. & G. Ins. Co., 153 Mass. 70, 26 N. E. 244. The reinsurance policy in that case contained a clause similar to that in the lower slip attached to the policies sued on, to wit: "This policy is subject to the same risks, conditions, mode of settlement, and, in case of loss, payable at the same time and in the same manner, as the policies reinsured." The court said that many of the provisions in the printed blank would be inapplicable, and quotes one provision at the very commencement of the blank, viz.: "This company shall not be liable beyond the actual value of the insured property at the time any loss or damage happens." This, said the court, does not measure the defendant's liability under the contract of indemnity. Under that, it may be liable, not only for the amount of the original loss, but for the costs and expenses incurred by the German-American Company, in defending itself against Chauncy's suit. Again, in speaking of the provision quoted above, the court says: "We think this provision means, not that the various terms in the reinsured policy as to the risk, conditions, mode of settlement, and time and manner of payment in case of loss are incorporated with and form part of the contract for indemnity,—so that, for instance, claims by the plaintiff upon the defendant shall be settled by arbitration, or the plaintiff shall submit its books to the inspection of the defendant, or shall bring suit within one year,—but

that the reinsured or original policies furnish in these and other particulars the basis upon which the contract of indemnity stands, and that in all dealings with the original insured the provisions of the policy issued to him are to be observed." The object of the coinsurance clause is to make the owner of the property carry a part of the risk, unless he insures to the full value of his property. The purpose is to compel the owner of property to take out policies to the full value of his property, and pay premiums on such full value; whereas the retention clause in policies of reinsurance is intended to discourage and prevent full reinsurance, and is, in fact, a coinsurance clause as between the reassured and his reinsurer; for the retention clause is a contract between the insurer and his reinsurer that the original insurer will not effect reinsurance to the extent of his entire liability, but will carry himself a part of that liability, and the part to be carried was fixed in this case at not less than $25,000. Hence the retention clause—the coinsurance clause as between the reassured and the reinsurer—is intended to accomplish an object totally different from the object intended to be secured by the coinsurance clause in the primitive policy issued to the assured.

It is therefore plain that the clause in the upper slip or rider attached to the policies of reinsurance has no application whatever to reinsurance. That clause provides "that this company shall be liable for only such proportion of the whole loss as the sum hereby insured bears to the cash value of the property hereby insured." No property whatever is insured by the reinsurer. His policy applies to a liability of the original insurer, arising out of his insurance of the property, and this liability is the incorporeal subject-matter of the reinsurance contract, and is collateral to the property. If the above-quoted clause were applicable to reinsurance, the liability of the Imperial Company on its policy for $10,000 would be only $833.33, or one-twelfth thereof, inasmuch as the amount insured ($10,000) is one-twelfth of $120,000, which sum, for the purpose of illustration, is assumed to be the total value of the cotton insured. This result is almost absurd in the face of an agreement contained in the policy of reinsurance that "this company will be liable in case of reinsurance for the loss sustained only in the proportion which the sum reinsured shall bear to the whole sum covered by the reinsured company." Besides, there is an express pro rata clause in the lower slip attached to the policy which provides for pro rata payments to be made by the reinsurer, at the same time and in the same manner as by the Home Company. It is apparent that, in case of reinsurance, the value of the property is abandoned as a test of proportionate liability, and in place thereof is substituted the proportion which exists between the amount of insurance carried by the reinsurer and the total amount of insurance carried by the primitive insurer. This is necessarily the case, as the property is not insured by the reinsurer; the liability of the primitive insurer, in respect of the property, being the subject-matter of the reinsurance contract. The coinsurance clause cannot be said to be descriptive of the risk as between the reassured and the reinsurer, because the risk which the reinsurer takes is the risk described in the original policy, whatever that may be, unless some clause can be found in the reinsurance contract which expressly varies that description. We find no clause in the reinsurance policies which varies or modifies the risk as assumed by the original insurer. The complaint is not that any clause in the reinsurance policy has been violated by the Home Company, but that the Home Company did not insert the coinsurance clause in its contract with the primitive assured.

This reduces the case to one of misrepresentation or concealment. No averment in the answers is made on which such a defense can be based. Indeed, such a defense is inconsistent with the answers, which assert that the coinsurance clause is contained in the policies sued on, and treat as such that part of the policy which declares that the insurer shall be liable for only such proportion of the whole loss as the sum insured bears to the cash value of the whole property at the time of the fire. The answers insist that all the terms of the contract between the parties are to be found in the policies of reinsurance. We need not, therefore, go beyond these policies to determine the rights of the parties, and hence no case of concealment or misrepresentation is presented by the pleadings.

The defendants claim that the clause just quoted is the coinsurance clause, and that their liability is for only "such proportion of the whole loss as the

sum insured bears to the cash value of the whole property insured." It appears to us that this clause has no application to reinsurance, and is inconsistent with the pro rata clause, which provides that the reinsurance is subject to the risk specified in the original policy, and that the reinsurer is to pay the loss pro rata with the reinsured.

It is urged that one of the applications for reinsurance expressly asks for reinsurance subject to coinsurance, and appellants insist that this is not only a material but the most material of the descriptions of the risk, "because, at the time when the contracts of reinsurance in this cause were entered into, the market rate charged in the city of New Orleans upon policies on cotton, and containing the coinsurance clause, was one per cent., whilst policies not containing such a clause upon the same product commanded a premium of one and one-half per cent. In other words, it cost fifty per cent. more to obtain insurance without the coinsurance clause than with it." Let us see. Frankenbush and Borland had, to use round numbers, $60,000 worth of cotton. They lost, still using round numbers, $30,000 worth of their cotton. On this they had $25,000 of insurance without the coinsurance clause, for which they paid 1½ per cent. premium, amounting to $375, and got $25,000 on their policies. Now, with that amount of property and that amount of loss, how much coinsurance must they have had to get $25,000 indemnity? The indemnity received was five-sixths of the loss. To have received a like amount under coinsurance policies, they must have had policies written nominally for five-sixths of the value of the property insured; that is to say, to the amount of $50,000, which at 1 per cent. on the amount nominally written would have cost them $500 instead of $375. This is basing our calculation on the facts of this case. The proof shows that Mr. Borland is a director in the Home Company. It also shows that he would not accept coinsurance policies on his cotton at risk. It shows that another firm of cotton factors, who took more insurance in the Home on cotton than all other persons combined, would not take coinsurance policies. It is not contended or suggested that they are not as binding according to their terms as other policies, or that they present any difficulty in the matter of adjustment. We incline to think that those who preferred policies without the coinsurance clause were justified in resting their choice on the knowledge they had that such insurance was the cheapest. Therefore, in addition to the reasoning of Mr. Semmes, which we have above adopted, we suggest that, considered as a representation, the materiality of the words "subject to coinsurance" is not made to appear by the proposition we have quoted from the brief of appellants' counsel, which is the proof text of their discourse. It seems to be clear that the purpose of the coinsurance clause is to stimulate full insurance. This being the chief object, insurance companies can hardly claim that it operates to lessen the moral hazard. It manifestly cannot affect the physical hazard. The fact that some of the appellee's policies did not have the coinsurance clause cannot therefore be relied on as a concealment, though "all the authorities, concerning matters of insurance, concur in the position that, if the concealment is material, it will avoid the policy, notwithstanding the assured did not in-

tend to commit any fraud. The suppressio veri may happen by mistake, and be entirely without fraudulent intention; still the underwriter is deceived, and the policy is thus void, for the very plain reason that the risk run is really different from the risk understood and intended to be run at the time of the agreement. A concealment which is only the effect of accident, inadvertence, or mistake, is equally fatal to the contract as if it were designed. The principle is that if the party proposing insurance conceals anything which may influence the rate of premium which the underwriter may require, although he does not know that it would have that effect, such concealment entirely vitiates the policy. By a material fact is meant one which, if communicated to the underwriter, would induce him either to decline the insurance altogether, or not to accept it unless at a high premium." Ang. Ins. § 175. Within the meaning of the authorities, it was not material, even if it can have relation to the contracts of reinsurance herein involved.

The decree of the circuit court in each case is affirmed.

PARDEE, Circuit Judge (dissenting). In a reinsurance policy the description of the risk reinsured is just as material as is the description of the property insured in an ordinary policy. False representations affecting the risk reinsured have the same effect as false representations affecting the property insured. There were two several applications made by the Home Insurance Company to the Royal Insurance Company upon which the policies in this suit were issued. The first, in November, 1891, was for reinsurance, wherein the exact risk insured by the Home and desired to be reinsured was precisely set forth, as follows:

"4,524,712.

"On $10,000 of their liability as Insurers under their Policy No. —— VARIOUS —— Issued to —— VARIOUS PARTIES —— For $—— VARIOUS —— for a term of 1 YR. from NOV. 12/95. Rate 1%, and covering as follows:

"$10,000 on cotton in bales, their own or held by them in trust or on commission, while contained in the Yd. 1, Shippers' Press.

"And it is agreed and understood to be a condition of this insurance that this policy shall not apply to or cover any cotton which may at the time of loss be covered in whole or part by a marine policy; and it is further agreed to be a condition of this policy that only actual payment, by check or otherwise, for cotton purchased, shall constitute delivery of cotton from the seller to the buyer; and it is further agreed that tickets, checks, or receipts delivered to bearer shall not be considered as evidence of ownership; *and it is further agreed that this company shall be liable for only such proportion of the whole loss as the sum hereby insured bears to the cash value of the whole property hereby insured at the time of fire.*

"Other insurance permitted without notice, until required.

"Attached to and made a part of policy No. —— of Home Insurance Company of New Orleans.

"_____

"This policy to be subject to the same risks, conditions, valuations, indorsements, assignments, and mode of settlement as are or may be assumed or adopted by the HOME INSURANCE CO., and the loss, if any, payable pro rata, at the same time and in the same manner as by said company.

"REINSURED CO. RETAINS $25,000. H."

The other, in December, 1891, was on a different form, and called for reinsurance on various policies issued and to be issued by the Home "on cotton yard 1, Shippers' Press, subject to coinsurance clause"; the provision as to coinsurance being written in by hand.

It is conceded that these applications thus made by the Home to the Royal for reinsurance asked for reinsurance only upon risks of the Home under policies which contained the coinsurance clause. The two policies issued by the Royal on the above applications describe the risks reinsured exactly, word for word, as the risk desired to be reinsured was described by the Home in the November application. Therefore, that the policies issued by the Royal described no other risks for reinsurance than those insured by the Home in policies issued upon the specific property named, and containing the coinsurance clause, seems to be a proposition too plain for argument.

The undisputed evidence in the case is to the effect that the difference in the premium between reinsurance on policies containing the coinsurance clause and reinsurance on policies not containing the coinsurance clause was one-half of 1 per cent. To illustrate: The application in the present instance by the Home was for insurance on policies containing the coinsurance clause, and, on acceptance, the premium was 1 per cent. If the application had been made for reinsurance upon policies upon the same property, but not containing the coinsurance clause, and that had been accepted, the premium would have been 1½ per cent. It is not disputed that the coinsurance clause affects the liability of the Royal about 100 per cent.; that is to say, the amount for which the Royal is liable, if the liability is not restricted to risks of the Home containing the coinsurance clause, is about twice as much as it would be if the liability should be restricted to risks of the Home containing the coinsurance clause. As I understand the opinion of the majority, they do not deny that the applications were for policies containing the coinsurance clause, or that the policies of the Royal in describing the risks reinsured describe only risks of the Home under policies containing the coinsurance clause; but, by reasoning which seems to me to be unsound, they reach the conclusion that the limitation of the risk is not material in this case. If representations affecting the amount of the premium and a stipulation restricting the liability of the reinsurer are not material in a reinsurance policy, the text-books on insurance ought to be rewritten, for now they are liable to confuse the bar and mislead some judges. It is true that the evidence shows that some insurance companies will not reinsure risks not subject to the coinsurance clause, and that some cotton men will not take insurance which contains such clause. The majority apparently deduce from this that a stipulation restricting reinsurance to risks subject to the coinsurance clause is immaterial. I do not think that the insurers and the insured would both make so much opposition on an immaterial matter.

The very ingenious brief of the learned counsel for the appellee, which seems to have compelled the judgment of the majority, and which is adopted as their opinion, has been carefully considered, but

I fail to find therein either argument or authority sufficient to overthrow the plain propositions of fact which ought to control the decision of this case. It is true, that, by reason of the blanks used, there are in the policies sued on many provisions not applicable to reinsurance; but is that any reason for rejecting those provisions which not only do apply, but which the parties were insistent in having inserted? The cases cited in the brief relate only to questions not disputed, and tend rather to cloud than enlighten the really disputed question. The fact is there are no adjudged cases which throw any light whatever upon the disputed questions in this case, and it is probably because no insurance company ever before disputed the materiality of the coinsurance clause as affecting the liability of a reinsurer who had stipulated therefor. The brief of counsel adopted by the majority further tends to confuse because it does not discriminate between the stipulation which was intended to regulate and control the adjustment between the Royal and the Home in case of loss and the stipulation describing the contract of the Home which was to be reinsured, and which pertained directly to the risk, treating the latter as immaterial in so far as they assume that there is a conflict.

It appears to be seriously contended by the learned counsel that "the Royal agreed to cover any risk that the Home might be willing to take," and they say that that is the meaning of the clause: "This policy to be subject to the same risks, conditions, valuations, indorsements, and mode of settlement as are or may be assumed or adopted by the Home Insurance Company, and the loss, if any, payable pro rata, at the same time and in the same manner as by said company." And this contention is only limited by allowing that the contract of the Royal must be applied to cotton in Shippers' Press, yard 1, and to losses by fire. The court has reformed the Royal's policy so as to excuse the Home from retaining any risk on cotton in Shippers' Press, yard 1, provided it holds risks on other property in the immediate neighborhood; and the court further holds that the coinsurance clause and differences in rates of premium were immaterial. Why not follow the argument of Messrs. Semmes and Browne to its logical conclusion, and hold broadly, as declared by them, that "the Royal agreed to cover any risk the Home might be willing to take"? Why should not the court say the contract of the Royal is reinsurance, and "it is agreed to cover any risks which the insurer might be willing to take," and "any printed stipulation having reference to the property itself, or the cash value thereof, cannot be applied to the contract between the reinsurer and reinsured, because the property is not subject-matter of their contract"? And, further, that whether the cotton insured by the Home was in one press or another really made no difference to the Royal, for the subject-matter of the reinsurance was risk, and not property, and wherever the latter was located was immaterial, because the Royal would have issued its policy of reinsurance just the same? If the opinion of the court is sound, but one good reason suggests itself for confining the liability of the Royal to cotton in Shippers' Press, yard 1, and that is that the

exigencies of the Home's case do not require that the liability should be extended to cotton elsewhere.

The result reached by the circuit court, and affirmed here, permits the Home Insurance Company to recover from the Royal Insurance Company reinsurance for which the Home Insurance Company never asked, for which it never paid, and upon risks never insured by the Royal Insurance Company, and which the Home agreed that the Royal should not insure.

The case of the Imperial Insurance Company against the Home Insurance Company presents the same questions, and should be ruled the same way.

For these reasons, I dissent from the opinion of the court in both cases.

WESTERN ASSUR. CO. v. REDDING.

(Circuit Court of Appeals, Fifth Circuit. June 20, 1895.)

No. 372.

1. FIRE INSURANCE—PROMISSORY WARRANTY.

Plaintiff, the keeper of a country store, held a policy of insurance on his stock of goods, issued by the defendant company, which contained a clause providing that it was one of the conditions of the policy that plaintiff should keep a set of books showing a complete record of his business, purchases, and sales, take an itemized inventory at least once a year, keep such books and inventory in a fireproof safe, and produce the same in case of loss, and that failure to comply with such conditions should avoid the policy. Plaintiff's store and stock were destroyed by fire, and, in an action subsequently brought against the insurance company, it appeared that he kept a set of books in a primitive and unskillful manner, which books were all in the safe, and were produced, except a cash-sales book, covering 21 days before the fire, which had been inadvertently left out of the safe and burned; that such books showed plaintiff's purchases and credit sales, and some of his cash sales, as well as the result of an inventory taken a short time before the fire. *Held*, that the promissory warranty contained in the "safe clause" aforesaid was a condition subsequent, only, and that the facts shown were sufficient to justify a finding of compliance therewith. Per McCormick, Circuit Judge, and Bruce, District Judge.

2. SAME.

Held, that a literal rulfillment of the promissory warranty contained in such clause was requisite, and it was error to instruct the jury that a substantial compliance was all that was necessary. Per Pardee, Circuit Judge, dissenting.

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

This was an action by Joseph H. Redding against the Western Assurance Company on a policy of insurance. Judgment was rendered for the plaintiff in the circuit court. Defendant brings error. Affirmed.

W. A. Blount, for plaintiff in error.

J. M. Stripling, for defendant in error.

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

McCORMICK, Circuit Judge. Joseph H. Redding, the defendant in error, "kept store" in a country station town in Florida. He commenced the business January 2, 1893. He testifies that he took an inventory of his stock in February, 1893, but that inventory was destroyed when the store was burned. On the 10th day of February, 1893, he insured with the plaintiff in error, the Western Assurance Company, organized under the laws of Toronto, Canada, his stock of goods and other property, taking $1,000 on the stock of goods. On the morning of the 1st of October, 1893, a fire occurred, which consumed his store and the stock of goods insured. His policy contained the clause which is known as the "iron-safe clause," and is in these words:

"It is a part of the conditions of this policy that the insured shall keep a set of books showing a complete record of business transacted, including all purchases and sales, both for cash and credit, and take an itemized inventory of stock on hand at least once every year; and it is further agreed that insured will keep such books and inventory securely locked in a fireproof safe at night, and at all times when the store mentioned in this policy is not actually open for business, or in some secure place, not exposed to fire which would destroy the house where said business is carried on. It is further agreed that, in event of loss, insured will produce said books and inventory. Failure to comply with these conditions shall render this policy null and void, and no suit or action at law shall be maintained thereunder for any loss."

Payment of the loss was refused and recovery resisted on the ground that the insured had not kept the set of books contemplated by that clause, and that one of the books he claims to have kept was left out of the safe, and was consumed by the fire. On the trial the insured and one other witness, H. T. Shackleford, gave testimony tending to prove: That the storehouse and stock of goods described in the policies were burned at 2 or 3 o'clock in the morning of October 1, 1893,—not during business hours, and when the store was closed. That the value of the stock of goods in the store at the time of the fire, and consumed, was about $4,900. That the insured had taken an itemized inventory of stock, which he had completed on the 16th of September, 1893. That he had received, between the time of the completion of the inventory and the occurring of the fire, $318.72 worth of goods, which went into the store. That he kept in his business a set of six books, which he produced, and which, by order of the trial court, were sent up to this court. That these books showed the state of his business, and were all the books which he kept, except a cash-sales book, which he opened or began 9th of September, 1893 (21 days before the fire), in which he made daily entries of cash sales up to the time of the fire. That this book was destroyed in the fire which destroyed the stock of goods; it having been inadvertently left out of the safe, on a desk, on the night of the fire. That he began business on January 2, 1893. The cash-sales book during that time shows daily receipts from cash sales for January aggregating $76.05. For February: Wednesday, 1st, $0.50; Thursday, 2d, $1.50; Friday, 3d, $0.00; Saturday, 4th, $2.50. Then the business days of the next three weeks are entered by names, and the receipts for each week are extended, showing $4.80 for the first of these three weeks, $6.75 for the second, $8.00 for the third,

and for the last two days of the month, Monday 27th, $1.00, and Tuesday 28th, $0.50, aggregating for the month $25.00. The first four days of March the entries are made for each day, then for from 6th to 11th, 13th to 18th, 20th to 25th, 27th to 1st, being the business days in the weeks, the entry showing the weekly receipts aggregating for that month $24.75,—and so it runs, showing for April, $36.00; for May, $23.60; for June, $31.25; for July, $25.40; for August, $25.75; for Friday, September 1st, $0.50; Saturday, September 2d, $2.50; September 4th to 9th, $9.75. The inventory of stock, closed September 16th, shows a footing up of $4,906.12. The insured, corroborated by Shackleford, testified that the entries to bills payable, aggregating $1,000.18, showed all his purchases from January 2, 1893, to the time of the fire. The books show entries of credit sales through the whole period, with bills of particulars. These books had been locked in the safe; were in the safe, in the store, at the time of the fire; and were not materially damaged. Viewed as "a set of books," from the standpoint of an expert in that scientific system of bookkeeping which obtains in the business of an insurance company which has pushed its business at least from the chief city of Canada to the obscure hamlet of Greenville, Fla., these books in evidence are primitive to a degree that may test his temper, if not his skill; but to impartial jurors, patiently searching for proof to support a recovery on a contract of indemnity for a loss insured against, and incurred without fraud or fault on the part of the insured, these books tell a plainer story than the expert unconsciously or strenuously looking to them for ground of forfeiture was able to read in them. He could make nothing out of their entries to show that the insured had on hand in his store, at the time of the fire, goods to such an amount in value that three-fourths thereof exceeded the amount of insurance written thereon, or to show that the insured had any goods in the store at the time of the fire. To our view, the very imperfections of these books vouch their good faith. It is insisted that the accounts of goods purchased should have set out the specific articles, and the value of each, and that the account of cash sales should have been equally particular as to articles sold, and the price; for, it is argued, the insured may have sold goods at one-tenth of their cost price, for aught that appears in these entries of cash sales. If these accounts were to have been thus kept, thus itemized, why not have said so? There was time and space in the clause in question to provide expressly that the inventory of stock to be taken at least once every year "should be itemized." If the accounts of purchases and sales were to be so itemized, why take stock at all? The credit sales are itemized, as is not only customary, but necessary. Now, when the articles purchased, the goods sold on credit, and those sold for cash, are all itemized, posted, footed up, and balanced, barring moths, rust, and thieves, the difference would show the goods remaining; and the time spent, and shop wear of the stock, would either be wholly unnecessary, or, in the average country store, an expensive and worthless check on unscientific bookkeeping. When the circumstances of these respective parties are impartially considered, it is highly improbable that such a degree

of extravagance or of proficiency in bookkeeping on the part of the insured was in the contemplation of either of them, and certainly was beyond the conception of the insured, and cannot be considered to have been in the mind of the agent of the insurer, without a high impeachment of his integrity, for he must have known that such a set of books as the contention now made by his company requires would not be kept.

It is well known that our law of insurance had its beginnings in marine risks. Parties willing and offering to indemnify against such risks for a consideration did not, and perhaps yet do not, by their agents, compass sea and land to find a subject; but those with ships or goods at hazard, either in person or by a broker, who is in fact the agent of the applicant, seek the protection they need by bringing their subjects to the attention of those whose business it is to furnish such insurance. These applicants gave what are called instructions for writing the policy, which, besides naming the ship, her burden, cargo, and voyage, embraced such other matters as were supposed to constitute inducements to the contract, or to affect the rate of premium. These instructions were either oral or written, or partly oral and partly written. But in the earlier years of Lord Mansfield's service on the bench it was not the usage to consider the instructions as a part of the policy. Parol instructions were not entered in a book, nor written instructions kept, till, on the occasion of actions brought before him where brokers had made false representations in many matters material to the risk, that judge advised the insured to bring actions against the brokers, which some did, and recovered; and the brokers thereafter, on his lordship's caution and recommendation, began the practice of entering all representations made by them in a book. Even at that early day there was no distinction better known than that which exists between a warranty or condition which makes part of a written policy, and a representation of the state of the case. Where it is a part of the policy it must be performed, is the doctrine of all the cases. Good faith is a necessary element of all binding contracts. And where insurance is effected as marine insurance formerly was, and generally is still written, the situation of the parties requires the exercise of the utmost good faith. In enforcing this requirement against unfaithful parties, rules were announced and followed which conditions then existing demanded, but, by reason of the gradual and great development of a change in the relations of parties to these contracts, these rules, though once wholesome and necessary, have become severe, and, with the well-known tendency towards the growing weight of precedents, have often been applied to cases and in a manner not within Lord Mansfield's reasonings. He says, with his peculiar force, "a warranty in a policy of insurance is a condition or a contingency, and unless that be performed there is no contract." De Hahn v. Hartley, 1 Term R. 343. In the case just cited there was written on the margin of the policy, "Sailed from Liverpool with 14 six pounders, swivels, small arms, and fifty hands or upwards." The ship sailed from Liverpool 13th October, 1778, with only 46 hands, but six hours after sailing she touched at Beaumaris, and took on

6 more hands, continuing her voyage with a force of 52 men, which she kept and had till her capture, 14th March, 1779, six months after sailing from Liverpool. The insurer, in ignorance of the facts, had paid the loss, but recovered it back, because there was no contract. Now if, instead of sailing from Liverpool with only 46 hands, the Juno had sailed with 52 hands, and on the 13th of March, 1779, the day before her capture, 6 of her men had seized one of her life boats and deserted, so that when she was attacked by the public enemy she had only 46 hands with which to repel force by force, does any one suppose that Lord Mansfield, or any other sane judge, would have held that by reason of that fact alone there was no contract at the time when the capture and loss occurred? Out of the business of marine insurance, or superinduced thereby, the business of fire and life insurance has sprung, and grown till it fills all the land, and its cases overflow the courts and their reports. The relations of the parties are reversed. The policies in current use are travesties on the common-sense form in use in marine insurance. And while the distinctions and construction announced in Pawson v. Watson, Cowp. 785, and in De Hahn v. Hartley, supra, are too well settled to be disturbed by judicial action, there has long been a marked and growing judicial sense that the application of these, and later cases in line with them, should not be carried beyond the boundaries of controlling precedents; that common honesty and common sense are safe guides in the construction of even these wonderfully devised contracts. While, therefore, it is certainly the law that a precedent condition warranted to exist must in fact exist, exactly as stated, or there will be no contract, because the minds meet only on all the stipulated conditions, a promissory warranty is often, if not always, necessarily a condition subsequent, and courts should and do and will apply to these the doctrines that obtain in adjudging forfeitures. It would too greatly extend this opinion to review the cases. Many of them are cited and epitomized in the third edition of May on Insurance, in the chapters on Warranties, Representations, and Exceptions. We think the application to the case at bar of what we have here advanced is apparent. The judgment of the circuit court is affirmed.

PARDEE, Circuit Judge (dissenting). On January 9, 1892, the Western Assurance Company, plaintiff in error, a corporation of Canada, insured Joseph H. Redding, defendant in error, a citizen of Florida, for three years, for $1,000, on a dwelling house in Greenville, Fla. On February 10, 1893, it insured him, for one year, for $800 on his store building in the same city, for $1,000 on his stock of merchandise in said store, and $200 on his fixtures therein. The store and contents were destroyed by fire at 2 or 3 o'clock on the morning of October 1, 1893, and the dwelling on the night of the same day. The Western Assurance Company, claiming that the fire was the result of incendiarism, which Redding had reason to anticipate, and claiming that Redding had not kept and produced his books as required by the policy, declined to pay the loss. Redding brought suit in the court below, embracing in his declaration two counts,—

the first one upon the policy insuring the store and contents, and the second upon the policy insuring the dwelling. The plaintiff pleaded to the first count, setting up, generally, that Redding had not kept a set of books as required by the policy, nor kept them safely; that they were burned in the fire which destroyed the property; and that he did not produce them after the fire. Redding took issue upon all these pleas, a jury trial was had, and a verdict rendered for the plaintiff for the face of both the policies and interest. The only exceptions insisted upon in this court are some taken by the Western Assurance Company to different portions of the judge's charge, and the judge's refusal to give certain special charges asked by it. The policy upon the store and contents contained the following clause:

"It is a part of the conditions of this policy that the insured shall keep a set of books showing a complete record of business transacted, including all purchases and sales, both for cash and credit, and take an itemized inventory of stock on hand at least once every year; and it is further agreed that insured will keep such books and inventory securely locked in a fireproof safe at night, and at all times when the store mentioned in this policy is not actually open for business, or in some secure place, not exposed to fire which would destroy the house where said business is carried on. It is further agreed that, in event of loss, insured will produce said books and inventory. Failure to comply with these conditions shall render this policy null and void, and no suit or action at law shall be maintained thereunder for any loss."

The trial judge refused several special charges requested by the defendant in the court below, to the general effect that under the evidence in the case there had been a breach of the above-mentioned stipulation, and that the jury should find that the defendant was not liable on his contract of insurance for the stock of merchandise. The court did charge the jury, after reading the above stipulation, and commenting upon its reasonableness, as follows:

"But as I suggested in your hearing yesterday, that all that can be demanded is a substantial compliance with that, and whether there was a substantial compliance,—whether, in some minutiae, some matter of no special importance, there may have been a variation from that,—that is a question; but the court instructs you that there is required, by the policy, a substantial compliance with that clause."

—And further, after submitting to the jury, as a question of fact, whether the books produced by the plaintiff showed a complete record of his business, as follows:

"The language of the clause of the policy is this: 'It is agreed that, in event of loss, assured will produce said books and inventory.' You have heard the testimony in regard to the production of those books, and you will determine, gentlemen, whether that was a substantial compliance with the terms of the policy. One party, the insurer, states he simply produced two books,—the ledger, and what is known as the 'Stock Book,' which simply contained the inventory. The party plaintiff claims that he produced those books, all except the cash book, and had not found that. The nonproduction of the cash book is accounted for by saying it was mislaid. It is also in testimony that the cash book which was in use at the time of the fire was not produced at all, but was consumed, and was left, as stated by the witness, upon a desk in the store, and was consumed in the fire."

Proper exceptions were taken in time by the defendant in the court below to the above charges given.

It ought not to be disputed that the provision in the policy of insurance with reference to the books commonly called the "iron-safe clause" is a warranty. Insurance Co. v. Wilkerson (Ark.) 13 S. W. 1103; Kelley-Goodfellow Shoe Co. v. Liberty Ins. Co. (Tex. Civ. App.) 28 S. W. 1027; and authorities cited in said cases. It cannot be disputed that the parties to the policy had the right to make the stipulation, and that it should be construed and enforced, like all other contracts, according to the understanding and intent of the parties. In Dwight v. Insurance Co., 103 N. Y. 341, 346, 8 N. E. 654, it is said:

"Parties to an insurance contract have the right to insert such lawful stipulations and conditions therein as they may mutually agree upon, or which they may consider necessary and proper to protect their interests, and which, when made, must be construed and enforced, like all other contracts, according to the expressed understanding and intent of the parties making them. If an insurance policy, in plain and unambiguous language, makes the observance of an apparently immaterial requirement the condition of a valid contract, neither courts nor juries have the right to disregard it, or to construct, by implication or otherwise, a new contract in the place of that deliberately made by the parties."

In Imperial Fire Ins. Co. of London v. Coos County, 151 U. S. 452, 462, 14 Sup. Ct. 379, Mr. Justice Jackson, for the court, says:

"Contracts of insurance are contracts of indemnity upon the terms and conditions specified in the policy or policies embodying the agreement of the parties. For a comparatively small consideration the insurer undertakes to guaranty the insured against loss or damage, upon the terms and conditions agreed upon, and upon no other; and when called upon to pay, in case of loss, the insurer, therefore, may justly insist upon the fulfillment of these terms. If the insured cannot bring himself within the conditions of the policy, he is not entitled to recover for the loss. The terms of the policy constitute the measure of the insurer's liability, and in order to recover the assured must show himself within those terms; and if it appears that the contract has been terminated by the violation, on the part of the assured, of its conditions, then there can be no right of recovery. The compliance of the assured with the terms of the contract is a condition precedent to the right of recovery. If the assured has violated, or failed to perform, the conditions of the contract, and such violation or want of performance has not been waived by the insurer, then the assured cannot recover. It is immaterial to consider the reasons for the conditions or provisions on which the contract is made to terminate, or any other provision of the policy which has been accepted and agreed upon. It is enough that the parties have made certain terms conditions on which their contract shall continue or terminate. The courts may not make a contract for the parties. Their function and duty consist simply in enforcing and carrying out the one actually made."

A warranty is to be strictly complied with, in order to avoid the breach of a contract. In the early case of Pawson v. Watson, Cowp. 785, Lord Mansfield held that a substantial compliance with the warranty is never sufficient, saying:

"Nothing tantamount will do, or answer the purpose. It must be strictly performed, as being a part of the agreement."

Again, in De Hahn v. Hartley, 1 Term R. 343, Lord Mansfield said:

"A warranty in the policy of insurance is a condition or a contingency, and unless that be performed there is no contract. It is perfectly immaterial for what purpose the warranty is introduced, but, being inserted, the contract does not exist, unless it be literally complied with; and Lord Ashurst said: 'The very meaning of a warranty is to preclude all questions whether it has been substantially complied with. It must be literally so.'"

The law, as declared in these cases, has been recognized and followed in a long line of uniform decisions; and it would seem to be now settled and established law, in insurance cases, if in no others, that a present warranty must be literally true, and a promissory warranty must be literally fulfilled, otherwise recovery is defeated. May, Ins. (3d Ed.) § 156; Wood, Ins. p. 448. If there are adjudged cases to the contrary, I doubt their authority. In saying this, I am not referring to that large class of cases in which the courts have construed stipulations which the insurance company considered a warranty to be merely representations which, so far as the case in hand was concerned, were not material, nor to that other class of cases where the denominated "warranties" have been held to have been modified by other provisions in the policy. See Insurance Co. v. Johnston, 80 Ala. 467, 2 South. 125, and cases there cited. In the present case the trial judge charged the jury that a substantial compliance with the warranty was all that was necessary, and, so far as I can find in the record, he did not instruct the jury what he meant by a "substantial compliance." In my opinion, this charge was erroneous, because it was not in accordance with the law, and tended to mislead and confuse the jury. It substantially, if not literally, instructed the jury that, with regard to the compliance with a warranty, they might substitute their own judgment of what was necessary, what was reasonable, and what was equitable. A substantial compliance with a warranty is a very uncertain matter, depending upon the knowledge, relations, and prejudices of the individual called upon to pronounce. A warranty by a merchant not to store gunpowder in his store building is substantially complied with, in the mind of the ordinary juror, as well as to the satisfaction of some judges, when he only stores it once in a while; and a warranty not to use gasoline and other explosive fluids in the insured property is substantially complied with when gasoline is only used once a week,—say on extra occasions. The defendant in this case, according to the evidence, substantially complied with the warranty to keep books, and save them for the information of the insurer, by keeping a full set of books up to within 30 days before the fire, although he thereafter omitted to keep just the book which would have informed the insurer of the amount of goods he had on hand at the time of the fire. He substantially complied with his warranty to keep his books in an iron safe by putting, on the evening before the fire, all the books in the safe, except one, which happened to be the one which would inform the insurer of the amount and value of the goods destroyed by the fire. In my opinion, the judgment of the circuit court should be reversed for error in instructions to the jury.

R. ROTHSCHILD'S SONS' CO. v. MENTEL et al.

(Circuit Court, S. D. Ohio, W. D. July 8, 1895.)

No. 4,632.

DESIGN PATENT—VALIDITY AND INFRINGEMENT—SALOON-BAR FIXTURES.

The Rothschild patent, No. 22,222, for a design for saloon-bar fixtures, found not anticipated, and *held* valid and infringed.

This was a suit in equity by the R. Rothschild's Sons' Company against Ferdinand Mentel and others for infringement of a design patent.

George J. Murray, for complainant.
Stern & Allen, contra.

SAGE, District Judge. The complainant sues for infringement of patent No. 22,222, issued February 14, 1893, to David Rothschild, for design for saloon-bar fixtures. The only defense relied upon is that the patentee, from whom complainant derives title, did not invent the patented design, but surreptitiously appropriated to himself and patented what was the invention of Victor Vollbracht. Vollbracht testifies positively that he was the originator of the design, and that David Rothschild had nothing to do with its invention; that it was made originally in the city of Detroit, as shown in defendant's exhibit, "Vollbracht's Sketch of Swan Fixture." This sketch contains two drawings. The first shows only a plan of a counter, square arm rail, cigar case, back bar, wine coolers, cashier's desk, and indicates the bases of columns and the location of mirrors. The second is the sketch of the back of the fixture, including panels, ornamentations, and mirrors. The arched canopy projecting from the wall over the counter is neither shown nor indicated, nor are the columns or their capitals. These drawings are not sufficient to show an anticipation of the complainant's patent.

Vollbracht is contradicted by William Kleeman, of Cincinnati, manufacturer of office, store, and saloon fixtures, who testifies that the drawings of the complainant's patent represent a fixture made by him about March 28, 1892, for the Rothschild's Sons' Company, in accordance with orders and instructions received by him from David Rothschild. His testimony is that the drawings or sketches were made by Vollbracht, but that the instructions for making them were given, and a good many parts of the design were suggested and directed, by David Rothschild, in the presence of the witness.

He also testifies that the ideas and the sketch from which he made the City of Paris saloon fixtures (which is the name given to fixtures made according to the patented design) for the R. Rothschild's Sons' Company he received from David Rothschild, who afterwards changed the ends of the mirror frame from oval to straight, and from wood to metal; that David Rothschild called three or four times a week while they were working on the fixture, which it required six weeks to complete; and that Vollbracht called twice, and

gave instructions concerning the carving of the heads and shields and the corbel; also, that Vollbracht never gave any instructions in regard to building up the work.

Julius A. Braum testifies that no fixture was ever made by the Rothschild's Sons' Company after the design which Vollbracht claims to have sketched for Swan at Detroit. Vollbracht is also contradicted by Julius F. Beuhler, who testifies that Rothschild originated the patented design; that for some four years before the date of his testimony, which was given March, 1894, Rothschild had stated to witness his intention to get up a design for new fixtures that would, as he expressed it, "stun the country"; and that he spoke on a good many occasions to the witness of the details of the design, such as the marble work, the cove overhead, the lion heads, and the columns resting on the counter, and holding the cove of the mirror frames; also, that several rough sketches were made, to which improvements were added, and they were altered from time to time, all under the instructions of Rothschild. The sketches of these drawings and improvements were made by Vollbracht, then draftsman for the Rothschild's Sons' Company. This was, the witness states, early in 1891, probably in January, but long after David Rothschild had spoken to the witness about the design. The criticism upon the testimony of these witnesses that they speak from hearsay is not well founded. It is true that in some matters, but not those above referred to, they did speak from hearsay, or testified to inferences. Their testimony as detailed above is clear and positive. I am satisfied upon all the testimony that David Rothschild invented the design; that Vollbracht's claim to be the inventor is unfounded in fact; and that the patent is valid. It is not denied that the defendants have copied and used the complainant's design, and that they are infringers if the patent be sustained. The decree will be for an injunction and account against the defendants.

WOODARD et al. v. ELLWOOD GAS STOVE & STAMPING CO.

(Circuit Court, W. D. Pennsylvania. April 18, 1895.)

No. 13.

1. COURTS—COMITY IN PATENT CASES—EFFECT OF VERDICT AND JUDGMENT.
In an action at law for infringement of a patent there was a verdict for plaintiff, and the court entered judgment thereon in his favor. Subsequently, in a suit in equity in another circuit against another infringer, the defendant set up the same defenses which had been made in the previous action at law. *Held*, that the same weight should be given to the verdict and judgment at law as is ordinarily accorded to a decree in equity at final hearing sustaining a patent, and that upon a motion for a preliminary injunction the presumption in favor of the validity of the patent arising from the previous adjudication should prevail.

2. SAME—VAPOR STOVES.
The Klein and Woodard patent, No. 249,842, for a vapor-burning stove attachment, *held* valid and infringed, on motion for preliminary injunction.

This was a bill by William H. Woodard and L. D. Benedict against the Ellwood Gas Stove & Stamping Company, for infringe-

ment of a patent for a vapor-burning stove attachment. Complainants moved for a preliminary injunction.

George H. Lothrop, for plaintiffs.
John R. Bennett, for defendant.

ACHESON, Circuit Judge. This is a suit for the infringement of letters patent No. 249,842, issued November 22, 1881, to Charles F. Klein and William H. Woodard, for a vapor-burning stove attachment, and the case is now before the court upon a motion for a preliminary injunction. Clearly the defendant infringes if the patent is valid. This is not denied. To defeat this motion, the defense mainly relied on is that the patentees were not joint inventors, but that Klein was the sole inventor of the device in question. It appears, however, that in an action at law for the infringement of this patent brought September 17, 1887, by these plaintiffs against the Dangler Stove & Manufacturing Company in the United States circuit court for the Northern district of Ohio, Eastern division, this same defense, among others, was set up and vigorously pressed, the action being defended not only by the company there sued, but by a combination of vapor-stove manufacturing companies. In that case, after a protracted trial, there was a verdict sustaining the patent. The defendant moved for a new trial, assigning as one of the principal reasons in support of the motion the finding by the jury of joint inventorship by the patentees. After argument, the court, on November 17, 1888, overruled the motion, and entered judgment for the plaintiffs on the verdict. Subsequently to the rendition of that judgment, there was no infringement of the patent until this defendant began to infringe shortly before the date of this suit. In support of the allegation that the patentees were not joint inventors, but that Klein was the sole inventor, the present defendant has produced a caveat filed by Klein alone, and also an affidavit of Klein. But that caveat was in evidence in the former action, and Klein was there examined as a witness for the defense to show that he was the sole inventor. As to the question of joint inventorship, the proofs now before me are by no means convincing that the verdict of the jury and the judgment of the court thereon were erroneous. In view of the former adjudication, I am of the opinion that the presumption that the patent rightly issued to the patentees as joint inventors must prevail upon this application for a preliminary injunction, and that the consideration of this defense must be postponed until final hearing. This conclusion is in accord with the general rule of practice approved by the circuit court of appeals for this circuit in Philadelphia Trust, Safe-Deposit & Ins. Co. v. Edison Electric Light Co., 13 C. C. A. 40, 65 Fed. 551. The suggestion that less weight should be given to the verdict of the jury and judgment of the court here relied on than is to be accorded to a decree in equity sustaining a patent cannot be accepted. Wells v. Gill, 6 Fish. Pat. Cas. 89, 91, Fed. Cas. No. 17,394. The question of joint or sole inventorship is largely one of fact, and presumably the finding of the

jury in this instance was based upon proper instructions given by the court. Then, the finding was sanctioned by the court by the refusal to disturb the verdict and the entry of judgment thereon. The patent in suit has but a few years to run, and the plaintiffs should not be lightly deprived of the benefit of the verdict and judgment they have obtained. Moreover, the defendant is a very deliberate infringer.

The defense of want of patentability was not much pressed here. It failed in the former action. The only prior patent exhibited here is the one to A. J. White. That patent, however, was set up in defense in the former suit. I do not think that it anticipates or affects the patent in suit; and I am entirely satisfied, upon the present proofs, that the plaintiffs' patent is for a new and useful invention. A preliminary injunction will be allowed.

THE GLIDE.

HUDSON v. GRAFFLIN.

(Circuit Court of Appeals, Fourth Circuit. June 11, 1895.)

No. 135.

ADMIRALTY PRACTICE—TAKING EVIDENCE ON APPEAL.

Upon the hearing of a cause in admiralty, the claimant, who did not live in the city where the hearing took place, failed to appear. The libelant's evidence was taken, and the case adjourned to a future day. On such adjourned day claimant again failed to appear, and his proctor was unable to give any reason for his absence, whereupon the case proceeded to judgment for the libelant. It appeared that claimant had been ill, had expected to be present on both days, but had been prevented by his disease from attending or advising with his proctor. *Held*, that a proper case was made out for permitting claimant to take evidence pending an appeal.

This was a libel by George W. Grafflin against the barge Glide (George P. Hudson, claimant). Judgment was rendered in the district court for the libelant. The claimant appealed, and now moves for leave to take testimony pending his appeal.

Robert H. Smith, for appellant.
Frank Gosnell, for appellee.

Before GOFF and SIMONTON, Circuit Judges, and HUGHES, District Judge.

SIMONTON, Circuit Judge. This is a petition in behalf of the claimant, praying that he be allowed to examine certain witnesses, pending the appeal in this court. The prayer of the petition is resisted by the appellee.

We have no special rule bearing on this case. It is governed by rule 8,[1] conforming our practice to that of the supreme court. The application is not a matter of right. The court in each case

[1] (11 C. C. A. cl., 47 Fed. v.)

determines whether or not the prayer of the petitioner should be granted, and it will never be granted unless some satisfactory reason is shown why witnesses were not produced and examined in the court below. The Mabey, 10 Wall. 419. See, also, The Venezuela, 1 U. S. App. 315, 3 C. C. A. 319, 52 Fed. 873; Sorenson v. Keyser, 2 U. S. App. 177, 2 C. C. A. 92, 51 Fed. 30; The Beeche Dene, 13 U. S. App. 212, 5 C. C. A. 208, 55 Fed. 526; The Lurline, 14 U. S. App. 153, 5 C. C. A. 166, 55 Fed. 422. In the present case, after some delay, in which both parties acquiesced, the cause was called for trial. The witnesses of the libelant appeared, and were examined. The claimant, who did not live in Baltimore, where the case was heard, did not appear. He was ill at his home at Norfolk. The court adjourned the cause for several days, when it was again called, and the claimant was again absent. It seems that he had hoped to have recovered sufficiently to attend on the day thus fixed for the trial, but his disease prevented him. His proctor, not having been advised of his continued illness, could give no satisfactory reason, beyond surmise, of his repeated absence, and the judge properly ordered the case to proceed. It appears now that the illness of the claimant prevented him from attending at Baltimore, and from instructing his proctor how to meet the case made by the libelant; that he believes bona fide that he has a substantial and meritorious defense, and that but for his illness he could have properly instructed his proctor, have procured the attendance of the witnesses, and, under these circumstances, have developed his defense. Permitting him to do so now would better serve the ends of substantial justice. See River Line v. Cheatham, 9 C. C. A. 124, 60 Fed. 517.

Let a commission issue from this court, in accordance with the practice prescribed in rule 12 (3 Sup. Ct. ix.) of the supreme court, for the purpose of examining the witnesses named in the petition.

AMERICAN ASS'N, Limited, v. EASTERN KENTUCKY LAND CO. et al.

(Circuit Court, W. D. Virginia. May 17, 1894.)

FEDERAL COURTS—EQUITY JURISDICTION—PARTITION.

A federal court of equity cannot entertain a suit for partition of lands where the plaintiff's title is denied, although a state statute permits courts of equity to take cognizance of questions of title in partition suits.

This was a suit by the American Association, Limited, against the Eastern Kentucky Land Company and others for the partition of lands. The Eastern Kentucky Land Company filed its answer denying plaintiff's title, and thereupon demurred to the bill for want of jurisdiction.

White & Buchanan and Jerome Templeton, for complainant.
A. L. Pridemore, for defendants.

PAUL, District Judge. This is a chancery suit brought by the complainant company against the Eastern Kentucky Land Company and others for the partition of a tract of 100 acres of land lying near Cumberland Gap, in Lee county, Va., and also praying for an injunction to prevent waste on said land; but, there being no proof of any waste committed, it is not necessary to consider this question in the proceedings.

The complainant alleges that it is a joint tenant or tenant in common with the defendants in said land. It also claims that it is the owner of a right of way for a railroad tunnel through said land; that it has constructed said tunnel, and is in possession thereof. The principal defendant is the Eastern Kentucky Land Company. In fact, it is the only party defendant claiming any interest in the land. It files its answer, and claims that it is the sole and exclusive owner of the land in question. It denies "that the plaintiff and defendant companies own any lands in the state of Virginia as joint tenants, tenants in common, or in any other form of joint ownership; or that the plaintiff owns any lands in such tenancy with the codefendants of said Eastern Kentucky Land Company; or that the complainant company is in possession of any land owned or claimed by it, except the railroad tunnel, so far as it passes through the defendant company's land, about 1,000 feet, in the state of Virginia, which the plaintiff company entered upon without lawful authority or leave or license, and commenced the construction of its work, and still holds possession thereof." The plaintiff company claims immediate title to the land by deed from the devisees under the will of one Samuel C. Jones. The defendant company claims immediate title by deed from one J. W. Divine and wife, said Divine being the grantee in a deed from the same Samuel C. Jones. The plaintiff and the defendant company each recites many antecedent conveyances from different persons. Surveys have been made, and numerous depositions have been taken, all bearing upon the questions of the title of the plaintiff to the lands in controversy, and the boundaries of the same. The defendant the Eastern Kentucky Land Company demurs to the plaintiff's bill, on the ground that a

federal court of equity cannot entertain a suit for partition of lands where the plaintiff's title is denied; that, to entitle a plaintiff to relief in equity in respect to partition, he must have a clear legal title. It is admitted by counsel for the complainant that this was formerly the law, but it is contended that since the enactment of the Virginia statute (Code 1887, § 2562), it is otherwise. The said section provides as follows: "Sec. 2562. Tenants in common, joint tenants, and copartners, shall be compellable to make partition, and the circuit court of the county, or the circuit or corporation court of the corporation, wherein the estate or any part thereof is, shall have jurisdiction in cases of partition, and, in the exercise of such jurisdiction as a court of equity, may take cognizance of all questions of law affecting the legal title that may arise in any proceeding." It is contended that under this statute a federal court of equity, in a suit for partition, has jurisdiction of "all questions of law affecting the legal title that may arise in any proceeding"; that its jurisdiction has been extended beyond what it was before the enactment of this state law. I cannot concur in this view. A state statute can neither abridge nor extend the jurisdiction of the United States circuit courts as courts of equity. As was said by McCrary, J., in Strettell v. Ballou, 9 Fed. 256: "It has long been settled that the jurisdiction of the circuit courts of the United States in equity is derived from and defined by the constitution and laws of the United States; that it is the same in all the states, and is not affected or varied by the various statutes of the states whereby the chancery powers and jurisdiction of state courts may be defined and regulated. This court cannot, therefore, look to any state legislation as the source of its jurisdiction in equity." In Boyle v. Zacharie, 6 Pet. 658, the supreme court thus stated the rule: "And the settled doctrine of this court is that the remedies in equity are to be administered, not according to the state practice, but according to the practice of courts of equity in the parent country, as contradistinguished from that of courts of law, subject, of course, to the provisions of the acts of congress, and to such alterations and rules as, in the exercise of the powers delegated in those acts, the courts of the United States may from time to time prescribe." See, also, Livingston v. Story, 9 Pet. 632; Robinson v. Campbell, 3 Wheat. 212; U. S. v. Howland, 4 Wheat. 115; Neves v. Scott, 13 How. 271. With this view of the law, we will have to proceed in this cause as if the Virginia statute referred to had never been enacted. The complainant's title being called in question by the defendants, and it not appearing to the court that the complainant has a clear legal title, the complainant must, before this court can give the relief sought, establish its title at law, by ejectment or other legal proceeding. 2 Minor, Inst. 464; Sedg. & W. Tr. Title Land, §§ 169, 170; Currin v. Spraull, 10 Grat. 145; Rich v. Bray, 37 Fed. 273; Brown v. Coal Co., 40 Fed. 849. The authorities seem to be uniform in holding that "where the suit in the state court unites legal and equitable grounds of relief or of defense, as authorized by the state statute, it may, in the federal court, be recast into two cases, one at law and one in equity, and in such a case a repleader is necessary."

See Perkins v. Hendryx, 23 Fed. 418; Fost. Fed. Prac. (2d Ed.) § 391; Dill. Rem. Causes (5th Ed.) §§ 83–86, and notes thereto. An order must be entered in this cause staying proceedings for a reasonable time, in order to allow the plaintiff to prosecute an action at law to try the title to the land in question.

FOSTER et al. v. BANK OF ABINGDON et al.

(Circuit Court, W. D. Virginia. May 8, 1894.)

FEDERAL AND STATE COURTS—JURISDICTION.

The trustees named in a deed of trust executed by a bank for the benefit of its creditors instituted a suit in a state court against the bank and all its stockholders and creditors, for the purpose of administering the assets of the bank, under the direction and with the aid of said court. While such suit was pending, two of the creditors, who were parties to it, instituted a suit in a federal court against the bank, its officers, and the trustees, to set aside the trust deed, secure the appointment of a receiver, and an accounting. *Held*, that the jurisdiction of the state court, which attached to the parties and the subject-matter, upon the institution of the suit therein, was exclusive, and that the federal court was without jurisdiction.

This was a suit by Joel Foster and Nathaniel Foster against the Bank of Abingdon, John A. Buchanan, R. M. Page, and others, for an accounting and other relief. The defendants demurred to the bill, and the defendants Buchanan and Page also filed a plea, which was set down for argument with the demurrer.

This is a suit in equity brought by the complainants, who are nonresidents of the state of Virginia, against the Bank of Abingdon, a corporation under the laws of the state of Virginia, and others. The officers of said bank and the trustees in a deed of trust executed on the 5th day of August, 1893, are also made defendants. The bill charges the officers of the bank with gross negligence in the management of the finances of the bank, and seeks to hold these officers personally responsible for the losses resulting from their alleged official misconduct. The bill also charges that the deed of trust is voidable on various grounds assigned, and asks to have the same construed by the court. The bill prays for the removal of the trustees named in the trust deed, and for the appointment of a receiver to take charge of all the property of the bank; and that accounts, etc., be taken by a master, and that the officers of the bank be held personally liable for the losses accruing through their negligence; and for general relief.

The bill was filed February 13, 1894, and on the 14th of February, 1894, a temporary receiver was appointed, and an injunction issued restraining the trustees in the deed of trust of August 5, 1893, from further acting under said trust deed, until the further order of the court. A rule was awarded against all the defendants, requiring them to show cause why the order appointing a temporary receiver should not be made permanent. On the return of the rule, the defendants filed this special demurrer: "The defendants come and say that the court ought not to make permanent the appointment of the temporary receiver heretofore appointed in this cause because, they say, * * * that it appears by the complainant's own showing by the said bill that they have no standing in this court as a court of equity for the appointment of a receiver, because they are simple contract creditors, whose claims have not been reduced to judgment, and who have no express lien upon the assets of the said bank."

The defendants John A. Buchanan and R. M. Page, the trustees in the deed of trust, filed the following plea: "The defendants John A. Buchanan and R. M. Page, trustees, etc., come and say that this court ought not to

make permanent the appointment of the temporary receiver heretofore appointed in this cause, and that the complainants ought not to have and maintain their said suit, in so far as it seeks to take from the control of said trustees the assets of said bank, and to have the same administered in this court, because, they say, that this court has no jurisdiction of these matters, because, they further say, that on the 25th day of January, 1894, a suit in chancery was instituted in the circuit court of Washington county, Virginia, by the said John A. Buchanan and R. M. Page, trustees of the said bank, against the said bank and all of its stockholders and creditors, including the complainants, for the purpose of administering the assets of the said bank under the direction and with the aid of the said court of equity, praying for all proper aid in the administration of said trust, for all proper accounts, and for all further and general relief; that process had regularly issued from the clerk's office of the circuit court of Washington county, Virginia, and had been served upon more than thirty of the parties to said bill; that the said circuit court of Washington county, Virginia, was a court of competent jurisdiction for the purposes of said suit, and able to give complete relief in the premises, and co-ordinate in its jurisdiction, for the purposes named, with the jurisdiction of this court; and that the said suit is still pending in the said circuit court of Washington county, Virginia; that, by the institution of said suit, the issuance and execution of process as aforesaid, the jurisdiction of the state court had attached to the parties and to the trust fund, the subject-matter of said suit; that afterwards, to wit, on the 14th day of February, 1894, the complainants in this suit, the said Joel E. and Nathaniel Foster, and others, presented their bill in equity to the judge of this court for an injunction restraining said trustees from further acting under the deed of trust set out in said bill, and for the appointment of a temporary receiver to take charge of said trust assets, and this was the first step towards invoking the jurisdiction of the federal court; that the said bill presented to the judge of this court has for its purpose, among other things, the administration of the same assets of said bank, and the appointment of a receiver therefor. Wherefore the defendants the said John A. Buchanan and R. M. Page, trustees as aforesaid, do plead to said rule and to the jurisdiction of this court, and pray the judgment of this court whether they should be compelled to make any other or further answer to said rule, and pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained."

To this plea no replication has been filed, and in this condition of the pleadings the cause has been argued and is submitted.

D. F. Baily and Blair & Blair, for complainants.

White & Buchanan, C. F. Trigg, Geo. E. Penn, and Fulkerson & Page, for defendants.

PAUL, District Judge (after stating the facts). The demurrer filed on the ground that the complainants are simple contract creditors, and therefore cannot maintain a suit in equity, cannot be sustained. The deed of trust made by the Bank of Abingdon on the 5th of August, 1893, is for the benefit of all the creditors of the bank, and gives to all its creditors alike a lien on the assets, real and personal, of the bank. The property conveyed constitutes a trust fund for the payment of all creditors, and under its provisions all creditors of the bank are lienors of the trust property, and any of them can maintain a suit in equity, touching the subject-matter of the trust, as if they were specially mentioned in the trust. I think this position in harmony with the principles laid down in Hollins v. Iron Co., 150 U. S. 371, 14 Sup. Ct. 127; Case v. Beauregard, 101 U. S. 688. Talley v. Curtain, 4 C. C. A. 177, 54 Fed. 43, is a case decided by the circuit court of appeals of this circuit, and the

facts are in many respects similar to the facts in this case. The debts of the complainants are not disputed, but are admitted in the pleadings, but are claimed to be simple contract debts. The demurrer will be overruled.

To the plea filed in this cause there is no replication, and in such case all the facts well pleaded are considered as admitted. See rule 33, Equity Rules, and notes thereto; Desty, Fed. Proc. 696; rule 38, Equity Rules, and notes thereto; Desty, Fed. Proc. 698; Fost. Fed. Prac. (2d Ed.) p. 270, § 157; Rhode Island v. Massachusetts, 14 Pet. 210. The plea shows that at the time this suit was instituted there was pending in the circuit court of Washington county, Va., a chancery suit instituted on the 25th day of January, 1894, by the trustees in the deed of trust of August 5, 1893, against the Bank of Abingdon and all of its stockholders and creditors, including the complainants, for the purpose of administering the assets of said bank, under the direction and with the aid of said state court. It shows that the state circuit court of Washington county, Va., is a court of concurrent jurisdiction with this court, and that said suit is still pending therein; that, by the institution of that suit, the issuance and execution of process, the jurisdiction of the state court had attached to the parties and to the subject-matter of that suit; and that this court is without jurisdiction as to the matters involved in the state court, because of the prior existence of a suit in the state court involving the same matters. The question raised by the plea is one that has been so often determined by the courts, federal and state, that we should have no difficulty in deciding it in the present case.

In Taylor v. Taintor, 16 Wall. 370, the supreme court, speaking by Justice Swayne, said:

"Where a state court and a court of the United States may each take jurisdiction, the tribunal which first gets it holds it to the exclusion of the other, until its duty is fully performed, and the jurisdiction invoked is exhausted; and this rule applies alike in both civil and criminal cases. It is, indeed, a principle of universal jurisprudence that, where jurisdiction has attached to person or thing, it is, unless there is some provision to the contrary, exclusive in effect until it has wrought its functions."

In Gaylord v. Railroad Co., 6 Biss. 286, Fed. Cas. No. 5,284, the court said:

"We think that there is no other safe rule to adopt in our mixed system of state and federal jurisprudence than to hold that the court which first obtains jurisdiction of the controversy, and thereby of the res, is entitled to retain it until the litigation is settled."

The supreme court of Illinois has said:

"As a general principle, in all cases of concurrent jurisdiction, the tribunal which first obtains jurisdiction of the subject-matter must proceed and finally dispose of it." Mason v. Piggott, 11 Ill. 88.

Case in Vermont:

"We hold it to be a sound rule of law, based upon the most salutary principle, that in all cases of concurrent jurisdiction the court that has first possession of the matter should be left to decide it, unless there exists some peculiar equitable ground for withdrawing a controversy from a court of law to a court of chancery, and which disenables the party having the law in

his favor from bringing his case fairly and fully before a court of law. This principle is founded upon the courtesy which courts of concurrent jurisdiction should exercise towards each other, and may be necessary, as matter of policy, to prevent a conflict in the action of different courts." Bank of Bellows Falls v. Rutland & B. R. Co., 28 Vt. 477.

The supreme court of Maryland:

"When two courts have concurrent jurisdiction over the same subject-matter, the court in which the suit is first commenced is entitled to retain it. This rule would seem to be vital to the harmonious movement of courts whose powers may be exerted within the same spheres, and over the same subjects and persons. * * * Any other rule will unavoidably lead to perpetual collisions, and be productive of the most calamitous results." Brooks v. Delaplaine, 1 Md. Ch. 354.

A very full and able discussion of this question is found in the opinion of Justice Field in Sharon v. Hill, 36 Fed. 337. See, also, Ward v. Todd, 103 U. S. 327; Smith v. M'Iver, 9 Wheat. 532; Shelby v. Bacon, 10 How. 56; Freeman v. Howe, 24 How. 450. The court, in addition to the authorities cited, calls attention to section 720 of the Revised Statutes of the United States, which says a writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except where such injunction is authorized by any law relating to proceedings in bankruptcy. A recent case decided by the circuit court of appeals of the Fifth circuit, in a case coming up from the Eastern district of Louisiana, holds that the prohibition in section 720 of the Revised Statutes extends to all cases over which the state court first obtains jurisdiction, and applies, not only to injunctions aimed at the state court itself, but also to injunctions issued to all parties before the court, its officers, or litigants therein. See Whitney v. Wilder, 4 C. C. A. 510, 54 Fed. 554, 555, and authorities there cited.

The rule to show cause must be dismissed, and the order heretofore entered in this cause, appointing a temporary receiver and granting a restraining order, must be vacated.

HASTINGS, Atty. Gen., et al. v. AMES et al. SAME v. SMITH et al. SAME v. HIGGINSON et al.

(Circuit Court of Appeals, Eighth Circuit. June 7, 1895.)

Nos. 590-592.

CIRCUIT COURTS OF APPEALS—JURISDICTION—CONSTITUTIONAL QUESTIONS.

Certain stockholders of railway companies operating lines in Nebraska brought suits against the members of a state board of transportation to restrain them from putting in force a schedule of freight rates prescribed by Laws Neb. 1893, c. 24, on the grounds that such act violated the fourteenth amendment of the constitution of the United States, and also certain provisions of the constitution of Nebraska. The circuit court found that the rates were unreasonable, and that the act accordingly violated the fourteenth amendment, but overruled the other grounds of objection. From the decrees enjoining the enforcement of the act, the members of the board appealed. *Held*, that such appeals were within the jurisdiction of the supreme court, as defined by the act of March 3, 1891, c. 517, § 5, subd. 6 (26 Stat. 826), and were therefore not within the jurisdiction of the circuit court of appeals.

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

John L. Webster, A. S. Churchill, and W. A. Dilworth filed brief for appellants.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. These cases have been submitted to obtain a decision of the question whether this court has jurisdiction by appeal to review the final decrees therein which were rendered by the circuit court of the United States for the district of Nebraska. The several appellees above named, to wit, Oliver Ames et al., George Smith et al., and Henry L. Higginson et al., claiming to be stockholders, respectively, of the Union Pacific Railway Company, the Chicago & Northwestern Railway Company, and the Chicago, Burlington & Quincy Railroad Company, filed separate bills of complaint against the said companies, respectively, and against the appellants, George H. Hastings, attorney general of the state of Nebraska, John C. Allen, secretary of state, Eugene Moore, auditor of public accounts, Joseph F. Bartley, state treasurer, A. R. Humphrey, commissioner of public lands and buildings, who together constituted a board of transportation for the state of Nebraska, and against William A. Dilworth, J. M. Kountze, and J. W. Johnson, secretaries of said board, to restrain the publication and the putting in force of a certain schedule of freight rates theretofore prescribed by the legislature of the state of Nebraska, by an act passed on April 12, 1893, entitled "An act to regulate railroads, to classify freights, to fix reasonable maximum rates to be charged for the transportation of freight upon each of the railroads in the state of Nebraska, and to provide penalties for the violation of this act." Laws Neb. 1893, p. 164, c. 24.

The several bills, which were each of the same general tenor and effect, charged, in substance, that the aforesaid act was repugnant to the fourteenth amendment of the constitution of the United States, and was therefore null and void, in that it denied the several railroad companies to which it was made applicable "the equal protection of the laws," and deprived them of their property "without due process of law." It was also alleged in the bills, in substance, that the aforesaid act was inoperative and void, for the reason that it was not read at large in each house composing the legislature of the state of Nebraska on three different days, as the constitution of that state requires (section 11, art. 3, Const. Neb.), and for the further reason that the bill as enrolled and signed by the governor of the state differed radically from the measure that was actually passed by the legislature, so that the act which was adopted by the legislature was not in fact signed by the governor of the state, and had not become a law. The circuit court overruled all of the objections to the law that were based on the ground that it had not been duly enacted in the mode prescribed by the constitution of the state, but it found that the act prescribed a schedule of rates that

were unreasonable and unjust. It thereupon enjoined the appellants from putting said schedule of rates in force, on the ground that the enforcement of the same in the mode provided by the act would deprive the defendant corporations of "the equal protection of the laws" guarantied by the fourteenth amendment of the constitution of the United States, which guaranty, as the court said, "forbids legislation, in whatever form it may be enacted, by which the property of one individual is, without compensation, wrested from him for the benefit of another or of the public." Ames v. Railway Co., 64 Fed. 165, 173. See, also, Reagan v. Trust Co., 154 U. S. 362, 399, 14 Sup. Ct. 1047.

It is manifest, therefore, that the suits at bar are cases in which it was claimed that a law of a state contravenes the constitution of the United States. The relief prayed for by the plaintiffs was predicated on the express ground that the statute which the appellants were about to enforce was in violation of the federal constitution, and the relief sought was granted by the circuit court on that ground and for no other reason. The cases accordingly fall within the purview of the sixth subdivision of section 5 of the act of March 3, 1891 (26 Stat. 826, c. 517), which declares that appeals may be taken to the supreme court in the following cases: "(6) In any case in which the constitution or law of a state is claimed to be in contravention of the constitution of the United States." In opposition to this view it has been suggested that the question which arises on these appeals is simply whether the rates prescribed by the Nebraska statute are unreasonable and unjust, and that this is not a constitutional question, but an ordinary issue of fact. It is true, no doubt, that the issue is one of fact; but a finding is required upon that issue solely for the purpose of deciding the ultimate question, which arises in the several suits, whether the state statute prescribing the rates is constitutional or otherwise. When the validity of a statute is challenged on the ground that it violates the organic law, it is ordinarily the case that the question can be determined by a simple inspection of the statute; but it may happen, as in the present case, that it can only be determined in the light of extrinsic facts which serve to demonstrate the necessary effect and operation of the statute. Now, it matters not, as we think, how a decision in such cases is to be reached, whether it be by a simple comparison of the statute with those limitations upon legislative power which are imposed by the constitution, or by an investigation and decision of a preliminary issue of fact. If, in a given suit, the ultimate question involved is whether a state statute is void, either because it impairs rights that are guarantied by the federal constitution or because the legislature of a state has assumed to exercise powers that have been surrendered to the general government, then the case is one which does not fall within the appellate jurisdiction of this court. Railway Co. v. Evans, 7 C. C. A. 290, 19 U. S. App. 233, and 58 Fed. 433; Hamilton v. Brown, 3 C. C. A. 639, 2 U. S. App. 540, and 53 Fed. 753; City of Macon v. Georgia Packing Co., 13 U. S. App. 592, 60 Fed. 781, and 9 C. C. A. 262; U. S. v. Sutton, 2 C. C. A. 115, 47 Fed. 129.

The language of the act of March 3, 1891, which we have quoted above, is very comprehensive; sufficiently so, as we think, to withdraw from the jurisdiction of this court every case in which it is claimed, in good faith, that a state statute is in contravention of the federal constitution, even though it may be claimed in the same case that the state statute in question is invalid or inoperative on other grounds. This court has decided at the present term that, if a plaintiff predicates his right to relief on the provisions of an act of congress, the case is of federal cognizance as one arising under the constitution and laws of the United States, even though the same relief is sought on other grounds that do not involve the consideration of federal laws. St. Paul, M. & M. Ry. Co. v. St. Paul & N. P. Ry. Co., 68 Fed. 2. By a strong analogy, it may be said that a case is within the appellate jurisdiction of the supreme court, and not within the appellate jurisdiction of this court, if it is claimed that a law of a state is void because it contravenes the constitution of the United States, although its invalidity is asserted on other grounds as well, and although the case may involve the consideration of many other questions. It surely was not intended that the appellate jurisdiction of the supreme court should be limited to that class of cases where a constitutional question is the sole issue involved, but, even under that stringent rule, the supreme court of the United States would have jurisdiction of these appeals.

It follows from what has been said that the cases are not within the appellate jurisdiction of this court, and the several appeals are for that reason dismissed.

SNEED v. SELLERS et al.

(Circuit Court of Appeals, Fifth Circuit. April 23, 1895.)

No. 256.

COSTS ON APPEAL—DISMISSAL FOR WANT OF JURISDICTION BELOW.

When a judgment is reversed, and the cause ordered dismissed because the record failed to show jurisdiction, all the costs, both of the circuit court and of the appellate court, should be taxed against plaintiff.

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

This was an action by John S. Sneed against A. F. Sellers and others to try title to real estate. The circuit rendered judgment on a verdict of a jury establishing a boundary line. The plaintiff brought error to this court, which, on December 11, 1894, reversed the judgment, with instructions to dismiss the case. 13 C. C. A. 518, 66 Fed. 371. A motion is now made to have the judgment of reversal amended in respect to the costs.

S. H. Lumpkins, for plaintiff in error.

Robertson & Robertson, for defendants in error.

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

PARDEE, Circuit Judge. At a preceding day of this term a judgment was rendered herein reversing the judgment of the circuit court and remanding the cause, with instructions to dismiss the action with costs. This judgment was given on the ground that the record did not affirmatively show the jurisdiction of the court. Through inadvertence, the directions with regard to costs provided for the costs of the circuit court only, leaving the costs of this court under the rule to be taxed against the defendants in error, who were also the defendants in the circuit court. As the judgment of the circuit court was reversed, and the cause remanded with instructions to dismiss for want of jurisdiction, all of the costs, both of this and the circuit court, should be paid by the plaintiff below, plaintiff in error here. Railway Co. v. Swan, 111 U. S. 379, 388, 4 Sup. Ct. 510. It is therefore ordered that the judgment of this court entered in the above-entitled cause on the 11th day of December, 1894, be, and the same is hereby, amended so as to read as follows: It is now here ordered and adjudged by this court that the judgment of said circuit court in this cause be, and the same is hereby, reversed, at the cost of the plaintiff in error, and this cause is remanded to said circuit court, with instructions to dismiss the action at the costs of the plaintiff.

SOCIETY OF SHAKERS AT PLEASANT HILL et al. v. WATSON et al.

(Circuit Court of Appeals, Sixth Circuit. June 4, 1895.)

No. 272.

1. FEDERAL COURTS—JURISDICTION—CITIZENSHIP.
   W., the owner, and S., the pledgee, of a note, prepared and verified a bill to charge such note as a lien on the property of the maker. The bill contained proper allegations of diverse citizenship. Before it was filed, S. died, but the bill was filed without change. Subsequently, the executrix of S. filed a so-called "supplemental bill," setting out the preparation and filing of the original bill and her interest in the subject-matter, but making no allegation as to her citizenship. *Held*, that W. was the only party to the bill as originally filed, and, his title to the note being a sufficient foundation for the suit, the court had jurisdiction, which was not ousted by the subsequent intervention of S.'s executrix, whatever her citizenship might be.
2. EQUITY—JURISDICTION—MULTITUDE OF PARTIES.
   The Society of Shakers at P., in Kentucky, are an unincorporated community, having a membership of about 100, which is constantly changing by additions, withdrawals, and deaths. The property of the community, pursuant to articles of covenant between the members, is held in a mass in common, without any individual interest in any member, and is managed and disposed of, for the purposes of the society, by certain trustees chosen by the society from time to time. *Held*, that a suit upon a note executed in behalf of the society by the trustees was properly brought in equity, even without regard to the statute of Kentucky (Act Feb. 11, 1828) giving the right to sue in equity in such cases, and that it was sufficient to make parties the society and the trustees for the time being, who were also members of the society.
3. SAME—LIEN.
   Held, further, that an instrument in the form of a promissory note, executed in behalf of such society by its trustees, in the form in which they were accustomed to do business, and in return for money which went to increase the funds of the society, created an equitable lien upon the property of the society.

4. PRINCIPAL AND AGENT—SIGNATURE BY AGENT.
Where the language of an instrument, with respect to the party to be charged, is equivocal, and such instrument is signed by an agent in his own name, with the addition of the title indicating his agency, evidence is admissible, as against the principal, to show that the instrument was in fact intended as his obligation, and not that of the agent.

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

This was a suit by Oliver Watson and Letitia Souther, as executrix of Henry Souther, deceased, against the Society of Shakers at Pleasant Hill, Ky., Napoleon D. Brown, James W. Shelton, and Mary Jane Sutton, trustees of said society, to subject the property of the society to a charge for the payment of a note. The circuit court rendered a decree for the complainants. Defendants appeal. Affirmed.

The original bill in this case was filed on the 11th day of May, 1891, in the names of Oliver Watson and Henry Souther, as complainants, against the defendants above named, for the purpose of subjecting the property of the said Society of Shakers, one of the above-named defendants, to an equitable charge for the payment of a promissory note alleged to have been executed by the said society on the 18th day of October, 1882, and given to one M. M. Mays, of which the following is a copy:

"$9,985. October 18, 1882.

"Seven years after date, we promise to pay to the order of M. M. Mays, or bearer, the sum of nine thousand nine hundred and eighty-five dollars ——/100 dollars, value received, with interest at the rate of 6 per cent. per annum from date until paid. Negotiable and payable at the Fourth National Bank, Cincinnati. If not paid when due, to bring 8 per cent. from date.

"Dunlavy & Scott,
"Trustees of the Society of Shakers at Pleasant Hill, Kentucky."

At the time of the bringing of this suit, the defendants Brown, Shelton, and Sutton were the trustees of the society, and were made parties as such, and also in their individual capacities as members thereof. Dunlavy and Scott and one Boisseau were, at the time of making the note, trustees of the society. This note was sold and indorsed by Mays to the complainant Watson on or about July 2, 1889, in part payment for a farm known as "Chatham," near Fredericksburg, Va. In August, 1889, Watson borrowed from the complainant Souther the sum of $5,000, and, as collateral security for the payment of that sum, pledged the above-mentioned note to Souther, and delivered it to him, but did not indorse it. The original bill was prepared and signed and sworn to by Watson in New York on the 13th day of March, 1891, and by Souther in Virginia on the same day, and was thereafter transmitted to their attorneys in Kentucky, to be filed in the proper court. It was not filed, however, until May 11th following. In the meantime said Souther died, leaving a will, which was probated on April 17, 1891; and his wife, Letitia Souther, was appointed and qualified as the executrix thereof. On the 7th day of September, 1891, Letitia Souther, as executrix, filed what is termed in the record a "supplemental bill," setting out the circumstances above stated relating to the preparation of and swearing to the original bill of complaint and the filing thereof, the death of said Henry Souther, his leaving a will, the probate thereof, and her appointment as executrix. In this supplemental bill she adopted and reaffirmed the statements and allegations of the original bill, and prayed to be substituted as complainant in the place of the said Henry Souther.

The defendants appeared, and on the 2d day of November, 1891, filed their demurrer to the original bill and supplemental bill, in which they set out as special grounds thereof: "First. That it appeareth on the plaintiffs' own showing by the said bill that their only cause of action, if any, is for money due upon the alleged note exhibited with the bill, for which they have an adequate and complete remedy at law. Second. That it appeareth on the face of the note sued upon and exhibited with the bill that the same is not the obligation of the Society of Shakers at Pleasant Hill, Ky., and is not binding upon the defendants or either of them. Third. That it appears from the bill and exhibits filed

that the said Dunlavy and Scott had no power or authority to bind the Society of Shakers at Pleasant Hill, Ky., by the alleged obligation sued on."

After a hearing upon the demurrer, it was overruled by the court; and, upon the suggestion of the court, the bill was amended, but no new fact material to the questions presented was set out in the amendment. Thereupon the defendants answered, setting out the following grounds of defense: First. (a) That the society never executed the note. (b) That the society never by the note promised to pay according to the tenor of the note or otherwise. (c) That the note was not signed in a proper manner to bind the society or its estate, nor in accordance with the custom and usage of the society or its trustees. (d) That the alleged note or contract was not authorized by or consented to or approved by said society, or the ministry or elders thereof. Second. That the note is not the act and deed of Dunlavy & Scott, nor of said Dunlavy, Scott & Boisseau, or either of them. Third. That the note was not signed, executed or delivered, or its execution or delivery authorized or consented to, by all or any or either of said trustees. Fourth. That the note is without any good or valuable consideration. Fifth. That neither said trustees, nor any or either of them, had any power or authority to bind the said society or its estate or property by the execution of the note. Sixth. That the alleged holders or owners of the note were not innocent purchasers thereof, but took the same with notice, and fully protected themselves in the transaction. Seventh. That neither Dunlavy & Scott, nor either of them, as trustees of said Shakers at Pleasant Hill, Ky., or otherwise, had any authority to make or use the paper sued upon, or to bind the society thereby.

Replication having been filed, proofs were taken upon the issues presented by the answer. The defendants the Society of Shakers at Pleasant Hill are a community of people living in Mercer county, in the state of Kentucky, and are commonly known and described by the name last mentioned; and the defendants Brown, Shelton, and Sutton are members of the community, and at the time of the commencement of this suit were its duly appointed and authorized trustees or agents, selected in pursuance of the articles of covenant of the community, and, as such trustees, hold all the property of the society. The society has an actual membership of more than 100 people, and the membership is constantly changing by additions, withdrawals, and deaths. Upon the coming together of the community, the several members of it subscribed to certain articles of covenant, a copy of which is attached as an exhibit to the bill. The articles were duly recorded in the register's office of the proper county. All their property, both personal and real, is held in a mass in common; no one of the members claiming any specific interest therein, everything being devoted to the joint interest of the church. The articles of covenant state that it is "fit and proper that certain individuals should be intrusted with the care of the temporal interest of the church as trustees or agents"; and then it is therein covenanted that the said trustees or agents and their successors shall be duly invested with the said office of trustees or agents, and "empowered to exercise all the duties thereof," and "that it shall be the duty of the trustees or agents to take the general charge and oversight of all and singular the property, estate, and interest dedicated, devoted, and given up as aforesaid to the joint interest of the church, with all gifts, grants, and donations that may at any time be given or devoted for the benefit of the church or for the relief of the poor or any such charitable use or purpose; and the said joint interest, estate, gifts, grants, and donations shall be held by them in the capacity of trustees or agents, and shall be and remain forever inviolably under the care and oversight and at the disposal of the trustees and agentship of the church in a continual line of succession." The said articles of covenant contain this further provision or covenant, to wit: "And we do by these presents covenant, promise, and agree that all the transactions of the trustees or agents in the use or disposal of the joint interest of the church shall be for the mutual benefit of the church, and in behalf of the whole body, and to no personal end or purpose whatever; but the trustees or agents shall be at liberty, in union with the body, to make, present, and bestow deeds of charity upon such as they may consider the proper objects, that are without; and when, by death or other means, any trustee or agent shall cease to act in his office as aforesaid, then all and singular the power invested in or duties incumbent upon him shall be transferred and devolved upon his successor, who shall be appointed to fill his place in said office and trust, so that each individual appointed to the office of trustee or agent of the church shall be vested

with the power and authority of managing and disposing of the property and interest of the church as aforesaid, and of making all lawful defense for the security and protection of the joint interest and privileges of the church, and all the transactions of such members shall be valid so long as they act in the official capacity of trustees or agents in union with the body according to the tenor of the covenant, and no longer." The said articles contain this further provision or covenant, to wit: "And we further covenant and agree that it shall be the duty of the trustees to keep or cause to be kept in a book or books provided for that purpose a true copy of this covenant, together with all other records or matters of a public nature that may be necessary for the information and satisfaction of all concerned, and for the security of the joint interest of the church committed to their care; and, further, that the trustees shall make application to the proper authority for the covenant to be duly recorded in the county office of this county, together with the names of all the subscribers who previously shall have subscribed to it; and in all deeds, wills, grants, etc., which may thereafter be given or conveyed to the trustees or agents aforesaid for and in behalf of the joint body or church, express reference shall be had to the same, specifying the date or time when it was subscribed or first begun to be subscribed." The said articles contain this further provision or covenant, to wit: "We do freely and cordially covenant, promise, and agree together for ourselves that we shall never hereafter make any account of any property, labor, or service devoted by us to the purpose aforesaid, or bring any charge or debt or damages or hold any demand whatever against the church or community, or any member thereof, on account of either property or services given, rendered, or consecrated to the aforesaid sacred and charitable uses." These articles of covenant, originally established in 1815, were amended somewhat in 1844, but not in respect to any matter deemed material to the result. The article providing for trustees distinctly declares the trust, and in regard to real estate says that they shall "have in trust the fee of all the land belonging to the church."

Considerable testimony was taken in support of the defenses set up in the answer by the defendants, and considerable also by the complainants in rebuttal thereof. It is not worth while to go into a discussion of the details of it. As gathered by the court, the most material facts in regard to the execution of the note and its subsequent history are as follows: It is sufficiently proved that Dunlavy and Scott were at the time when the note bears date the executive officers of the society. Boisseau was also one of the trustees, but he was not an active member of the board, if we call it such, and the business of the society was actually conducted by Dunlavy and Scott in their capacity as trustees and agents. Such was the general rule. They signed the obligations of the society in substantially the same form in which the note is signed, and it sufficiently appears that this was the method and usage in business dealings generally in which the society was concerned; and that this mode of conducting their affairs and signing their written obligations was well known to and recognized by all the members of the society, no question, so far as appears, ever having been raised as to the authority of Dunlavy and Scott to conduct the business in this way, or of the obligation of the society to respond to their acts so done, as being authorized by the whole body. Mays, the payee of the note, was an adventurer, engaged in speculations of one kind and another in Ohio, and, having some money for investment, went to Pleasant Hill, in Kentucky, and loaned the amount represented by the note to Dunlavy and Scott for the society. It is proven beyond a doubt that the signatures of Dunlavy and Scott are in the handwriting of Dunlavy, Scott being present and assenting to the transaction. There are some circumstances which tend to beget a suspicion that there may have been some unfair dealing on the part of Mays in procuring the note, but the grounds of such a charge are either quite vaguely shown, or rest upon mere conjecture. The note was held by Mays until, as before stated, it was sold and indorsed by him to Watson, and by the latter pledged to Souther. All this occurred before the maturity of the note. There is no proof that Watson, at the time he took the note, had any knowledge of any defense to it, except that he was informed by correspondence with the society during the pendency of the negotiations between himself and

Watson for the sale of the farm and the taking of the note that the society claimed that the note was never executed by or in behalf of the society, and that the society claimed that it had never received the money for which the note purported to have been given.

The legislature of the state of Kentucky, on the 11th day of February, 1828, passed an act relating to suits against such societies as the one here sued, which is as follows:

"An act to regulate civil proceedings against certain communities having property in common.

"Section 1. Be it enacted by the general assembly of the commonwealth of Kentucky. That it shall and may be lawful for any person having any demand exceeding the sum of fifty dollars, founded on any contract implied or expressed against any of the communities of people commonly called 'Shakers,' living together, and holding their property in common, to commence and prosecute suits, obtain decrees, and have execution against any such community, by the name or description by which said community is commonly known, without naming or designating the individuals of such community, or serving process on them, except as is hereinafter directed. All such suits shall be by bill in chancery, in the circuit court of the county in which such community reside; and it shall and may be lawful to make parties to such suits, all other persons by name who may have any interest in the matter in controversy, or who may hold any property in trust for said community, or may be indebted to them.

"Sec. 2. Whenever any subpoena founded on any such bill shall be placed in the hands of any officer to execute, he shall fix a copy of such subpoena on the door of the meeting-house of such community, shall deliver a copy to some known member of the community, and shall read the subpoena aloud at some one of the dwellings of said community, at least ten days before the term of the court at which said community are required to answer, and on these facts being returned in substance on the subpoena, they shall constitute a good service of process of said community, so as to authorize the court to require and compel an answer agreeable to the rules and usages in chancery.

"Sec. 3. All answers for and in behalf of such community may be filed on the oath or affirmation of one or more individuals of such community, who shall moreover swear or affirm that he or they have been nominated as the agents or attorneys of such community, to defend such suit, and thereupon the individual so answering shall have full power and authority to manage and conduct said suit on the part of such community, or to settle and adjust the same, and all notices to take depositions against said community may be served on such agent or left at their place of residence, provided, that for good cause shown, the court may at any time permit such agents to be changed or substituted by others of the community; provided, however, that the agents or defendants shall not be compelled to answer on oath to any charges or allegations, which are, by the existing rules of law and equity, cognizable alone in the courts of common law; and provided, further, that in all such cases as mentioned in the foregoing proviso, the defendants shall be entitled to a jury, if they, or any one of them, shall signify their desire to that effect at any time before the trial shall have been gone into, and in such case above described either party may require the personal attendance of witnesses and a viva voce examination, as though the suit were at common law, and the court shall direct such process at the request of either party, or summonses may issue as in other cases of the kind.

"Sec. 4. Be it further enacted that nothing in this act contained shall be so construed as to render the communities aforesaid, or any of them, liable upon contracts entered into by any individual or individuals, not authorized by their laws and usages to contract for such community; nor shall it be so construed as to give to any person, who, having been a member of such community, has heretofore left it, or may hereafter leave it, any right, in consequence of such membership, which he or she would not have had if this act had not passed; but such right shall depend upon and be determined by the laws, covenants and usages of such society and the general laws of the land, except as to the mode of suit.

"Sec. 5. Be it further enacted, that, any community which may be sued under the provisions of this act shall have the same right to change of venue as other defendants."

This statute is quoted at large for the reason that its various provisions illustrate the status and character given to such societies by the laws of Kentucky, and by which they are thus recognized.

The court below decreed for the complainants, declaring the note to be an equitable charge upon the property of the society, and providing for the enforcement of the lien as prayed by the complainants. The defendants bring the case here on appeal.

Stone & Sudduth, D. W. Lindsey, R. P. Jacobs, and P. B. Thompson, Sr., for appellants.

St. Geo. R. Fitzhugh and C. A. Hardin, for appellees.

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

Having stated the case as above, SEVERENS, District Judge, delivered the opinion of the court.

The first question raised by the defendants is one of jurisdiction, it being contended that the citizenship of Letitia Souther is not sufficiently shown to be different from that of the defendants. In the original bill, Watson was described as a citizen of New York, and Henry Souther as a citizen of Virginia. The bill styled "supplemental," of Letitia Souther, does not show her citizenship. The amended bill describes her as being a nonresident of Kentucky, but does not allege her citizenship there. The defendants, therefore, insist that she, being, as they also contend, a necessary party to the suit, is not shown to be a citizen of some other state than Kentucky, and so that the court is without jurisdiction. The general rule here invoked is undoubtedly well established as the result of the statutory provisions upon the subject. Robertson v. Cease, 97 U. S. 646; Insurance Co. v. Rhoads, 119 U. S. 237, 7 Sup. Ct. 193; Everhart v. Huntsville College, 120 U. S. 223, 7 Sup. Ct. 555.

But attention must be given to the peculiar circumstances shown by the record in order to ascertain whether the rule is applicable. At the time when the original bill was filed, Henry Souther was dead. Counsel for defendants insist, and we think rightly, that Watson was therefore the only party complainant in the bill then filed, and that for all practical purposes it should be treated as though Souther had not been named as a party at all; and we also agree to their further proposition that, when Letitia Souther came in, she came as an original party. The new matter brought forward by her bill was in no proper sense supplemental. Her interest had not before been represented in the suit. But the court had already acquired jurisdiction of the case. Watson, who held the general property in the note upon which the suit was brought, had filed his bill more than four months before Letitia Souther came in. She had an equitable interest arising upon the pledge of the note as collateral to Watson's indebtedness to the estate she represented. Watson's title was a sufficient foundation on which the case could stand. It is true the pledgee of the note was a proper party, and, in a sense, a necessary party to the suit. She was not a necessary

party in giving jurisdiction to the court over the case, and enabling it to make a decision; but she was a necessary party to the rendition of such a decree as should bind all the parties interested in the subject-matter. If the suit had proceeded without the intervention of Letitia Souther, it would have been defective in respect of parties, but not fatally so. It would have given ground for demurrer, and probably for an objection, to be taken in the answer or at the hearing, though the objection is rarely allowed to be first started on an appeal. McGahan v. Bank, 156 U. S. 218, 15 Sup. Ct. 347. A party, by failing to seasonably insist that necessary parties to a complete decree are not before the court, "often suffers the evils of inadequate litigation by leaving some branch of the subject still open to future controversy." The court also might take the objection sua sponte at the hearing, and order the case to stand over for the bringing in of the party having an equitable interest in the claim. Story, Eq. Pl. § 75; Calv. Parties, 113–116; Mitf. Eq. Pl. 180; 1 Daniell, Ch. Prac. c. 5; Coop. Eq. Pl. 33. That the court may do this, of course, necessarily implies that the case is under its jurisdiction and authority. The defendant should be required to take the objection seasonably. If he does not, and goes on with the litigation, and, as here, first raises the objection on appeal, he ought to be held to have waived all defects except such as deprive the court altogether of the power to afford any effectual relief. If the defendant, by proceeding, waives such defects, he exposes himself to further litigation at the instance of the party interested in, but not represented in, the former suit. But that would be the result of his own negligence in not requiring all parties to be brought into the first suit, so that the decree would protect him.

If Watson had obtained a decree upon the original bill, he would have held the fruit of the suit subject to the same equities as he held the note; that is, subject to a trust in favor of his pledgee for the amount of his debt. Here Mrs. Souther was allowed to intervene for her interest early in the suit. That which the defendants might have insisted on, or the court on its own motion have directed, was seasonably done, and no inconvenience has ensued. Permitting a party to intervene in a pending suit to represent an interest involved does not oust the jurisdiction of a federal court already acquired by reason of the diverse citizenship of the original parties, of whatever state the intervener may be a citizen. Stewart v. Dunham, 115 U. S. 61, 5 Sup. Ct. 1163; Freeman v. Howe, 24 How. 450; Krippendorf v. Hyde, 110 U. S. 276, 4 Sup. Ct. 27; Phelps v. Oaks, 117 U. S. 236, 6 Sup. Ct. 714; Osborne v. Barge, 30 Fed. 805. We think, therefore, that the jurisdictional objection founded on the citizenship of the parties is not well taken.

The next ground of defense is that the court had no jurisdiction, because there was a plain and adequate remedy at law. What the supposed plain and adequate remedy at law is in such a case is not very clearly shown to us. It was the society, and not the individual members, which made the note. Some of the members were adults, and some infants. The society was not a "partnership."

Neither was it a "corporation," in the proper sense of that term. The members have no property, having renounced all to the society. It is a somewhat anomalous case, but is yet of a kind which occasionally appears in the books of reports, and in regard to which the law has been settled by a number of decisions. It is urged that the statute of Kentucky in regard to the remedy in such cases is of no avail. It is said that it is unconstitutional, in that it attempts to vest a court of equity with jurisdiction of a purely legal right. It is further said that the statute has been repealed by implication, and that, at all events, it was not competent for the legislature of Kentucky to determine the jurisdiction of the equity courts of the United States, or to interpolate therein a strictly legal cause of action. We think none of these suggestions are well founded. The law which is thought to repeal the statute is the general practice regulation of the Code of the state, which does not specifically refer to this statute, and is not so inconsistent with it but that both might harmoniously be wrought out together. Frost v. Wenie, 157 U. S. 46, 15 Sup. Ct. 532. Nor can we see any good reason for holding the law void for the reason suggested, or for saying that the equity courts of the United States should altogether disregard it. We do not refer to that act for the details of practice provided by it, but only to show that, by providing the equitable remedy, the rights to be secured were recognized as of an equitable character; for, while the statutes of a state may extend the subject of equity jurisdiction, they do not affect the mode of its exercise. Holland v. Challen, 110 U. S. 15, 3 Sup. Ct. 495; Whitehead v. Shattuck, 138 U. S. 149, 11 Sup. Ct. 276; Gormley v. Clark, 134 U. S. 338, 10 Sup. Ct. 554.

That the rights here dealt with partake of an equitable character had been decided in the courts of chancery long before the date of this statute, and the doctrine has now become so well established that we should not hesitate to support the jurisdiction if the Kentucky statute had never been enacted. Let us first suppose that the note constitutes a legal obligation upon which an action at law can be maintained. Against whom shall the suit be brought? Not against the society, for it is not a corporation, and has no legal existence as an aggregation. If the suit be brought against the members, what members are liable? Probably such only as were sui juris at the time of making the note. But some of these are dead, and others may have withdrawn. The suit, if brought, would be liable to repeated abatements. Perhaps these difficulties could be got along with. But a greater one would be experienced in the remedy for the satisfaction of the judgment. The members have no private property. All is merged in the common mass. There is no inheritance and no estate which would go to an administrator. It would be an extremely embarrassing task to identify any legal interest of the members in the common property upon which an execution could be levied. It is true there is a statute in Kentucky making the interest of a cestui que trust leviable on execution.

Section 21, art. 1, c. 63, p. 829, of the General Statutes of Kentucky, provides as follows:

"Estates of every kind held or possessed in trust shall be subject to the debts and charges of the persons to whose use or for whose benefit they shall be respectively held or possessed, as they would be subject if those persons owned the like interest in the property, held or possessed, as they own or shall own in the use or trust thereof."

If this statute applies to the interest of members of such a society, such a proceeding would result in rights for contribution among the members, and consequences altogether alien to the purpose and interests of the society would ensue. It is to such a case that the jurisdiction of a court of equity is peculiarly applicable. By the flexibility of its procedure to fix the liability and the scope of the remedies it is authorized to employ for its satisfaction, it can furnish complete relief where the remedy of the common law is neither plain nor adequate. A large branch of equity jurisdiction has always been concurrent with that of the courts of law,—that is, has extended over the same general subjects as those taken cognizance of in actions at law; but where, from the nature of the circumstances, and on account of the inadequacy of its remedies, a court of law cannot afford the due and appropriate relief. In these cases there is an obligation of a legal character at the foundation of the suit, like the note in the present case, but there is some difficulty either in the manner in which the obligation rests upon persons or property, or in the efficiency of the process belonging to the court, which makes the legal remedy inadequate. Boyce's Ex'rs v. Grundy, 3 Pet. 210; Wylie v. Coxe, 15 How. 416; Barber v. Barber, 21 How. 582.

In Weymouth v. Boyer, 1 Ves. Jr. 424, Mr. Justice Buller, sitting for the lord chancellor, says:

"We have the authority of Lord Hardwicke that if a case was doubtful, or the remedy at law difficult, we would not pronounce against the equity jurisdiction. This same principle has been laid down by Lord Bathurst."

It would result from these considerations that this bill could be maintained if the note could be regarded as imposing a technically legal liability. But we doubt if it can be so regarded, and are inclined to think that the rights secured by it are of a purely equitable character. Looking to the circumstances in which this note was given, we think it cannot be doubted that it was intended to charge the property of the society. The society itself, as has already been said, was not a corporation of which the law could lay hold, nor was it a partnership. It was but a mere name given to a community whose membership is constantly shifting. The note was not effectual against anything but this changing body, and that only by supposing it to be intended to be a charge against the property which all the members of the society had concurred in putting in a common mass in the hands of the trustees of the society. It could not be accepted that the society intended to obtain the money, appropriate it to its own use, and give this note as an idle form, which it is unless it charges their property. And the consideration of the note went

to augment the fund upon which it is sought to charge it. "Rights in equity equivalent to liens may arise under various circumstances. Thus, real or personal estate may be charged by an agreement, express or implied, creating a trust which equity will enforce." Snell, Eq. (2d Ed.) 274. "In courts of equity the term 'lien' is used as synonymous with a charge of incumbrance upon a thing, where there is neither jus in re, nor ad rem, nor possession of the thing. The term is applied as well to charges arising by express engagement of the owner of property, as to a duty or intention implied on his part to make the property answerable for the specific debt or engagement. Mr. Justice Erle once remarked [Brunsdon v. Allard, 2 El. & El. 27] that 'the words "equitable lien" are intensely undefined.' It is necessarily the case that something of vagueness and uncertainty should attend a doctrine that is of such wide and varied application as is this of equitable lien; and yet the principles are as well defined as other equitable principles, and their application to certain well-established classes of liens is well settled. To apply them to that undefined class of liens which arises from the contracts of parties may be more difficult, because these liens are as various as are the contracts, and precedents which exactly apply may not be found. This wide application of the doctrine is one element of the importance of this branch of equity jurisprudence." 1 Jones, Liens, § 28. And Pomeroy, in discussing the subject of equitable liens, says: "There is no doctrine which more strikingly shows the difference between the legal and equitable conceptions of the judicial results which flow from the dealings of men with each other from their express or implied undertakings." 3 Pom. Eq. Jur. § 1234.

In Perry v. Board, 102 N. Y. 99, 6 N. E. 116, the plaintiff had in good faith advanced money for the improvement of certain property which was in the hands of the defendant upon a trust to raise money by mortgage to pay off this and another debt. The money so raised was not sufficient after paying the other debt to satisfy the plaintiff. He sued in equity to charge the trust property. He had no legal obligation of the trustee, nor of the party which created the trust, upon which he could maintain an action, and no recourse but to the property itself. The court of appeals held that, because of the lack of any available remedy for the reimbursement of the money which he had bestowed in augmentation of the trust property with the knowledge of the officers of the parties interested in the trust property, the plaintiff was entitled to an equitable lien thereon, which was directed to be enforced. This case is cited by Jones in his work on Liens in support of the proposition that equity will afford a lien where the plaintiff's rights can be secured in no other way. 1 Jones, Liens, § 39; 1 Beach, Mod. Eq. Jur. §§ 290, 291. And see, also, Riddle v. Hudgins, 7 C. C. A. 335, 58 Fed. 490, and cases cited.

The bill in this case makes the society, the trustees, and three of the members parties defendant. In our opinion, this was sufficient. It belongs to that class of cases in which it has been held that when the parties are numerous, and it is inconvenient to bring them all be-

fore the court, a representation of them may be constituted, and the representatives be made parties to prosecute or defend for all.

Lord Hardwicke, in Vernon v. Blackerby, 2 Atk. 144, mentions the case of The Bubble, decided in the high court of chancery in 1720, in which, "although several persons were interested, yet they lodged a general power and authority in some few only, and therefore, to avoid inconvenience from making such numerous parties, this court restrained them to those particular persons who were intrusted with this general power."

In Meux v. Maltby, 2 Swanst. 277, the bill made the treasurer and directors of a joint-stock company, who were also holders of shares, defendants to the suit. Objection being made for want of parties, it was held, upon review of many previous cases, by Sir Thomas Plumer, master of the rolls, that the objection was not maintainable. In delivering judgment he said:

"Here is a current of authority, adopting more or less a general principle of exception, by which the rule that all persons interested must be parties yields when justice requires it, in the instance of either plaintiffs or defendants. The rigid enforcement of the rule would lead to perpetual abatements. This, therefore, cannot be regarded as a new point, or as creating a difficulty. It is quite clear that the present suit has sufficient parties, and that the defendants may be considered as representing the company. Can I then dismiss the bill for want of parties, because all the proprietors, admitted to be so numerous that it is difficult to find them, are not before the court? There is no fair distinction in that respect between this case and those which have been stated."

This was a case where the parties themselves had lodged the authority of management in certain officers. The same principle obtains where the court itself adopts a few as representatives of the whole. Story, Eq. Pl. §§ 117, 118.

We therefore conclude that the suit is properly brought in equity, and that the defendants are rightly constituted.

The next defense presented is that the note was not so executed as to bind the society, but only the individuals, Dunlavy and Scott. The note is signed in their names, as "Trustees of the Society of Shakers at Pleasant Hill, Ky." Prima facie it might be that, under the rule adopted by many authorities, the result contended for might follow such a mode of signing, especially where the note has passed into the hands of a party who had no acquaintance with the facts in which the note originated, and insisted on holding the signers to the rule. But here the defendant, the principal of the persons signing the note, raises the objection. When an instrument like this bears on its face a suggestion that it is executed by one acting as an officer or agent of another, evidence is admissible as against the principal to show that the instrument was intended as the obligation of the party who was in fact the principal in whose behalf the business was done, and not that of the agent. The case is governed by the rule laid down in Metcalf v. Williams, 104 U. S. 93. The cases of Brockway v. Allen, 17 Wend. 40, and Kean v. Davis, 21 N. J. Law, 683, cited by Mr. Justice Bradley in Metcalf v. Williams, are also precisely in point. The doctrine of these cases is that, while the general rule is as here contended, still it is competent to

prove the surrounding circumstances where the language of the instrument with respect to the party to be charged is equivocal. The evidence in the present case leaves no doubt whatever that the society was intended to be the obligor. The suggestion of the society that its trustees should be held personally responsible for the debt is altogether devoid of merit.

It is also insisted that neither Dunlavy nor Scott had power to bind the society. The defendants contend that, Boisseau having been also a trustee, his concurrence in the act of giving the note was necessary. It is undoubtedly the general rule that all the trustees appointed must participate in the act of agency. Mechem, Ag. § 77; 1 Perry, Trusts, § 411; Wilbur v. Almy, 12 How. 180. And, if the society had held its trustees to the rule, it might very well be that this obligation, thus executed, could not at law have been enforced. But the evidence demonstrates that it did not in the transaction of its business stand upon the rule, but permitted the individuals of the trustees, sometimes one and sometimes two, to conduct the business of the society. Indeed, it quite clearly appears that Dunlavy was the recognized manager, who often conducted its important affairs without any active intervention of the other trustees. We think the society should not now be allowed, having got the money procured by its ordinary methods and evidenced by an instrument executed in the manner in which for many years its obligations had without dissent been executed, to say that its adopted method was irregular and did not bind it. Besides, if the execution of the instrument was defective, it would not on that account fail in equity. The real purpose and effect of the instrument is to prove the fact upon which the society's property should be charged; that is, that the money it represented was loaned to the society. 3 Pom. Eq. Jur. (2d Ed.) § 1237; 1 Beach, Mod. Eq. Jur. § 292; Allis v. Jones, 45 Fed. 148.

The observations made in regard to the defense last mentioned apply to the further ground of defense, which is, as stated in the language of the brief submitted by appellant's counsel, that "the trustees had no power to bind the society upon negotiable paper, nor did Dunlavy's signing of the name Dunlavy & Scott bind the society." It is proven that the society was in the habit of using such paper so executed. If it did not govern itself by its own rules, or permitted its agents to make a rule of practice of their own, the society should respond to the results of a rule of practice thus sanctioned.

The last ground of defense, and which really ought to have stood first in the line, is that there was no consideration for the note, and that Watson is not an innocent holder of the note. We are entirely satisfied that Dunlavy signed the note; that is, that the signature is in his handwriting. This was almost conceded by counsel for defendants on the argument. But the evidence leaves it clear enough. This fact goes far towards proving the good faith of the transaction. Dunlavy's reputation for integrity is not impugned. He appears always during his life to have had the entire confidence

of the society, and was trusted by it in its most important business affairs. There is no ground whatever shown for suspecting him. Nor is there any proof that the instrument is not such as was intended. It recites that the consideration for which it was given was in fact received. There is affirmative proof from witnesses that the money represented by the note was paid, and there is no proof to the contrary. The law presumes good faith and fair dealing. There is nothing but the singularity of the transaction to raise a suspicion of anything wrong, and this is not sufficient to overcome the positive evidence supported by the legal presumption. It is not necessary, therefore, to determine whether Watson is a "bona fide holder," as that term is employed in the law of negotiable paper.

We think the decree of the court below is right, and it is accordingly affirmed.

KLEINHANS et al. v. JONES et ux.

(Circuit Court of Appeals, Sixth Circuit. June 10, 1895.)

No. 274.

CONTRACTS—ASSENT.

Complainants on October 2, 1893, communicated in writing to one P., who was authorized by defendant to receive and transmit propositions for the purchase of certain real property owned by defendant, and forward his answers thereto, an offer for the purchase of such property. The terms of the offer were to pay $120,000 for the property,—$10,000 cash, and the balance in annual installments of $11,000,—the buyers agreeing to take up the notes in five years, if money could be gotten at 6 per cent.; to pay taxes for 1894; to pay interest semiannually; to insure for $25,000; to improve the property immediately, and that if any note or interest remained unpaid for 30 days the whole should be due; possession to be given in 60 days, and commission paid by defendant. P. at once sent a telegram to defendant, purporting to communicate this offer, and stating that the proposed buyers would pay $120,000 for the property,—$10,000 down, the balance in 10 notes, payable annually, with 6 per cent. semiannual interest, and the privilege of paying all the notes on or before five years; that they agreed, if money was easy, to pay all the notes, if desired, in five years; to pay the taxes of 1894; to improve at once, and insure to secure defendant. No answer having been received from defendant, complainants on October 10th submitted to P. another offer in writing, in which they agreed to pay $120,000,—$10,000 in cash, the balance in 10 annual payments of $11,000 each, payable on or before maturity, to be secured by lien, with semiannual interest at 6 per cent., the whole to be due if any note remained unpaid for 60 days; also to insure the property for $20,000, and pay the taxes of 1894; defendant to pay commission, and give a good title, with general warranty. On October 11th, and before the last-mentioned offer was communicated to him, defendant telegraphed P. that he would accept the offer in P.'s telegram of October 2d, if properly secured on the property. Thereupon P. indorsed an acceptance on complainants' offer of October 10th, attaching defendant's telegram thereto, and receipted for a partial payment from complainants. *Held*, that there was no meeting of the minds of the parties as to the terms of a contract.

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

This was a suit by Horace Kleinhans and D. G. Simonson against Samuel H. Jones and Elizabeth Dunbar Jones for the specific per-

formance of a contract. The circuit court dismissed the bill. Complainants appeal. Affirmed.

This case was originally brought in the chancery division of the Jefferson circuit court, in Kentucky, by petition. Subsequently the defendants, upon filing their proper petition and bond, procured the removal of the case into the circuit court of the United States for the district of Kentucky. In the latter court the complainants reformed their pleadings, and converted their petition into a bill in equity. The object of the suit was to obtain a decree to compel the specific performance of a contract for the sale of a lot and the building thereon in the city of Louisville known as the "Mozart Hall Property," of which, at the time of the making of the alleged contract, the defendant Samuel H. Jones was the owner; the other defendant named in the pleadings (Elizabeth Dunbar Jones) being his wife. The complainants were copartners engaged in business in Louisville under the firm name of Kleinhans & Simonson, and were citizens of Kentucky. The defendants were citizens of the state of Pennsylvania. One Curran Cope, a resident of Louisville, had for some time previously acted as the local agent of the defendants in the care and management of the Mozart Hall property. The defendants, having it in contemplation to make a sale of this property, had authorized Pope to receive, and communicate to them, any offer that might be made by an intending purchaser, and to receive from the defendants, and communicate to such party, the response which they might think proper to make to such offer. At the time of the negotiations which are alleged to have resulted in the contract upon the basis of which the suit is brought, a firm by the name of Crutcher & Stark were in the occupation of the building. The supposed contract upon which the complainants rely was made by correspondence,—by letter and telegram. The bill sets out the correspondence from which the contract is claimed to have resulted, and prays for a specific performance thereof. The substance of the answer of the defendants is that no contract was established by the correspondence set out by the complainants. Upon this issue the controversy mainly depends. The complainants, through John A. Stratton & Co., their agents, on the 2d day of October, 1893, submitted an offer to Pope for the Mozart Hall property, to be communicated by him to his principals. This offer was in the words and figures following:

"Will pay	$120,000
Cash	$10,000
1 year, on or before	11,000
2 years, on or before	11,000
3 years, on or before	11,000
4 years, on or before	11,000
5 years, on or before	11,000
6 years, on or before	11,000
7 years, on or before	11,000
8 years, on or before	11,000
9 years, on or before	11,000
10 years, on or before	11,000

"Will take up notes at the end of five years, if money can be gotten at six per cent. Will pay taxes for 1894. Will pay interest semiannually. Will insure for at least $25,000 for benefit of deferred payments. Will improve immediately. They want immediate possession within sixty days after deed is made. If any note or installment of interest is not paid within thirty days after maturity, all are due. This contemplates Mr. Jones paying comm.

"[Signed] Kleinhans & Simonson."

On the same day Mr. Pope assumed to communicate this offer to Mr. Jones by the following telegram:

"Bona fide new party will give one hundred and twenty thousand for Mozart. Ten thousand cash, balance ten notes payable annually, with six per cent. interest payable semiannually. Privilege of paying all notes on or before five years. Agree, if money is easy, to pay all notes, if desired, at the end of five years. Will pay ninety-four taxes. Will improve at once, and in-

sure to secure you. Possession to be given sixty days from date. This is the top notch, and parties better than gold. It is a paying, safe, solid investment. Answer at once.

"[Signed] Curran Pope."

Jones replied, postponing any definite answer to the proposition until he should get some further information and advice from another party in reference to the subject. No definite reply to the offer having been received by Pope from Jones, the complainants on the 10th day of October, 1893, submitted another form of offer for the property, which was in the words and figures following:

"Louisville, Ky., Oct. 10, 1893.

"John A. Stratton & Co., Agents: You are authorized to offer $120,000, payable $10,000 cash, balance in ten equal annual payments of $11,000 each, payable on or before maturity, to be secured by lien, and the premises to be insured for at least $20,000 for benefit of deferred payments, and notes bearing interest at the rate of 6 per cent., payable semiannually; and should any of the notes become due, and is unpaid, and remain unpaid for the space of sixty days, the whole amount, at the option of holder, to be deemed due. Possession to be given within thirty days after date of deed. We pay taxes for 1894, and seller to pay your commission for selling the property belonging to S. H. Jones, fronting 99 feet on east side of Fourth street, by a depth of 83 feet on Jefferson street, the south line of which binds on Jefferson street. Mr. Jones to make us a good title, and give general warranty deed, free of all incumbrances.

"[Signed] Kleinhans & Simonson,
"Per John A. Stratton & Co., Agents."

This communication does not appear to have been transmitted to Jones at the time. On the following day,—that is to say, October 11, 1893,—Jones telegraphed to his agent, Pope, as follows: "I accept the offer in your telegram of October 2nd, provided the notes are properly secured on the property. [Signed] Sam. H. Jones." And on the same day Pope indorsed upon the complainants' offer of October 10th the following acceptance: "Accepted. Sam'l H. Jones, by Curran Pope, acting under authority of telegram of October 11, 1893,"—and attached the telegram, or a copy thereof, to his acceptance. At the time of the making of this acceptance the complainants paid to Pope, for Jones, as part of the purchase money, $1,000 in cash, which was receipted for by Pope, in the following form:

"Louisville, Ky., October 11, 1893.

"$1,000. Received of Kleinhans & Simonson one thousand dollars ($1,000) in part payment, as per contract, on $10,000 cash payment on 99x83 feet, northeast corner Fourth and Jefferson streets, for which I am to make a good title, free of all incumbrances, and give general warranty deed. If unable to make said deed, am to refund the one thousand dollars.

"Sam'l H. Jones, By Curran Pope, Agent."

The possession of the property was not delivered, but continued in Crutcher & Stark. On the 21st day of October, 1893, the complainants addressed the following communication to Pope in reference to the occupation of the property:

"Dr. Curran Pope, Agent S. H. Jones—Dear Sir: We agree to extend time for possession of property, 99x83 feet, northeast corner Fourth and Jefferson streets, to sixty days from date of deed, provided you cannot get possession in thirty days; but you must do all in your power, legally and otherwise, to get possession within the time originally agreed.

"Kleinhans & Simonson."

But in the meantime Crutcher & Stark, without any communication with Pope upon the subject, sent a telegram to Jones offering $130,000 for the property, stating that they had been informed by his agent that it was not for sale. After some correspondence by letter and telegram between Jones and Pope, in which the former complained of Pope that he had not obtained as good a price as he ought from Kleinhans & Simonson, and on the other hand, by Pope, that the offer of Crutcher & Stark was a dishonorable attempt at

circumvention, and insisting that the agreement with Kleinhans & Simonson had been made in good faith, and that Jones was bound, in law and morals, to carry it out, Jones at length refused to perform the agreement of Pope with Kleinhans & Simonson, and entered into a contract for the sale of the property to Crutcher & Stark for the sum of $125,000, of which $25,000 was to be paid down. This last-mentioned contract was made on the 30th day of October, 1893, and on the same day Crutcher & Stark, with sureties, executed a bond in the penal sum of $25,000, which, after reciting the sale from Jones to Crutcher & Stark, and that Kleinhans & Simonson might set up a claim as prior purchasers of the property, and might institute suit for damages, or specific performance, and that Pope might demand commissions from Jones upon the sale of the property to Kleinhans & Simonson, obligated the makers of the bond to indemnify and hold Jones harmless against any loss or damage he might be put to by reason of any such suit, including any costs for attorney's fees and expenses incurred in defending it, that might be brought by Kleinhans & Simonson, or by Pope. On the 6th day of November following, Kleinhans & Simonson brought this suit for specific performance of the contract which they claim Jones had made with them for the sale of the property, by his telegram of acceptance, of October 11th, of their offer of October 2, 1893. Elizabeth Dunbar Jones demurred to the bill in the United States circuit court, alleging that it contained no equity upon which the court could give a decree to the complainants against her. By leave of the court the complainants' bill was amended on the 19th day of April, 1894, and the substance of that amendment was that it contained an allegation that the contract sought to be specifically enforced by complainants in their bill was that set forth in the communication from Pope to Jones on the 2d day of October, 1893, and accepted by Jones by his telegram to Pope of October 11, 1893, both which communications have already been set out in the foregoing statement. There is much correspondence, as is shown by the record, between Jones and Pope, and between Jones and Crutcher & Stark; but as the questions to be decided hinge upon the construction and effect of the communications between the parties which have been above exhibited, the other correspondence in no wise materially affecting the same, such other correspondence will not be further referred to. There is also some oral testimony by witnesses in the record, but that does not affect the vital parts of the case. The case was heard in the court below upon pleadings and proofs as to the defendant Samuel H. Jones, and upon the bill and demurrer as to the defendant Elizabeth Dunbar Jones. That court, being of opinion that there had been no meeting of the minds of the parties complainant and the defendant Samuel H. Jones, whereby they had assented to the same terms of agreement, held that there was no legal contract between them, and that, therefore, the bill could not be sustained. The bill was accordingly dismissed, and complainants bring the case here by appeal.

O'Neal, Phelps, Pryor & Selligman and Dodd & Dodd, for appellants.

Stone & Sudduth, for appellees.

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

Having stated the case as above, SEVERENS, District Judge, delivered the opinion of the court.

We think it quite clear that it was competent for the parties to become bound by correspondence carried on in the way in which this was,—by letters and telegrams,—and that these, when put together, if they made out an assent of the parties to the terms of sale, would make a binding agreement, which could be specifically enforced, and that such a mode of creating a binding contract would be sufficient under the statute of frauds of the state of Kentucky, which seems to be not essentially different from that of other states, in re-

quiring written evidence of the agreement of the vendor of real estate, and of the authority of the attorney, when the making of the agreement is not the personal act of the owner, but is made by his agent in his name. Lyon v. Pollock, 99 U. S. 668; Ryan v. U. S., 136 U. S. 83, 10 Sup. Ct. 913; Minnesota Linseed Oil Co. v. Collier White-Lead Co., 4 Dill. 431, Fed. Cas. No. 9,635; Fry, Spec. Perf. 291; Mechem, Ag. § 92; Godwin v. Francis, L. R. 5 C. P. 295; Saveland v. Green, 40 Wis. 431. Negotiations on the part of the vendors were carried on through Pope, as their agent. We say the "vendors," intending thereby, of course, to include Mrs. Jones, because it was undoubtedly expected that she would join in making the proper conveyance. We do not, however, intend to imply that she was, in any legal sense, a party to these negotiations. Counsel for complainants attributes to Mr. Pope a larger capacity, as agent, than we think the evidence justifies. We can entertain no doubt, after an examination of the testimony, that Pope had no general authority to make a sale of the Mozart Hall property, and that his powers were limited to a mere communication of the proposals of the buyer to Jones, and of Jones' responses to such offers. He was therefore a special agent, the limitation of whose powers was well known to the complainants; and they can rely upon no act of his in fixing the terms of purchase, which he was not specially authorized to make. Morrill v. Cone, 22 How. 75; Butler v. Maples, 9 Wall. 766; Hennessey v. Woolworth, 128 U. S. 438, 442, 9 Sup. Ct. 109; Chinnock v. Ely, 4 De Gex, J. & S. 638; Hamer v. Sharp, L. R. 19 Eq. 108; Pom. Spec. Perf. § 77; Mechem, Ag. § 288.

We come then to the main question in the case, which is whether the principals ever came to an agreement. When the original petition in the case was filed in the state court, the complainants based their suit upon a supposed contract created by their offer of October 10th, and the acceptance thereof on October 11th by Pope, for Jones, under the authority of Jones' telegram to Pope bearing the same date as Pope's acceptance of the offer made on October 10th. This telegram of October 11, 1893, was as follows: "I accept the offer in your telegram of October 2nd, provided the notes are properly secured on the property." Thus it will be seen that the authorization of Pope by Jones was to accept a contract of the terms of October 2d. This is plainly indicated by the language of the telegram itself; and, if that were doubtful, it is made clear that Jones' authorization of acceptance had no reference to the offer made on October 10th, for he then had no knowledge of that proposition. It follows that Pope was without authority to bind his principal to the terms contained in complainants' proposition of October 10th, unless that proposition was in fact identical with, and a mere continuation of, the proposition of October 2d. Whether it was so or not we will consider further on. The statement of the alleged contract made in the original petition leaves a fatal hiatus, in not setting forth what was the offer contained in Pope's telegram of October 2d, for it was that offer only which the petitioner shows Jones had given Pope authority to accept. It was not stated in the petition that the offer of October 2d was the same as the offer of October 10th, and

there was no presumption that it was so. After the case was removed into the circuit court of the United States, and during its pendency there, the incongruity of the contract, as originally stated in the petition, seems to have occurred to the learned counsel for the complainants; and, in the hope of putting the alleged contract upon a surer foundation, leave was obtained from the court to amend the bill, and this was done. By this amendment the complainants' ground was shifted, and the contract which the amended bill asked the court to enforce was a contract constructed upon the proposition of the complainants' communication by Pope to Jones of October 2, 1893, and the alleged acceptance thereof by Jones in his telegram to Pope of October 11th, and the proposition of the complainants of October 10th was relegated to a new place, the allegation being that this was drawn up merely for the purpose of carrying into more expanded form the contract alleged to have been made by complainants' proposition of October 2d and Jones' telegram of October 11th; and it is alleged that the instrument bearing date October 10th was not intended to vary the original contract, and that if it does so it is a mistake, and contrary to the intention of the parties, and should be reformed. But, unfortunately for the complainants, the new ground does not furnish them any better standing than that originally taken. In the first place, the evidence fails to show a binding acceptance by Jones of the offer of October 2d. The telegram indicating an acceptance was addressed to Pope, his own agent, and not to the complainants. It is manifest that the understanding of all parties was that the acceptance was to be made by Pope by some further affirmative act on his part to be done, in the way of closing the sale. That this was so is also shown by the actual transaction which occurred on the 11th of October, when Pope signed the complainants' offer of October 10th in behalf of Jones, and then attached the telegram of that date as his authority for signing Jones' acceptance. Jones' telegram, in the circumstances, amounted to only an authorization, and indeed, being addressed, as it was, to one who was in no sense the agent of the proposed purchasers, was not sufficient to bind the vendor, under the statute of frauds.

But there is another difficulty. The instrument of October 10th, made by the complainants, was made the day before the date of Jones' telegram authorizing the acceptance of their offer, and this circumstance negatives the contention that it was made in the elaboration and further explanation of the contract already made; and the oral testimony taken in the case fails to satisfy us that this paper of October 10th, signed by the complainants, was in fact intended to be anything else than to be the foundation of the contract they proposed to make. We are convinced that the fact was that, while the complainants were waiting for Jones' reply to their offer of October 2d, they formulated a fresh offer, and then, when Jones' telegram came, Pope, instead of executing his authority by accepting the original offer of October 2d, accepted the other offer of October 10th, assuming that that amounted to practically the same thing as the first offer, and would be equally acceptable to his principal. We have no doubt that this general statement embodies the substantial fact.

We are therefore to consider whether the complainants' proposition of October 10th, which Pope, in behalf of Jones, accepted, was in truth the same thing as the offer of October 2d, which Jones authorized Pope to accept. The offer of October 2d, as communicated, reserved to the payee the privilege of paying all notes for the deferred purchase money on or before five years. That of October 10th made them payable on or before maturity, the maturity of the last note being ten years after date. The offer of October 2d was to pay all the notes, if desired, at the end of five years, if money should be easy. There was nothing of that kind in the offer of October 10th. In the original offer it was stipulated that the purchasers would improve the property at once. There was no stipulation of that kind in the offer of October 10th. In the offer of October 2d was a proposition to insure for the benefit of the vendor, to secure him, no amount at which the insurance should be made being stated. In that of October 10th the agreement was to insure for the same purpose for at least $20,000, and an insurance for that amount would have answered that stipulation. In the offer of October 2d, possession was required to be given in 60 days from that date. In that of October 10th, possession was to be given within 30 days after the date of the deed of conveyance. And an entirely new term was inserted in the offer of October 10th, in the form of a stipulation that the vendor should pay the commission of Stratton & Co. for selling the property, thus attempting to convert Stratton & Co. into the relation of agents for Jones. In fact, Stratton & Co. were never the agents of Jones, but were, and continued to be, acting as the agents of the complainants in the transaction. If, on the other hand, we compare the offer of October 10th with that laid before Pope on October 2d, instead of the form in which the latter actually transmitted it to Jones, upon the assumption that Jones was responsible for Pope's negligence in the transmission of the offer, and that the complainants had the right to suppose that the vendor was dealing with them upon the footing of their offer as made (see Insurance Co. v. Waterman, 6 U. S. App. 549, 560, 4 C. C. A. 600, 54 Fed. 839), it will be found that the variations are quite as important, and trench quite as deeply into the substance of the contract. Now, some of these stipulations in the complainants' offer of October 2d, it must be confessed, were somewhat vague, and it may be that their vagueness would start a doubt whether the terms of their offer were sufficiently definite to make a legally binding contract. But several of the stipulations we have referred to are sufficiently definite and distinct to furnish the basis of a comparison with those contained in the later offer, and it is manifest from such comparison that it is impossible to say that the acceptance of one would make a contract identical with one made by the acceptance of the other. While it may be—and we think it quite probable that such would have been the result—that Jones would not have objected to the variations from the first offer contained in the second, which was accepted by Pope, but for the intervention of other parties, and the prospect of obtaining a larger purchase price by disavowing the act of Pope and accepting the better bid of the interveners, yet we are not at liberty to act upon any con-

jecture as to whether Jones would have ratified Pope's act, whether or not the new parties had come into the field. In the first place, a court of equity has no power to enforce the specific performance of a contract which is not already established between the parties; and, in order to give ground for the action of the court, it must be made clearly to appear that a definite and binding legal contract exists. Carr v. Duval, 14 Pet. 77; Marble Co. v. Ripley, 10 Wall. 339, 359; Nickerson v. Nickerson, 127 U. S. 668, 8 Sup. Ct. 1355; Dalzell v. Manufacturing Co., 149 U. S. 315, 13 Sup. Ct. 886. Then, recurring to the rules of law whereby such binding contract may be formed, it is an elementary doctrine that, to constitute a valid contract, the minds of the parties must have met, and agreed to the terms of their agreement. It is necessary, not only that the parties shall have assented to the several terms of the contract, but, in order that there shall be any bond which shall tie the parties in mutual obligations, their assent must be communicated to each other. Smith v. Hughes, L. R. 6 Q. B. 607, per Blackburn, J.; Cornish v. Abington, 4 Hurl. & N. 549; Cox v. Troy, 5 Barn. & Ald. 474; Browne v. Hare, 3 Hurl. & N. 495; Shepherd v. Gillespie, 3 Ch. App. 764; In re East of England Banking Co., 4 Ch. App. 14; Mactier v. Frith, 6 Wend. 103; White v. Corlies, 46 N. Y. 467. Where it is apparent that one party has not consented to the several terms to which the other has agreed, no contract is formed. If the divergence is of anything which partakes of the substance of the contract at all, there is no legal agreement; and the court is not at liberty to speculate upon the question whether some stipulation which it might think of minor importance, or some variation which it might think would not have influenced the parties in making the contract, can be dispensed with, and the parties held, in disregard of them. Bank v. Hall, 101 U. S. 50; Eggleston v. Wagner, 46 Mich. 610, 620, 10 N. W. 37; Pol. Cont. c. 1; Leake, Cont. 17 (3d Ed.); De Sollar v. Hanscome, 158 U. S. 216, 15 Sup. Ct. 816. In the case last cited the bill was filed to compel specific performance. The vendor had given authority to his agent to sell certain real estate in Denver for $5,000, one-half cash, and the balance one-half in one and one-half in two years. The agent had sold by contract which required only $200 of the cash payment down, and $2,300 in three weeks. And, while the contract price was nominally $5,000, the actual price was $4,950, the agent throwing off $50 from his commission. It was held that the agent had transcended his authority, and specific performance was refused. Applying these rules to the present case, we can reach no other conclusion than that arrived at by the court below, which was that the proof failed to establish a contract between the parties for the purchase and sale of the property in question. As this result is fatal to the case of the complainants, it is unnecessary to discuss the other questions which were argued at the hearing. The result is that the decree of the court below must be affirmed.

AMERICAN HARROW CO. v. SHAFFER et al.

(Circuit Court, W. D. Virginia. January 26, 1895.)

1. TAXATION—EQUALITY—VIRGINIA LICENSE TAX.
   The statute of Virginia (Acts 1889–90, §§ 108, 109) imposing a license tax upon a person who sells or offers for sale manufactured implements or machines, by retail, unless he is the owner thereof, duly licensed as a merchant, or takes orders therefor on commission; such tax being $30 for the county in which the license is taken out, and $10 for each additional county in which goods are sold,—any person who pays an annual tax to the state of $30, upon capital invested in the manufacture of such articles, being permitted to sell the same, by himself or by agents, without license tax,—does not violate article 10, § 1, of the constitution of Virginia, providing that taxation shall be equal and uniform.
2. SAME—INTERSTATE COMMERCE.
   Nor is such statute in conflict with the constitution of the United States, as creating a regulation of commerce between the states, or restricting the privileges of the citizens of the several states.
3. INTERSTATE COMMERCE—SALE BY SAMPLE.
   Where a corporation of one state sends its manufactured goods into another state, in car-load lots, and its agents take the same, in small quantities, from a central storehouse, and carry them about the country, selling and delivering them directly to purchasers, such agents are not engaged in selling goods by sample, nor in interstate commerce.

This was a suit by the American Harrow Company against Joseph B. Shaffer, commissioner of the revenue for Wythe county, Va., and others, to restrain the defendants from collecting penalties for the nonpayment of taxes.

Blair & Blair, for complainant.

R. Taylor Scott, Atty. Gen. for Va., for defendants.

PAUL, District Judge. This is a motion to dissolve an injunction awarded on the 3d day of August, 1892, on behalf of the complainant against Joseph B. Shaffer, commissioner of the revenue for Wythe county, Va.; G. W. Repass, treasurer; J. L. Gleaves, commonwealth's attorney; and J. R. Harkrader, sheriff of said county, —restraining said officers from proceeding in the circuit court of Wythe county to collect the statutory penalty for nonpayment of certain license taxes alleged to be due the commonwealth of Virginia by the complainant and its agents. The tax complained of was assessed under the tax law of Virginia (Acts 1889–90, p. 240, §§ 108, 109), which provides as follows:

"Sec. 108. Any person who shall sell or offer for sale manufactured implements, or machines by retail, other than sewing machines, unless he be the owner thereof and duly licensed as a merchant, or takes orders therefor on commission or otherwise, shall be deemed to be an agent for the sale of manufactured articles, and shall not act as such without taking out a license therefor. No such person shall, under his license as such, sell or offer to sell such articles through the agency of another, but a separate license shall be required for any agent or employé who may sell or offer to sell such articles for another. For any violation of this section the person offending shall pay a fine of not less than fifty dollars nor more than one hundred dollars for each offense.

"Sec. 109. Every agent for the sale of manufactured implements or machines, other than sewing machines, shall pay for the privilege of transact-

ing such business the sum of thirty dollars, and this shall give to any party licensed under this section the right to sell the same within the county or corporation in which he shall take out his license. And if he shall sell or offer to sell the same in any other of the counties or corporations of the state, he shall pay an additional sum of ten dollars in each of the counties or corporations where he may sell or offer to sell the same: provided that any person who shall pay an annual tax to the commonwealth upon capital actually employed by him in the manufacture of these articles or machines mentioned in this section of not less than thirty dollars per annum, may without anything further being paid for the privilege by himself or his agents, employ agents to sell said articles or machines manufactured by him in any of the counties or corporations of the state; and the certificate of the treasurer of the county or corporation in which said tax shall be paid by such person on the capital so employed by him in the manufacture of such articles or machines shall be evidence of the fact and the amount of tax so paid by him to the state thereon."

The bill alleges that the complainant is a corporation organized under the laws of the state of Michigan, and a citizen of that state, engaged in the business of selling implements and machines manufactured by it in the state of Michigan, by retail and otherwise, by its agents; that it manufactures a combined harrow, cultivator, and seeder; that on the 16th day of July, 1892, it sent its agents into Wythe county to sell said implements by sample, and to deliver the same; that while its agents were so engaged the tax complained of was assessed against them; that its mode of doing business was as follows:

"Your orator, by its agents, travels through the country with its wagons containing samples of its implements, and its agents solicit orders for the sale of the same, and when said orders are given and said orders are approved by your orator, or its general manager here [Wythe county], then the order is filled, and the implements delivered to the purchaser, who either pays cash for it or executes his note for the same."

The defendants answer the bill under oath, and in their answer say:

"Respondents deny all, each, and every allegation of the bill touching complainant's business in the county of Wythe, and the manner in which said business is and was carried on and conducted."

Further answering, these respondents say the—

"American Harrow Company brought and had shipped to the county of Wythe manufactured articles, such as harrows, etc., commingled said articles with the property of the county, stored them in houses, depots, and other places, and then proceeded to sell and offer for sale said articles without having first obtained the license prescribed by law for the business in the manner and form set out in the revenue laws enacted by the general assembly of Virginia."

And, in consequence of the complainant's agents failing to obtain such license, actions were instituted in the circuit court of Wythe county.

The defendants Gleaves and Shaffer file a statement of facts which counsel for complainant agree may be read and used as affidavits, without notice, and with the same effect as though in the form of depositions. The statement is as follows:

"The following statement of facts is submitted by counsel for defendants as the facts in the above suit: In the year 1892 there came to Wythe county, Virginia, eight or ten men, bringing with them eight pairs of horses and

wagons. That in a few days afterwards there arrived at the Wytheville depot one or more car loads of American harrows. That these harrows were taken from the cars by these eight or more men, who represented themselves to be agents of the American Harrow Company, and stored in a building in said town. That they then loaded their eight wagons with two harrows each, and proceeded to sell and offer to sell the same throughout the said county of Wythe, and, when a sale was made, delivering one of the harrows upon the wagons. That when a license tax was demanded by Jos. B. Shaffer, commissioner of the revenue, they declined to pay the same, saying they were exempt from said tax by the interstate commerce law, the said harrows being manufactured in the state of Michigan. That afterwards, when told by the said commissioner of the revenue that unless the tax, as prescribed by section 109, Acts Assem. 1889–90, regulating the amount of tax to be paid by agents for the sale of manufactured implements, was paid, that he would be compelled to collect the same by law, said agents declined to pay the said tax, but expressed a willingness to pay the license tax prescribed by section 28 of same act, imposing a tax upon merchants, which said tax the commissioner was unwilling to accept."

The complainant has taken no testimony to sustain the bill. It filed the ex parte affidavits of some of its agents, which the court cannot consider as evidence; being taken without notice to the defendants, and defendants not consenting that they may be read as evidence. The cause, as presented to the court, stands upon the bill and exhibits filed therewith, showing the pendency of the proceedings in the state court, the answer of the defendants, under oath, and the statement of facts by the defendants Gleaves and Shaffer, which, by consent of complainant's counsel, is to be read with the same effect as if it were in the form of depositions of said defendants.

The first ground relied on by counsel for complainant to sustain the injunction in this case is that the license tax law (section 109, above quoted) is unconstitutional, in that it discriminates in favor of home manufactures of implements and machines, and against the manufacturers of other states; that the discrimination consists in this: that section 109 provides that any person who shall pay an annual tax to the commonwealth upon capital actually employed by him in the manufacture of articles or machines mentioned in said section, of not less than $30 per annum, may, without anything further being paid for the privilege by himself or his agents, employ agents to sell said articles or machines manufactured by him in any of the counties or corporations of the state. But it is contended that additional licenses are imposed upon persons who sell or offer to sell these goods, who do not pay to the state of Virginia tax to the amount of $30 upon the capital invested in manufactures; such persons being required to pay a specific license tax of $30, which gives them only the right to sell within one county or corporation in which the license is taken out, and if they wish to sell or offer for sale in other counties or corporations of the state, and by other agents, they are required by said section 109 to pay $10 for each additional county and for each additional agent, and that this is a discrimination against manufacturers of other states. The provision of the constitution of the state of Virginia that is invoked to nullify the act in question is section 1 of article 10, which provides that:

"Taxation, except as hereinafter prescribed, whether imposed by the state, or county or corporate bodies, shall be equal and uniform, and all property, both real and personal, shall be taxed in proportion to its value, to be ascertained as prescribed by law. No one species of property from which a tax may be collected shall be taxed higher than any other species of property of equal value."

Section 4 of article 10 provides, "the general assembly may levy a tax upon incomes," and upon certain licenses, among others, commission merchants, persons selling by sample, brokers, pawnbrokers, and all other businesses which cannot be reached by the ad valorem system. It further provides, "The capital invested in all business operations shall be assessed and taxed as other property."

The argument of counsel is based on the ground that the tax provided for in section 109 is not equal and uniform; that it favors the manufacturer who sells by agent, and who has sufficient capital invested in his business to require him to pay $30 taxes thereon to the commonwealth, over one who sells the same manufactured articles, by himself or agents, who has not such an amount of capital invested in the manufacturing business in this state. It is settled by unquestioned authorities that the terms "equal and uniform" apply only to a direct tax on property, and that the clause by which equality and uniformity are prescribed does not limit the power of the legislature as to the subjects of taxation, but is only intended to prevent an arbitrary taxation of property according to kind or quality, without regard to value. Com. v. Moore, 25 Grat. 951; Eyre v. Jacob, 14 Grat. 422; Cooley, Const. Lim. (5th Ed.) 616, 617; Sedg. St. & Const. Law (2d Ed.) 504. The question under discussion, viz. the power of the legislature to lay a license tax, on other than an ad valorem basis, was before the supreme court of the state of Virginia in Com. v. Moore, 25 Grat. 962, and was held to be constitutional. As to the discrimination complained of, much might be said, if it were within the province of the court to do so, in defense of the statute, and of the wisdom and justice of the policy pursued by the legislature in its enactment. But the justice or injustice of the act is a question with which the court can have no concern. It is a matter that the constitution has confided to the judgment and discretion of the legislature. "The rule of law upon this subject seems to be that, except where the constitution has imposed limits upon the legislative power, it must be considered as practically absolute, whether it operates according to natural justice, or not, in any particular case. The judiciary can only arrest the execution of a statute when it conflicts with the constitution." Cooley, Const. Lim. 201. "The presumption always is that the legislature has judged correctly of its constitutional powers, and the contrary must be clearly demonstrated before a co-ordinate branch of the government can be called upon to interfere between the people and their immediate representatives. The decisions of all the courts, state and federal, speak a uniform language on this subject." "We declare an act of the general assembly void only when such an act clearly and plainly violates the constitution, and in such manner as to leave no doubt or hesitation on our minds."

Com. v. Moore, 25 Grat. 953; Eyre v. Jacob, 14 Grat. 422. The act under which the taxes complained of were assessed violates no provision of the constitution of Virginia, either express or implied, and contains no provision discriminating against the citizens or the manufactured articles of other states.

Counsel for complainant claim, in argument, that the statute in question has been declared to be in conflict with the constitution of the United States in the case of Webber v. Virginia, 103 U. S. 344. But an examination of that case shows that the statute there decided to be unconstitutional imposed a tax on agents for the sale of the manufactured articles of other states and territories different from that assessed upon agents for the sale of articles manufactured in this state. That statute (Revenue Law 1875, § 45), decided to be unconstitutional, contained this provision:

"That any person who shall sell or offer for sale the manufactured articles of other states or territories, unless he be the owner thereof, and taxed as a merchant, or takes orders therefor on commission, or otherwise, shall be deemed an agent for the sale of such articles, and shall not act as such without a license therefor."

The forty-sixth section of the same act fixed the license tax for the sale of such articles at a rate different from that fixed for the sale of articles manufactured in this state. "Here," says the court, "is a clear discrimination in favor of home manufacturers, and against the manufacturers of other states." The tax was made to depend upon the foreign character of the articles sold,—that is, upon their having been manufactured without the state,—and it was, to that extent, a regulation of commerce in the articles between the states. 103 U. S. 350. But this discriminating provision is not embodied in the tax law we are now considering, nor is it found in any revenue statute passed by the Virginia legislature since the decision in Webber v. Virginia was rendered.

A number of decisions are relied upon by counsel for complainant to show that the Virginia statute is obnoxious to clause 3, § 8, art. 1, of the constitution of the United States, commonly known as the "Commerce Clause," giving to congress the power to regulate commerce among the several states. A careful examination of the cases cited shows no provision in the statute which is inhibited by this declaration of the federal constitution. The case first quoted by counsel is Ward v. Maryland, 12 Wall. 418. In this case the Maryland statute fixing taxes was held void because it discriminated in favor of residents and against nonresidents of the state, and was in violation of the provision of the constitution of the United States which provides that the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states. Const. U. S. art. 4, § 2, cl. 1. Another case quoted is Welton v. Missouri, 91 U. S. 275. A Missouri statute required the payment of license tax from persons who dealt in the sale of goods, wares, and merchandise which were not the growth, product, or manufacture of the state, by going from place to place to sell the same in the state, and required no such license tax from persons selling in a similar way goods which were the growth, product, and

manufacture of the state. Walling v. Michigan, 116 U. S. 446, 6 Sup. Ct. 454, is another case in which a statute imposed a tax on nonresidents, or their representatives, for selling liquor in the state, which discriminated in favor of citizens of the state of Michigan. It is clear that these decisions cannot be relied upon to show that the Virginia license law is unconstitutional because it discriminates in favor of residents, and against nonresidents, of the state. The statute makes no such discrimination. It requires the same license tax of an agent who engages in the business of selling manufactured implements or machines, whether he be a citizen of Virginia or of another state. The cases above cited establish what enactments in license tax laws are discriminations in favor of the citizens of the state enacting such laws, and against the citizens of sister states, and are therefore invalid, as impinging upon the provision of the constitution of the United States regulating commerce among the states. The decisions of the supreme court of the United States are equally clear and conclusive as to certain provisions in state tax laws which are not in conflict with the commercial clause of the United States constitution. Machine Co. v. Gage, 100 U. S. 676, was a case in which the plaintiff was a corporation of the state of Connecticut. It manufactured sewing machines at Bridgeport, in that state, and had an agency at Nashville, in the state of Tennessee. From the latter place an agent was sent into Sumpter county, in that state, to sell machines there. A tax was demanded from him for a peddler's license to make such sales. He denied the validity of the law under which the tax was claimed. The Tennessee law fixed a tax upon peddlers of sewing machines. The sewing machines were manufactured in Connecticut. The supreme court of Tennessee held that the law taxing the peddler of such machines levied the tax on all peddlers of sewing machines, without regard to the place of manufacture. The supreme court of the United States sustained the decision, the court saying:

"In all cases of this class to which the one before us belongs, it is a test question whether there is any discrimination in favor of the state, or of the citizens of the state, which enacted the law. Wherever there is such discrimination, it is fatal. Other considerations may lead to the same result." "In the case before us the statute in question, as construed by the supreme court of the state, makes no such discrimination. It applies alike to sewing machines manufactured in this state and out of it. The exaction is not an unusual or an unreasonable one. The state, putting all such machines upon the same footing with respect to the tax complained of, has an unquestionable right to impose the burden."

It is sought by counsel for complainant to bring this case within the scope of the decision of the United States supreme court in Robbins v. Shelby Co. Taxing Dist., 120 U. S. 489, 7 Sup. Ct. 592. The statute of Tennessee imposed a tax on all drummers, and all persons not having a regular licensed house of business in Shelby taxing district. The facts, as stated in that case, were: Robbins was a citizen and resident of Cincinnati, Ohio, and was engaged in the business of drumming in the taxing district of Shelby county, Tenn., i. e. soliciting trade, by the use of samples, for the house or firm

for which he worked as a drummer; said firm doing business in Cincinnati, where all the members thereof lived. The question was as to the constitutionality of the act which imposed the tax on drummers, and the court held that it was not competent for a state to levy a tax, or impose any other restriction, upon the citizens or inhabitants of other states, for selling, or seeking to sell, their goods in such state, before they were introduced therein. We have numerous decisions in the federal courts to the same effect. But the facts in the case now before this court do not bring it in line with that class of cases. The evidence in this case shows these facts: The complainant in July, 1892, sent its agents (eight or ten of them) into Wythe county, with eight teams and wagons. In a few days afterwards there arrived at the Wytheville depot, in said county, two car loads of implements known as the "American Harrow." That these harrows were taken from the cars by these eight or more men, who represented themselves to be agents of the American Harrow Company, and stored in a building in the said town of Wytheville. That these men then loaded their eight wagons with two harrows each, and proceeded to sell and offer to sell the same throughout the county of Wythe, and when a sale was made of a harrow they delivered to the purchaser one of the harrows which they had on their wagons. That when a license tax was demanded of them they declined to pay the same, saying they were exempt from said tax by the interstate commerce law, the said harrows being manufactured in the state of Michigan. That afterwards, when told by the commissioner of the revenue that unless the tax was paid as prescribed by section 109 of the revenue law of the Acts of Assembly of 1889–90, fixing the amount of tax to be paid by agents for the sale of manufactured implements, he would be compelled to collect the same by law, they still declined to pay the same, but expressed a willingness to pay the license tax prescribed by section 28 of said revenue law, imposing a tax upon merchants. On this statement of facts, these men do not come within the class of mercantile agents styled "drummers" or sample merchants selling, on orders, goods in another state, to be thereafter forwarded and delivered to the purchaser in the state where sold. The facts place them on a footing with citizens of the state selling goods that are within the state at the time of sale. In Webber's Case, 33 Grat. 898, the court says:

"And while it is conceded to be no easy task precisely to define when the privilege of the sample merchant begins, or when it terminates, it is very clear that a person, whether he be owner or agent, who has a place of business in a county or town, and there sells and delivers the articles at the time of sale, or a person who carries his goods from place to place, and sells and delivers the articles at the time of sale, is not selling by sample, card, or description. Such a person may be a retail merchant or a peddler, but he is not a sample merchant."

In the case cited by counsel for complainant (Robbins v. Shelby Co. Taxing Dist., 120 U. S. 498, 7 Sup. Ct. 592), the court held that the negotiation of sales of goods which are in another state, for the purpose of introducing them into the state where the negotiation is made, is interstate commerce. In the same case the court said:

"As soon as the goods are in the state, and become a part of its general mass of property, they will become liable to be taxed in the same manner as other property of similar character."

The court held the same doctrine in Brown v. Houston, 114 U. S. 622, 5 Sup. Ct. 1091. In Machine Co. v. Gage, 100 U. S. 676, the court said:

"Where goods are sent from one state to another for sale, or in consequence of a sale, they become part of its general property, and amenable to its laws, provided that no discrimination be made against them, as goods from another state, and that they be not taxed by reason of being brought from another state, but only taxed in the usual way, as other goods are."

Applying the principles so distinctly stated in these decisions to the facts in this case, no other conclusion can be reached than that the agents of the complainant were not engaged in selling harrows by sample, taking orders therefor, the orders to be sent to their principal, in the state of Michigan, and the harrows so sold on orders forwarded to the purchasers. Had this been the course pursued by these agents, no question could have arisen as to their liability to pay the license tax demanded of them. They would clearly have been exempt from such tax. But when the plaintiff shipped its harrows by car loads from the state of Michigan into the state of Virginia, deposited these goods in a warehouse in the town of Wytheville, and then, through its agents, loaded them on wagons, sent them through the country, selling and delivering them to purchasers from the wagons, it cannot be claimed that they were engaged in interstate commerce. These goods were completely severed from the general property of the state of Michigan, were sent to the state of Virginia for sale, were commingled with the general property of the latter state, and subject to her laws. The plaintiff's agents, in selling these goods in the manner they did, were as clearly amenable to a license tax as if they had been engaged, as agents, in selling implements and machinery manufactured in the state of Virginia. Having refused to pay the license tax, they subjected themselves to the penalty fixed by the statute, to recover which the suits were brought in the state court, the prosecution of which this court is asked to perpetually enjoin.

The contention that the Virginia statute violates article 4, § 2, of the constitution of the United States, which declares that "the citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states," cannot be sustained. The statute makes no discrimination in favor of citizens of Virginia, and against the citizens of other states. It does not violate the privileges and immunities of the complainant and its agents, as citizens of another state engaged in business pursuits in this state, but imposes upon them the same burden of taxation, and none other, that it places upon the citizens of Virginia.

Equally untenable is the proposition that the Virginia statute is in conflict with the fourteenth amendment, § 1, of the federal constitution, which provides that "no state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States nor deny to any person within its jurisdiction the

equal protection of the laws." In view of what the court has already said on other points presented in the case, no discussion of this question is necessary. The injunction will be dissolved, with costs to the defendants.

BOSTON SAFE-DEPOSIT & TRUST CO. v. HUDSON.

(Circuit Court of Appeals, Fourth Circuit. May 28, 1895.)

No. 93.

JUDGMENTS—PRIORITY OVER MORTGAGES—NORTH CAROLINA STATUTES.

Under the North Carolina Code, which provides, in section 685, that conveyances by corporations, whether absolute or by way of mortgage, shall be void as to existing creditors and torts previously committed, provided such creditors or persons injured shall commence suit within 60 days after the registration of the deed; and, in section 1255, that mortgages by corporations shall not exempt their property from executions on judgments for labor or materials furnished, or for torts by which any person is killed or person or property injured,—a judgment against a railroad company for a tort causing injury to the person is superior to a mortgage executed after the tort was committed, though the action was not brought within 60 days from the registration of the mortgage.

Appeal from the Circuit Court of the United States for the District of South Carolina.

This was an application by H. T. Hudson, Jr., for payment to him, out of the proceeds of sale under foreclosure of the Charleston, Cincinnati & Chicago Railroad, of the amount of a judgment obtained by him against the railroad company. The circuit court granted the application. 61 Fed. 369. The Boston Safe-Deposit & Trust Company, the plaintiff in the foreclosure suit, appeals. Affirmed.

This is an appeal from the decree of the circuit court ordering a judgment of the appellee, Hudson, to be paid out of the proceeds of the sale of the Charleston, Cincinnati & Chicago Railroad in preference to the claim of the first-mortgage bondholders. Hudson, while in the employ of the railroad corporation in the state of North Carolina, was injured April 29, 1887. He entered suit against the corporation October 13, 1887. In that suit judgment of nonsuit, in invitum, was entered against him at the August term, 1888. On October 2, 1888, he entered a second suit, in which he recovered judgment for $1,500 and costs. The railroad corporation, on August 9, 1887, after the injury to Hudson, executed a mortgage to secure a large issue of first-mortgage bonds, which was recorded October 8, 1887. Default having been made in the payment of the interest on the bonds, a decree of foreclosure was entered in this cause; and the railroad property sold. There were no earnings, and the proceeds of the sale were largely insufficient to pay the bonds. Hudson filed his judgment in this case, claiming that, by virtue of the statutes of North Carolina, he was entitled to be paid his judgment in preference to the holders of the mortgage bonds. The dates are as follows: Hudson was injured April 29, 1887; his first suit was commenced October 13, 1887; the mortgage is dated August 9, 1887; the mortgage was recorded October 8, 1887; his second suit was commenced October 2, 1888. The circuit court, by its decretal order, adjudged that Hudson's claim, by the statutes of North Carolina, had priority over the bonds secured by the mortgage, and directed his claim to be paid. To reverse that decree this appeal was taken.

A. M. Lee, of Smythe & Lee, and Platt D. Walker, of Walker & Cansler, for appellant.

Julian Mitchell, for appellee.

Before GOFF, Circuit Judge, and HUGHES and MORRIS, District Judges.

MORRIS, District Judge (after stating the facts). Whether or not Hudson's claim for personal injury was entitled to be paid in preference to the debt secured by the mortgage depends upon the effect to be given to two sections of the North Carolina Code which was adopted in 1883. In adopting this Code, the legislature of North Carolina repealed all other statutes and declared that it should be construed as one act, and as if enacted on one day. The first section is found under the head "Corporations," and is as follows:

"Sec. 685. How Corporations may Convey by Deed; Void as to Existing Creditors. R. C., c. 26, s. 22, 1798, c. 514, s. 4. Any corporation may convey lands and all other property which is transferable by deed by deed of bargain and sale, or other proper deed, sealed with the common seal and signed by the president or presiding member or trustee, and two other members of the corporation, and attested by witnesses. 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 the 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 employés, 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 the registration of said deed, as required by law."

The second section is found under the head "Deeds and Conveyances," and is as follows:

"Sec. 1255. Property of Corporations not Exempt from Certain Liabilities on Account of Mortgages, 1879, c. 101. Mortgages of incorporate companies upon their property or earnings, whether in bonds or otherwise, hereafter issued, shall not have power to exempt the property or earnings of such corporations from executions 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 whereby any person is killed, or any person or property injured, any clause or clauses in such mortgage to the contrary notwithstanding."

The contention of the appellant is that Hudson's claim, being for a tort committed by the railroad corporation prior to the execution of the mortgage, comes within the proviso of section 685, and does not have priority over the mortgage unless Hudson's action to enforce his claim was commenced within 60 days after the recording of the mortgage, and that, although Hudson's first action was so commenced, as he was nonsuited in that action and did not commence the action in which the judgment now filed was obtained until one year after the recording of the mortgage, he has not brought himself within the terms of section 685. The contention of the appellant as to section 1255 is that it applies only to torts which occur after the execution of a mortgage by a corporation, and therefore not to the tort for which Hudson obtained his judgment. The circuit court held (Simonton and Brawley, JJ., 61 Fed. 369) that section 1255 applied to all claims for labor, materials, or torts against a corporation, whether incurred before or after the execution of a mortgage, and that its beneficial provisions were not to be limited by the

proviso inserted in section 685. It is conceded that the precise point in controversy has not been determined by the supreme court of North Carolina, and we are therefore to determine the meaning and effect of the statute by such settled rules of interpretation as are applicable.

In the first place, it is to be presumed that the attention of the legislature was called to the differences and to the similarities in the two sections, and that they were designed. If they run in parallel lines, each covering something that the other also covers, and each covering something that the other does not, still the presumption is that the legislature, out of abundant caution, so intended it. Maxw. Interp. St. 199. There is nothing doubtful or obscure in the words of either section. The difficulty arises solely from the fact that the subject-matter of section 685 is in part also covered by section 1255, and the contention is that as to that part the proviso appended to section 685 should be construed as applying also to section 1255. But it is a rule that a proviso is strictly construed, and should be confined to what precedes it, unless it clearly appears to have been intended to apply to other matters also. Suth. St. Const. § 223; Potter, Dwar. St. 272; End. Interp. St. § 186; Wayman v. Southard, 10 Wheat. 30; U. S. v. Dickson, 15 Pet. 141–165. Before, therefore, the proviso appended to section 685 is made to modify and limit section 1255, it must clearly appear that by no other construction can the two sections stand together. In section 685 the legislature declared that any conveyance of property by a corporation should be of no effect as to existing creditors or existing claims for torts, provided the claimants commenced proceedings within 60 days. In section 1255 the legislature declared that thereafter a mortgage of its property or earnings by a corporation should not exempt its property or earnings from execution on any judgment for labor or materials, or for torts by which persons or property was injured. We have in section 685 an enactment which applies to all conveyances and to all creditors and to all torts. In section 1255 we have an enactment which applies only to mortgages, only to creditors for labor and material, and only to torts which injure persons or property. By section 685 the legislature expressed a general intention with regard to a general subject-matter. Section 1255 expresses a particular intention with regard to more restricted subject-matter. The rule is that when a general intention is expressed, and also a particular intention, the enactment expressing the particular intention shall prevail. Maxw. Interp. St. 202; Suth. St. Const. § 153; Potter, Dwar. St. 131; Vatel's Rules, 40, 273; Stockett v. Bird, 18 Md. 484. We are obliged to give full meaning and effect to both sections, if it be reasonably possible, and we think this is done by considering that the legislature has, first, enacted a general rule with regard to all conveyances made by corporations and with regard to all debts owing at the execution of the conveyances; then, with more particularity, it has enacted a special rule with regard to a particular kind of conveyance, to wit, mortgages, and with regard to a particular class of creditors. By the first enactment it declared that conveyances

should be of no effect only as to existing creditors, and only as to those who should sue within 60 days; by the second enactment it declared, as to mortgages and as to special creditors, that the mortgages should be of no effect at all. We find nothing repugnant or unusual in these two enactments, and we cannot see how it appears that the legislature did not intend just what the words express in each section. It is as if there was a general law that no conveyance by a corporation should be effective against any debt, provided the creditor sued within 60 days after its recording, and another section provided that, as to debts for labor, no mortgage by a corporation should have any effect at all. In this supposed case there could be no doubt that labor claims would be excepted out of the general proviso requiring actions to be brought within 60 days.

Searching for reasons which might have influenced the legislators to make a distinction between claims of the class mentioned in section 1255, when existing at the recording of the mortgage, as distinguished from those contracted afterwards, we find no reason why the one class should be required to proceed within 60 days and the other not be so limited. Where, as under section 685, only existing claims were allowed to displace the conveyance, and subsequent claims had no such right, it was reasonable that creditors who were going to attack the conveyance should do so promptly, or be shut out; but when, as under section 1255, the mortgaged property was declared liable at all times just as if it had never been mortgaged, there does not appear to us any reason why creditors whose claims were in existence at the recording of the mortgage should be required to proceed more promptly than creditors whose claims arise after the recording of the mortgage. A reason could be suggested why those who become creditors after the recording of the mortgage, and therefore with notice of it, should be less favorably considered than those who become creditors when their debtor's property was free from the recorded incumbrance; but no reason occurs to us for the contrary distinction. So far as any inference can be deduced from the order in which the sections appear in the Code, we find section 1255 to be the later one; and, of two passages in a statute, the later one, being the expression of the later intention, should prevail. Maxw. Interp. St. 188. The wording of section 1255 is very indicative of the intention of the legislature to make it impossible for corporations to execute mortgages which should stand in the way of any judgment for labor or materials, or for torts resulting in injury to persons or property. With respect to a corporation, the legislature can grant to it or withhold from it the power to mortgage its property at all, and in section 1255 it is enacted that corporations "shall not have power to exempt by mortgage" their property or earnings from this class of claims. So far, therefore, as this class of claims is concerned, the mortgage is as if it did not exist. The wisdom of this legislation it is not our province to pass upon, but it may be said, as was suggested in the opinion of the circuit court, that the underlying principle is that doctrine of equity which, with regard to one class of corporations and under careful limitations, recognizes a preference in favor of the labor and sup-

plies which have enabled such corporations to keep going and retain their business and franchises.

Several cases have been cited to us from the decisions of the supreme court of North Carolina, but we do not find that they decide the question involved in this case. Blalock v. Manufacturing Co., 110 N. C. 99, 14 S. E. 501, was not a case of a mortgage, but of a deed of trust for the benefit of creditors. To that character of conveyance section 685 was held to be applicable, and it was held that creditors who failed to bring an action until after 60 days had lost the benefit of that section. Duke v. Markham, 105 N. C. 138, 10 S. E. 1003, was a case of a chattel mortgage made by a corporation, but, at the date of its recording, executions on judgments were already in the hands of the sheriff, who thereupon seized the chattels, notwithstanding the mortgage. The court, under section 685, held the mortgage void as against the executions. It was not necessary to consider section 1255, and it was not cited. Traders' Nat. Bank v. Lawrence Manuf'g Co., 96 N. C. 298, 3 S. E. 363, was a case before the enactment of the North Carolina Code, and section 1255 was then part of the act of 1879. So far as the act of 1879 and section 1255, which is taken from it, apply to materials furnished to corporations, the supreme court of North Carolina held that it did not apply to machinery purchased out of the state, when personal security alone was looked to and a negotiable security taken, and the court intimated that, so far as the act related to claims for labor or materials, it was in furtherance of the lien enacted by the constitution and statutes in favor of laborers and material men. But the supreme court recognized that the act was intended also to prevent claims against a corporation for torts from being defeated by a mortgage executed by it. Antietam Paper Co. v. Chronicle Pub. Co., 20 S. E. 366 (decided November 13, 1894) was a case arising under section 1255. In this case the supreme court of North Carolina reaffirmed Traders' Nat. Bank v. Lawrence Manuf'g Co., and held that paper, ink, cuts, and the like, furnished to a publishing company, were not "materials" within the meaning of section 1255. The court held that, not being articles which were attached to or which enhanced the value of the property mortgaged, they were not within the spirit or letter of the section. The court did not have occasion to consider the question of torts, and as torts of the class for which Hudson recovered his judgment in the case in hand are specifically mentioned in section 1255, we cannot perceive how this claim could be held not to be within the letter of the section.

We think the circuit court was right in holding that the mortgage in this case did not exempt the property of the railroad corporation from Hudson's judgment by reason of section 1255, and we do not, therefore, find it necessary to consider whether his suit was brought within the 60 days required by the proviso to section 685. **Decree affirmed.**

HALSEY et al. v. CHENEY.

(Circuit Court of Appeals, Seventh Circuit. July 9, 1895.)

No. 168.

PRINCIPAL AND AGENT—TRUSTS—LACHES.

The executors of one D. filed a bill for an accounting against C., alleging that he had obtained control of the affairs of D., an inexperienced woman, and had misappropriated her property, and failed to account. C. denied the charges, and, on the hearing, there was a failure to prove that D. was under C.'s control; and it appeared that while she had had full opportunity for 10 years, while free from C.'s influence, to object to his management, she had never done so, and that C. held vouchers for his most important transactions. *Held*, that any right to relief which D. or her executors might have had was barred by laches.

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

This was a suit for an accounting by Edmund D. Halsey and Ann Caroline Teese, executors of Mary D'Arcy, deceased, against Prentiss D. Cheney. The circuit court dismissed the bill. Complainants appeal.

Samuel P. Wheeler and Charles H. Aldrich, for appellants.

John G. Drennan, for appellee.

Before WOODS and JENKINS, Circuit Judges, and BAKER, District Judge.

WOODS, Circuit Judge. Dr. Edward A. D'Arcy, a resident of Jerseyville, Jersey county, Ill., died April 25, 1863, possessed of a large estate, which he devised equally to his surviving wife, Mary D'Arcy, who was made executrix of his will, and two daughters, Ann Caroline Teese, one of the appellants, and Catherine Cheney, wife of the appellee, Prentiss D. Cheney, except that the homestead and a tract of land, worth together about $5,000, were given to Mrs. Cheney, because the testator anticipated that Mrs. Teese would benefit by inheritance or bequests from relatives in the East with whom she had lived from infancy. From the death of her husband until after the death of Mrs. Cheney, in 1877, Mrs. D'Arcy was a member of the family of the appellee. She then removed to New Jersey, where, until her death, which occurred August 12, 1887, she lived with her sister Matilda Fairchild, during the winters at Morristown, and in the summers at Mendham; the residence of Mrs. Teese being at Newark. The appellants, Edmund D. Halsey and Mrs. Teese, were named as executors of the will of Mrs. D'Arcy, and, having received letters testamentary, on the 17th of February, 1888, instituted this suit against the appellee, charging and alleging, besides the facts stated and other formal matters: That the estate of Edward A. D'Arcy consisted of both real and personal property; that the devisees, by divers quitclaim deeds, made an amicable partition of the portions of the real estate devised to them in common, and the residue, excepting lands in Missouri which they continued to hold in common, they proceeded to sell, and to divide the proceeds; that Mrs. D'Arcy at the death of her husband was

advanced in years, unaccustomed to business, and ignorant of her duties as executrix; that Cheney was a plausible man, of good character, and of winning address and manners, and by means thereof obtained her confidence, and induced her to commit to him the care and custody of her estate; that he assumed the active management of the estate of Edward A. D'Arcy, acting therein as the agent, attorney, and trustee of the executrix, and personally received into his hands the entire proceeds of the estate, but that the particulars of his service cannot be stated, because the papers relating to the estate are not on file in the office of the county clerk, and, according to the statement of the clerk, had been removed; that the interest of Mary D'Arcy in the estate and the amount received by Cheney as and for her share was a large sum, to wit, $20,000; that, in the year 1871, Mrs. D'Arcy received from the estate of her brother, Alexander McEowen, notes, bonds, and money to the amount of $10,000, which, together with the proceeds of the estate of her husband belonging to her, were, from time to time as they came to her, received by Cheney, upon his undertaking and agreement to act as her trustee in loaning the same, and were by him loaned, whereby her estate was largely increased; that, by reason of his influence over her, Cheney was able to postpone any full accounting with Mrs. D'Arcy, although he did long prior to her death render partial accounts, "which your orators now have," but which do not bring the account to the time of her death; that he retained the whole of said money in his hands as trustee, excepting small payments made as stated in the bill; that he never rendered to her a full and fair account of said trust, or of the income and profits, nor to the complainants, as executors, since her death, although requested in a friendly way to do so, but, on the contrary, refused to give to complainants any information on the subject; that in 1877, when Mrs. D'Arcy went to reside in New Jersey, there was in Cheney's hands, held in trust for her, of principal and accumulations, the sum of $25,000, of which he paid her occasional small sums, aggregating not more than $500; that, at sundry times after the death of her husband, Mrs. D'Arcy became seised of divers lots, lands, and real estate in Illinois and elsewhere, and that, while holding towards her the confidential relation of trustee, and availing himself of the influence he had over her, Cheney, for the purpose of his own gain, and without adequate consideration, procured from her, either to himself or to others for his benefit, deeds of conveyance for every square foot of real estate she owned; that this was systematically carried on for years, your orators charge, fraudulently, and Cheney should in equity establish the fairness of the several transactions; that Cheney sold timber from lands in Missouri, and received therefor $8,000, of which he never accounted to Mrs. Cheney for her share; that by reason of frequent changes of investment made by Cheney, sometimes taking securities in his own name, and intermingling the moneys of Mrs. D'Arcy with his own, an intelligent account cannot be stated, except by Cheney; that, disregarding his duty as trustee, he has refused to make any statement whatever. The bill prays that Cheney be

made party, and required to answer, but not under oath; that, on the hearing, an account may be taken of his doings in connection with Mrs. D'Arcy's estate; that an account may be stated, under the direction of the court, of all moneys received by the defendant or properly chargeable to him on account of the trust; that the complainants may have a decree against him for the balance due them as executors, also a decree that the several conveyances of Mrs. D'Arcy to the defendant or to others in his interest were fraudulent; that the defendant be required to show that the transactions were in good faith; and that, in all cases where the consideration was not adequate, the defendant be decreed to hold the estate in trust, if he has not parted with the title; and, if he has parted with the title, that he may be charged with the value and compound interest.

The defendant answered, denying many of the essential averments of the bill; particularly that he had been the agent, attorney, or trustee of Mrs. D'Arcy, as executrix, in respect to the management of the D'Arcy estate; that the property or proceeds thereof had come into his hands; that he had been her agent, attorney, or trustee in respect to her individual property derived from that estate, or from the estate of her brother, or that her property or money had come into his hands upon his agreement to act as trustee in loaning the same; and alleging that all his acts and doings for her had been done by him as her son-in-law, in order to conserve her interests, and without compensation, and that he had made to her full and fair accounts and statements, to her satisfaction, and paid over to her what was due.

Issue having been joined by a replication in denial, a reference was made to a special master to take an account, "and, for the better discovery of the matters aforesaid," it was ordered that the defendant within 30 days submit to the master a full, true, and accurate account, with dates and amounts, etc., and that the master examine witnesses, and embody the testimony in his report. In obedience to that order, the defendant, on March 18, 1891, made to the master a statement, showing, that on February 5, 1866, Mrs. D'Arcy had with D'Arcy & Cheney, bankers, of which firm the defendant was a member, the sum of $1,040.89; that on April 25, 1872, there were in his hands, belonging to her, promissory notes, which are described, amounting, principal and interest, to $14,666.66; that on April 21, 1874, a settlement was made with her which left in his hands specified notes to the amount of $5,066.66, for which, in a settlement made September 9, 1879, she was allowed a credit on her note then held by him, given for Nebraska lands, as shown by a written assignment of which a copy is set out. This the defendant presented as a full, true, and accurate account to date so far as it was in his power to state the same, alleging that he had no record or account of any other transaction, and that, if there were others, they were unknown to him. Upon this, the master, on January 24, 1891, made to the court a report of his efforts and inability to obtain a more satisfactory accounting; and on July 18, 1891, upon the petition of the complainants, the court ordered the defendant, by the ensuing 1st (afterwards changed to

the 23d) of September, to show cause why he should not be attached for contempt of court. On the last-named day, the defendant filed his answer to the rule to show cause, and at the same time presented to the special master an additional and supplementary account, wherein it is stated that the firm of D'Arcy & Cheney consisted of himself and Mrs. D'Arcy, the interest of the latter being nominal only; that on January 1, 1866, the business was sold to Cross & Swallow, and her deposit of $1,040.89 paid to her February 5, 1866, as shown by Exhibit C; that, after the banking business was closed, he kept no account with her; that she kept a book in which was an account of her notes and money affairs, which book was taken by her in 1877 to New Jersey, and was never under his control; that while she lived with him she kept her valuable papers in his fireproof safe, to which she had access at her pleasure, this practice continuing until April 25, 1872, when he gave her a receipt (Exhibit E) for her papers; that no account was kept or made of collections except by her in her own book, she receiving the money; that on January 4, 1873, he sold and conveyed to her lands in Nebraska, in Johnson county for $7,200, in Pawnee county for $6,600, and in Lancaster county for $2,000, in payment for which she delivered to him, April 25, 1871, notes amounting to $5,800, and for the remainder of the price ($10,000) gave him her promissory note, drawing six per cent. interest, which he held until May 9, 1885, when, upon a settlement made, she gave him in lieu her note for $5,600, payable five years after date, with six per cent. interest, which note he had transferred to A. W. Goss, of the First National Bank of Jerseyville, who is now the holder thereof; that on April 21, 1874, a settlement was made between them, at which time there were in his hands (in his safe in an envelope marked "Mary D'Arcy") the notes set forth in Exhibit F; that the Samuel Doud note ($400) and Silas Bates note ($666.66) were paid to her; that he had no memorandum of dates and amounts; that the claims against Joel Cory ($3,000) and W. A. Potts ($1,000) were paid, and the proceeds invested in Nebraska loans; that, having been compelled to bring suits for foreclosure, she transferred her Nebraska claims to him upon his agreement to credit upon her note the amounts received; that in the settlement of May 9, 1885, the credit was allowed upon the $10,000 note, leaving her indebted thereon in the sum of $5,600, for which she then gave the note above mentioned; that in that settlement he accounted to her for $600 received for timber from lands in Missouri, for which she gave the receipt marked "Exhibit G" filed with the master. Thereupon the court ordered that the rule to show cause be discharged and that the special master be relieved from further duty, it appearing that an account could not be stated from the data furnished, and that all matters involved in the suit be brought before the court without the intervention of a master's report. Upon the final hearing the bill was dismissed for want of equity.

The bill, it is to be observed, is one for relief, and not for discovery. Though it alleges that in certain particulars an intelligent account cannot be stated except by the respondent, it submits no

interrogatories, asks no discovery, waives verification of the answer, and prays that an account may be stated under the direction of the court. The case comes, therefore, within the general rule that every fact essential to the plaintiff's title to maintain the bill and obtain the relief must be stated in the bill, and that relief will not be granted "for matters not charged, although they may be apparent from other parts of the pleadings and evidence." Story, Eq. Pl. § 257; 1 Daniell, Ch. Pl. & Prac. 325, 326; Stearns v. Page, 7 How. 819, 829.

The evidence in the record is voluminous, but we deem it necessary to notice only some of the more salient features, in connection with the allegations of the bill to which they are pertinent. The evidence does not support the averment to the effect that, by reason of advanced years, inexperience in business, and ignorance of her duties as executrix, Mrs. D'Arcy came under the domination of Cheney, and was induced by him to commit her estate to his custody and management. On the contrary, it is apparent that she was a woman of more than the average intelligence, accustomed to think for herself, and to give attention to her own affairs. Besides, it is shown that for some months after the death of her husband, and until a division had been made of the estate, she had the assistance and advice of F. M. Teese, a lawyer of large experience, and the husband of her daughter Caroline, whose interest in the estate was equal to her own. At the same time it is evident that Mrs. D'Arcy reposed confidence in Cheney, and, while she lived with him, received his assistance in the management of her affairs; but upon the death of Mrs. Cheney, in 1877, she went to live with her people in New Jersey, and if in the transactions in Nebraska lands, or in other respects, she had been wronged by Cheney, it is not probable that she would or could have concealed the fact from her daughter, with whom and with whose husband she was on friendly terms; and if the fact of such wrongs as are charged became known to Mr. and Mrs. Teese, it is both incredible and inexcusable that suit was not brought during Mrs. D'Arcy's life, when she and Cheney would both have been competent to testify, instead of waiting 10 years, and until after her death, before suing, and then insisting, under a disqualifying statute, which might have been waived, that the one witness who, it is conceded, could give "an intelligent account," should not be heard. The bill admits that, long prior to Mrs. D'Arcy's death, Cheney rendered to her partial accounts, which, though in the possession of the complainants, are not set out. It is alleged that they are not fair and full, and do not bring the account to the time of her death. Rendered to her, they, of course, did not come to the time of her death, but it should have been alleged to what time they did come, what they contained, and in what respect they were false or erroneous. There are vouchers in evidence, attested by the signature of Mrs. D'Arcy, which cover the most important, if not all, of the matters in dispute; but the body of the instruments in each instance is in the handwriting of Mr. Cheney, and might have been written after the signature was obtained, and on that account it is insisted they should be

rejected. On the contrary, the genuineness of the signatures being undisputed, the documents constitute at least prima facie evidence of the settlements which they recite, and the burden was on the complainants to overthrow or discredit them. We do not overlook the circumstances in evidence which unexplained throw grave doubt upon some of the transactions for which we are asked to declare the respondent accountable; but they are not of a character which makes explanation impossible, and in view of the lapse of time, the long acquiescence of Mrs. D'Arcy, and of the fact that Cheney was not required nor permitted to give such explanation as he could, we are unable to see any safe ground upon which we can set aside the decree rendered, and award relief to the complainants. They have no better standing in court than would Mrs. D'Arcy have if she were living and the suit had been in her name, and without different proof from what has been made, if the suit were by her, we should be of opinion that her delay in bringing it was inexcusable and fatal to her standing in a court of equity. There is some proof, amounting to a degree of probability, that Mrs. D'Arcy understood and intended the disposition which was made of her property. It may be that in each instance Cheney was dealing with affairs in trust, but, if that be conceded, it results only that the transactions were voidable, and not void; and, after long acquiescence by the party interested, the courts should not interfere, unless upon a reasonable certainty that they would not be committing an injustice equal to or greater than that supposed to need correction. Stearns v. Page, supra; Hammond v. Hopkins, 143 U. S. 224, 12 Sup. Ct. 418.

A pertinent discussion of the effect of laches upon the right to relief in equity is found in the recent case of Abraham v. Ordway, 15 Sup. Ct. 894, from which we quote the following:

"It is now too late to ask assistance from a court of equity. The relief sought cannot be given consistently with the principles of justice, or without encouraging such delay in the assertion of rights as ought not to be tolerated by courts of equity. Whether equity will interfere in cases of this character must depend upon the special circumstances of each case. Sometimes the courts act in obedience to statutes of limitations; sometimes in analogy to them. But it is now well settled that, independently of any limitation prescribed for the guidance of courts of law, equity may, in the exercise of its own inherent powers, refuse relief where it is sought after undue and unexplained delay, and when injustice would be done, in the particular case, by granting the relief asked. It will in such cases decline to extricate the plaintiff from the position in which he has inexcusably placed himself, and leave him to such remedies as he may have in a court of law. Wagner v. Baird, 7 How. 234, 238; Harwood v. Railroad Co., 17 Wall. 78, 81; Sullivan v. Railroad Co., 94 U. S. 806, 811; Brown v. Buena Vista Co., 95 U. S. 157, 159; Hayward v. Bank, 96 U. S. 611, 617; Lansdale v. Smith, 106 U. S. 391, 392, 1 Sup. Ct. 350; Speidel v. Henrici, 120 U. S. 377, 387, 7 Sup. Ct. 610; Richards v. Mackall, 124 U. S. 183, 188, 8 Sup. Ct. 437."

The decree of the circuit court is affirmed.

WATSON v. UNITED STATES SUGAR REFINERY et al.

(Circuit Court of Appeals, Seventh Circuit. July 9, 1895.)

No. 223.

1. EQUITY PLEADING—MULTIFARIOUSNESS.
A bill alleging that complainant had been induced, by false representations of certain individual stockholders and officers of a corporation, to purchase stock therein, which has proved worthless, and also alleging numerous grounds upon which a dissolution of the corporation and an accounting are sought, is multifarious in joining a cause of action against the individual defendants, for deceit, with one against the corporation for dissolution and accounting.

2. CORPORATIONS.
A bill by a stockholder, seeking dissolution of a corporation and accounting, alleged that business had been suspended, "among other things," because of the worthlessness of a patent under which it had been carried on, but without stating that that was the controlling reason; that the officers were misapplying the funds, but without stating that any effort had been made to have the corporation bring suit; that the officers had tampered with the books, but without stating in what manner; that certain assets had not been entered in the books, but without charging concealment or intentional wrong. *Held*, that the allegations were too general and indefinite to justify granting relief.

3. EQUITY PRACTICE—PARTIES.
Where a bill for dissolution of a corporation and accounting seeks to have full payment made to the complaining stockholder for his investment before any payment to the transferees of certain other stockholders, such transferees are necessary parties.

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

Henry M. Wolf, for appellant.
Homer Cooke, for appellees.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

WOODS, Circuit Judge. This suit was brought by the appellant, William H. Watson, a citizen of New York, against the appellees, the United States Sugar Refinery, a corporation, and Thomas A. Jebb and William T. Jebb, citizens of Illinois. Error is assigned upon the action of the circuit court in sustaining the demurrers of the respondents to the amended and supplemental bill, and in dismissing the cause "for want of jurisdiction." The opinion of the court, which is in the record, shows that the demurrers were sustained upon each of the grounds alleged, namely,—that the complainant had not made a case entitling him to a discovery or other relief; that the bill was multifarious, exhibiting against the corporation and against the defendants Jebb several and distinct matters; and that there were other stockholders of the company who were necessary parties to the action. The averments of the original bill, which, like the supplemental bill, purports to be for the benefit of the complainant and other stockholders of the United States Sugar Refinery who may choose to join in the suit as parties complainant, are, in substance, that the United States Sugar Refinery, incorporated under the laws of Illinois about the 24th day of December, 1889, with a capital stock of $500,000, in shares of $100, was organ-

ized for the purpose of manufacturing rose malt, grape sugar, glucose, starch, syrups, feeds, corn meal, corn flour, and other products of corn, and that William T. Jebb is a stockholder, director, and president of the company; that the incorporators, original subscribers to the stock, and directors of the company for the first year, were Henry C. Hutchinson, Henry B. W. Browning, and J. A. Holzbauer, Browning having subscribed for 4,998 shares, and the others each for one share, but that the Jebbs, father and son, who were owners of a majority of the capital stock, and were then preparing to engage in the business of manufacturing glucose or grape sugar from maize, under certain letters patent for a process of making the same issued to William T. Jebb, as assignee of John C. Schuman, were practically the sole executive officers and managers of the company. From this point, the bill proceeds to show in detail and at great length that, by false representations in respect to the validity and value of their patents and the process covered thereby, the Messrs. Jebb procured the complainant in March, 1890, to purchase and pay for 50 shares of the capital stock of the company, of which shares, it is alleged, he ever since has been and is the legal owner and holder. It is further averred that the company completed and begun to operate its factory in May, 1890, but before the end of nine months, "by reason, among other things, of the utter worthlessness of said patents and processes," the works were shut down, and since February, 1891, have stood idle, and that for more than two and one-half years the company has wholly ceased doing business; that no stockholders' meeting has been held for more than two years; that, though often requested, no accounting has been rendered, and no report made by the officers of the company; that William T. Jebb, the president, and other officers, acting under his directions, have refused to allow stockholders or their agents to examine the books of the company, and that there is now pending a suit in the circuit court of Lake county, Ill., to compel the officers to permit a stockholder to examine the books. It is also alleged that the officers have illegally employed the assets of the company in speculations in real estate, and have squandered, given away, and sold a considerable part of the assets to parties known to be pecuniarily irresponsible; and, upon information and belief, it is averred that the treasury of the company is without money or funds of any kind, and is in debt to the amount of about $20,000, to recover which suits are pending on appeal, taken by the company, to the United States circuit court of appeals for the Seventh circuit; that the company is insolvent; that the Jebbs are without funds, and have put their stock in the names of their wives; that the plant of the company, its real estate and buildings, are worth more than $5,000, and in the neighborhood of $300,000; that the purposes of the company cannot be attained; that any use to which the property might now be put would involve, necessarily, a departure from the original corporate design, and that the stockholders ought to be protected against further loss or diminution of the capital stock or assets of the company, which cannot be done unless the company is wound up and dissolved; that this suit

is not a collusive one, designed to confer jurisdiction which the court otherwise would not have. This is the substance of the original bill, the prayer of which is, that the defendants be required to answer, but not under oath; that a receiver be appointed of the assets of the company; that the assets be sold, and the proceeds applied to the payment of debts, and that the remainder be distributed, giving to the complainant and other stockholders similarly situated the full amount of their investments, before paying anything to the Jebbs or to the transferees of their stock; that the company be dissolved, and that meanwhile the defendants Jebb be restrained from selling, incumbering, or interfering with the assets of the company or transferring their stock therein; and that other proper relief be given. The supplemental bill, reaffirming the original averments, alleges that, since the filing of the original bill, the complainant has been informed and believes, and therefore avers, that the total available cash assets of the company are only about $400, and are insufficient to continue the employment of suitable watchmen to protect the plant; that, during the period of operation before February, 1891, the company lost large sums, consuming its available cash capital; that for the last year or more the expenses of protecting the property have been paid out of funds taken by William T. Jebb from the assets of the United States Starch Works, a corporation owning adjoining property, of which said Jebb had been treasurer and manager, but that, by reason of his recent removal from control, that source of supply has been cut off; that William T. Jebb, the president, has tampered with and manipulated the books, papers, and accounts of the company, and has rewritten or caused to be rewritten one of the main books of account, falsifying the entries therein; that 1,000 shares of the stock of United States Starch Works which were issued to William P. Kennard, the secretary and treasurer of the United States Sugar Refinery, in trust for the latter company, and of which 930 shares have since been transferred out of the name of Kennard into the name of George R. Teller, and 50 shares into the name of Henry B. W. Browning, have not been entered upon the books of the company as an asset thereof, and that said Teller's note for about $93,000, given to William T. Jebb, in trust for the company, in consideration for the transfer mentioned, has not been turned over to the treasurer, nor any entry thereof made upon the books of account of the company; that, since the filing of the original bill, as complainant is informed, a pretended annual meeting of the company was held, about the 21st day of December, instant, of which neither the complainant nor any other stockholder in like interest received any notice or had any knowledge; that he is informed that certain persons, since that meeting, have visited and examined the works and plant, with a view to purchasing the same; and he charges that, unless restrained, the Messrs. Jebb, as officers in control, will sell the property, "and appropriate such portion of the proceeds of such sale as they may be able to do." The prayer, in so far as it differs from the prayer of the original bill, is that the respondents be prohibited from selling, leasing, mortgaging, or

conveying any of the property of the company until authorized thereto by the stockholders, at a meeting duly called and held.

If the appellant was induced by false representations to make a losing investment in the corporate stock, his remedy is at law against those who deceived him, and not against the corporation. It may be, as was suggested in West v. Huiskamp, 11 C. C. A. 401, 63 Fed. 749, 755, that one who is induced to join others in the organization of a corporation, by false representations which affect the solvency of the enterprise from the beginning, may be entitled, upon discovery of the fraud, to a decree in equity for the winding up of the affairs of the company; but that is not the case presented. The appellant was not an original corporator, but simply the purchaser and assignee of shares in an organization already complete. Unless, therefore, the averments in respect to the deceit practiced upon him be rejected as meaningless or superfluous, the bill is clearly multifarious, not only because it joins distinct and independent matters, but because it seeks to enforce different remedies against distinct parties not jointly liable or interested. In other respects, moreover, the allegations of the bill are too general and indefinite, or otherwise defective, to justify relief in a suit by a stockholder. The appellant, owning but 1 per cent. of the stock of the company, professes to sue for the benefit of himself and other stockholders in like situation, but fails to show or to raise a fair inference that there are others who desire or who would be benefited by the relief sought. The bill may, therefore, be regarded as if brought in his own interest alone. Without repeating in detail the different allegations, we note some of the particulars in which they are defective: The works of the company, it is stated, after being kept in operation at a loss for nine months, were shut down, for the reason, "among other things," that the patents and patent processes which they had proposed to use had proved worthless; but whether that was the main or controlling reason is not explained, and, as against the pleader, the contrary is inferable. No stockholders' meeting has been held for more than two years, and no report of officers has been made; but that any interest had suffered or was likely to suffer on that account is not shown, nor affirmed; and the supplemental bill admits a recent meeting of the board,—held, it is alleged, without notice, but it may have been at the time fixed by a rule or by-law of the company, of which, without formal notice, stockholders were bound to take cognizance. Stockholders and their agents, it is charged, were not permitted to examine the books of the company; but under what circumstances, and for what reason, the examination was sought and refused, is not disclosed. If wrong was done in that respect, it is to be presumed that it will be righted in the suit brought for that purpose in the state court. It is alleged that the assets of the company have been employed in speculations in real estate; but, besides the total failure to allege tangible particulars, the remedy should be sought in the name of the corporation. The rule is well settled that a stockholder cannot maintain a suit for a wrong to the corporate body without showing either an effort to set the corporation in motion to redress the wrong, an application

made to the board of directors to that end, or that such effort or application would be useless. And this requirement is not satisfied by an allegation that the directors or a majority of them are acting in the interest or under the control of others who are charged with the fraud. Brewer v. Proprietors, 104 Mass. 378; Dodge v. Woolsey, 18 How. 331. While it is alleged that the Jebbs were practically the sole executive officers and managers of the company, it does not appear that Hutchinson, Browning, and Holzbauer, who were directors, were for any reason unable, or, with information of the facts, unwilling, to bring proper suits to correct the harm done, or to prevent that threatened. It is alleged that the company is without available cash capital, and without means to employ watchmen; but it is admitted that money for that purpose had been supplied from another source. Instead of being insolvent, it appears that the company, while indebted to the amount of $20,000, is owner, in addition to its plant, worth $300,000, of a promissory note for $93,000, the maker of which is presumably solvent and responsible. It is alleged that entries have not been made upon the books of the company of certain transfers of stock and of the Teller note; but it is not charged that the omission was intentional or wrongful, or that there had been any concealment of the nature of the transactions or of the company's interests therein. In what respect, and for what purpose, the entries were falsified in the book which is alleged to have been rewritten, is not shown, and whatever wrongs there may have been in that respect were, under the rule already stated, matters for complaint or suit by the company, and not by the appellant as a stockholder. If it be true, as asserted in the bill, that any use to which the property might now be put would involve a departure from the original design, then a sale of the property and a division of the proceeds between stockholders was the proper course, and no ground for an injunction is disclosed in the averment that the Messrs. Jebb, as officers in control, will make a sale "and appropriate such portion of the proceeds of such sale as they may be able to." This does not show a purpose to appropriate more than their just share; nor is it alleged that they are insolvent and irresponsible for what should come into their hands.

Even upon the appellant's own theory of the case, there is a lack of necessary parties. The prayer of the bill is that the property of the company be sold, and the proceeds, after payment of debts, given to the appellant and others in like situation, to the full amount of their investment, before payment of anything to the Jebbs or to their wives, to whom it is alleged they had transferred their shares of stock; but it is evident, on elementary principles, that such an order, if otherwise justifiable, could not be made in a case to which the legal holders of the shares were not parties.

Objection is made, in a supplemental brief, that the bill was dismissed without leave to amend, and that the proper practice, when a bill is dismissed without a consideration of its merits, is to decree a dismissal without prejudice. Durant v. Essex Co., 7 Wall. 107, 110; Kendig v. Dean, 97 U. S. 423, 426. The assignment of errors presents no such question. Besides, the first ground

of demurrer went to the merits of the bill, and the opinion of the court, as already stated, shows that all the grounds advanced were deemed good. The final order was that the bill be dismissed "for want of jurisdiction,"—meaning, doubtless, that a case of equitable cognizance was not shown. If it means that the merits were not decided, then the decree is equivalent to a dismissal without prejudice. In any view, we do not perceive that the decree upon this bill, which, as we agree with the circuit court in holding, presents no ground for relief, can be a bar to another bill which shall show different and good ground. Leave to amend, if desired, should have been asked at the time the decree was announced, or seasonably thereafter. Equity rule 35. The decree of the circuit court is affirmed.

FORSYTHE v. CITY OF HAMMOND et al.

(Circuit Court, D. Indiana. July 3, 1895.)

No. 9,215.

1. CONSTITUTIONAL LAW—LEGISLATIVE AND JUDICIAL POWERS.
   It is within the power of the legislature of a state, whose constitution denies to the legislature the power of creating municipal bodies or enlarging or contracting their boundaries by special act, and requires such changes to be provided for by general laws, to confer upon the courts the power to determine whether the conditions exist prescribed by law for the creation, enlargement, or contraction of a municipal body.
2. SAME—UNDERLYING PRINCIPLE OF RIGHT.
   A court cannot declare void an act of the legislature of a state which violates no provision of the state or federal constitution on the ground that it is wrong, unjust, or oppressive, or that it violates the genius and spirit of our institutions.
3. SAME—DUE PROCESS OF LAW—TAKING PRIVATE PROPERTY—TAXATION.
   A court cannot say that the levy of a tax, however great the hardship or unjust the burden, is a taking of property without due process of law, or without just compensation; nor that a tax is unconstitutional because its proceeds may be applied to the payment of a debt incurred in excess of a constitutional limit.

This was a suit by Caroline M. Forsythe against the city of Hammond, Ind., to enjoin the collection of a tax.

Miller, Winter & Elam, for complainant.
Peter Crumpacker, for defendants.

BAKER, District Judge. This is a suit to enjoin the collection of taxes levied for city purposes by the defendant city on the lands of the complainant. The question for decision is the sufficiency of the bill to entitle the complainant to the equitable relief for which she prays. The sufficiency of the bill depends upon the answers to be given to two questions:

First. Were the proceedings and judgment of the circuit court of Porter county, Ind., which adjudged the annexation of certain lands, including the complainant's, to the city of Hammond, illegal and void, or were they valid? It is contended that the judgment annexing the lands of the complainant and others to the city of Ham-

mond is void, because the creation and enlargement of municipal bodies are purely political questions, to be determined by the legislature, and not judicial, to be determined by the courts; and hence that the legislature cannot confer upon the courts power or authority to adjudge or decree the annexation of territory to a municipal body. It is not denied that the legislature has attempted to confer such power upon the courts, but the contention is that the question of the enlargement of the limits of a municipal body is purely a political question, and that, under the constitution of this state, no power except judicial can be conferred upon the courts. Counsel for the complainant rely upon a number of authorities in support of their contention, which we here cite: Dill. Mun. Corp. § 9; 1 Beach, Pub. Corp. § 80; Stone v. Charlestown, 114 Mass. 220; People v. Bennett, 29 Mich. 451; Galesburg v. Hawkinson, 75 Ill. 152; People v. Town of Nevada, 6 Cal. 143. It must be conceded that these authorities, to which others might be added, do hold that the legislature of a state cannot confer power upon the courts to change the boundaries of such municipal bodies as cities or towns by annexing territory to or disconnecting it from them, because such acts are in their essential nature legislative and political, and not judicial; that the same power cannot be either legislative or judicial, as the legislature may be disposed to retain it or surrender it to the judiciary; and that, as it is a legislative power, the courts cannot be invested with it. It is said that whether a city, town, or village shall be incorporated, and, if incorporated, whether enlarged or contracted in its boundaries, presents no question of law or fact for judicial determination. It is, so it is said, purely a question of policy, to be determined by the legislative department. I should perhaps feel constrained to yield to the force of the reasoning of these authorities if the constitution of this state conferred power on the legislature to create such municipal bodies, or to enlarge or contract their boundaries by the enactment of special laws applicable to each particular municipal body. Such power, however, is denied to the legislature by the constitution of the state. The constitution requires the organization of cities and towns and the enlargement or contraction of their boundaries to be provided for and regulated by general laws. These laws, in the nature of things, must be prospective, and must specify the conditions on the happening of which such creation, enlargement, or contraction may be made, and must provide some tribunal to determine the existence of those conditions. The power to hear and determine whether the conditions prescribed by law for the creation, enlargement, or contraction of a municipal body exist is judicial in its nature, and may be appropriately conferred upon the courts. The creation, enlargement, or contraction of a municipal body is not the act of the court, but is the act and result of the law. The court simply determines whether the conditions are present which authorize the creation of a municipal body, or the enlargement or contraction of its limits; and, when these conditions are judicially ascertained, the law, ex proprio vigore, creates the municipal body, or enlarges or contracts its boundaries. The constitution of the state

compels the legislature to confide this power to some tribunal; and to none could it more appropriately have been confided than to the courts. It is a legitimate function of courts to ascertain and determine the existence or nonexistence of a given state of facts. The legislature is required, as we have seen, to provide by general laws for the creation of municipal bodies, and for the enlargement and contraction of their boundaries; and no limitation has been placed upon the power of the legislature to confer upon any tribunal it may select the authority to determine when the conditions are present which shall create, enlarge, or contract municipal bodies. The power of the legislature in this regard being unlimited, it may exercise its own discretion in confiding to any tribunal it pleases the power to determine the existence of the conditions which shall give effect to the general law touching the enlargement of municipal bodies. It is thoroughly well settled that many legislative enactments are valid and constitutional which become operative upon persons and property within defined territorial limits on the happening of some future contingency. Among such enactments are laws providing for aid in the construction of railroads and other public improvements, whose operation is made dependent on the petition or vote of the electors or taxpayers of a specified locality. So, also, local option laws, making the sale of intoxicating liquors within certain territorial limits lawful or unlawful, are made dependent on the vote or petition of a certain number of electors in such localities. These enactments only become operative on the happening of conditions which must be ascertained and determined by some tribunal in the manner appointed by law. It is not perceived why the ascertainment and determination of the conditions upon which the law shall become operative within given territorial limits may not be committed to the courts. In my judgment, the legislature possessed the constitutional power to confer jurisdiction on the courts to hear and determine whether or not the requisite conditions exist to justify the annexation of territory to a municipal body. The decisions of the supreme court of this state are in harmony with these views. While this precise question has been but seldom referred to, the supreme court has, in cases too numerous to justify citation, by taking appellate jurisdiction, recognized the power of the courts to hear and determine the questions confided to them by the statute providing for the incorporation of cities and towns. In the case of Grusenmeyer v. City of Logansport, 76 Ind. 549, the court expressly affirmed the jurisdiction of the courts to hear and determine these questions; and the court there declared that these questions were judicial in their nature. This case has been cited and approved in many more recent decisions of the court. The question must be regarded as settled in this jurisdiction adversely to the contention of complainant's counsel. Besides, the supreme court of the state, in the recent case of Forsyth v. City of Hammond, 40 N. E. 267, has decided that the annexation of the lands of the complainant and others to the city of Hammond was lawfully made; and this court possesses neither the disposition nor the power to declare the annexation of the terri-

tory in question invalid. The decisions of the supreme court of the state on questions of local law are binding and conclusive on this court.

Second. It is insisted that it is evident from the facts stated in the bill that the enlargement of the boundaries of the city of Hammond over large tracts of farm and vacant lands did not have its origin in the legitimate needs of the city, but in the desire to impose the burdens of taxation upon property beyond the limits of the city de facto, as indicated by houses, streets, or other urban improvements, and without any ability or intention on the part of the city to make any compensation for the taxes so levied and collected. It is said that this is an abuse of the law, and an act of injustice and oppression, from which the courts may relieve; that it is violative of the constitutional guaranty which forbids the taking of private property for public uses without making just compensation therefor; and that, independently of this constitutional guaranty, there is a fundamental principle of right and justice in the nature and spirit of all constitutional governments, which the legislature may not disregard without overpassing its rightful authority. By the constitution, the whole legislative power of the state is vested in the general assembly. When, therefore, an act of the general assembly is passed, which violates no provision of the state or federal constitution, the courts cannot declare it void on the ground that it is wrong, unjust, or oppressive; or on the ground that it violates the genius or spirit of our institutions. Welling v. Merrill, 52 Ind. 350; Churchman v. Martin, 54 Ind. 380; City of Logansport v. Seybold, 59 Ind. 225. Courts would find themselves upon a shoreless sea, with neither chart nor compass to direct their course, if they should undertake the task of declaring statutes invalid because of their supposed conflict with the principles of natural justice, or because they were supposed to be violative of the spirit of constitutional governments. Other remedies must be invoked and applied for the correction of such evils if they should arise. The tax levy sought to be restrained does not conflict with the constitutional provisions invoked. This is settled, so far as the constitution of this state is concerned, by the case of City of Logansport v. Seybold, 59 Ind. 225; and, so far as the constitution of the United States is concerned, by the case of Kelly v. Pittsburgh, 104 U. S. 78. This court cannot say, however great the hardship, or unjust the burden, that the tax in question is the taking of the property of the complainant without due process of law, or without just compensation. It is claimed that the indebtedness of the city of Hammond is in excess of the constitutional limit, and that it is proposed to apply the taxes, when collected, to the payment of such unlawful indebtedness. But this affords no excuse for the complainant's failure to pay her taxes. If, when these taxes are paid, the city authorities shall undertake to apply them to the payment of invalid or illegal obligations, it will be time for the complainant to invoke the aid of the court to restrain such misappropriation of the corporate funds. The injunction will therefore be denied, and the bill dismissed, for want of equity, at complainant's costs.

WISCONSIN TRUST CO. v. ROBINSON & CARY CO.

(Circuit Court of Appeals, Eighth Circuit. June 3, 1895.)

No. 553.

1. MECHANICS' LIENS—PRIORITY—NORTH DAKOTA STATUTE.
The statute of North Dakota relating to mechanics' liens (Comp. Laws, § 5476) provides that the claimant of a lien may file a statement of his account with the clerk of the district court within 90 days after the completion of the work, but that a failure to file such account within the time shall not defeat the lien, "except against purchasers or incumbrancers, in good faith, without notice, whose rights accrued after the 90 days and before any claim for the lien was filed." *Held*, that a lien, the account and claim for which is filed more than 90 days after the completion of the work, is superior to a mortgage made and filed within such 90 days.

2. SAME—EFFECT OF TAKING NOTES.
The holder of a mechanic's lien, who takes, for his account, notes of his debtor, maturing within the time allowed for foreclosure of the lien, which he discounts, and afterwards pays, does not thereby waive or lose his rank as a lienholder, or his right to file and enforce his claim to a lien.

Appeal from the Circuit Court of the United States for the District of North Dakota.

Edgar W. Camp, for appellant.

John S. Watson (W. F. Ball, on the brief), for appellee.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. In this case the Wisconsin Trust Company, a corporation, and a mortgagee, appeals from a decree of the circuit court for the district of North Dakota foreclosing a mechanic's lien of the Robinson & Cary Company, a corporation, upon the mortgaged property, and adjudging it to be superior to the lien of the mortgage. The mechanic's lien is a creature of the statute. The provisions of the statutes of North Dakota material to the determination of the questions presented in this case are:

"Sec. 5469. Every mechanic, or other person who shall do any labor upon, or furnish any materials, machinery or fixtures for any building, erection or other improvements upon land, * * * by virtue of any contract with the owner, * * * upon complying with the provisions of this chapter, shall have for his labor done, or materials, machinery, or fixtures furnished, a lien upon such building, erection or improvement, and upon the land belonging to such owner, on which the same is situated, to secure the payment of such labor done, or materials, machinery, or fixtures furnished."

"Sec. 5476. Every person, except as has been provided for subcontractors, who wishes to avail himself of the provisions of this chapter, may file with the clerk of the district court of the county, * * * in which the building, erection or other improvement to be charged with the lien is situated, and within ninety days after all the things aforesaid shall have been furnished or the labor done, a just and true account of the demand due him after allowing all credits, and containing a correct description of the property to be charged with said lien, and verified by affidavit; but a failure to file the same within the time aforesaid shall not defeat the lien, except against purchasers, or incumbrancers in good faith, without notice, whose rights accrued after the ninety days and before any claim for the lien was filed."

Comp. Laws Dak. 1887, c. 31, pp. 934, 935.

The appellee did not file its account and claim for a mechanic's lien within 90 days of the completion of the performance of its

contract for the materials it furnished for the mortgagor, but first filed such an account about 8 months after it completed the performance of its contract. About 60 days after that contract was completed, the appellant loaned to the mortgagor about $22,000, and took and recorded its mortgage to secure the payment of the loan. At the time it completed its contract the appellee took promissory notes of the mortgagor for its account, which it discounted, and subsequently paid, before it filed its account and claim of lien. It produced and offered to surrender these notes at the trial.

These facts present two questions for determination. They are: (1) Does the holder of a mechanic's lien in the state of North Dakota, who first files his account and claim of lien more than 90 days after he completes the performance of his contract, lose his priority of lien over a mortgage that is made and filed within the 90 days? And (2) does the holder of a mechanic's lien, who takes for his account the promissory notes of his debtor, maturing within the time allowed for the foreclosure of the lien, and discounts them, thereby waive or lose his rank as a lienholder, or his right to file and enforce his claim to a lien? The first of these questions involves a construction of the statutes we have cited. The second is a question of general law.

No argument or exposition can make the purpose or effect of the provisions of the statutes clearer than their own words. These provisions give to every laborer upon, and to every person who furnishes materials or machinery for, a building, pursuant to a contract with the owner, a lien upon the building and the land of the owner upon which it stands for the labor he performs or the materials or machinery he furnishes. As against the owner, and all parties claiming under him whose rights accrue within 90 days after the performance of the contract of the lienor has been completed, they make the performance of the labor or the furnishing of the materials or machinery the only prerequisite to the existence and enforcement of the lien. They provide, it is true, that the lienor may file his account and claim of lien within 90 days after he has completely performed his contract, but the only purpose of that filing is to preserve the lien as against purchasers and incumbrancers without notice, whose rights accrue after the 90 days. Its filing, or the failure to file it, in no way affects the lien as against the owner, or as against the purchasers or incumbrancers whose rights accrue within the 90 days. The statute expressly declares that "a failure to file the same within the time aforesaid shall not defeat the lien, except against purchasers, or incumbrancers in good faith, without notice, whose rights accrued after the ninety days and before any claim for the lien was filed." The theory and reason of the statute are that during the construction of the new building or improvement, and for 90 days thereafter, the new building or improvement itself shall be notice to all purchasers and incumbrancers of the lien upon it, and that all who take any title to or mortgages upon the land on which it stands during this time shall take the title cum onere, and with constructive notice of every mechanic's lien that has attached to it. It is for this reason that the statute does

not require the filing of any account to preserve the lien against them, and declares that the omission to file it shall not defeat the lien except against purchasers and incumbrancers in good faith whose rights accrue after the 90 days have expired. The rights of the appellant, the mortgagee in this case, did not accrue after, but accrued before, the expiration of the 90 days, and consequently it was not within the class of purchasers and incumbrancers excepted by the statute; and the omission by the appellee to file its account and claim of lien during the 90 days did not defeat or affect its lien as against this mortgagee. Our conclusion is that the failure of the holder of a mechanic's lien to file his account within 90 days after the completion of the performance of his contract under sections 5469 and 5476 of the Compiled Laws of Dakota, 1887, will not defeat his lien or its priority as against the mortgage made and recorded within 90 days. Hill v. Building Co. (S. D.) 60 N. W. 752, 757; Sarles v. Sharlow, 5 Dak. 100, 109, 37 N. W. 748; Evans v. Tripp, 35 Iowa, 371, 372; Kidd v. Wilson, 23 Iowa, 464; Noel v. Temple, 12 Iowa, 276, 281; Neilson v. Railway Co., 44 Iowa, 71, 73; Curtis v. Broadwell (Iowa) 24 N. W. 265, 266; Hoskins v. Carter (Iowa) 24 N. W. 249; Doolittle v. Plenz (Neb.) 20 N. W. 116.

Since it was unnecessary for the appellant to file any account or claim of lien in order to preserve the priority of its lien upon this property as against the appellee, the only remaining question in this case is whether or not the acceptance and discount of the promissory notes taken for the account which was secured by the lien destroyed the lien. This question is too well settled by the consensus of judicial reasoning and authority to warrant extended discussion. Statutes securing upon buildings and improvements the wages of the labor and the value of the materials bestowed upon them are and ought to be liberally construed. The labor and material once bestowed lose all their value to the laborer or material man. He cannot take them back. They enhance the value of the property on which they are bestowed, and its owner, and those who take under him, receive all the benefits of this labor and material. Under such circumstances, justice and equity demand that the lien of the laborer or material man for his wages or for the value of his material should be maintained to the full extent to which the statutes give it. No reason occurs to us why a lienor who takes a promissory note for his account under an arrangement that the note is not accepted as payment, but that it will be credited when paid (and that was the arrangement under which the appellant took the notes in this case), should be held to thereby release or destroy his lien. The book account is an evidence of indebtedness. The note taken for the account is merely another form of evidence of the same debt, and it is secured by the same lien. The note may suspend the right to enforce the lien, but if it matures within the time allowed by the statute for foreclosure it is not perceived why the lien may not be then enforced. Nor is there anything in the act of discounting the note that ought to discharge or destroy the lien. The indorsement and transfer of the note may be an equitable assignment of the lien, but the legal title to it still remains in the lienor. There is no

doubt that the payment of the note would constitute a complete defense to the enforcement of the lien, just as the payment of a mortgage note to an indorsee would be a complete defense against the mortgage. But this fact does not destroy or affect the security of the lien or of the mortgage while the note still remains unpaid. While a note given for an account that is secured by a mechanic's lien remains in the hands of the indorsee the maker owes the debt to him, and the indorser stands bound to pay the note if the maker does not. The lien is held by the indorser to secure the performance of both these contracts, and it inures to the benefit of him who first performs. If the maker pays the note, he thereby procures the benefit of the lien, and may have it discharged. If the note is protested, and the indorser is compelled to take it up and pay it, that payment effects a reassignment to him of the equitable interest in the lien, and gives him the right to enforce it for his own benefit upon a surrender of the note. These views appeal to the reason with such compelling force, and have been so often expressed by the courts, that it would be a work of supererogation to do more than to state them, and our conclusion is that the acceptance and discounting by the holder of a mechanic's lien of promissory notes taken for the account secured by the lien, which mature within the time limited for its enforcement, do not destroy the lien, or subordinate it to a subsequent mortgage. Hill v. Building Co. (S. D.) 60 N. W. 752, 755; Bank v. Schloth, 59 Iowa, 316, 13 N. W. 314, 317; Smith v. Johnson, 2 MacArthur, 481; Miller v. Moore, 1 E. D. Smith, 739; Farwell v. Grier, 38 Iowa, 83; Sweet v. James, 2 R. I. 270; McMurray v. Taylor, 30 Mo. 263; Goble v. Gale, 7 Blackf. 218; Graham v. Holt, 4 B. Mon. 61; Dawson v. Black, 148 Ill. 484, 36 N. E. 413; Phillips, Mech. Liens, § 278.

The decree below must be affirmed, with costs, and it is so ordered.

THE VIGILANCIA.
THE SEGURANCA.
THE ALLIANCA.
THE ADVANCE.

ATLANTIC TRUST CO. v. PROCEEDS OF THE VIGILANCIA et al.

(District Court, S. D. New York. May 7, 1895.)

1. CORPORATION BONDS—SALE BELOW PAR NOT USURY—BY-LAWS—PUBLICATION—COMPUTATION OF TIME.

   The Brazil M. S. Co., a New York corporation, issued its bonds at 80 cents on the dollar by vote of directors elected at a meeting on the 28th, of which notice was first published on the 8th, the by-laws requiring notice to be published "not less than 20 days previous." *Held*, that under the law of New York usury was not available as a defense either to the corporation or to judgment creditors, as against a mortgagee of the company's ships to secure the bonds; and that the notice of publication was sufficient.

2. SURPLUS PROCEEDS OF VESSELS—EQUITABLE MORTGAGE BY CONTRACT—ASSENT OF STOCKHOLDERS—REFILING.

   A mortgage of three steamships already built, covered also two others begun but not finished, and not then registered; the mortgage covenanted

for the execution of supplementary mortgages on the latter vessels when completed, which were afterwards executed; but in the meantime a state statute required the assent of two-thirds of the stockholders to a corporation mortgage, and this assent was not sought or obtained. *Held*: (1) that the statute did not apply to mortgages given in execution of contracts made before the act was passed, and made upon valuable consideration already paid; and that (2) if it did, the original mortgage and contract for further mortgages on the new vessels, created an equitable mortgage upon the vessels and the proceeds in the registry superior to the subsequently accruing claims of the contesting judgment creditors.

In the matter of the petition of the Atlantic Trust Company against the proceeds of the Vigilancia, Seguranca, Allianca, and Advance.

Carter & Ledyard and E. L. Baylies, for petitioners.

R. D. Benedict and Maxwell Evarts, for Huntington and Pratt & Co.

Cary & Whitridge and W. P. Butler, for Brown Bros.

James McKeon, for G. & R. Hudson.

W. Mynderse, for B. & F. M. Ins. Co. and others.

BROWN, District Judge. Petitions for the surplus proceeds of the above vessels having been filed by the Atlantic Trust Company, as mortgagee in trust for holders of bonds of the United States & Brazil Mail Steamship Company, as well as by other creditors, who contest the validity of the trust mortgage, and upon an order of reference thereon, the commissioner having made his report, exceptions have been filed to the commissioner's findings sustaining the validity of the mortgage as against creditors as well as against the steamship company. The principal points of the contestants in claiming the invalidity of the mortgage are: (1) That the mortgage was usurious and void as against creditors, because the bonds were sold at a discount of 20 per cent.; (2) that the directors by whom the mortgage was executed were not elected in conformity with the by-laws of the company, which required a previous notice of 20 days of the time and place of holding the election; (3) that the supplementary mortgages upon the Seguranca and Vigilancia were void, because made after the act of 1890, which requires the written assent of two-thirds of the stockholders, which was not obtained.

The report of the commissioner presents a full statement of the facts; and he overrules each of these objections, with a statement of his reasons therefor, which seem to me, upon careful examination, to be sound.

1. It is a principle of constant application in the federal courts that the construction of a state statute given to it by the highest court of the state, is to be taken as the meaning of the statute, and effect given to it accordingly. The defense of usury in actions against corporations is expressly prohibited by the state statute of 1850. The construction given to this act is, that in effect it repeals the statute of usury as respects corporations. Curtis v. Leavitt, 15 N. Y. 9, 85, 154, 229; Rosa v. Butterfield, 33 N. Y. 665, 675; Merchants' Exch. Nat. Bank v. Commercial Warehouse Co., 49 N. Y. 635; Bank v. Wheeler, 60 N. Y. 612; affirmed 96 U. S. 268. This

has been so often affirmed that I do not consider myself at liberty to regard this defense as available to the contestants. The statute is for the protection of the lender to corporations; and this purpose would be thwarted if his security could be destroyed by a defense of usury interposed by creditors, as much as if that defense were allowed to be interposed by the corporation itself. In the language of Rosa v. Butterfield, such contracts, since the act of 1850, are "not usurious," and it is immaterial that the defense is not made directly by the corporation.

2. The meeting at which the directors who executed the mortgage were chosen was held on May 28, 1889, and notice thereof was published on May 8, and on every week day thereafter, including the 28th. The by-laws required that "notice of the time and place of holding the election shall be published not less than 20 days previous thereto." The contestants claim that the by-law required 20 full days to intervene, which would not be till May 29th. This is contrary, however, to the ordinary rule for the computation of time in this state. By Code Civ. Proc. §§ 787, 788, it is provided that "the time within which publication of legal notices or within which acts in actions or any special proceedings are required to be done, shall be computed by excluding the first day and including the last"; and by section 5013 of the United States Revised Statutes a similar provision was made in regard to proceedings in bankruptcy. These provisions do not literally include the publication of notices under the by-laws of corporations. But the state rule, prescribed in all cases of legal proceedings, is a legislative provision of such importance, and its analogy to the present case is so plain, that I can have no doubt that it ought to be adopted, in the absence of any contrary indication, as the meaning and intent of this by-law. In most of the cases in which a different rule has been adopted, the language construed has been peculiar, seeming to require the specified number of days or months to have elapsed; such as the entry of judgment "after four days," or avoiding an assignment "within four months." Dutcher v. Wright, 94 U. S. 553; Kane v. City of Brooklyn, 114 N. Y. 586, 594, 21 N. E. 1053. In the present case there is nothing in the language of the by-law to indicate that both the first day and the last should be excluded. The by-law, I find, required only a publication "not less than 20 days previous"; and a publication on the 8th was, as I find, a publication 20 days previous to the 28th.

3. The original mortgage, dated July 1, 1889, was executed on the 12th day of December, 1889. It covered the ships Allianca, Advance and Finance, and other property, and also two steamships to be called the Seguranca and Vigilancia, then in process of building under contract, at Chester, Pa., but unfinished, and not then entitled to registry. The mortgage was executed for the purpose of retiring certain outstanding bonds, and for the purpose of procuring the moneys necessary to complete the building of the two new steamships. This mortgage expressly covered the Seguranca and Vigilancia, already begun, but then incomplete; and it covenanted for the execution of two further mortgages, similar to the

first, on the steamships Seguranca and Vigilancia respectively, as soon as they should be completed and become entitled to a certificate of registry. Upon the faith of this mortgage, the bonds were issued and purchased by Mr. Pratt, upon the agreement that the moneys paid therefor were to be applied strictly to the construction of the two new steamers, and to the retirement of the existing bonds. Upon the completion of the steamers, the two supplementary mortgages were accordingly afterwards executed; that of the Seguranca on the 8th day of September, 1890; that of the Vigilancia on the 4th day of December, 1890. All three mortgages were duly filed in the customhouse at New York, and were also filed as chattel mortgages in the office of the register of the city and county of New York, pursuant to the state law.

I concur with the commissioner in the opinion that the state statute of 1890, requiring the written assent of two-thirds of the stockholders to the execution of a mortgage by the corporation, is not applicable to mortgages given, like those upon the Seguranca and the Vigilancia, in fulfillment of a valid and obligatory contract made upon a full and valuable consideration before the statute was passed; that such an application of the statute was not the design of the act, and would not be constitutional if it was; since in that case its effect would be, not merely to make more difficult the performance of a previous contract, but to imperil, if not to destroy, the contract altogether, by making the substantial benefits of the contract dependent on the subsequent volition of the stockholders, over which the corporation had no power. Farmers' Loan & Trust Co. v. Equity Gas Light Co., 84 Hun, 373, 32 N. Y. Supp. 385.

If, however, the construction of the law of 1860 contended for by the contestants were correct, their situation in this proceeding would not be materially improved. For the express inclusion of the Seguranca and Vigilancia then already contracted for, and already partly in esse, in the original mortgage executed in December, 1889, and the covenants therein contained for further assurance, were sufficiently clear and definite to create an undoubted equitable mortgage, upon those two vessels, which gave the trust company an equitable lien thereon for the moneys advanced in good faith upon the strength of the original mortgage prior to the time when the contestants' claim arose. No doubt an equitable mortgage stands in no better position as respects creditors, and the necessity of a proper filing thereof, than a legal mortgage stands; but in the present case the filing of the original mortgage, and the refiling of the same from year to year, as well as of the new mortgages, gave full notice of these equitable rights, and as perfectly fulfilled all the purposes of the statute as regards this equitable mortgage, as they did with respect to the perfect legal mortgage of the ships already completed. Upon the first refiling there was a delay of a month beyond the statutory period; but as all the contestants' claims arose subsequent to the refiling, they are not in a situation to take any advantage of the prior laches.

As against an equitable mortgage, or a valid equitable lien, a subsequent execution creditor has no priority. An execution,

whether against real or personal estate, attaches only upon the debtor's actual interest, and is as much subject to a prior valid equitable lien or title as to a prior legal one. Averill v. Loucks, 6 Barb. 19, 27, and cases there cited (Paige, J.); Kiersted v. Avery, 4 Paige, 9; Lamont v. Cheshire, 65 N. Y. 30, 40; Frost v. Bank, 70 N. Y. 553–556; and see Sisson v. Hibbard, 75 N. Y. 542. Had the steamship company refused to give any supplementary mortgage at all, the rights of the bondholders under the original mortgage and the equitable hypothecation of the two vessels already contracted for and begun, would have been the same in a court of equity; and consequently those rights would prevail over mere execution creditors in the application for surplus moneys.

The other points referred to have been so satisfactorily treated by the commissioner, that I think it unnecessary to make further reference to them, and concur in what he has said.

Exceptions overruled and report confirmed.

BOWERS et al. v. NEW YORK LIFE INS. CO.

(Circuit Court, D. Maine. January 12, 1895.)

No. 409.

1. CONTRACTS—REFORMATION—EVIDENCE.
   The proofs in this case do not bring it within the rule that to justify the reformation of a written contract, on the ground of mistake, the testimony must be clear, unequivocal, and convincing.
2. SAME.
   A statement, made by a deceased beneficiary in an insurance policy issued two years before, as to his understanding of the terms of the policy, is not admissible to show mistake in the policy.
3. SAME—PLEADING.
   In a bill of this character it is sometimes permissible to charge fraud or mistake in the alternative.
4. SAME—ALLEGATIONS—FRAUD.
   In this case defective allegations as to citizenship in a petition for removal from a state court were made good by reference to other parts of the record.

This was a bill in equity by Walter T. Bowers, as administrator, and others, against the New York Life Insurance Company, to reform a policy of insurance.

Joseph W. Symonds, for complainants.
Charles F. Libby, for respondent.

PUTNAM, Circuit Judge. This case was removed from the supreme court of Maine. The removal papers were not printed in the record, though they should have been. On an examination of them, it appears the petitioner makes proper allegations of the citizenship of the complainants. Touching the citizenship of the defendant corporation, the petition only alleges that it is a citizen of the state of New York, which alone is not a sufficient allegation; but the bill itself alleges that the defendant corporation was duly

organized under the laws of that state, so that, taking the record as a whole, jurisdiction is apparent.

There are occasional instances of such gross injustice happening under the forms of law that, except for the power of courts in equity, exercised under some circumstances, to cancel or reform written contracts or other instruments, and even legal proceedings, the common mind would be shocked, and the law would be brought into disrepute. On the other hand, if this power was practically made use of in such way as to cause a general unsettling of transactions done with apparent care and under solemn forms, the mischief resulting therefrom would be greater than the injustice which the power referred to is intended to relieve against. Therefore, the courts have said that the power is to be exercised only when the testimony on which its exercise is based is clear, unequivocal, and convincing; and they have further said that it cannot be exercised upon a bare preponderance of evidence, which leaves the issue in doubt. U. S. v. Budd, 144 U. S. 154, 161, 12 Sup. Ct. 575.

In Coal Co. v. Doran, 142 U. S. 417, 435, 12 Sup. Ct. 239, the proposition was put in another form, as follows:

"The jurisdiction of equity to reform written instruments where there is a mutual mistake, or mistake on one side, and fraud or inequitable conduct on the other, is undoubted; but, to justify such reformation, the evidence must be sufficiently cogent to thoroughly satisfy the mind of the court."

A striking expression of the practical rule in this particular, as well in equity as at common law, is given by Judge Walton in Connor v. Pushor, 86 Me. 300, 303, 29 Atl. 1083, as follows:

"A deed which can be seen and read is a wall of evidence against oral assaults, and cannot be battered down by such assaults, unless the evidence is clear and strong, satisfactory and convincing."

The complainants in this case do not desire to rescind the contract, but to reform it. The whole tenor of the bill, and its prayers, bring forward nothing else for our action. Therefore, the discussions which were had at the bar touching the alleged waiver by the defendant corporation of the strict terms of its policy as to the time of payment of premiums, like the points lately under consideration in Insurance Co. v. Unsell, 144 U. S. 439, 12 Sup. Ct. 671, and to which the mass of proofs taken seems to relate, and touching whether this policy was completed as a contract in the state of Maine or in the state of New York, like those lately under consideration in Society v. Clements, 140 U. S. 226, 11 Sup. Ct. 822, and touching the statutory authority of certain alleged agents, like those lately discussed in Insurance Co. v. Chamberlain, 132 U. S. 304, 10 Sup. Ct. 87, need not be considered in the view which we take of this case. It was said at the bar that the facts offered in evidence touching the first of these three questions threw some reflected light upon the substantial issue; but, if it does, it is so faint as not to assist the court. It is all quite as consistent with the proposition that the defendant corporation did not intend to insist on a strict performance of the provision as to the time of payment found in its policy, as with the proposition that the omission of any express allowance of grace was for any of the reasons alleged in

the bill. Indeed, it more naturally comes in line with the first hypothesis than with the second.

The bill fails to charge fraud on the defendant corporation with the positiveness or with the detail which the rules of equity pleading ordinarily require therefor. Indeed, all the allegations touching fraud are in the alternative. However, we do not find it necessary to criticise them, and perhaps we cannot justly do so. The citation we have already made from Coal Co. v. Doran, ubi supra, shows that relief in reforming written instruments may be granted, not only for mutual mistake, but where there is a mistake on one side and fraud on the other, or, indeed, where there is a mistake on one side and inequitable conduct on the other. Moreover, as is said in Wasatch Min. Co. v. Crescent Min. Co., 148 U. S. 293, 298, 13 Sup. Ct. 600, fraud, especially legal fraud, and inadvertence or mistake, sometimes run into each other; so that it might be difficult, under the precise circumstances of this case, for the complainants to allege, in the particular to which we have referred, more specifically than they have.

* * * * * * * * *

Here follows a discussion of the facts, which, by direction of the judge who delivered the opinion, is not reported.

Let there be a decree to dismiss the bill, with costs.

KNOX COUNTY v. MORTON.

(Circuit Court of Appeals, Eighth Circuit. June 17, 1895.)

No. 603.

COUNTY WARRANTS—LIMITATION—MISSOURI STATUTE.

Rev. St. Mo. 1889, § 3195, providing that county warrants not presented for payment within five years of their date, or, being presented within that time, and protested for want of funds, and not presented again within five years after funds are set apart for payment thereof, shall be barred, prescribes a special limitation for actions on such warrants, within section 6791, providing that the limitation of 10 years prescribed by section 6774 for action on any writing for the payment of money shall not extend to any action which shall be otherwise limited by any statute.

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

This was an action by William H. Morton against Knox county upon a county warrant. The defendant, in its answer, set up the general statute of limitations. The circuit court sustained a demurrer to this defense. 65 Fed. 369. Defendant brings error.

Knox county, in the state of Missouri, the plaintiff in error, sued out this writ to reverse a judgment against it upon a county warrant. In his complaint in this action, William H. Morton, the defendant in error, alleged that on August 9, 1879, the county issued and delivered to him the warrant in suit on account of certain judgments he had obtained against the county; that on August 12, 1879, on December 26, 1888, on January 6, 1892, and on October 9, 1894, he presented this warrant to the county treasurer of Knox county, and demanded its payment; that on each occasion payment was refused by the county treasurer, and the warrant was protested by the treasurer for want

of funds to pay it, and that there never were any funds of the county set apart for, or applicable to, the payment of this warrant prior to January 1, 1892. He made the jurisdictional and the other necessary allegations in his complaint to entitle him to judgment if the defense of the statute of limitations, pleaded in the answer, cannot be sustained. The county, in its answer, pleaded for its fourth defense that the cause of action was barred by the general statute of limitations of 10 years found in section 6774 of the Revised Statutes of Missouri of 1889; and, for its sixth defense, that it was barred by the special statute of limitations found in section 3195 of the Revised Statutes of Missouri of 1889. The defendant in error demurred to these defenses, and his demurrer was sustained. In this court the county has waived the sixth defense, but insists that the court erred in sustaining the demurrer to the fourth.

Charles D. Stewart, for plaintiff in error.

W. C. Hollister and F. L. Schofield filed brief for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

Is the time within which an action may be maintained upon a county warrant issued by a county in the state of Missouri limited by section 6774 or by section 3195 of the Revised Statutes of Missouri of 1889? This is the only question that requires consideration in this case. Section 6774 is a part of the general statute of limitations of the state of Missouri, and is found in chapter 103 of the revision of 1889, which is entitled "Limitations of Actions." The provisions of that chapter that are material to the decision of this question are:

"Sec. 6773. Period of Limitation Prescribed.—Civil actions, other than those for the recovery of real property, can only be commenced within the periods prescribed in the following sections, after the causes of action shall have accrued.

"Sec. 6774. What Actions shall be Commenced within Ten Years.—Within ten years: First, an action upon any writing, whether sealed or unsealed, for the payment of money or property; * * * third, actions for relief, not herein otherwise provided for."

"Sec. 6791. Actions Otherwise Limited.—The provisions of this chapter shall not extend to any action which is or shall be otherwise limited by any statute; but such action shall be brought within the time limited by such statute."

Section 3195 is a part of chapter 45 of the revision of 1889, which is entitled "Counties," and it is found under article 4 of that chapter, which is entitled "County Treasurers and County Warrants." The provisions of this section that are pertinent to the question at issue are as follows:

"Sec. 3195. When Canceled—Barred by Lapse of Time, When. * * * And whenever any such warrant, being delivered, shall not be presented to the county treasurer for payment within five years after the date thereof, or, being presented within that time and protested for want of funds to pay it, shall not be again presented for payment within five years after funds shall have been set apart for the payment thereof, such warrant shall be barred and shall not be paid, nor shall it be received in payment of any taxes or other dues."

The legal effect of the provisions of chapter 103 is to limit the time within which actions can be maintained upon writings for the pay-

ment of money to 10 years, except in cases in which the time for the maintenance of such actions is limited by some other statute; and they expressly provide that in the latter cases the actions shall be brought within the time limited by such statute. The legal effect of section 3195 is to limit the time within which an action can be maintained upon a county warrant to five years after the date thereof, when it is not presented and protested within that time, and in the latter case to five years after funds have been set apart for the payment thereof, unless it is again presented. Attempted judicial construction of the unequivocal language of a statute serves only to create doubt and to confuse the judgment. Where the meaning of statutes is plain and clear on their face, arguments drawn from the history of the legislation and the possible motives or purposes of legislators are entitled to very little consideration. They often serve rather to obscure than to elucidate the meaning of the laws, and, where the signification of the language is certain, the legislature must ordinarily be presumed to have meant what they have expressed. It is only when the terms of the statute are ambiguous, or their signification is doubtful, that the history of the laws and the probable purpose of the legislators can aid in their construction. The statutes we have quoted have been in force in the state of Missouri from a time anterior to the issue of the warrant in question, and their language seems to us so certain, and its signification so plain, that we are compelled to refuse to follow counsel for plaintiff in error into the consideration of matters that are not disclosed by their terms. There is no safer or better settled canon for the interpretation of a statute than that, when its language is plain and unambiguous, it should be held to mean what it plainly expresses, and no room is left for construction. U. S. v. Fisher, 2 Cranch, 358, 399; Railway Co. v. Phelps, 137 U. S. 528, 536, 11 Sup. Ct. 168; Bedsworth v. Bowman, 104 Mo. 44, 49, 15 S. W. 990; Warren v. Paving Co., 115 Mo. 572, 576, 22 S. W. 490; Davenport v. City of Hannibal, 120 Mo. 150, 25 S. W. 364.

In his discussion of the language of these statutes, counsel for the plaintiff in error insists that actions upon county warrants cannot be limited by section 3195, because the effect of such a holding would be to repeal by implication the limitation of 10 years, prescribed by chapter 103. But section 6791 expressly provides that the limitation of 10 years prescribed by section 6774 of that chapter shall not extend to any action limited by any other statute, but that in such a case the limitation prescribed by the latter statute shall govern. Actions upon county warrants have been expressly limited by another statute, which is embodied in section 3195. A decision that actions upon county warrants are limited and governed by the latter statute is not a holding that any of the provisions of sections 6774 and 6791 have been repealed by implication. It is a decision that all of their provisions are in force, and that they must be applied. On the other hand, a decision that actions upon county warrants are not limited by section 3195 is, in effect, a repeal by judicial construction of both section 3195, the statute which limits the action, and section 6791, the statute which provides that in such cases the

actions shall not be limited by the provisions of chapter 103, but shall be governed by the special statute that prescribes their limitation. It is argued that section 3195 does not limit actions upon county warrants, because chapter 103 provides that "civil actions can only be commenced within the periods prescribed in the following sections," while section 3195 has no provision about the commencement of actions upon county warrants, but simply declares that warrants "shall be barred" at the expiration of the periods it specifies. This contention sticks in the words of these statutes, and ignores their legal effect. It goes without saying that the provision that "civil actions can only be commenced within the periods prescribed in the following sections" does not prevent the commencement of actions after those periods have passed; nor does it prevent the prosecution of such actions to judgment, if the defendants fail to interpose by demurrer or answer their pleas of the statute of limitations. When such pleas are interposed, and then only, the statute takes effect, and bars the actions by the lapse of time. The legal effect of this provision, then, is, not to prevent the commencement of actions after the time limited has expired, but to bar their successful maintenance if the defendants properly interpose their pleas of the statute. The provision in section 3195 that the warrant shall be barred has exactly the same legal effect upon actions commenced upon these warrants after the times there limited have expired. It prevents the successful maintenance of the actions if the lapse of time is properly pleaded. It bars a recovery in that event, and this is the effect, and the only effect, of the limitations in chapter 103. If one of these statutes limits actions, the other does, for each permits the commencement of actions after the times limited, and bars recovery in them upon proper pleas of the lapse of time and then only.

It is contended that the provision of section 3195 that after the lapse of time there fixed "such warrant shall be barred, and shall not be paid, nor shall it be received in payment of any taxes or other dues," is a mere direction for the guidance of the county officers, and is in no sense a limitation of the action upon the warrant. It may be conceded that the declaration that it "shall not be paid" was made for the guidance of the county treasurer, and that the direction that it shall not be received in payment of taxes or other dues was intended to define the duty of the collector of the revenue. But what shall be said of the positive enactment that "such warrant shall be barred"? That declaration in no way defined or affected the acts or the duties of the county officers. It was not their province to determine whether or not a county warrant was barred, and there was but one place where that declaration could have any effect, and that was in a court of justice, after an action had been commenced upon the warrant. "The familiar rule that all the words of a law must have effect rather than that part should perish by construction" (City of St. Louis v. Lane, 110 Mo. 254, 258, 19 S. W. 533) forbids the rejection or disregard of this declaration, and if it is not disregarded it is a plain statute of limitations. An act of the legislature which makes the lapse of time a complete bar to an action or to a cause of action has all the essential features of a statute of limita-

tions. Mr. Wood, in his work on Limitations, declares that "statutes which destroy a remedy or a right unless enforced within a certain specified period are statutes of limitation." Wood, Lim. § 1. The legislature of the state of Missouri selected and used in section 3195 the most expressive and effective word in the English language to effect a limitation upon an action. They declared that the warrant should be "barred" after the lapse of time there specified. "Barred" is the word in general use to characterize the effect of a statute of limitations. An action or a cause of action is commonly said to be "barred" by such a statute. Counsel for the plaintiff in error, in his answer in this case, pleads that "this action is barred by the statute of limitations of ten years." In section 65, c. 1, Rev. St. Mo. 1889, the legislature of that state declared that certain demands not presented within one year "shall be forever barred against the partnership effects administered." In section 86 of the same chapter they declare that, if certain claims be not exhibited within two years after the publication of notice of letters of administration, "they shall be forever barred." In sections 4558, 6770, 6771, and 6799 of their Revised Statutes of 1889 they have used this word in the same sense, and in section 3195 they declare that, if five years shall elapse after the date of the county warrant without action or presentation, or if, after due presentation, five years shall elapse after funds are set apart to pay the warrant without action or presentation, the warrant shall be barred. The conclusion is irresistibly forced upon our minds by this unequivocal declaration of the statute that actions upon county warrants were limited by this section, and hence that by the express provision of section 6791 they were not limited by section 6774. The judgment below must be affirmed, with costs, and it is so ordered.

AMERICAN COTTON OIL CO. v. KIRK et al.

(Circuit Court of Appeals, Seventh Circuit. July 9, 1895.)

No. 198.

CONTRACTS—MUTUALITY.

A contract to sell and deliver 10,000 barrels of oil, at a stipulated price, in such quantities per week as the buyer may desire, to be paid for as delivered, but which contains no agreement on the part of the buyer to purchase and receive any particular quantity of oil, is not binding, for want of mutuality.

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

This is an action brought by James A. Kirk and others, partners, doing business at Chicago, against the American Cotton Oil Company, a corporation of Ohio, doing business at Cincinnati, to recover damages for the nondelivery of a certain quantity of cotton-seed oil according to contract. The declaration set out the contract substantially as the plaintiffs' evidence tended on the trial to show it, as follows: "That the plaintiffs, at the request of the defendant, bargained with the defendant to buy from the defendant, and the defendant then and there sold to the plaintiffs, a large quantity, to wit, ten thousand barrels of prime yellow cotton-seed oil, at the price of thirty-two and one-half

cents for each gallon thereof, to be delivered by the defendant to the plaintiffs, at Chicago, to wit, at the district aforesaid, in such quantities per week as the plaintiffs should desire, with the option to the plaintiffs of taking said ten thousand barrels of oil in tank cars loose instead of in barrels, at the price of thirty cents for each gallon thereof; and in consideration thereof, and that the plaintiffs had promised the defendant, at the defendant's request, to accept and receive the said oil, and to pay the defendant for the same at the price aforesaid, the said defendant, on the day first aforesaid, at the district aforesaid, promised the plaintiffs to deliver the said oil to them as aforesaid." The defendant insisted that the contract, instead of being for the sale and delivery of 10,000 barrels at the price named, until the entire 10,000 barrels should be delivered as the plaintiffs might desire and request, whether during the year 1892 or afterwards, was one simply for the sale and delivery of so much oil as the plaintiffs might order from time to time during 1892, not exceeding 10,000 barrels, at the price named. The plaintiffs testified that the contract was as stated in the declaration. Wallace F. Kirk, one of the plaintiffs, testified that Kirk & Co. had long been manufacturers of soap in Chicago, and had for many years prior to 1891 purchased oil from defendant, through Henry Bausher, the agent; that on December 23, 1891, witness, acting for Kirk & Co., concluded with Bausher an agreement whereby Kirk & Co. bought from defendant 10,000 barrels of oil at 32½ cents per gallon, or 30 cents if taken in tanks; that the oil was to be delivered, and Kirk & Co. were to take it, in such quantities per week as they might desire, and were to pay therefor 10 days after its receipt; that there was no limitation whatever upon the time in which Kirk & Co. were to receive the oil. They could, by the agreement, insist upon the delivery of the oil from time to time for the next three or four or five years. This witness also testified that, at the time the agreement was made, on December 23, 1891, he reduced it to writing in the presence of Bausher, who read it over two or three times. Thereupon, the witness produced a book, containing, as he said, the memorandum in pencil so made and read over by Bausher, which memorandum was read in evidence, and was as follows:

"Dec. 23, 1891.

"American Cotton Oil Co: 10,000 bbls. prime yellow cotton-seed oil at thirty-two and a half cents per gallon, delivered in Chicago, with the option of taking the 10,000 bbls. in tank cars loose at thirty cents per gallon. Deliveries to be made per week as Kirk & Co. desire. Payments ten days after arrival of oil at our works. This purchase made through H. Bausher, Jr., agent."

The evidence for defendant, it must be conceded, was strong, in favor of its contention relative to the contract, and was corroborated by the previous course of dealing between the parties and the conduct of the plaintiffs during 1892 in making their orders for oil. It appeared in evidence that oil was shipped from time to time to the plaintiffs during the year, as ordered by them, and paid for, to the number of 9,490 barrels, or 510 barrels less than the 10,000 provided for by the contract. Also, that in the fall of 1892 the price of oil advanced, so that the jury found the market value on January 1, 1893, to be 58 cents per gallon. The jury found a verdict for the plaintiffs for the difference in value of this 510 barrels of 50 gallons each, between 32½ cents and 58 cents per gallon. The principal issue of fact litigated on the trial was stated by the circuit court, in its charge to the jury, as follows: "For the purposes of this litigation, the question of fact for you to pass upon is whether this contract was a contract for the absolute delivery of ten thousand barrels of oil at the price named, until it was all delivered, as the plaintiff might desire and request, or whether it was a contract simply for the sale and delivery of so much oil as the plaintiffs might need in the year 1892, not to exceed ten thousand barrels." At the conclusion of the evidence, among other things, the defendant's counsel requested the court to direct the jury to return a verdict in favor of the defendant, which request was refused, and exceptions taken. Defendant's counsel also requested the court to charge the jury as follows: "If the agreement was, in substance, that ten thousand barrels of oil was to be sold by defendant to plaintiffs; that plaintiffs were to have the oil in barrels or tanks, as they might elect, the price to be thirty cents per gallon in tanks, or thirty-two and one-half cents in barrels; that defendant was to de-

liver the oil to plaintiffs at Chicago, in barrels or tanks, as plaintiffs might elect, and in such quantities per week as plaintiffs might desire, and that the price was to be paid as the oil was delivered, and ten days after the arrival of the same at plaintiffs' works,—then plaintiffs cannot recover. Such an agreement shows no obligation on plaintiffs to take the ten thousand barrels. It amounts to no more, at most, than an offer to sell ten thousand barrels. In order to make it binding as a contract, plaintiffs must have signified to defendant that they would take the oil, naming or indicating dates for deliveries of oil aggregating ten thousand barrels." This instruction was also refused, and an exception to the ruling duly taken.

J. M. Oliver and Edward Colston, for plaintiff in error.
Charles S. Holt, for defendants in error.

Before WOODS and JENKINS, Circuit Judges, and BUNN, District Judge.

BUNN, District Judge (after stating the facts as above). There are several questions presented by the record in the case, but we have found it necessary to determine but one, and that is whether the contract as alleged in the declaration testified to by the plaintiffs, and found by the jury, is a valid contract for the sale and delivery of 10,000 barrels of oil, or is it invalid for want of mutuality in its provisions? A promise on the part of the defendant to sell and deliver 10,000 barrels, without a corresponding agreement on the part of the plaintiffs to purchase and receive it, would clearly be void for want of mutuality. Where, in this contract, as testified to by the plaintiffs, is there any agreement to order and receive 10,000 barrels? It is clear that the time of ordering, as well as the quantity, is left wholly to the discretion of the plaintiffs. Deliveries are to be made per week, as Kirk & Co. desire. But suppose Kirk & Co. do not desire, and do not order or order in such quantities as would require a hundred years to complete the delivery,—is there any way open to the defendant to put plaintiffs in default? We think not, and that there is no mutuality of promises for the sale of a definite or ascertainable quantity of oil. Suppose the plaintiffs had decided upon ordering six barrels of oil per week, or one barrel for every working day. That would require 32 years for the fulfillment of the contract. And we can discover no way, by the terms of the contract, whereby the defendant could put the plaintiffs in default for failure to order more oil each week, because the amount and times of ordering are left wholly to the plaintiffs. If the market price of oil should fall below the contract price, then, according to their contention as to the terms of the contract, the plaintiffs could purchase their supply of oil elsewhere, and at the lower price, resorting to the contract when, and only when, the price stated was lower than the market price,—and this without respect to time. Such a contract is one-sided, and without mutuality. If the contract had been that the plaintiffs should order and receive, and the defendant should ship, all the oil which would be required in the plaintiffs' business for a definite period, not exceeding 10,000 barrels, there would be a mutual obligation. The plaintiffs could not, in such case, order oil from other sources, and could be put at fault for not ordering and receiving all which was reasonably

required to run their plant. The case would then come within the principle of National Furnace Co. v. Keystone Manuf'g Co., 110 Ill. 427. In that case the National Furnace Company agreed to sell to the Keystone Company all of certain quality of pig iron, known as Lake Superior Charcoal Iron, which the Keystone Company would need, use, or consume in its business during the coming season from July 9, 1879, to July 1, 1880, such amount supposed by the parties to be about 700 tons. This was held to be a good contract. The court say:

"It cannot be said that the appellee [Keystone Company] was not bound by the contract. It had no right to purchase iron elsewhere for use in its business. If it had done so, appellant might have maintained an action for breach of the contract."

In the case at bar, there was no agreement on the part of plaintiffs to purchase from defendant all the oil they required in their business. They might order as little as they pleased, and supply the bulk of what they needed from other sources. The contract had the effect merely to bind the plaintiffs to receive and pay for at the stipulated price all the oil which might be shipped upon their order, from time to time, by the defendant, not exceeding 10,000 barrels. Further than that it can have no binding force, for want of mutuality. The case comes fairly within the principles announced in Railway Co. v. Dane, 43 N. Y. 240; Wilkinson v. Heavenrich, 58 Mich. 574, 26 N. W. 139; Sykes v. Dixon, 9 Adol. & E. 693; Railway Co. v. Mitchell, 38 Tex. 85; Stiles v. McClellan, 6 Colo. 89; Cool v. Cuningham, 25 S. C. 136; Davie v. Mining Co., 53 N. W. 625, 93 Mich. 491; Dorsey v. Packwood, 12 How. 126. See, also, 1 Pars. Cont. (Ed. 1893) 448. Judgment is reversed, and the cause remanded to the court below, with directions to award a new trial.

CITY OF CARLSBAD et al. v. KUTNOW et al.

(Circuit Court, S. D. New York. July 2, 1895.)

1. TRADE-MARKS AND TRADE-NAMES—INFRINGEMENT SUITS—EFFECT OF FOREIGN DECISION.
   A decision of the high court of chancery in England, granting to defendant, against complainant's opposition, the right to register as a trade-mark the words alleged to be an infringement, is no bar to a suit here for an infringement by using such words.
2. SAME—WHAT CONSTITUTES INFRINGEMENT—"CARLSBAD SPRUDEL SALTS."
   The city of Carlsbad, Bohemia, having long made and sold salts of high medicinal qualities, in crystals and powder, made by evaporating water from the springs owned by that city, under the name of "Carlsbad Sprudel Salts," *held*, that it was an infringement to sell artificial salts, in no way derived from the Carlsbad waters, under the name of "Improved Effervescent Carlsbad Powder," it appearing that the city of Carlsbad had not used the name upon any but genuine salts derived from the spring waters.
3. SAME—TRADE-MARK IN NAME OF CITY.
   The fact that Carlsbad is a geographical name does not prevent the city of that name from having an exclusive right to the use thereof in connection with springs owned by it, which have this same name and give it to their products.

This was a bill in equity by the city of Carlsbad and others against Hermann Kutnow and others for an infringement of the trade-mark or trade-name "Carlsbad Sprudel Salts."

Charles G. Coe, for plaintiffs.
Antonio Knauth, for defendants.

WHEELER, District Judge. The Carlsbad springs appear to be owned by, and wholly within the control of, the city of Carlsbad, in Bohemia; and the waters of them, for many years, to have been evaporated into salts of highly medicinal qualities, in crystals and powder, well known for their curative properties, everywhere, as "Carlsbad Sprudel Salz." This bill is brought to restrain the defendants, who are dealers in drugs and medicines in New York, from further using the words, "Improved Effervescent Carlsbad Powder," in selling other salts of similar appearance and properties, and for an account of profits from such use. As these are natural waters, unlike any others, and from which salts different from any others are produced, all genuine Carlsbad salts must necessarily emanate from them; and the plaintiffs, as proprietors of the springs and their products, must have the exclusive right to prepare and sell these waters and products as genuinely coming from these springs. The defendants do not deny the use of these words in selling similar salts, but claim the right to so use them because registry of these words, with other symbols relating to the Carlsbad springs, as a trade-mark, was granted to them by the high court of justice of England, chancery division, against opposition by the plaintiffs, in 1893; because, as they allege, the plaintiffs sell artificial salts by the name of "Carlsbad Salts;" and because their use of these words is not likely to mislead purchasers as to the origin of their salts.

The decision in favor of granting the application for registry of the trade-mark could have no effect beyond the grant of that privilege in that jurisdiction; and it does not appear to have been granted upon any supposition that even there it could be used in selling any but genuine preparations of Carlsbad spring water as such, but rather that it could not. 10 Rep. Pat. Design & Trade-Mark Cas. 401. That would appear to be no bar to a suit there for using the trade-mark on other salts to deceive; and it cannot be any bar to such a suit here, out of that jurisdiction, and beyond the operation of the laws under which the decision was made. If any artificial salts have come to be known by the name of "Carlsbad Salts," from similarity or otherwise, of course the defendants have the same right to sell such salts by that name that they have to sell anything by the name by which it is known. But there is no real evidence to that effect. And if the defendants procured genuine Carlsbad waters or salts, and put them up in different forms, or with other ingredients, to improve their taste or vary their effects, these words would be truthful, and they would seem to have a clear right to use them in such preparations; but the plaintiffs' proof tends to show that the defendants' salts are not, in sub-

stance, genuine Carlsbad salts, in any form, and the leading defendant has been a witness, and has not assumed to state—and, although the proof must be within their reach, none has been produced to show—that their salts come direct, in any form from the Carlsbad springs. The impression left by the evidence is that they do not, but are artificial. No proof has been brought showing that the plaintiffs have used the name of "Carlsbad" upon any but genuine Carlsbad sprudel salts.

As the case stands here, the defendants appear to be using the name "Carlsbad" upon artificial salts having no connection with that name, and to be using it only because of its connection with the genuine Carlsbad sprudel salts. Carlsbad, with its springs, is far away. This use of the name in connection with a preparation so similar to this well-known product of them is some representation that it is a genuine product of them. Calling the powder "Improved Carlsbad" is a direct representation that genuine Carlsbad powder has been taken to be improved upon; and calling it also "effervescent" is a representation that the improvement is in the effervescence. This is putting the plaintiffs' mark, to some extent, upon the defendants' salts, and is calculated to lead customers to think they are the salts of the plaintiffs. Such deception would be actionable at law, and is preventable in equity. McLean v. Fleming, 96 U. S. 245; Menendez v. Holt, 128 U. S. 514, 9 Sup. Ct. 143; Improved Fig-Syrup Co. v. California Fig-Syrup Co., 54 Fed. 175, 4 C. C. A. 264; Von Mumm v. Frash, 56 Fed. 830. Allusion has been made to this word being the name of the city, to which ordinarily an exclusive right cannot be acquired; but it is also the name of these peculiar springs, and gives the name to their products. Decree for the plaintiffs for an injunction and an account.

WHITE v. KELLER.

(Circuit Court of Appeals, Fifth Circuit. April 23, 1895.)

No. 262.

1. EVIDENCE—JUDGMENT.

   An action of ejectment, to recover certain land in Mississippi, was brought by W., claiming under deeds from the heirs at law of A., a former owner, against K., claiming under deeds from devisees to charitable uses under the will of A., who resided and died in Louisiana. Upon the trial, the defendant offered in evidence the record of a suit in Louisiana, to which both the heirs and devisees of A. were parties, and of the judgment therein. *Held*, that such record was admissible to prove that the will of A. was valid in Louisiana, that it devised all his real estate, that the devises to charitable uses were valid and the donees capable of taking the same, all of which points were decided by the judgment, which was binding on both parties to the action of ejectment as privies to the parties to the Louisiana suit.

2. WILLS—INTERPRETATION—PROPERTY.

   The term "property" embraces both real and personal estate, and a gift of the residue of "property and effects," in the general residuary clause of the will of a resident of Louisiana, is sufficient to pass real estate in Mississippi not specifically devised.

3. SAME—TIME OF TAKING EFFECT.
A devise of real estate takes effect upon the death of the testator, and its operation is not postponed to the time of proving the will in the state where the land lies.

4. CHARITABLE USES—PERPETUITIES.
The rule against perpetuities cannot be invoked to defeat a devise to charitable uses.

5. SAME—LAWS AND PUBLIC POLICY OF MISSISSIPPI.
There was no law or public policy in force in Mississippi in 1886 which prohibited a foreign ecclesiastical corporation, authorized by its charter and the laws of its domicile to take and hold lands for charitable uses, from taking and holding land in Mississippi in trust for such purposes, nor did the constitution of 1890 take away any rights vested in such corporations prior to its adoption.

6. TRUSTS—CAPACITY OF TRUSTEE.
Where a devise of land has been made upon a valid trust, the heirs at law of the testator have no right to inquire into or contest the right of the trustees to take or execute the trust.

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

This was an action of ejectment by Walter A. White against J. H. Keller. Judgment was rendered in the circuit court for the defendant. Plaintiff brings error. Affirmed.

In 1892, Walter A. White, the plaintiff in error, brought ejectment in the circuit court of Harrison county, state of Mississippi, against the tenant of J. H. Keller, defendant in error, who under the statute was admitted to defend. to recover a tract of land in that county. The same year the cause was removed to the United States circuit court by Keller on the ground of diverse citizenship, Keller alleging himself to be a citizen of Louisiana. In 1894 a trial was had, resulting in a verdict for the defendant in error under a peremptory charge by the court, and from the judgment on this verdict plaintiff sued out this writ of error. The admitted common source of title was Kaspar Auch. The plaintiff proved that David Zable and Rosina Muller, half brother and sister, were the sole heirs at law of said Auch; that Auch died seised of the property in 1886; and read in evidence the deeds of said Zable and Muller to him for the land, executed in 1891, which were quitclaim deeds, for an alleged consideration of $50 each; and rested. There were no objections to plaintiff's evidence. The defendant claimed title under the residuary clause of the will of Kaspar Auch, executed in New Orleans in 1886; and read in evidence, over the plaintiff's objection, a transcript of the record of the chancery court of Harrison county, state of Mississippi, in the matter of the probate of the will of said Auch, whereby Keller, in 1893, in his own interest, propounded for probate and probated the original will of Auch, upon a petition which recites that Auch was a citizen and resident of Louisiana, and died at his domicile at New Orleans in 1886, seised of real and personal estate in Louisiana, and of realty in Mississippi; that in 1886 said Auch made a will in New Orleans, in nuncupative form, before a notary, in the presence of three witnesses, which was probated in the civil district court of Orleans parish in 1886, upon the petition of the executors named. A copy of the will as probated in Louisiana is filed with the petition. The petition contains proper averments for the probate of an original will, and the original will is produced for probate, and the prayer is that the original will be admitted to probate. Due proof of the execution of the will was made by Hero, a witness, and upon this petition and proof the original will was admitted to probate. The will, after making numerous monetary bequests, among others to David Zable and Rosina Muller, contains this residuary clause: "I give and bequeath to the several incorporated religious associations of the city of New Orleans, propagating the teachings of religion according to the form of government and Book of Discipline of the Presbyterian Church, all the rest and residue of the property and effects that I may die possessed of, of whatever nature and kind, to the end that the poor of said respective churches in

this city may be cared for." Theisman and Wicke were appointed executors, and qualified as such in Louisiana. Plaintiff conceded that these probate proceedings were regular on their face, but objected to the reading of this record in evidence for the reason: "(1) The said will does not, on its face, purport to devise real estate in Mississippi, and must be limited in its operative effect to the state of Louisiana. (2) The said will, even if otherwise unobjectionable, could not pass to foreign religious societies the real estate of the testator in controversy, because said societies, at the death of the testator, had no capacity to take real estate in Mississippi for any purpose, and especially for the purpose stated in the instrument itself. (3) The religious societies named in the will could, by comity, acquire and hold in Mississippi no greater rights than domestic religious establishments, and these latter could not, when the will was executed, or at the death of the testator, take such devise as is therein made, or acquire or hold the lands in controversy for the purpose stated in said will. (4) The said will, if allowed in evidence and given the construction contended for by counsel, would allow to foreign societies what is denied to domestic religious establishments, and invest such foreign religious societies with the legal title to real estate in Mississippi, contrary to her constitution and laws, and against her determined policy. (5) The said will, in its residuary clause, is void for uncertainty as to the trustees and beneficiaries. It provides no plan or scheme by which to ascertain the poor of the churches or apportion the fund, and the trust could not be enforced in the courts of this state by the trustees or beneficiaries. (6) The words 'property and effects,' as used in the residuary clause, are shown by the context to apply only to personalty, or, at best, to the 'property and effects' of the testator in Louisiana. (7) If said clause be construed as vesting title in the churches, they are given no power of disposition over the lands in this state, and the will would create a perpetuity. (8) The will was not probated until after the adoption of the constitution of Mississippi in 1890; and as, under that constitution, the devise is void, and no title in Mississippi could pass under the will until probated, the prohibition of the constitution extends to it, though made in 1886. There is no comity, law, or decision that could, in the doctrine of relation, defeat the constitution and policy of the state, the churches not being purchasers. But the court overruled the said objections and allowed the said will to be read in evidence, to which ruling and judgment of the court in overruling said objections, the plaintiff then and there instantly excepted, and his exception was allowed. The said petition, will, and probate order and certificates, were read to the jury, the exhibits to the petition and caption being omitted, by consent of counsel and court, to save expense." These objections were overruled, and plaintiff excepted, and this action of the court constitutes the ground for the first assignment of error.

The defendant then read in evidence a transcript of the record of the supreme court of Louisiana in the matter of the succession of Kaspar Auch, whereby it appeared that in 1886, on the petition of the executors and on proof of death, the will was probated in the civil district court, in nuncupative form, by notarial act, and without proof by witnesses, as the notarial act imported full proof. It contained also the petition of intervention of certain churches, to which petition the executors only were defendants, setting up the residuary clause of the will, and averring that the petitioners were the corporations thereby described, and praying to be declared residuary legatees, and that the executors sell the lands of the estate specified in exhibits. Upon proof made, the civil district court, in June, 1886, decreed the churches to be residuary legatees and instituted heirs, and that the executors sell the real estate mentioned in the inventory, and account for personalty and the proceeds of sale of lands to the churches. Said transcript also set forth a petition, filed in October, 1886, by Rosina Muller, naming the executors, said churches, and David Zable as defendants, setting forth the judgment in favor of the churches on their petition, and averring that the residuary clauses of the will were void, for the special reasons: "(1) Because it is therein attempted to create a trust, and to hold and perpetuate a fund for purposes not recognized by law. (2) Because the said clause is in effect a fidei commissum and substitution, and in violation of law. (3) Because the said claimants and the said legatees are incompetent to receive the said legacy, the object and purposes of

the same being beyond the scope of the powers granted by the various charters of the said churches and societies, and by the laws of this state for the creation and government of the same. (4) Because the said attempted disposition is too vague and indefinite, and can never be carried into effect, by reason of said vagueness and indefiniteness,"—and praying that she be recognized as heir, notwithstanding said decree in favor of the churches. The executors and the churches answered. Zable did not appear, nor is it shown that he was served with process. This petition upon proof taken was dismissed. Petitioner Muller appealed to the supreme court of Louisiana, and the judgment was affirmed. Succession of Auch (La.) 3 South. 227. Plaintiff objected to the reading of this record of the Louisiana court in evidence, for the reasons: "Because the said transcript was not competent evidence in this controversy as to the issue to be tried by the jury, and, if intended as an estoppel on the plaintiff through one of his grantors, Rosina Muller, was inoperative here, and inapplicable, the precise question therein litigated not being now here in issue; and for the further reason that the opinion and judgment of the said supreme court is neither pursuasive nor controlling as to the validity of the residuary clause of Kaspar Auch's will here, in respect of land in Mississippi; and because the opinion of the court could be proven by the report thereof to be found in the printed volume of Reports of Louisiana, or by a certified copy of the opinion itself." These objections were overruled, and plaintiff excepted. Therefrom arises the second assignment of error.

The plaintiff admitted that the defendant derived title through mesne conveyance from the said churches. Thereupon, at the instance of the defendant, the court granted a peremptory instruction to find for defendant; to which action plaintiff excepted, and from this ruling arises the third assignment of error. Upon this writ of error, it is admitted that the several churches through whom defendant claims title were duly incorporated under the laws of Louisiana, by charters of the same tenor and effect as that of the First Presbyterian Church, found in the record; and that the same were duly certified, in the same form as set forth in the record, by the recorder of mortgages of the parish of Orleans; and that said several churches are named in the record. It is further admitted that said churches, petitioners in the intervention proceeding, passed in 1886, and had enrolled on their several minutes, resolutions of the same tenor and effect as those of the First Presbyterian Church, set forth in the record, accepting said residuary clause of the said will; and that said minutes of said several churches, duly certified, and said several charters duly certified, were set forth and constituted part of said record of the supreme court of Louisiana read in evidence. It is further admitted that there was contained in said record of the Louisiana court, read in evidence, proof of the identity of said intervening churches, with the description contained in said residuary clause of said will; and that that proof showed that said churches, named as grantors in the deed to Keller's grantor, were the "incorporated religious associations of the city of New Orleans" intended to be described in said residuary clause of the will of Auch.

S. S. Calhoun, M. Green, W. L. Nugent, and T. A. McWillie, for plaintiff in error.

R. H. Browne, E. J. Bowers, Thomas L. Ford, and Ira L. Ford, for defendant in error.

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

PARDEE, Circuit Judge (after stating the facts). That the will of Kaspar Auch was a valid will in Louisiana; that it devises all the real estate of which Kaspar Auch died seised; that the legacy to the incorporated churches of the Presbyterian denomination in the city of New Orleans, "to the end that the poor of said respective churches might be cared for," is a donation to pious uses; that there is no uncertainty as to the legatees described in

the will; and that the several incorporated churches named in the record have power, under their charters, to take as trustees under the said will, and have full power to administer the trust,—is all adjudicated by the decision of the supreme court of the state of Louisiana, found in the record, and reported in 39 La. Ann. 1043, 3 South. 227.

On the trial in the court below, the plaintiff objected to the admission in evidence of the record from Louisiana, and such admission is assigned in this court as error. Many objections are elaborated, but they are mainly as to the effect to be given to the record. In our view, the record was admissible to show that, as between plaintiff's grantors and the defendant's grantors, practically the matters above recited were duly litigated and decided, binding both plaintiff and defendant privies thereto as to all matters in connection with the will of Kaspar Auch within the jurisdiction of the Louisiana court.

"The nature, meaning, and interpretation of a will of immovable property, and the rights and powers arising under it, are to be determined by the law of the domicile of the testator, and not by the law rei situs." Crusoe v. Butler, 36 Miss. 150; citing Story, Confl. Laws, 262, 479a, 479h, 479m, 490.

As Kaspar Auch's domicile was in the state of Louisiana, and as the question in this case involves immovable property in the state of Mississippi, it seems clear that the nature and meaning and interpretation of Kaspar Auch's will, and the rights and powers arising under it, are fully settled for this case by the decision of the supreme court of Louisiana, supra.

"The term 'property' embraces both real and personal estate; and under it, when used in the general residuary clause in a will, the real estate of the testator, not attempted to be specifically disposed of, will pass." Morris v. Henderson, 37 Miss. 492; citing Doe v. Langlands, 14 East, 370; Doe v. Morgan, 6 Barn. & C. 512, 13 E. C. L. 235.

"If the real estate be not attempted to be disposed of specifically by the will, it will pass to the general residuary devisee, unless restricted by other clauses of the will; for, not being disposed of, nor attempted to be disposed of, it must be taken to have been intended to be embraced in the positive disposition of the residuary clause. 1 Jarm. Wills, 588–590. In such a case it would be doing violence to the express disposition of the will to say that, as to such real estate, the testator intended to die intestate." Morris v. Henderson, supra.

These authorities dispose of the objections that the will of Kaspar Auch does not, on its face, purport to devise real estate in Mississippi, and must be limited in its operative effect to the state of Louisiana, and that the words "property and effects," as used in the residuary clause of Kaspar Auch's will, are shown by the context to apply only to personalty, or, at best, to the property and effects of the testator in Louisiana.

If the devise of all the testator's real estate to the Presbyterian churches of New Orleans, "to the end that the poor of said respective churches may be cared for," is a valid devise, and operated to convey real estate in the state of Mississippi,—as to which more will be said hereafter,—then the question is presented as to when the said devise took effect. It is seriously contended, and the contention is supported by very plausible argument, that the said de-

vise took effect only when the will of Kaspar Auch was probated in Mississippi, and Rankin v. Scott, 12 Wheat. 177, and M'Cormick v. Sullivant, 10 Wheat. 202, are cited as authority for the position. An examination of those cases will show that they do not support the contention, but rather establish, what we think would hardly be denied, that the subsequent probate of an unregistered will will not be effective as against an innocent purchaser for value from the heir at law. In Williams on Executors (Am. Notes, p. 255) it is said:

"The probate is, however, merely operative as to authenticated evidence, and not at all as the foundation of the executor's title, for he derives all his interest from the will itself, and the property of the deceased vests in him the moment of the testator's death. Hence the probate, when produced, is said to have relation to the time of the testator's death."

In the case of Crusoe v. Butler, supra, the above proposition from Williams on Executors is quoted with approval, and the court, speaking of an Alabama will probated in Mississippi, under which the executors had made a sale of lands in Mississippi prior to probate in that state, said:

"When the will was probated in Alabama, the power granted had relation back to the death of the testator. The grant of letters was merely the establishment of the character of the executors, and operated as a sanction to their exercise of the said power, granted to them in their character as executors by the will. The power in them was thus complete upon the probate of the will and their undertaking the trust in Alabama; and when the will was admitted to record in this state, it was merely for the purpose of authenticating the evidence by which the special power was established, and of rendering the prior right available here; but it was clearly neither the source nor the foundation of the power."

If it were necessary, the proposition quoted from Williams on Executors, supra, could be supported on principle, and by the authority of many adjudged cases. But we do not understand that the case of Crusoe v. Butler is seriously denied as correctly declaring the law in Mississippi, and we therefore conclude that the rights of the legatees under the will of Kaspar Auch, if said will was otherwise valid, vested when Kaspar Auch died, in 1886, and that the rights of the defendant in error, claiming under said legatees, are unaffected by the failure to probate the will of Kaspar Auch in the state of Mississippi until the year 1893; and also that in determining whether the will of Kaspar Auch was valid, and passed the real estate belonging to the testator in the state of Mississippi, the constitution of the state of Mississippi declared and put in force in 1890 need not be considered, except so far as the provisions of the said constitution may aid the court in determining what was the policy of the state of Mississippi in the year 1886 in regard to devises to religious corporations in trust for charitable uses. So far as the will under consideration makes a devise for charitable uses, we understand that the rule against perpetuities cannot be invoked against it. Jones v. Habersham, 107 U. S. 174–185, 2 Sup. Ct. 336; Russell v. Allen, 107 U. S. 163, 2 Sup. Ct 327; Ould v. Hospital, 95 U. S. 303; 1 Perry, Trusts, 384.

Having eliminated all the objections made to the introduction of Kaspar Auch's will as probated in 1893, in evidence on the trial of the case in the court below, except the objections, stated in various forms, that the will is invalid and did not pass title to real estate in Mississippi because the devise of real estate to religious corporations in trust for charitable uses was contrary to the law and public policy of that state, we now proceed to consider that question, the main one in the case.

"For, besides the admitted incapacity of a corporation of one state to exercise its powers in another state, except with the assent and permission, expressed or implied, of the latter, it is a principle 'as inviolable as it is fundamental and conservative that the right to hold land, and the mode of acquiring title to land, must depend altogether on the local law of the territorial sovereign.' Runyan v. Lessee of Coster, 14 Pet. 122; Lathrop v. Bank, 8 Dana, 114." Christian Union v. Yount, 101 U. S. 352-354.

The following propositions are declared in the headnotes of the case:

"In harmony with the general law of comity among the states composing the Union, the presumption is to be indulged that a corporation, if not forbidden by its charter, may exercise the powers thereby granted within other states, including the power of acquiring lands, unless prohibited therefrom, either in their direct enactments or by their public policy, to be deduced from the general course of legislation or the settled adjudications of their highest courts. This court cannot presume that it is now, or was in 1870, against the public policy of Illinois that one of her citizens owning real estate there situate should convey it to a benevolent or missionary corporation of another state of the Union, for the purpose of enabling it to carry out the objects of its creation, since she permitted her own corporations, organized for like purposes, to take such real estate by purchase, gift, devise, or in any other manner."

There are no settled adjudications of the supreme court of the state of Mississippi declaring the public policy of the state to be for or against the power of religious corporations of the state to take, or take and hold, as trustees for charitable uses, any devises of property real or personal made by her own citizens or by foreigners. The only case we find, or to which we have been cited, in which the supreme court has at all considered the question, is Wade v. Society, 7 Smedes & M. 663. It was held in that case that the trusts created by the will of Isaac Ross in favor of the American Colonization Society, looking to the emancipation of slaves, were legal and valid, being sufficiently definite and certain for a court of equity to enforce them by virtue of its ordinary jurisdiction. In relation to charitable trusts, and whether the statute of 43 Eliz. was in force in the state of Mississippi, the court said:

"It is next contended that if these devises are invalid, either for want of capacity to take on the part of the donees, or of the trustees, then equity cannot enforce them as charities. To this we reply that if the trusts created by this will be valid, then there is no room and no necessity for the application of the doctrine of charities. It is only where the bequest or devise is too vague or indefinite for those intended to be benefited to claim any interest under them that the doctrine as to charities arises. It is clearly settled that 'definite charities are trusts, which equity will execute by virtue of its ordinary jurisdiction.' Gallego's Ex'rs v. Lambert, 3 Leigh, 450; Inglis v. Trustees, 3 Pet. 100. Charities begin where definite trusts end. It is there-

fore wholly unnecessary for us to inquire whether St. 43 Eliz. is in force in this state, and whether the court of chancery has any jurisdiction over charities to compel their performance, apart from and independent of that statute. It may not be out of place, however, to remark, as this point was urged in argument with great zeal, that in the late case of Vidal v. Girard's Ex'rs, 2 How. 127, that court modified very much, if it did not overrule, the case of Trustees v. Hart's Ex'rs, 4 Wheat. 1. The court there said that 'new sources of information, recently developed, established conclusively that, long before that statute, courts of chancery exercised jurisdiction over charities, not only where they were indefinite in their nature, but where either no trustees were appointed or where they were not competent to take.' The opinion was delivered by Judge Story, and must be regarded also as an abandonment of the opinion upon this subject expressed in his Commentaries upon Equity. But in this case it is matter of speculation rather than of practical use, because we see no reason to change the former opinion, that these trusts, so far as it is necessary now to determine them, are valid."

There is some discussion in the briefs of counsel as to whether the court in that case approved of Gallego's Ex'rs v. Lambert, 3 Leigh, 450, or of Vidal v. Girard's Ex'rs, 2 How. 127, as to the effect of the repeal of 43 Eliz., and in regard to the power of courts of equity to enforce charitable trusts. As we read the case, we incline to the opinion that the court cited Gallego's Ex'rs v. Lambert only for the proposition that "definite charities are trusts, which equity will execute by virtue of its ordinary jurisdiction," and that, as to whether courts of chancery have any jurisdiction over charities to compel their performance apart from and independent of 43 Eliz., the court leaned to the doctrine declared in Vidal v. Girard's Ex'rs. But it is not important to be accurate in regard to this matter, because it is certain that Wade v. Society cannot be held as declaring any public policy of the state in relation to charitable trusts. So far as the laws of the state of Mississippi are concerned, our examination leads us to the conclusion that in relation to devises in favor of religious corporations in their own right, or to such corporations as trustees for charitable uses, the public policy of the state of Mississippi has not been uniform. In the early days, and up to 1838, the legislature incorporated some 46 different churches. Hutch. Code Miss. 335, 336. So far as we have been able to examine these charters to ascertain the power generally given the respective churches to take and hold real estate, we find generally that the power is ample, and that the churches were highly favored. Rev. Code Miss. 1824, pp. 596–603. In 1838 an act was passed granting certain powers and privileges to the officers of organized religous societies, in which it was enacted that:

"Hereafter when any body of people shall organize themselves as a religious sect, and shall establish a place of worship, it shall be lawful for the officers of such body, so organized, or such trustees as shall be duly elected, or appointed by said body, to receive by gift, grant, or purchase, any lands, tenements, or other property, for the use and benefit of said body, or their successors, to be used and enjoyed by them, so long as they or their successors shall continue to worship at such place so established." See Hutch. Code Miss. p. 324.

So far as we are advised, this remained the law until the Code of 1857, which provided a general law for the chartering of corporations by the governor, with the approval of the attorney general,

and declared that thereunder charters may be granted for the following purposes only, to wit:

"For the incorporation of cities, towns, Masonic and Odd Fellows' lodges, temperance societies and associations, charitable associations, literary institutions or associations, religious societies, fire companies, mechanics' societies, manufacturing companies, agricultural societies, associations formed for the building of theatres and hotels, and telegraph companies." Code 1857, c. 35, § 1.

Section 10 of said chapter contains the following provisions as to religious societies or congregations:

"Art. 53. Any religious society or congregation, or ecclesiastical body, may hold at any one place, a house or tenement for a place of worship, with proper and reasonable ground thereto attached; a house or tenement as a place of residence for their pastor or minister, with proper and reasonable ground thereto attached; a house or tenement to be appropriated and used as a male school or seminary of learning, with proper and sufficient ground thereto attached; and another house or tenement to be appropriated as a female school, or seminary of learning; and a cemetery of sufficient dimensions, and no more. Provided, that any religious society or denomination may own such colleges, or seminaries of learning, as it may think proper, if used for such purposes.

"Art. 54. All lands, tenements, or hereditaments, or any interest or benefit therein, or therefrom, except for the purposes provided in the foregoing article, which may be given, granted, conveyed, leased, or released, to any religious society, denomination or congregation, either directly or indirectly, or in trust or confidence for the use or benefit of such society, either express or implied, or secret, or by the judgment of any court, or by way of lien, mortgage or pledge, shall be ipso facto, by such alienation, forfeited to the state; nor shall such society, denomination, or ecclesiastical body, by any act or ingenuity, appropriate, or have appropriated, to its use, or for its benefit, or to its disposition, any present or future interest in lands, tenements, or hereditaments, other than to the extent above mentioned; nor shall any such society evade this provision, by any device or subterfuge, in taking or holding more land for any of the purposes above mentioned, than is necessary.

"Art. 55. Every devise or bequest of lands, tenements, or hereditaments, or any interest therein, of freehold, or less than freehold, either present or future, vested or contingent, or of any money directed to be raised by the sale thereof, contained in any last will and testament, or codicil, or other testamentary writing, in favor of any religious or ecclesiastical corporation, sole or aggregate, or any religious or ecclesiastical society, or to any religious denomination, or association of persons, or to any person or body politic, in trust, either express or implied, secret or resulting, either for the use and benefit of such religious corporation, society, denomination, or association, or for the purpose of being given or appropriated to charitable uses or purposes, shall be null and void, and the heir at law shall take the same property so devised or bequeathed, as though no testamentary disposition had been made.

"Art. 56. Every legacy, gift, or bequest, of money or personal property, or of any interest, benefit or use therein, either direct, implied, or otherwise, contained in any last will and testament, or codicil, in favor of any religious or ecclesiastical corporation, sole or aggregate, or any religious or ecclesiastical society, or to any religious denomination or association, either for its own use or benefit, or for the purpose of being given or appropriated to charitable uses, shall be null and void, and the distributees shall take the same as though no such testamentary disposition had been made." See Hutch. Code Miss. pp. 302, 303.

The foregoing provisions are reproduced in sections 2438–2441, c. 55, art. 7, Code 1871. Under the provisions of these two Codes, there can be little doubt that the power of religious corporations in the state of Mississippi, so far as they could be controlled by statute, were restricted so that no religious corporation could take a devise

of property either in its own right or as trustee for charitable uses. In 1872, however, the legislature dealt with the subject again, and without expressly repealing sections 2439–2441 of the Code of 1871, above quoted, enacted:

"That sections 2439, 2440 and 2441, article 7, chapter 35, of the Revised Code of 1871, be so amended and construed as in no manner whatsoever to prohibit or prevent any religious society or ecclesiastical corporation, sole or aggregate, or any religious or ecclesiastical society of this state, or of any of the United States, incorporated by the laws of any of the other states of the Union, prior to the adoption of the Code of this state of 1871, the acts of incorporation of which grant the franchise of taking, receiving, acquiring and holding real and personal estate, as provided for in the act of incorporation of said religious societies, corporations or denominations; and that said sections aforesaid shall, in no manner whatever, interfere with, be construed so as to limit or otherwise impair the franchise granted by the laws of this state, or by the laws of any of the states of the Union, to any religious society or corporation aforesaid, to receive, take, acquire, and hold real and personal estate, as provided in said acts of incorporation." See Laws Miss. 1872, p. 32, c. 26.

And to the end that the construction given by this act should be coextensive with the articles of the Code thus legislatively construed, it was enacted that the act itself, approved March 20, 1872, should take effect and be in force from and after the 1st day of October, 1871, the day on which the Revised Code of 1871 went into effect. In preparing the Code of 1880, the above-quoted act of 1872 was doubtless regarded as practically repealing sections 2439, 2440, and 2441 of the Code of 1871, for those sections were all omitted.

We have been favored on both sides with an interesting discussion as to the scope and effect of sections 2437 and 2438 of the Code of 1871, reproduced as sections 1071 and 1072 of the Code of 1880, in determining the public policy of the state as to the powers of religious corporations to take and hold real estate. As showing a legislative tendency to closely limit the powers of the religious societies created by section 1071, Code 1880 (section 2437, Code 1871), into quasi corporations, to hold, if not to take, real estate, the sections 1072 of the Code of 1880 and 2437 of the Code of 1871 are very impressive; but we cannot construe these sections as at all affecting the powers theretofore granted to full-fledged ecclesiastical corporations chartered by special laws, nor even affecting the powers of such religious corporations as should be thereafter fully chartered by the governor and attorney general under the provisions of sections 1027 to 1032 of the Code of 1880, which corporations were authorized to take and hold real and personal estate, not exceeding $50,000. See, also, Acts 1882, p. 50, c. 26. That the sections in question were not intended to apply to ecclesiastical corporations is shown by the fact that they were originally followed by the sections 2439, 2440, and 2441, Code 1871, which unquestionably apply. When Kaspar Auch's will took effect in 1886, and when the Presbyterian churches of New Orleans, devisees under the will of Kaspar Auch, conveyed to the grantors of the defendant in error, in 1888, this was the state of the law in regard to the power of religious corporations of Mississippi, or of other states of the Union, to acquire real estate or other property in Mississippi in trust for charitable uses. It may be here noted that the religious corporations of Louisiana, the trustees for char-

itable uses under Kaspar Auch's will, were fully empowered in that behalf prior to the adoption of the Mississippi Code of 1871, so that, for the purposes of this case, it is immaterial whether the restrictive sections 2439, 2440, and 2441 of the Code of 1871 were wholly repealed by the Code of 1880 or remained in force with the legislative construction of 1872. After the rights of the defendant in error were acquired and vested, and before the plaintiff in error acquired his title, the constitution of 1890 was enacted and declared in force. In this constitution the sections 2439, 2440, and 2441, as they appear in the Code of 1871, are practically reproduced and made a part of the fundamental law of the state. We do not understand that the constitution of 1890 was intended to give to the grantors of the plaintiff in error any rights to property in Mississippi not theretofore existing, or that it was intended to, even if it could, take away any of the vested rights of the defendant in error; and therefore we are of opinion that the question whether the laws and public policy of the state of Mississippi prohibited and avoided the grant of property in Mississippi to the devisees under the will of Kaspar Auch in trust for charitable uses must be determined by the laws and public policy in force at the time the devise took effect; and at that time, from the review we have given, it cannot be said that such devise was void because prohibited by law, or that there was such a well-defined public policy adverse to the power of ecclesiastical corporations to take and hold real estate for religious or charitable uses as would authorize this court to declare the devise void.

If possibly we are wrong as to this view of the public policy of the state of Mississippi, and the declaration in the constitution of 1890 can have retroactive effect against foreign religious corporations in regard to power to take, hold, and administer trusts for charitable uses, it is still clear that under the circumstances of this case the plaintiff in error, as holding from the heirs at law of Kaspar Auch, is without right or interest to raise the question. The trust was valid in 1886, whatever the powers of the trustees may have been, or whatever may be the since-declared public policy of the state of Mississippi, and therefore the heirs at law of Kaspar Auch were divested by his will of all interest in the property devised, and left without right to attack the same. Christian Union v. Yount, supra; Jones v. Habersham, supra.

"And if the trusts were in themselves valid in point of law, it is plain that neither the heirs of the testator nor any other private person could have any right to inquire into or contest the right of the corporation to take the property or execute the trust." Vidal v. Girard's Ex'rs, 2 How. 191.

The views herein expressed practically dispose of all the questions raised by the assignment of errors, and adversely to the plaintiff in error; and the judgment of the circuit court is therefore affirmed.

OAKES et al. v. MYERS, Jefferson County Treasurer.

(Circuit Court, D. Montana. June 22, 1895.)

No. 365.

1. TAXATION—PROPERTY IN HANDS OF RECEIVER.
Property in the hands of a receiver of a federal court cannot be reached by proceedings for the collection of state taxes, without the consent of such court. In re Tyler, 13 Sup. Ct. 785, 149 U. S. 164, followed.

2. PUBLIC LANDS—NORTHERN PACIFIC RAILROAD GRANT—TITLE—TAXATION.
Until the final determination by the government as to what lands within the limits of the grant to the Northern Pacific Railroad Company (Act Cong. July 2, 1864) are mineral, in accordance with the provisions of the grant excepting such lands from its operation, and with Act Cong. Feb. 26, 1895, requiring such determination to be made before the issue of any patent for the lands, no title of any kind to any of the lands within the grant passes to the company, and none of such land is taxable by the states in which it lies. Wisconsin Cent. R. Co. v. Price Co., 10 Sup. Ct. 341, 133 U. S. 496, and Barden v. Northern Pac. R. Co., 14 Sup. Ct. 1030, 154 U. S. 288, followed.

This was a suit by Thomas F. Oakes, Henry C. Payne, and Henry C. Rouse, as receivers of the Northern Pacific Railroad Company, against William V. Myers, treasurer of Jefferson County, Mont., to enjoin the collection of a tax. The defendant demurred to the bill.

John C. Spooner and F. M. Dudley, for complainants.
H. J. Haskell, Atty. Gen. of Mont., for defendant.

BEATTY, District Judge. The complainants, as receivers of the Northern Pacific Railroad Company, by this action ask to enjoin the collection of taxes levied by the state of Montana, and in their complaint allege concerning the grant, by act of congress of July 2, 1864, to aid in the construction of the Northern Pacific Railroad, of the odd sections of land within the place limits of the grant, that the company has in all respects performed all the acts devolving upon it; that it desires its patent for the lands in question, and has made its demand upon the government therefor, but has been refused the same for the reason that no mineral lands are included in the grant; that some of the lands in such odd sections may be mineral; that the government is investigating the facts, and will not issue its patent until it shall have determined them; that the company cannot now know or designate the lands it will finally procure title to; that in this condition of the title the defendant, as the authorized officer and agent of the defendant county, has assessed against said company taxes on all the lands in said odd sections, regardless of the fact of their mineral or nonmineral character, and is proceeding to sell them for nonpayment of such taxes, and that such taxation and sale of the lands would cloud the title thereto. Upon the complaint, Judge Knowles of this district issued a temporary restraining order against such threatened sale, and to the complaint the defendant demurs, assigning as causes: First, that the complaint does not state such a cause of action as entitles complainants to the relief prayed; and, second, nonjoinder of necessary parties. The first, being the

only ground argued or relied upon, will alone be considered. Preliminary to the main question is raised another,—that all the lands to which the railroad company may have any claim or title, being in the hands of the receivers of this court, are in custodia legis, and cannot without the consent of the court be sequestrated by any other authority. That property under the direct control of a court can be reached only through the authority of such court has been the law so long that it has become elementary. That the same rule governs when the claim against the property is for taxes is fully declared by the supreme court in Re Tyler, 149 U. S. 164–181, 13 Sup. Ct. 785, and cases therein cited. It results that the defendant should have had the consent of this court before proceeding against such lands, and any attempt to seize or sell them without such consent may be restrained.

The important question is whether any of the lands in question are now subject to state taxation. It will be conceded that lands belonging to the government cannot be so taxed, but that they can be when the legal or equitable title shall have passed from the government to some other party, and certainly it must follow that no one can be taxed therefor until such title shall be in him. In whom, therefore, does the title to these lands now rest? In reply to that much has been said of the holdings of courts that the grant was one in praesenti, but such grants become operative from the date of the act, only after the conditions attached are fully complied with. It was by no means an absolute grant of all the land in each odd section within the place limits, for there were excepted from its operation all rights existing, under any law of the United States prior to 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 all mineral lands. By many decisions it has been held, under the act in question and other similar acts, that as soon as the donee complied with the conditions of the act the equitable title, at least of all the odd sections, except those portions thereof to which prior rights had attached, passed to him, no reference being made to the mineral exception in the act. But it must be observed that many of such decisions were concerning lands in those jurisdictions where no mineral existed; hence the mineral exception in the statute was not considered. By another line of authorities it was held that mineral lands not actually known to be such at the time the grant became operative passed with the other lands to the donee. Such was the view held by that able jurist the late circuit judge of this circuit, in Railroad Co. v. Barden, 46 Fed. 592; and such was the generally recognized rule until the reversal of that case by the supreme court in 154 U. S. 288, 14 Sup. Ct. 1030. Undoubtedly, under such construction of the act the complainants would have an equitable title to these lands, and they would be subject to taxation; but this recent decision has overturned that construction. Has it not also overturned, or at least put in abeyance, complainants' title to all these lands, and placed them beyond the reach of state taxation? The court, in substance, says, in the Barden Case, that no title to any mineral lands, whether known or unknown as mineral,

passes until a patent shall issue; that it is the duty of the land department to investigate the facts, and to withhold patent to all it shall conclude are mineral. The conclusive effect of this decision is that the complainants have now no title to any of these lands; they have no actual control over or use of any; they cannot sell or give title to any; and whatever right or claim they may have is now so fully suspended that they cannot allege any present title. Beyond question, to some of them they will procure title; but to which they do not now know. Some of them are so clearly nonmineral that none can doubt their character; yet it is not complainants' right to determine or act upon that; but, prior to the act of congress of February 26, 1895, it was alone for the department to determine. The supreme court has held that before lands can be taxed the equitable title must have so far passed to the party that nothing more remains to be done but the mere formal act of issuing the patent to him, and, as held in Wisconsin Cent. R. Co. v. Price Co., 133 U. S. 496–505, 10 Sup. Ct. 341, the lands alienated must be distinctly defined, the donee must have the right to the lands, and not be excluded from their enjoyment. This was a case in which the state undertook to tax lands within the indemnity limits claimed by the railroad company in lieu of lands within the place limits which had been otherwise disposed of. The lands being in an agricultural country, the mineral exception in the law was not in question. The court held that all lands in the odd sections within the place limits not previously granted belonged to the railroad company, and could be taxed, but that as to those claimed within the indemnity limits no title passed until the selections made by the railroad had been approved by the secretary of the interior; that, although the company had done all required of it, and was demanding its patents, the secretary had refused to grant them; that his duties requiring him to investigate certain facts were judicial, and not merely ministerial; and that, until he did determine and act, the lands remained the property of the United States; that, while the government had made its promise to convey the lieu lands, yet such promise passed no title or created any legal interest until the department of the interior had performed the required acts; and it concluded that none of the lands claimed by the railroad company within the indemnity limits were subject to taxation. The facts of that case make the principle therein announced applicable to the facts in this case. Here, the mineral lands are excepted from the grant; the railroad has claimed all the lands within the odd sections, has done all by the law required to entitle it to patents, which it has demanded, and which the government has denied, for the reason that some of the lands claimed may be mineral, and says it must first investigate the facts, and that when it shall determine which of the lands are nonmineral it will issue its patent accordingly. This is a judicial question also, and until it is determined the complainants will have no title of any kind to any of the lands in controversy, which must lead us to the conclusion that none of them can now be subject to taxation. If, however, the decision in the Barden Case leaves any doubt that all title of the railroad company is so in abeyance

that it can exercise no control over or make any use or absolute disposition of any of these lands, it is entirely removed by the late act of congress approved February 26, 1895, by which it is provided that the secretary of the interior shall "cause all lands within the land districts hereinafter named [within which lie these lands] in the states of Montana and Idaho within the land grant and indemnity land grant limits of the Northern Pacific Railroad Company * * * to be examined and classified * * * with special reference to the mineral or nonmineral character of such lands and to reject, cancel and disallow any and all claim or filings heretofore made or which may hereafter be made by or on behalf of said Northern Pacific Railroad Company on any lands in said land districts. * * * And provided further, that the examination and classification of lands hereby authorized shall be made without reference or regard to any previous examination or report or classification thereof. That no patent or other evidence of title shall be issued or delivered to said Northern Pacific Railroad Company, for any lands in said land districts until such lands shall have been examined and classified as nonmineral, as provided for in this act, and such patent or other evidence of title shall only issue then to such land, if any, in said land districts as said company may be, by law and compliance therewith and by said classification entitled to, and any patent, certificate or record of selection or other evidence of title or right to possession of any land in said land districts, issued, entered or delivered to said Northern Pacific Railroad Company in violation of the provisions of this act shall be void: provided, that nothing contained in this act shall be taken or construed as recognizing or confirming any grant of land or the right to any land in the said Northern Pacific Railroad Company, or as waiving or in any wise affecting any right on the part of the United States against said Northern Pacific Railroad Company to claim a forfeiture of any land grant heretofore made to said company." Not only have we here the clear statement that the railroad company has no present title of any kind, and cannot have, until after the examination and classification provided for, to any of these lands within the place or indemnity limits, but it is so repeated in different forms in the act that no doubt of the design of congress can be entertained. If the company has no present title, it must follow that it remains in the government, and that the state cannot exercise the power of taxation. It is urged, and not without logic, that if the company now has no title to these lands it is not concerned in their taxation, and should not be heard to object thereto, and that if the lands belong to the company it cannot object. The injustice and hardship of this view is that, as must be conceded, some of these lands will be held by the government as mineral lands, and as it cannot now be determined which will be so found, the company, to avoid all risk of doubt upon the title to those which may be finally awarded to it, must pay upon all, and trust to future repayment of taxes erroneously paid. It may also be said that if the company now has no such title or claim to the lands as will justify their taxation, the threatened sale will cast no cloud. This leaves the company to assume all the risk,

leads to unnecessary expense on the part of the state, and to possible clouding of the title of the lands, and not only to such uncertainty of title as may for years prevent their occupation and improvement, but may result in a multiplicity of suits. While the courts favor the collection of taxes as a burden in which all should bear their just part, there is not sufficient reason why it should force this company to submit to an injustice in order to protect its rights. When the government so withdraws its claim to, and so ceases to exercise jurisdiction and control over, these lands, that it may fairly be said the company has at least an equitable title to any distinct tracts or parcels thereof, the same may be taxed, and should not be before.

The objection that this tax cannot be stayed by injunction is answered by the railroad land-tax case, 133 U. S., 10 Sup. Ct. It is therefore ordered that the demurrer be overruled, and that this order operate to continue the existing restraining order.

MONTANA CENT. RY. CO. v. MIGEON et al.

(Circuit Court, D. Montana. June 22, 1895.)

No. 180.

1. MINES AND MINING—OVERLAPPING PLACER AND LODE CLAIMS—PRESUMPTIONS FROM PLACER PATENT.
   The presumptions are all in favor of the validity of a placer patent as against a lode claim located subsequent to its issuance upon part of the same ground; and, where the patentee files an adverse claim against the application for patent to the lode, and brings an action in support thereof, the burden is upon the lode claimants to overcome these presumptions, and to show by clear and convincing proofs that the vein on which the lode claim was located was a known vein at the time of the application for the placer patent.
2. SAME.
   In order that a vein or lode, included within the limits of a placer patent, shall be excluded from the operation of the patent, under Rev. St. § 2333, so as to be subject to subsequent location, such vein must have been known, at the date of the application for the placer patent, to exist, and to contain minerals in such quantity, and of such quality and value, as to justify, under the circumstances then existing, expenditures for the purpose of extracting them.
3. SAME—"KNOWN" VEIN—REV. ST. §§ 2320, 2333.
   It seems that the requisites of a "known" vein, under Rev. St. § 2333, are different from those of a vein or lode which will justify a location under section 2320. Under the former the ledge must be known to be so valuable for its minerals as to justify expenditures for their extraction, while under the latter comparatively slight indications of a defined and mineral-bearing ledge have been held sufficient.
4. VALIDITY OF PLACER PATENT—COLLATERAL ATTACK—PRIOR LODE CLAIM.
   The fact that a placer claim, for which a patent has been issued, included at the time of its location part of a lode claim which had not then been forfeited, is a matter which cannot be considered in a collateral attack upon the placer patent, by one who has made a subsequent vein location upon part of the same land after the issuance of the placer patent.

This was an action by the Montana Central Railway Company, which claimed to own certain land by virtue of conveyance from the

patentee of a placer mining claim, against A. F. Migeon and others. The action was brought in support of an adverse claim filed by plaintiff against an application by defendants for a patent for a lode or vein mining claim, which was located upon part of the lands covered by the placer patent subsequent to the issuance thereof.

H. G. McIntire and A. J. Shores, for plaintiff.
George A. Clark, for defendants.

BEATTY, District Judge. With the announcement of the decision in this cause it is fitting to note the ability and courtesy of the counsel who conducted the trial. While most clearly presenting the important issues, they did so with such happy comity towards each other, the witnesses, the court, and all interested, as rendered the supervision of the proceedings a pleasure instead of the wearying performance of a duty. On July 2, 1877, the Morning Star lode claim was located 750 feet each way, easterly and westerly, from the discovery point in Summit Valley mining district, then in Deer Lodge, now Silver Bow, county, Mont. October 15, 1878, the Noyes placer mining claim was located, and included within its limits about 730 feet of the west end of the Morning Star lode claim. December 17, 1878, application for patent was made for such placer claim, and on July 28, 1880, patent was issued therefor, and subsequently a portion thereof was conveyed to plaintiff, and is now used for depot and other railway purposes. January 1, 1882, the Childe Harold lode claim, now owned by defendants, was located at the discovery point of the Morning Star location, 50 feet easterly and 1,450 feet westerly from such point, a part of which is included in that portion of said placer claim so conveyed to plaintiff. On September 27, 1887, the defendants made application for a patent to such Childe Harold claim, whereupon plaintiff brought this action in support of its adverse claim made in the land office to such application, and now asks that its title to the ground in conflict be quieted.

Involved in this action are the propositions: (1) The annulment of the government's patent as to the ground in controversy; (2) what is a known vein, as defined by section 2333, Rev. St.; and (3) whether such a known vein existed within the placer claim on the 17th day of December, 1878, the date of the application for patent therefor.

1. Lengthy discussions of the legal propositions would be profitless, for their solution seems to have been reached by the court of final resort. The stability of a patent and the barriers to its successful assault are indicated in the Maxwell Land Grant Case, 121 U. S. 365–381, 7 Sup. Ct. 1029, where the supreme court says:

"We take the general doctrine to be that when, in a court of equity, it is proposed to set aside, to annul, or to correct a written instrument for fraud or mistake in the execution of the instrument itself, the testimony on which this is done must be clear, unequivocal, and convincing, and that it cannot be done upon a bare preponderance of evidence which leaves the issue in doubt. If the proposition * * * is sound in regard to the ordinary contracts of private individuals, how much more should it be observed where the attempt is to annul the grants, the patents, and other solemn evidences of title emanating from the government of the United States under its official seal. In

this class of cases * * * the effort to set them [patents] aside, to annul them, or to correct mistakes in them, should only be successful when the allegations on which this is attempted are clearly stated, and fully sustained by proof. * * * It should be well understood that only that class of evidence which commands respect, and that amount of it which produces conviction, shall make such an attempt successful."

This is reaffirmed in Colorado Coal & Iron Co. v. U. S., 123 U. S. 307-317, 8 Sup. Ct. 131, which was an action by the government to vacate the patent for coal lands, wherein it is said that the proofs to do so must be "clear, convincing, and unambiguous"; and in U. S. v. Iron Silver Min. Co., 128 U. S. 673-676, 9 Sup. Ct. 195, being a direct action to cancel a placer patent because an alleged known lode was neither excepted nor paid for, the court says:

"The presumption attending the patent, even when directly assailed, that it was issued upon sufficient evidence that the law had been complied with by the officers of the government charged with the alienation of the public lands, can only be overcome by clear and convincing proof."

Without giving further attention to the views of that court upon this point, it must be concluded that all presumptions favor the validity of the placer patent; that the patentee had fully complied with the law in all respects; that at the time of his application the Childe Harold vein was not a known vein; and that, unless the defendants overcome these presumptions by clear and convincing proof, the plaintiff must prevail.

2. What constitutes a known vein under said section 2333 and the definitions of the courts, is not entirely clear. The question is more easily answered if it be conceded that the requisites of a vein which justify a location under section 2320 are different from those applied to a known vein under the other section. It must be admitted that but slight indications of a defined and mineral-bearing ledge have been held sufficient in many cases to support a location or a valid mining claim. Justice Field's definition in the Eureka Case, Fed. Cas. No. 4,548, is familiar,—that a lode "is a zone or belt of mineralized rock lying within boundaries clearly separating it from the neighboring rock." In North Noonday Min. Co. v. Orient Min. Co., 6 Sawy. 308, 1 Fed. 522, and in Jupiter Min. Co. v. Bodie Consolidated Min. Co., 11 Fed. 675, Judge Sawyer said it is "a seam or fissure in the earth's crust, filled with quartz carrying gold, silver, or other valuable mineral deposits named in the statute." In Mining Co. v. Cheesman, 116 U. S. 535, 536, 6 Sup. Ct. 481, is approved the following:

"A lode or vein is a body of mineral or mineral-bearing rock within well-defined boundaries in the general mass of the mountains. In this definition the elements are the body of mineral or mineral-bearing rock and the boundaries. With either of these things well established, very slight evidence may be accepted as to the existence of the other. A body of mineral or mineral-bearing rock in the general mass of the mountains, so far as it may continue unbroken and without interruption, may be regarded as a lode, whatever the boundaries may be. In the existence of such body, and to the extent of it, the boundaries are implied. On the other hand, with well-defined boundaries, very slight evidence of ore within such boundaries will prove the existence of a lode. Such boundaries constitute a fissure, and if in such fissure ore is found although at considerable intervals, and in small quantities, it is called a lode or vein."

It is held that:

"When the locator finds rock in place, containing mineral, he has made a discovery, within the meaning of the statute, whether the rock or earth is rich or poor, whether it assays high or low." Book v Mining Co., 58 Fed. 120.

That "a valid location of a mining claim may be made whenever the prospector has discovered such indications of mineral that he is willing to spend his time and money in following it in expectation of finding ore, and that a valid location may be made of a ledge deep in the ground, and appearing at the surface, not in the shape of ore, but in vein matter only," is adopted in Burke v. McDonald (Idaho) 29 Pac. 101, and in Harrington v. Chambers (Utah) 1 Pac. 375. The last case, on appeal to the supreme court, was affirmed, but without discussing this proposition, which was involved in the appeal. 111 U. S. 350, 4 Sup. Ct. 428. It is needless to add to the above other similar definitions. They establish the liberal rule that it is not necessary, to the location of a valid claim under section 2320, that ore of commercial value in either quantity or quality must first be discovered within its limits. While the practical observer will commend the rule, it must be reasonably applied. To apply it to every seam or fissure which may be filled with matter containing traces of the precious metals, whether in or remote from mineral country, whether valuable or worthless as a mining claim, would be a perversion of a liberal law. The vein or lode which the statute directs must be discovered before the location of a claim must be one that, from all its indications, has a present or prospective commercial value, for only "lands valuable for minerals" are subect to appropriation as mining claims. Section 2318. Hence, in any case, it may be an open question whether a location includes land valuable for minerals, or whether it is based upon some barren seam or fissure which may be easily found in all localities in which there has been much disturbance of the earth's crust.

There are other and later authorities, which seem not only to modify the above, but also to emphasize the statute that the lands must be "valuable for minerals," by holding that to claim them as mineral they must be more valuable for that than for other purposes, and in defining a known ledge under section 2333 require stronger evidence of a vein and mineral deposits than is required by some of the courts for the location of a valid claim under section 2320; but they are generally cases similar to the one under consideration, of contests between parties claiming the same land for different purposes. Deffeback v. Hawke, 115 U. S. 392, 6 Sup. Ct. 95, is a case of contest between the plaintiff, holding a placer patent, and defendant, claiming under an unpatented town-site location, in which, on page 404, 115 U. S., page 95, 6 Sup. Ct., the court says: "We say land known at the time to be valuable for its minerals, as there are vast tracts of public land in which minerals of different kinds are found, but not in such quantity as to justify expenditure in the effort to extract them. It is not to such lands that the term 'mineral,' in the sense of the statute, is applicable;" and then refers to the provisions of section 2318, by which "lands

valuable for minerals" are "reserved from sale" and for location as mineral lands. U. S. v. Iron Silver Min. Co., 128 U. S. 673, 9 Sup. Ct. 195, was an action to cancel placer patents because veins had not been excepted. At page 683, 128 U. S., page 195, 9 Sup. Ct., it is said:

"It is not enough that there may have been some indication, by outcroppings on the surface, of the existence of lodes or veins of rock in place bearing gold or silver or other metal to justify their designation as known veins or lodes. To meet that designation, the lodes or veins must be clearly ascertained, and be of such extent as to render the land more valuable on that account, and justify their exploitation."

The case of Davis' Adm'r v. Weibbold, 139 U. S. 507, 11 Sup. Ct. 628, was a contest between the owner of a patented lode claim and claimants under a prior town-site patent, in which is fully considered the question of exception of mineral lands from the operation of a town-site or other patent, and the characteristics of such lands, and approvingly refers to numerous rulings which hold, in effect, that they must be more valuable for minerals than for other purposes; and that it is not sufficient that they merely contain mineral, but that they must contain it in sufficient quantity to make them valuable as mineral lands; and, in harmony with what it had before said, the court says, on page 519, 139 U. S., page 628, 11 Sup. Ct.:

"There are vast tracts of country in the mining states which contain precious metals in small quantities, but not to a sufficient extent to justify the expense of their exploitation. It is not to such lands that the term 'mineral' in the sense of this statute is applicable."

And, after a review of the rulings, further, on page 524, 139 U. S., page 628, 11 Sup. Ct., that—

"It would seem from this uniform construction of that department of the government specially intrusted with supervision of proceedings required for the alienation of the public lands, including those that embrace minerals, and also of the courts of the mining states, federal and state, whose attention has been called to the subject, that the exception of mineral lands from grant in the acts of congress should be considered to apply only to such lands as were at the time of the grant known to be so valuable for their minerals as to justify expenditure for their extraction."

The case of Iron Silver Min. Co. v. Mike & Starr Gold & Silver Min. Co., 143 U. S. 394, 430, 12 Sup. Ct. 543, is important, because, after it had been once submitted, the court ordered a reargument upon the questions of "what constitutes a 'lode or vein,' within the meaning of sections 2320 and 2333, of the Revised Statutes," and "what constitutes a known lode or vein, within the meaning of section 2333"; and, like the case at bar, it was a contest between the patentee of a placer claim and the claimant of a lode located after application made for patent to the placer claim. On page 404, 143 U. S., page 543, 12 Sup. Ct., it is said:

"It is undoubtedly true that not every crevice in the rocks, nor every outcropping on the surface, which suggests the possibility of mineral, or which may, on subsequent exploration, be found to develop ore of great value, can be adjudged a known vein or lode within the meaning of the statute."

Then, after quoting the extracts above noted from 116 U. S. 536, 6 Sup. Ct. 481, and 128 U. S. 683, 9 Sup. Ct. 195, it concludes that—

"It is, after all, a question of fact for a jury. It cannot be said, as a matter of law, in advance, how much of gold or silver must be found in a vein before it will justify exploitation, and be properly called a 'known' vein."

It may be doubted that this decision directly modifies the former views expressed by the court that a well-defined mineral ledge must be proven to exist before a patent, issued for some other purpose, will be overthrown in its favor; but such modification seems to some extent to be implied from the quotation without disapproval of the liberal rule adopted in 116 U. S. and 6 Sup. Ct., supra, from the manner of its quotation, which seems to indicate that the court considered it somewhat antagonistic to other decisions, and from the argument of the dissenting opinion. However this decision may be viewed,—and it is cited with confidence by each party in this case,—the stricter view is adhered to in Dower v. Richards, 151 U. S. 658–662, 14 Sup. Ct. 452:

"The court held that if the ledge was not known, at the time of the acquisition of the town-site patent, to contain such an amount of minerals as to be valuable for mining purposes, it was not excepted from the operation of that patent. There can be no doubt that the decision of the supreme court of the state in this respect was correct. It is established by former decisions of this court that under the acts of congress which govern this case, in order to except mines or mineral lands from the operation of a town-site patent, it is not sufficient that the lands do in fact contain minerals, or even valuable minerals, when the town-site patent takes effect; that they must at the time be known to contain minerals of such extent and value as to justify expenditures for the purpose of extracting them; and, if the lands are not known at that time to be so valuable for mining purposes, the fact that they have once been valuable, or are afterwards discovered to be still valuable, for such purposes, does not defeat or impair the title of persons claiming under the town-site patent."

The conclusion reached from the foregoing citations is that, before a patent for a placer claim can be canceled or modified upon application of a ledge claimant, the latter must establish by clear and convincing proof that at the date when the application was made for patent to the placer claim, either that such placer applicant knew, or might have known by reasonable inspection, inquiry, or diligence, or that the community generally knew (Iron Silver Min. Co. v. Mike & Starr Gold & Silver Min. Co., 143 U. S. 402, 12 Sup. Ct. 543), that a mineral bearing ledge of rock in place existed within the limits of such placer claim; that such ledge was valuable for its minerals, which were in such quantity, and of such quality, as, under the then existing circumstances, would justify expenditure for the purpose of extracting them; and that more than merely indications of a mineral-bearing ledge must have then existed.

3. Has the evidence so shown within the limits of the Noyes placer claim, on the 17th day of December, 1878, the existence of such a mineral-bearing ledge or lode? Only the evidence of the conditions existing at the date named is pertinent. At that time two shafts or holes existed,—one at the discovery of the lode claim, and about 20 feet east of the east line of the placer claim; and the

other about 75 feet west of such line. Their depth at that time is not clearly shown, but the first was about 10 feet below the surface of the bedrock, and the other but a few feet deep, and of irregular dimensions. As to what was discovered in them the witnesses differ much. A review of the testimony will not be made, but only the impression it created stated. It is that a vein or fissure was developed in the discovery shaft, but that then there was not sufficient work done to show a vein in the other shaft; that, while the vein matter or contents of the ledge at the discovery shaft may have been such as justified the location of a lode claim under section 2320 and some of the rulings of the courts, it was not of such value as would then have paid, or even now pay, the expense of its extraction, or for the exploitation of the claim, and not such as the supreme court has held sufficient to justify the cancellation of a placer patent in support of a ledge claim in cases similar to this. Aside from the differing testimony of the witnesses, there are some established facts that strongly corroborate this conclusion. All the work done on this ledge prior to the application for the placer patent was done upon the Morning Star location, but which did not result in such development as induced the owners of that claim to hold it, for they abandoned it as worthless. The Childe Harold has been located for over 13 years. There does not seem to be any claim that more work than that necessary to hold it has been done thereon. The work consists of several shafts, easily and inexpensively made. There is no evidence to satisfy me that any of the work was done with the view of developing a valuable mine. While it is true that poor men, in these times of depressed price of silver, are not likely to do more work than they must, yet it is hardly to be expected that a claim held to be valuable for copper, as this is, would be carried by these defendants from the year 1885—when, as appears by their deed, in evidence, they purchased it for $75—to the present, practically without any effort to develop it into a valuable property. During the trial, witnesses spoke so freely of the location of mining claims about Butte City for surface purposes and value instead of for the minerals they contained, that the impression was left that it was no unusual thing in that vicinity to locate mining claims to be utilized as town lots, and this, too, without any apparent thought that it was illegal. That such has been the practice there, is confirmed from a plat exhibited during the trial, which showed the entire site of Butte City, and much of the adjoining country, covered with a blanket of mining locations, the lines of all fitting each other as closely and snugly as those of town lots and city additions. It is certainly true that nature has been most lavish in her mineral gifts to the locality of Butte City, for so many known great veins exist no place else on earth as there; but it must be doubted that mineral-bearing ledges within the meaning of the law are nearly so numerous anywhere as the mining locations are there, and it must be concluded that many of them were made without the sanction of law. It may not be that the Childe Harold was located, or is now held, merely for its surface value, but it is held that it has not been proven that on the 17th day of December,

1878, a known vein or lode existed within the limits of the Noyes placer claim.

That the placer claim included a part of what was the Morning Star, and was located before the latter had been forfeited, is an objection that cannot be considered in a collateral attack upon a patent, and, so far as concerns this proceeding, that defect was cured by the issue of the patent.

Other questions were referred to in argument, but it is deemed unnecessary to now consider them. Judgment must follow for the plaintiff as prayed, and it is now so ordered.

FRANK v. WEDDERIN et al.

(Circuit Court of Appeals, Fifth Circuit. May 21, 1895.)

No. 352.

1. PRACTICE—LIMITED APPEARANCE.
   One who intervenes in a pending suit to protect a supposed interest, and therein presents all the issues he wishes, and makes all the defense he cares to make, cannot be permitted to avoid the effect of the judgment rendered upon such issues by limiting his appearance to the purpose of protecting his right and disclaiming an intention to make himself a party to the suit.

2. JUDGMENT—ESTOPPEL.
   Three several creditors of the T. Co. commenced suits against it by attachment of its property and service of process. W. and others, claiming to be liquidating commissioners appointed upon a dissolution of the T. Co., and entitled to the possession and control of its property, filed motions in these suits, alleged to be for the sole purpose of protecting their possession and control, and without intention to make themselves parties to the suits, and, suggesting the dissolution of the corporation and their appointment, asked for the dismissal of the suits. After a full hearing upon such motions, in which W. and his associates introduced evidence, and examined and cross-examined witnesses, the motions were denied, and judgments given against the T. Co., and the attached property sold. No appeal was taken from these judgments. *Held*, that W. and his associates were estopped by the judgments, rendered upon their intervening motions, to set up a claim to the property sold under the attachment and executions, based on the same grounds upon which their intervening motions were based.

3. CORPORATIONS—DISSOLUTION.
   It seems that the voluntary dissolution of a corporation, insolvent or otherwise, without public notice, and after its creditors have been driven into the courts, should be viewed with suspicion, and strict compliance with all legal formalities should be required.

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

This was an action by Carl Wedderin, W. A. Taylor, and John C. Linney, Jr., claiming to be liquidators of the Taylor Brothers Iron Works Company, Limited, against Michael Frank, to recover certain property sold to him under executions against that company. Upon the trial in the circuit court, a verdict was directed for the plaintiffs, and judgment rendered thereon. Defendant brings error. Reversed.

For decision in a former litigation involving the same controversy, see 54 Fed. 82.

On the 6th day of December, 1892, suits at law were commenced in the circuit court of the United States, Eastern district of Louisiana, by the Prentiss Tool & Supply Company and the Niles Tool Works, and on the 7th day of December by the Cleveland Forge & Iron Company, against the Taylor Brothers Iron Works Company, Limited, a business corporation chartered under the laws of the state of Louisiana. Attachments and sequestrations issued, under which the marshal seized and took possession of the defendant's property on said dates, and the defendant was cited in each case on the 7th day of December, 1892, by domicile service on the secretary, and subsequently by service of process on the president in person, December 19th. On the 14th day of December, 1892, Carl Wedderin, W. A. Taylor, and John C. Finney, Jr., defendants in error in the present case, appeared in said court, and filed in each case a motion and exception in the following words: "Now come Carl Wedderin, Walter A. Taylor, and John C. Finney, Jr., liquidating commissioners of the Taylor Brothers Iron Works Company, Limited, and for the sole purpose of protecting their possession and control of the assets and property of said company, and not intending to make themselves parties thereto, they bring to the notice of the court the following facts: That the Taylor Brothers Iron Works Company, Limited, sued and cited as defendant herein, was dissolved and lost its corporate existence on November 16, 1892, by resolution of a general meeting of its stockholders held on said date, in accordance with law and section 7 of the charter of said company, evidenced by act before J. D. Taylor, N. P., April 7, 1891, which said company thereby lost its capacity to sue or to be sued as a corporation or in its corporate name; that at said general meeting of the stockholders of said company, which dissolved the corporation, your appearers were appointed liquidating commissioners of said company, likewise in accordance with law and said section 7 of said charter. Now your appearers appointed liquidating commissioners under the resolution aforesaid move that they be allowed by the court to appear solely for the conservatory purpose of moving to dissolve the attachment herein issued, on the ground that the Taylor Brothers Iron Works Company, Limited, had been dissolved and ceased to exist at the time the attachment in this cause issued, and prior thereto. Now come Carl Wedderin, Walter A. Taylor, and John C. Finney, liquidating commissioners of the Taylor Brothers Iron Works Company, Limited, and suggest to the court the following facts: That the Taylor Brothers Iron Works Company, Limited, sued and cited as defendant herein, was dissolved and lost its corporate existence on November 16, 1892, by resolution of a general meeting of its stockholders held on said date, in accordance with law and section 7 of the charter of said company, evidenced by authentic act before J. D. Taylor, notary public, April 7, 1891. Wherefore appearers pray that this suit may be dismissed, with costs, and for general relief."

The cases were heard by the late Judge Billings upon these pleadings; and the motion to dissolve the attachments, and for the delivery of the property and dismissal of the suit, were denied on the 13th day of February, 1893, after a full trial on the merits. Judgments were rendered against the corporation in each of the cases on the same day for the amounts sued for, with recognition of the attachments. Executions issued upon these judgments in due course, and the property claimed in the case was sold thereunder by the marshal to Michael Frank on the 31st of May, 1893, for the price and sum of $42,000. The plaintiffs below (defendants in error here), after February 13, 1893, remained silent until April 2, 1894, when the present suit was brought against Mr. Frank to recover the property. As grounds of recovery, the plaintiffs allege in their petition that the Taylor Brothers Iron Works Company, Limited, was dissolved on the 16th day of November, 1892, by a resolution of its stockholders, convened for that purpose, and that they were appointed liquidators by the same resolution, and that the resolution was recorded in the mortgage office on the 6th day of January, 1893; that on the 7th day of December, 1892, they filed a petition in the civil district court, setting up the resolution of dissolution, and praying for a judicial recognition of their appointment as liquidators, which was granted on the same day; that on Decem-

ber 6th said suits were instituted against the company in the United States circuit court, and citation served on the president and secretary; that the liquidators, on December 14th, without making themselves parties, appeared in said circuit court, and called the fact of the dissolution of the corporation to the attention of the court; that the court disregarded these facts, and rendered final judgment against the corporation on the 16th day of February, 1893, under which the seized property was sold to Michael Frank; that such sale was absolutely void; that the liquidators took possession of the property under the order of court of December 7th, which related back to November 16th, and that the marshal unlawfully deprived them of this possession; that no legal citation was ever served on the said company; and that the judgments against it were void, because the corporation had been dissolved, and they were not at the time officers; and, finally, that, even if said proceedings of the United States circuit court were otherwise valid, that could not interfere with the jurisdiction of the state court, which was acquired prior to said seizure. The petition closes with a prayer for a decree annulling the sale to Frank, and for the possession of the property. The defendant filed a general demurrer to this petition. Upon the same being overruled, he filed an answer and plea, denying the alleged invalidity of the sale for any of the reasons set forth in the petition, and setting up the judgment of Judge Billings in the attachment cases, on the exceptions and motions of the liquidators as an estoppel.

Upon the trial of the case in the circuit court upon these issues, the plaintiffs offered in evidence (1) a copy of the opinion of Judge Billings on the exception and motion to dissolve the attachment in the three cases; (2) the stipulation signed by all the parties adopting the statement of facts contained in that opinion, as the facts upon which the judgment on the exception and motion of the liquidators was rendered; (3) the resolution of November 16th, purporting to dissolve the corporation; (4) the appearance of the liquidators, of which copies are hereinabove set out in full; (5) the deposition of Carl Wedderin, in which he testifies that the three liquidators were in possession of the property when taken by the marshal under the writs of attachment, and that no notice of the meeting for the dissolution was ever published, as required by the charter. The defendant offered in evidence (1) the exception and motion of the liquidators to dissolve the attachments in the three suits, which had also been offered by plaintiffs; (2) copies of the exceptions and motions of the liquidators and the order of court setting them down for trial; (3) a copy of the opinion of Judge Billings, and the agreed statement of facts already offered by the plaintiffs, as above stated; (4) copy of the charter of the Taylor Brothers Iron Works Company, Limited; (5) a copy of the judgment of Judge Billings denying the motion of the liquidators to dissolve the attachments.

The following admissions were mutually made to save costs: (1) that the Taylor Brothers Iron Works Company, Limited, owned the property in dispute on the 16th of November, 1892, the date of the alleged dissolution of the corporation; (2) that the attachments were levied and property taken possession of by the marshal December 6, 1892; (3) that the property was sold to Michael Frank May 31, 1892, under executions issued on final judgments rendered in the three attachment suits on the 13th day of February, 1893; (4) that the alleged resolution dissolving the corporation was recorded in the mortgage office January 6, 1893; (5) that the liquidators filed a petition in the civil district court December 7, 1892, praying for a judicial confirmation of their appointment, which was granted on that day, and that an inventory of the property was subsequently taken under an order of that court, and filed January 9, 1893.

This being the entire evidence in the cause, and there being no disputed fact, the circuit court directed a verdict in favor of the plaintiff, refusing a request to charge for the defendant upon the same facts, to which action defendant excepted, making the whole evidence part of the bill. From the final judgment of the circuit court against him, the case is brought here for review, upon the following assignment of errors: (1) The circuit court erred in directing the jury to find a verdict in favor of the plaintiffs, and in refusing to instruct the jury to render a verdict in favor of the defendant, as requested, upon the entire evidence and the law applicable thereto. (2) The circuit court erred in not maintaining the estoppel pleaded in the defendant's answer,

upon the undisputed facts in the case. (3) The circuit court erred in not holding that the judgment of Judge E. C. Billings, denying the motions of said alleged liquidators to dissolve the attachments in the suits at law of the Prentiss Tool & Supply Company and of the Niles Tool Works Company against the Taylor Brothers Iron Works Company, Limited, had the effect of estoppel against said liquidators, as set up in this defendant's answer. (4) It was error in the circuit court to rule that the final judgments in said suits at law, in which said pretended liquidators appeared and filed exceptions setting up the alleged dissolution of the Taylor Brothers Iron Works Company, Limited, and praying for the dismissal of the suits, did not estop the plaintiffs in this suit, as claimed in the defendant's answer. (5) If said estoppel was not well pleaded, then the court erred in holding that the resolution of the stockholders of Taylor Brothers Iron Works Company, Limited, dated November 16, 1892, operated as a dissolution of that corporation, without a publication of the notices required by the charter.

Max Dinkelspiel, W. O. Hart, J. D. Rouse, and Wm. Grant, for plaintiff in error.

Thomas J. Semmes and Branch K. Miller, for defendants in error.

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

PARDEE, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

It was admitted on the hearing by the counsel for the defendants in error that, under the laws of the state of Louisiana, the voluntary dissolution of the Taylor Brothers Iron Works Company, Limited, if otherwise complete, did not take effect against creditors of the corporation until record was made of the dissolution in the mortgage office, which was on January 6, 1893. The record shows that, prior to the application of the elected liquidators to the state court, the attachments in the cases of the Prentiss Tool & Supply Company and the Niles Tool Works against the Taylor Brothers Iron Works Company, Limited, had been sued out in the United States circuit court, and had been levied on the property in controversy. We take it, then, that all questions of the validity of the original levy and of the proper custody of the property in the circuit court of the United States at the time of the contended dissolution of the corporation are eliminated from this case.

In Railroad Co. v. Gomila, 132 U. S. 478, 10 Sup. Ct. 155, it was declared:

"The jurisdiction of a court of the United States, once obtained over property by being brought within its custody, continues until the purpose of the seizure is accomplished, and cannot be impaired or affected by any legislation of the state, or by any proceedings subsequently commenced in a state court."

In Louisiana a corporation cannot avail itself of the provisions of the act relative to the voluntary surrender of property. Jeffries v. Iron Works Co., 15 La. Ann. 19. We know of no law in Louisiana, and counsel have suggested none, by which the voluntary dissolution of a corporation operates in any court a dissolution of attachments previously levied.

This brings us to the question whether the defendants in error (plaintiffs in the circuit court) are estopped by the judgment provoked by them in the circuit court in the cases of the Prentiss Tool & Supply

Company, the Niles Tool Works, and the Cleveland Forge & Iron Company, against the Taylor Brothers Iron Works Company, Limited; that is to say, to the question whether the defendants in error made themselves parties in those suits. The record shows that, thinking they had an interest in the subject-matter of the suits, they voluntarily appeared and suggested their interest; that they prayed for the dissolution of the attachments and the dismissal of the suits; that they were heard by the court, and introduced witnesses on their own behalf; and that, when judgment was rendered adverse to their demands, they abided the decision, whereby it became final. If they are, as they still claim to be, the liquidators of the Taylor Brothers Iron Works Company, Limited, they had an interest in the suits and a right to make a defense.

In Robbins v. Chicago, 4 Wall. 657, it is said:

"Conclusive effect of judgments, respecting the same cause of action, and between the same parties, rests upon the just and expedient axiom that it is for the interest of the community that a limit should be opposed to the continuance of litigation, and that the same cause of action should not be brought twice to a final determination. Parties in that connection include all who are directly interested in the subject-matter, and who had a right to make a defense, control the proceedings, examine and cross-examine witnesses, and appeal from the judgment. Persons not having those rights substantially are regarded as strangers to the cause; but all who are directly interested in the suit, and have knowledge of its pendency, and who refuse or neglect to appear and avail themselves of those rights, are equally concluded by the proceedings."

See, also, Chicago v. Robbins, 2 Black, 418.

To the same effect are Cromwell v. County of Sac, 94 U. S. 351; Chamberlain v. Preble, 11 Alen, 370; Tredway v. Railroad Co., 39 Iowa, 663.

It is true that in their motion to dissolve the attachment the defendants in error say that they appeared in the circuit court for the sole purpose of protecting their possession and control of the assets and property of said company, and not intending to make themselves parties thereto, and in such motion they did move the court that they "be allowed by the court to appear solely for the conservatory purpose of moving to dissolve the attachment herein issued on the ground," etc.; and it may be conceded that a limited appearance was all that the defendants in error intended; but, as a matter of fact, they presented all the issues that they wished, and made all the defense to the suit that they cared to make. We understand that a limited appearance is permissible in a case where a person comes into a cause for the sole purpose of objecting to the sufficiency of original process, or to decline the jurisdiction of the court on account of some personal privilege or exemption. To extend the rule much further would be to permit parties in the case to test the court upon the sufficiency of defenses that might be made, and yet not bind the parties by the decision thus provoked. The original proceedings in the circuit court were on the law side of the court, and the practice there is according to the practice in like cases in the courts of Louisiana. In Louisiana the parties are competent to waive all matters of form.

In Trescott v. Lewis, 12 La. Ann. 197, it is said:

"It matters not that the proceeding by rule was irregular, since the party against whom it was taken, as a favor to his adversary, waived all questions of form, and joined issue on the merits. Here are all the elements of a suit at law,—actor, reus, et judex. The form of the proceeding is immaterial. If proper parties join issue upon questions, either of law or fact, before a competent court, they must abide by the decision."

A decision directly in point is Tyrrell v. Baldwin, 67 Cal. 1, 6 Pac. 867, where a judgment in a case entitled "McLeran v. McNamara," purporting to be against Tyrrell's grantors, Sarah and Charlie McDonald, was offered by Baldwin to defeat his title. It appears that the McDonalds were not named as the defendants in the complaint, nor summoned as such, but that, some seven months after the complaint was filed, they voluntarily appeared, and filed answer, setting up defenses, but without any express leave of court. The case was tried on this answer, and judgment rendered aginst the McDonalds. In reversing the decision of the lower court excluding the record of the judgment in evidence, the supreme court says:

"The voluntary appearance of a defendant is equivalent to personal service of the summons and a copy of the complaint upon him. Appearance before being summoned confers jurisdiction equally with an appearance after being summoned. Under our practice, a person who is not named in the complaint, nor served with the summons, if he has an interest in the matter of the litigation, may become a party by obtaining leave of the court to file a complaint in intervention. Here the McDonalds, without objection or opposition, filed an answer, in which they denied all the allegations of the complaint, and alleged that they were the owners and entitled to the possession of a certain portion of the demanded premises. They were permitted to do, without opposition and by tacit consent, that which they might have done by leave of court. But why ask leave of the court to do that which nobody objected to their doing? They invoked the judgment of the court upon the issues raised by their answer to the complaint, and they got it. Can they now be heard to say that the judgment is a nullity because they obtruded themselves into the action? Their answer shows that they might properly have been made parties to it, and the record shows that they availed themselves of all the rights and privileges of which they could have availed themselves if they had been named and sued as defendants in the complaint. As soon as the answer was filed, the complaint might have been amended by adding the names of the McDonalds to those of the other defendants in the action."

The court held, upon review of the authorities, that a judgment thus rendered cannot be attacked collaterally, even if it might be reversed on appeal for irregularity.

See, also, 2 Black, Judgm. § 540.

It is, however, contended that although the defendants in error appeared in the circuit court in the attachment cases, there presented their matters of law and fact, introduced witnesses, were heard as before a jury,—all on matters tending to defeat the plaintiffs in the several cases,—yet the questions presented being collateral, and not going to the main issue of the indebtedness vel non, they had no right of appeal; and therefore the judgments denying their motions to dissolve the attachments and dismiss the suits were not binding, and can work no estoppel in the present suit, wherein exactly the same facts and the same title are set up. It is very doubtful whether the right to appeal from a judgment cuts much figure in determining

whether an estoppel results from such judgment. Sometimes the amount involved prevents a review of the judgment by a higher court, and sometimes the estoppel itself results from the judgment of the appellate court. The matters presented by the defendants in error in the attachment cases went beyond collateral issues. If they had been successfully established, the plaintiffs in attachment would have been denied the most valuable relief they sought, to wit, the appropriation of the attached property to the payment of their claims. It does not seem questionable that in such case the plaintiffs in attachment could have had the judgments of the circuit court reviewed on error. The act of 1891, establishing circuit courts of appeal, was then, as now, in force; and by that act jurisdiction is given to the circuit courts of appeal to review final decisions of existing circuit courts in cases where the jurisdiction of the circuit court is founded, as it was in the attachment cases, on diverse citizenship. If the motions of the defendants in error in the attachment cases had been granted, and the attached property turned over to the alleged liquidators, it would be difficult to distinguish the case as to the right of review from Railroad Co. v. Gomila, supra, where no doubt of the jurisdiction of the supreme court was suggested. If the plaintiffs in attachment could have had an adverse decision reviewed on error, why did not the defendants in error have the like right? The judgment of the circuit court was adverse and final as to them. It denied them the right to the property attached, and appropriated the property to the payment of the attaching creditors' claims. In connection with this, on an issue provoked by themselves, the court decided that the corporation known as the Taylor Brothers Iron Works Company, Limited, was not legally dissolved by the proceedings of the stockholders on the 27th of December, 1892. The court had jurisdiction; the parties were before it; the issue was made; and we feel constrained to now hold that the defendants in error, the alleged liquidators of the Taylor Brothers Iron Works Company, Limited, are estopped by the judgment of the circuit court in the attachment cases from now asserting against the plaintiffs in said attachment cases and against the present plaintiff in error, who holds title thereunder, that in fact, by the proceedings of the stockholders of the Taylor Brothers Iron Works Company, Limited, on the 7th of December, 1892, the corporation was dissolved.

We do not find it necessary to express any opinion upon the correctness of the judgments of the circuit court in the attachment cases, denying the relief sought therein by the defendants in error; but we do suggest that the voluntary dissolution of a trading corporation, insolvent or otherwise, without public notice, and after its creditors have been driven into the courts, should be viewed with more or less suspicion; and, when such dissolution is brought forward to defeat attaching creditors, we think the court should see that all the formalities prescribed by the laws of the state and the charter of the corporation to bring about a legal dissolution of the corporation are strictly complied with. Judge Billings, in his opinion, found in the record, given in the attachment cases, holds that

the provision in the charter of the Taylor Brothers Iron Works Company, Limited, providing for advertisement of proposed general meetings of the stockholders for the purpose of changing, modifying, or altering the charter, included in its meaning and purposes the matter of dissolution of the corporation; and that, as all such general meetings affected the public in regard to the then present indebtedness as well as future credits of the corporation, such preliminary advertisement could not be waived. If Judge Billings was correct in this,—on which we express no opinion,—the Taylor Brothers Iron Works Company, Limited, does not even now appear to have ever been legally dissolved. Leaving this aside, however, and basing our judgment entirely on the estoppel pleaded in this present case, we are of opinion that the judgment of the circuit court should be reversed, and the cause remanded, with instructions to award a new trial; and it is so ordered.

ROBINSON v. UNITED STATES MUT. ACC. ASS'N OF CITY OF NEW YORK.

(Circuit Court, E. D. Missouri, E. D. May 20, 1895.)

No. 3,781.

1. LIFE INSURANCE—INSURABLE INTEREST.
   Where one effects an insurance upon his own life, and, in the policy, designates another as the payee, the latter may maintain an action on the policy, without showing an insurable interest.

2. SAME—INTEREST OF BENEFICIARY.
   The beneficiary named in a policy of insurance on the life of another has no such vested or permanent interest in the policy as to prevent the assured, with the assent of the company, substituting a new beneficiary.

3. SAME—ACCIDENTAL INJURY.
   An insurance company issued to one M. a policy insuring him against injury or death, effected through external, violent, and accidental means, but not covering death resulting from duelling or fighting, or happening while or in consequence of violating the law. M. was shot by one C., while engaged in an altercation, M. being at the time unarmed. *Held*, that M.'s death was accidental, and the company was liable upon the policy.

4. DEFENSES—ACTION PENDING.
   Before his death, M. substituted one R. for the original beneficiaries in the policy. *Held*, that it was no defense to an action on the policy by R. that another action on the policy was pending, brought by the original beneficiaries, in another state, in which R. had intervened and been compelled to submit to a nonsuit.

This was an action by Minnie Robinson against the United States Mutual Accident Association of the City of New York on a policy of insurance upon the life of Emile O. Moore. The case was tried by the court, without a jury.

The policy sued on insured E. O. Moore, "subject to the by-laws and all conditions indorsed hereon, against personal bodily injuries, * * * through external, violent, and accidental means," and against death resulting from such injuries. The first condition indorsed upon the policy provided that the insurance should not "extend to or cover accidental injuries or death resulting from, or caused, directly or indirectly, wholly or in part by, * * * duelling,

fighting, or wrestling, * * * or voluntary exposure to unnecessary danger; nor extend to or cover accidental injuries or death happening * * * while or in consequence of violating the law."

Geo. N. Sanders, for plaintiff.
W. C. Jones and J. C. Jones, for defendant.

PRIEST, District Judge. Action upon policy of insurance. The policy of insurance was procured by E. O. Moore upon his own life, and, in the event of his death by accident, was made payable originally to his son and daughter. As he lawfully might, by the terms of the policy and the by-laws of the company, he substituted the plaintiff for the original beneficiaries, and this substitution was recognized and accepted by the company. The death of E. O. Moore is admitted. Payment is resisted by the company upon the following grounds: (1) Because plaintiff had no insurable interest in the life of the assured at the time of his death; (2) that the original beneficiaries had a vested interest in the policy, which could not be defeated by any act of the assured; (3) that, by the terms of the policy, its protection or indemnity should not extend to injuries or death in consequence of "voluntary exposure to unnecessary danger" or "violating the law"; (4) that immediate notice was not given of the death of the assured; (5) that the assured died of a gunshot wound intentionally inflicted by Dr. Chinault, and his death was not therefore the result of an accident; (6) that another suit is pending in the courts of Arkansas in which the deceased's son and daughter, the original beneficiaries, are plaintiffs, and in which this plaintiff intervened, upon which intervention she was compelled to submit to a nonsuit.

1. A recovery cannot be defeated because of the want of an insurable interest of the plaintiff in the life of the deceased. The rule against wagering contracts of insurance only applies to the cases in which the insurance is procured and paid for by one who has no interest in the life of the assured. When one effects an insurance upon his own life, and in the policy designates another as the payee, the latter may maintain an action on the policy without showing an insurable interest. Association v. Blue, 120 Ill. 121, 11 N. E. 331; Campbell v. Insurance Co., 98 Mass. 381; Vivar v. Knights, etc. (N. J. Sup.) 20 Atl. 36; Ingersoll v. Knights, etc., 47 Fed. 272; Milner v. Bowman (Ind. Sup.) 21 N. E. 1094; Morrell v. Insurance Co., 57 Am. Dec. 103 and note; Glassey v. Insurance Co. (Sup.) 32 N. Y. Supp. 335. In this case the assured procured the insurance, and paid all the premiums. Indeed, this plaintiff did not know that she had been made the beneficiary until some months after the death of Moore.

2. It is equally well settled that the first-named beneficiaries have no vested or permanent interest in the policy such as cannot be disturbed by the assured with the consent of the company. Sabin v. Lodge (Sup.) 8 N. Y. Supp. 185; Supreme Conclave, etc., v. Cappella, 41 Fed. 1; Brown v. Lodge (Iowa) 45 N. W. 884; Association v. Kirgin, 28 Mo. App. 80.

3. It is insisted that Moore's death, being designed by his slayer, was not accidental. It may not have been accidental so far as Dr.

Chinault was concerned, but it was so far as Dr. Moore's conduct was involved. The meaning of the word as employed in the contract must have reference to such disasters as are brought about through the culpable intention or designing of the assured. In one sense—that of scholastic philosophy—nothing is accidental, but we cannot employ such refinements in the interpretations of contracts of indemnity against casualties. Nor do I find that the assured was engaged in fighting or violating the law in that sense which would invalidate the policy. Dr. Moore was unarmed, and, according to the evidence of the only impartial witness to the tragedy, had made no menacing gestures at the time he was shot. He was, in my opinion, the victim of the nervous apprehension of Dr. Chinault. It does not follow that, if Dr. Chinault should be excused for the homicide, the defendant ought to be relieved of the obligations of the policy. He had the right to act upon appearances, and, though deceiving, they would relieve him. He may have acted in good faith in apprehension of immediately impending danger, and this, according to some authorities, would excuse him. But such defenses cannot be invoked by this defendant. It must stand upon a calm investigation of the actual facts.

4. The point that no notice was given of the assured's death is not well founded in fact. The evidence of the secretary at the home office in New York shows that prompt notice was there received and acted upon.

5. Nor does the fact that litigation is pending in Arkansas constitute a bar.

Judgment will accordingly be entered for the plaintiff for the sum of $5,000, with 6 per cent. interest from the date of the institution of this suit.

LOWRY v. MT. ADAMS & EDEN PARK INCLINE PLANE RY. CO.

(Circuit Court, S. D. Ohio, W. D. June 3, 1895.)

No. 4,782.

1. DAMAGES—PERSONAL INJURIES.
   A verdict of $7,500 for personal injuries causing great suffering, and resulting in permanent disability, of a man who had previously been earning $300 a month, is not excessive.
2. CHARGING JURY—COMMENT ON FACTS.
   The fact that a judge, in charging the jury, has failed to refer to certain facts which would have borne in favor of the defeated party, is not ground for a new trial, when the jury has been told that all issues of fact were to be determined by them, on the testimony, and that the comments of the court were for the purpose of illustration only.
3. PRACTICE—MOTION FOR NEW TRIAL.
   Rules of procedure upon motions for new trials, contained in state statutes, do not apply in the federal courts upon such motions, which must be determined according to the course of the common law.
4. NEW TRIAL—NEWLY-DISCOVERED EVIDENCE.
   Newly-discovered evidence which is merely cumulative or merely contradictory of other evidence is not ground for a new trial.

This was an action for personal injuries by Joseph A. Lowry against the Mt. Adams & Eden Park Incline Plane Railway Com-

pany. Upon the trial the jury gave a verdict for the plaintiff for $7,500. The defendants moved for a new trial. Denied.

C. W. Baker, for plaintiff.
Ramsey, Maxwell & Ramsey, for defendant.

SAGE, District Judge. It is claimed that the verdict, which was for $7,500, is excessive. The testimony is that the plaintiff was earning $300 a month. He was under the charge of a physician for several months. The left thigh was terribly torn and lacerated by the iron head of the tongue of the wagon which which the car came in collision. The wound was from five to seven inches long, ragged and exceedingly painful. The parts would not reunite until finally skin grafting was resorted to. According to the testimony, some 500 patches were made before the wound was completely healed. The testimony of the surgeons who were in charge was that the plaintiff was crippled, and would continue to be so during life. The power of extending and retracting the limb was seriously impaired, and the surgeon testified that he was as nearly restored at the time of the trial as he ever would be. In Railway Co. v. Brown, 6 C. C. A. 142, 56 Fed. 804, the court of appeals of the Seventh circuit held that $7,500 was not excessive damages for so injuring a railroad laborer that he became paralytic. In Southern Pac. Co. v. Rauh, 1 C. C. A. 416, 49 Fed. 696, a verdict for $10,000 was sustained upon the testimony of the attending physician, corroborated by that of another medical expert, that the plaintiff could not regain his health, although physicians called by defendant testified that plaintiff ought to recover soon. In Shumacher v. Railroad Co., 39 Fed. 174, the jury awarded $8,000 damages. Judge Parker, in his opinion, said that he was at one time inclined to regard the damages as excessive, but he sustained the verdict, holding that before a court could interfere on that ground the damages must be so excessive and disproportionate as to warrant the inference that the jury was swayed by prejudice, preference, partiality, passion, or corruption. In Osborne v. City of Detroit, 32 Fed. 36, the plaintiff suffered a complete paralysis of the right side, resulting from injuries occasioned by a defective sidewalk. Judge Brown upheld a verdict of $10,000. I do not feel at liberty to set aside the verdict of the jury in this case upon the ground that it is excessive, nor do I think it my duty to order a remittitur.

It is also urged that the charge tended to mislead the jury. It is not claimed that there was any misstatement of law, but that the court failed to refer, in its comments upon the facts of the case, to certain particulars which would have borne in favor of the defendant. The jury were told that all issues of fact were to be determined by them upon the testimony, and that whatever comments the court made were for the purpose of illustrating the statements of law, and were not to control the jury in any degree, with reference to their findings. The charge was altogether oral. No exception was taken to the refusal of the court to direct a verdict in favor of the defendant, and to the refusal of the court to give

one special charge as asked, and to the giving of it with qualifications. In the federal courts, exceptions, to be valid, must be taken at the time of the trial. They cannot be regarded if taken subsequently. Counsel referred in argument to the rules of procedure upon motions for new trial contained in the Ohio Civil Code. The Code does not apply with reference to motions for new trial. They must be according to the course of the common law. See seventh amendment of the constitution of the United States; Railroad Co. v. Horst, 93 U. S. 291; Newcomb v. Wood, 97 U. S. 581; Petition of Chateaugay Ore & Iron Co., 128 U. S. 554, 9 Sup. Ct. 150; Fishburn v. Railway Co., 137 U. S. 60, 11 Sup. Ct. 8.

Upon the hearing of the motion, counsel urged upon the court that on a new trial facts favorable to the defendant might be brought out more clearly; that an exact statement of the location of the barricade, and its distance from the track, and of the distance between the tracks, could be presented, from which it would appear that the defendant was not guilty of negligence. All these were matters that were presented in evidence on the trial. There was no showing that the additional evidence could not have been procured. Indeed, from its very nature it is apparent that it might have been procured as well before the trial as after. Upon all the points suggested, evidence was offered upon the trial. It is a rule of the federal courts that a new trial will not be granted upon the ground of the discovery of cumulative evidence merely. Ames v. Howard, 1 Sumn. 482, Fed. Cas. No. 326; Brown v. Evans, 17 Fed. 912. It has also been held that newly-discovered evidence to impeach or contradict is not enough to warrant granting a new trial. Carr v. Gale, 1 Curt. 384, Fed. Cas. No. 2,433; U. S. v. Potter, 6 McLean, 182, Fed. Cas. No. 16,077.

It was also urged that there was no evidence that the car was actually in motion when it came in collision with the wagon which caused it. The only witness who so testifies is the gripman. Isaac Rigdon, for the plaintiff, testifies that the car was in motion when the collision occurred, and that he did not notice any slackening of speed of the car up to the time of the collision. Charles V. Avery, for the plaintiff, testifies that the gripman did not slow the car in any way before the collision. The plaintiff also testifies that there was no slackening up of the car, that he observed, before the collision. Mrs. Redman, for the plaintiff, testifies that she did not notice whether the car had been slacked in any way. To the same effect was the testimony of Mr. Daniel Metz. Howard Kemper, a witness for the defendant, says that the car did not stop until the collision occurred.

The motion for new trial will be overruled.

McCONKEY v. PEACH BOTTOM SLATE CO.

(Circuit Court of Appeals, Fourth Circuit. May 28, 1895.)

No. 111.

CONTRACTS—ASSENT.

Plaintiff, in February, 1889, received from defendant corporation an option to purchase its real estate and other property, which was extended from time to time, but not acted on. On April 19, 1890, plaintiff received from defendant a new agreement, in consideration of $2,000 already paid, and $5,000 to be paid in 30 days, to sell to him defendant's property at any time within 6 months from April 7, 1890, at the price previously agreed on, of which the $7,000 was to form a part. It was the understanding of the parties that, if plaintiff did not take the property within the 6 months, the $7,000 should be forfeited. Within the 6 months plaintiff verbally notified defendant that he had arranged to procure the necessary capital, and would be ready to take the property, but before the expiration of the time some of the capitalists interested withdrew, and plaintiff was unable to, and did not, take the property or give a binding acceptance of the option. The option was not renewed, but plaintiff continued his efforts to obtain capital to buy the property, and was aided and encouraged to do so by the officers of defendant, until July, 1892, when plaintiff had secured the necessary capital, but a difference had arisen between plaintiff and defendant as to the forfeiture of the $7,000, and plaintiff made no offer in the precise terms of the option of April 19, 1890, until September 13, 1892, when it was declined. *Held*, that the defendant was not bound, after the expiration of the option, to sell the property to plaintiff, and that no binding contract between the parties ever came into existence.

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

This was an action by Charles R. McConkey against the Peach Bottom Slate Company to recover $7,000, alleged to have been paid under a contract broken by the defendant. The circuit court gave judgment for the defendant. Plaintiff brings error. Affirmed.

Alfred S. Niles and Oscar Wolff, for plaintiff in error.

H. Arthur Stump and James P. Gorter, for defendant in error.

Before GOFF and SIMONTON, Circuit Judges, and SEYMOUR, District Judge.

GOFF, Circuit Judge. The plaintiff below, a citizen of the state of Pennsylvania, sued in assumpsit, in the circuit court of the United States for the district of Maryland, the defendant, a corporation and citizen of the state of Maryland. In his bill of particulars filed with his declaration, which contains the common counts only, the plaintiff claims from the defendant the sum of $7,000, money paid by plaintiff to defendant on account of contract to purchase the property of defendant, situate in Harford county, Md., which contract, it was claimed, had been broken and rescinded by the defendant. The general issue and the statute of limitations were pleaded by defendant. The case was tried to a jury, which, under the direction of the court, at the close of the evidence, returned a verdict for defendant. The plaintiff thereupon prayed for this writ of error, assigning as error the refusal of the court below to give certain instructions asked for by the plaintiff, and the direction by the court that the jury return a verdict for defendant.

The testimony tended to show the following facts: That negotiations were entered into by plaintiff and defendant for the sale and purchase of defendant's property. That on February 15, 1889, a paper was executed which was as follows:

"Memorandum of a proposal of sale made this fifteenth day of February, in the year eighteen hundred and eighty-nine, by the Peach Bottom Slate Company, of Harford county, Maryland, to Charles R. McConkey. The said the Peach Bottom Slate Company, of Harford county, in consideration of the sum of sixty-five thousand dollars ($65,000.00), hereby agrees to sell to the said Charles R. McConkey, or his assigns, all the real estate now held by said company, together with the improvements, fixtures, machinery, and tools now located thereon or used in connection with the business of said company; payments to be made as follows: Thirty-five thousand dollars ($35,000.00) in cash upon the delivery of a good and sufficient deed for said property, and thirty thousand dollars ($30,000.00) within five years thereafter, with interest at five per cent., payable semiannually; the credit payment to be secured by mortgage on the property so sold. And the said corporation further agrees that at the time of the delivery of said deed the holders of the stock of said corporation shall deliver to said McConkey or his assigns all the capital stock thereof, to wit, one thousand shares of the par value of one hundred dollars each, amounting to one hundred thousand dollars, saving and reserving to said shareholders all the slate then on the bank, and all the debts due said company; said stockholders to pay all existing liabilities of said corporation. This offer to remain open for acceptance by said McConkey or his assigns until April 15th, in the year 1889, and unless accepted before said date shall be utterly null and void. In testimony whereof, the president of the said the Peach Bottom Slate Company, of Harford county, has hereto set his hand and affixed its corporate seal duly attested by the secretary thereof the day and year above written.

"[Seal.] Richard Rees, Pres't.
"John Humphrey, Sect'y.

"For and in consideration of one dollar, paid by Charles R. McConkey, the receipt of which is hereby acknowledged, the Peach Bottom Slate Company, of Harford county, hereby agrees to extend the time for acceptance of the foregoing offer from April 15th to May 15th, 1889. In testimony whereof the president of the said the Peach Bottom Slate Company, of Harford county, has hereto set his hand and affixed its corporate seal, duly attested by its secretary, this eighteenth day of March, A. D. 1889.

"[Seal.] Richard Rees, Pres't.
"John Humphrey, Sect'y.

"And, further, for and in consideration of one dollar paid by Charles R. McConkey, the receipt of which is hereby acknowledged, the Peach Bottom Slate Company, of Harford county, hereby agrees to extend the time for acceptance of the foregoing offer by said Charles R. McConkey or his heirs and assigns until December 20th, 1889, and unless accepted before that time shall be utterly null and void. In testimony whereof the president of the said the Peach Bottom Slate Company has hereto set his hand and affixed its corporate seal, duly attested by the secretary thereof, this 14th day of October, 1889.

"Richard Rees, President.
"John Humphrey, Sect'y.

"And, further, for and in consideration of one dollar paid by said Charles R. McConkey, the receipt of which is hereby acknowledged, the Peach Bottom Slate Company, of Harford county, hereby agrees to extend the time for acceptance of the foregoing offer by said Charles R. McConkey or his heirs and assigns, until February the 6th, 1890, and unless accepted before said time shall be utterly null and void. In testimony whereof the president of the said the Peach Bottom Slate Company, of Harford county, has hereto set his hand and affixed its corporate seal, duly attested by the secretary thereof, this 21st day of December, 1889.

"[Seal.] Richard Rees, President.
"John Humphrey, Secretary."

—That plaintiff was to secure other parties to furnish all or part of the purchase money mentioned in said option, and was to receive a commission of 5 per cent. if the sale was made under it. That before February 15, 1889, plaintiff had secured an option upon a certain piece of land called the "Coleman Tract" (adjacent to the defendant's property, the slate vein then being worked by defendant extending into said Coleman land), the same being in the following words, viz.:

"Lebanon, Pa., December 17, 1888.

"Mr. Charles R. McConkey, Peach Bottom, Pa.—Dear Sir: Confirming conversation of last week, I agree to sell to you or your assigns our Harford county slate tract for eleven thousand seven hundred dollars ($11,700.00). This offer to remain open until June 1st, 1889, after which date it becomes void.

"Yours, truly, Robt. H. Coleman."

—That plaintiff, after securing these options, endeavored to interest people in the same, and to raise the money required to pay for them so that they could be worked together. That defendant's option was renewed from time to time until February 6, 1890, without being accepted. That in the fall of 1889 the agreement as to commissions was changed so that plaintiff was to have $5,000 as commissions, provided he raised the money and took the property. That on February 8, 1890, the following paper was executed, viz.:

"Received, Delta, Pa., February 8th, 1890, from Charles R. McConkey one thousand dollars on account of the purchase money to be paid under an agreement between the Peach Bottom Slate Company, of Harford county, and the said McConkey, bearing date February 15th, 1889, and upon the payment of one thousand dollars additional, on or before February 20th, inst., and the balance of the cash payment specified in said agreement on or before April 7th, 1890, and have the credit payment fully secured, as specified in said agreement, the Peach Bottom Slate Company, of Harford county, hereby agrees to sell, transfer, and deliver to said McConkey or his assigns all the real estate held by said company, with the improvements, fixtures, machinery, and tools located thereon, together with the capital stock thereof, to wit: one thousand shares of the par value of one hundred dollars each, amounting to one hundred thousand dollars, according to the terms of said agreement. In the event of said McConkey or his assigns failing to make payments as aforesaid, then the Peach Bottom Slate Company, of Harford county, reserves the right to declare the payments already made forfeited to it, and this agreement null and void. In testimony whereof the president of the said the Peach Bottom Slate Company, of Harford county, has hereto set his hand and affixed its corporate seal, attested by the secretary thereof the date above written.

"[Seal.] Richard Rees, President.

"John Humphrey, Secretary.

"Delta, Pa., Feby. 8th, 1890.

"Received from Charles R. McConkey one thousand dollars, as above stated.

"$1,000. John Humphrey, Treas."

—That the second payment called for was paid, and following receipt given, viz.:

"Delta, Pa., Feby. 20th, 1890.

"Received from Charles R. McConkey one thousand dollars for second payment as stated in the foregoing agreement.

"$1,000. John Humphrey, Treas."

—That the $2,000 mentioned in said receipts was actually paid on the dates specified. That about 12 days after that option had expired the following agreement was entered into:

"This agreement, made and concluded by and between the Peach Bottom Slate Company, of Harford county, Maryland, hereinafter called the party of the first part, and Charles R. McConkey, of York county, Pennsylvania, hereinafter called party of the second part, witnesseth: That the said party of the first part, for and in consideration of the sum of two thousand dollars in hand paid, by the said party of the second part, at or before the execution hereof, the receipt whereof is hereby acknowledged, does hereby grant to said party of the second part, his heirs and assigns, an option for six months, from and after the seventh day of April, A. D. 1890, to purchase all the real estate now held by said company in Harford county, Maryland, together with the improvements, fixtures, machinery, and tools now located thereon, or used in connection with the business of said company, under the name of the 'Peach Bottom Slate Company of Harford county.' And the party of the second part does hereby agree to pay to the party of the first part hereto the further sum of five thousand dollars, within one month from the 7th day of April, A. D. 1890. And the said party of the first part does further covenant and agree by these presents that in case the said party of the second part does within the said time of six months from and after the 7th day of April, A. D. 1890, exercise his right of option, and agree to take and accept the said land and property, then upon the further payment of the sum of twenty-eight thousand dollars ($28,000.00) lawful money to be paid upon the execution and delivery of the conveyance hereinafter mentioned, the said party of the first part does hereby, for itself, its successors and assigns, covenant and agree to grant and convey to the said party of the second part, his heirs and assigns, the said described land and property, when requested so to do, and shall deliver a proper, good, and sufficient deed in fee simple therefor, and upon the delivery of said deed, the party of the second part hereby agrees to make, execute, and deliver, or cause to be made, executed, and delivered, to the party of the first part hereto, a first mortgage on said property, in the sum of thirty thousand dollars ($30,000.00), payable within five years from the date thereof, with interest on said sum at the rate of five per centum per annum, payable semi-annually, with the right to anticipate all or any part of said thirty thousand dollars, which shall be duly credited on said mortgage; the said land and property to be free from all incumbrances when conveyed by the party of the first part hereto, and title thereto to be good and merchantable and of record, and the examination of title and the preparation of deed to be made by the said party of the second part, and to be prosecuted with due diligence from and after his determination to take and accept the said land and property. Witness the hands and seals of the parties hereto, dated this 19th day of April, A. D. 1890.

"[Seal.] The Peach Bottom Slate Company, of Harford County
"By Richard Rees, Pres.
"Charles R. McConkey. [Seal.]

"Attest:
"John Humphrey, Secty.
"Witnesses:
"M. H. Houseman.
"W. F. Walworth."

—That the two previous payments were accepted as part of the consideration mentioned in that agreement, and that nothing was said at that time about forfeiting said payments, but that they were considered as payments on the purchase money. That nearly a week subsequently to April 19th, plaintiff, at the request of Mr. Humphrey, the secretary of the company, wrote and signed the following paper:

"Delta, Pa., April 19, 1890.

"To Whom it may Concern: I do hereby declare and affirm that in the matter of a certain agreement this day concluded between the Peach Bottom Slate Company, of Harford county, as party of the first, and myself as party of the second, part, it is fully understood, and I hereby consent, that in the event of

the failure to avail myself of the option to purchase the property on the 7th day of October, 1890, as therein agreed, all payments made prior to said 7th day of October, 1890, shall be forfeited to the said Peach Bottom Slate Company, of Harford county, Maryland. Chas. R. McConkey."

—That the $5,000 payment was made May 7, 1890, as appears by the following receipt, the draft mentioned therein being paid in due course:

"Received, Delta, Pa., May 7th, 1890, from Chas. R. McConkey, a draft on W. F. Walworth, of Cleveland, Ohio, for five thousand dollars, which, when paid, will be in full for payment of this date as per agreement of April 19th ult.
"$5,000. John Humphrey, Treas. Peach Bottom S. Co. of H. Co."

—That under the agreement of April 19, 1890, plaintiff continued his efforts to obtain the balance of the purchase money, and some time in June or July, 1890, he notified Mr. Rees, the defendant's president, and Mr. Humphrey, its secretary, that he had succeeded in getting people to subscribe the necessary money to the stock of a corporation which was to be formed and organized for the purpose of buying and operating the defendant's property and the Coleman tract, and that he would be ready to take the property. That he then employed an attorney to examine the title to the property, and that subsequently the defendant and its stockholders executed a deed for its property, mentioned in the option, conveying the same to the plaintiff on the terms therein stated, but that such deed was never delivered. That about the time such deed was ready, plaintiff told defendant's president that some of the parties who were to have joined him in the purchase had dropped out, and the matter would be delayed somewhat, but that he would go to work and get others, to which said president replied: "Go to work and get others." That plaintiff endeavored to get others to take the place of the parties who had dropped out, and continued so to do to the knowledge of defendant's officers until July, 1892. That in the spring of 1891 plaintiff prepared a prospectus, of which there were several copies, one of which he showed to defendant's president, and that it read as follows:

"The Old Peach Bottom Slate Company, of Harford county, a corporation, chartered in Maryland, with an authorized capital of $150,000, has secured 77 acres of valuable slate lands in Harford county, Maryland, containing very extensive deposits of slate, from which are made the celebrated 'Peach Bottom Roofing Slates,' in quality unexcelled by any in the world. The lands are located on the line of the Baltimore & Lehigh Railroad, near the borough of Delta, Pa., about half way between the cities of Baltimore and York. There is a quarry in successful operation, with a good equipment of machinery, producing five thousand squares of roofing slate annually, which can be increased to from thirty to fifty thousand squares, if desired, and operated for many years without exhausting the supply. An increase of the product to only three times its present proportions will enable the company to pay large dividends on its capital stock, from the profit in the manufacture. The properties cost $77,000, of which there may remain for five years at five per cent. interest $30,000; requiring to pay for lands $47,000. It is proposed to secure a full paid capital, $75,000, of which, after payment of lands, $47,000, there will remain $28,000, for additional machinery and working capital for an enlarged operation. About two-thirds of the capital stock has been subscribed by parties in the neighborhood in blocks of from one to ten thousand dollars

each. The subscribers to the stock have the greatest confidence in the success of the company, and cheerfully recommend it to the consideration of those desiring a profitable investment, believing that an examination of the properties will more than confirm any statement made concerning it."

—That the Old Peach Bottom Slate Company, of Harford county, referred to in the prospectus, was a corporation formed practically by plaintiff some time in 1890 to take this property of the defendant and the Coleman tract and operate the two properties. That the $77,000 mentioned as the cost of the two properties in the prospectus, was made up of $65,000 to be paid for defendant's property and $11,700 to be paid for the Coleman tract. That the reason why plaintiff made the cost of the Coleman property $12,000 was that "when I first presented the matter and told them the cost of the Coleman tract was $11,700, every one said, "we will call it $12,000 in round numbers," so plaintiff put it at $12,000 in the prospectus to make it an even sum, but explained to nearly every one that the property cost "nearly $77,000." That this prospectus was shown to the president of the defendant some months after the deed had been prepared, and that said president knew what properties were included in the $77,000. That plaintiff, in the spring of 1891, and later, had negotiations known to the officers of the defendant with various parties looking to getting money to complete the purchase and payment of the balance of the money. That he kept the president and secretary of defendant advised as to whom he had interested in the matter, and took, at various times, parties of gentlemen to the quarries. That the president of defendant always went around and showed these gentlemen the properties, and explained what the resources of them were. That Mr. Hill, of Baltimore, came up in February, 1891, and the president of the defendant met him and showed him through the quarries and over the Coleman tract. That in April or May, 1891, several parties came up with the same object with Thomas A. Hays. That shortly after May, 1891, the railroad facilities were poor, and plaintiff said to the president of defendant that he thought "we had better defer further efforts until the railroad company got into better shape; for the reason that if any parties were brought there the first question would be, 'What are the facilities for transportation?'" That the defendant's president agreed with plaintiff that it would be better to suspend operations for the present. That this condition of things continued until winter came on. That winter is a very unfavorable time to show anyone the slate property, and no further effort was made until the spring of 1892. Then plaintiff resumed efforts. That the president of the defendant knew that plaintiff was working to get any one interested that he could. That in the fall of 1891 plaintiff received letters from Mr. D. P. Jones in regard to furnishing money to make up the balance of the $77,000 mentioned in the prospectus above set forth, to be paid for defendant's property and the Coleman tract, and that plaintiff showed the letters to the president of the defendant. That in the spring of 1892 plaintiff negotiated with Senator Baker, and with a party in Philadelphia. That the president of the defendant knew of these negotiations. That in addition

to the negotiations spoken of, which were known to the officers of the defendant, plaintiff saw Governor Jackson, of Maryland, in February, 1891. That about that time he had an interview with Mr. Rose, of Harrisburg. That he met a number of gentlemen in Philadelphia and New York. That he went to Newport and Providence, R. I. That he made several trips to Pittsburg, several to Philadelphia, several to New York, and a number to Baltimore. That, in fact, during what might be considered the proper season to work, after October 7, 1890, to July 15, 1892, there was not an interval of two weeks that he was not away seeing somebody in reference to these negotiations. That plaintiff spent his time and about $800 by way of expenses in conducting the said negotiations. That these efforts of the plaintiff to secure the balance of the purchase money were practically continuous down to July 15, 1892, when they were successful. That about June 20, 1892, plaintiff received a letter from Mr. Coleman in which Mr. Coleman said that he had a cash offer for the Coleman tract, and, unless plaintiff could dispose of it very soon, he would have to withdraw his option. Plaintiff showed this letter to the president of defendant and said: "If this Coleman property passes out of my control, it will be impossible for me to get the people to take your property, because the Coleman property is a very important feature of the transaction." And plaintiff further said to the president of the defendant that he had his party, he thought, ready to take defendant's property, but that it would require a few days, and plaintiff asked the president of the defendant that defendant should take the Coleman property, and hold it until plaintiff was ready to take the whole thing off its hands, and plaintiff would then take the Coleman tract off defendant's hands, together with the defendant's property. That this proposition seemed to strike the president of the defendant favorably. That the same proposition was communicated to the secretary of the defendant, and seemed to strike him favorably. That the same proposition was submitted to Col. Webster and Mr. Harlan, two directors of the defendant, Col. Webster being also a large stockholder, and Mr. Harlan being its counsel, and was finally accepted by defendant. And that the purchase of the Coleman tract was soon after made by defendant, at plaintiff's request, to enable plaintiff to get the balance of the purchase money for defendant's land, and then take the Coleman tract, together with the defendant's property, off defendant's hands. That the option under which the Coleman tract was finally purchased is the option above mentioned, continued sometimes in writing and sometimes verbally, and that plaintiff never paid Mr. Coleman anything for it. That a few days after the purchase of the Coleman property by the defendant, plaintiff met secretary of the defendant, who showed him a letter from Col. Webster asking him to come to Bel Air to see him. That plaintiff asked, "Were you down?" That the secretary of the defendant answered, "Yes." That plaintiff said, "What did you do?" That the secretary of the defendant replied: "Well, we want you to have the property, but we have an offer from another party, and we don't want to lose the sale of it. We want you to hurry up." That plaintiff therefore renewed his efforts, and

saw Mr. Smith of Wilkesbarre, who agreed to take the property, with others, on July 15th. That on the 4th of July, plaintiff had an interview with Mr. Harlan, counsel for defendant, Mr. Rees, its president, and Mr. Humphrey, its secretary, and talked over the matter of the property. The plaintiff then, in response to the following questions, gave the following answers:

"Q. State what occurred. A. They came in there from a meeting which they had at Mr. Rees' house. Q. Came in where? A. Came to the bank. Q. At Delta? A. Yes, sir. Q. Where you were? A. Where I was at their invitation. I received word Mr. Harlan was coming up and desired to meet me on the 4th of July, and they came in there and talked this matter over. Q. What matter? A. The matter of the property,—paying the balance of the purchase money. I told them that I thought I could get the money by the 15th of July, and they gave me to the 15th of July to consummate it. Q. Was anything else said? A. Mr. Harlan remarked, 'You are to get a commission of $5,000;' I said, 'Yes, a commission of $5,000 and the $7,000 which I have already paid you.' He said, 'Oh, that $7,000 was put in by speculators and lost.' I said, 'Why, you knock the wind out of me.' I just felt as if the wind was knocked out of me, because it was the first intimation I ever had there was to be any forfeiture. It had never been intimated in the slightest degree. Mr. Harlan reared himself up and said, 'Why, I am appalled to think you claim that $7,000.' The matter dropped then. We went away, and Mr. Harlan says, 'Well, we will pay you the $5,000 commission, but the $7,000 is a matter for further consideration.' With that they went out. That was the first intimation I had that they had any notion of asking the forfeiture of that money. Q. That was all that was said? A. That was all that was vital to the matter. Q. You say they gave you to the 15th to complete the contract and pay the balance of the purchase money? A. Yes, sir. Q. What happened, then, on the 15th? A. I wrote a letter accepting the properties, and had it served on Mr. Rees. Q. In the interview of July 4th, when you say you talked about the property, what property was it? A. It was the property of the Peach Bottom Slate Company, of Harford county, together with the Coleman property, which I expected to take off their hands at the price they had paid. Q. At your request? A. Yes, sir."

And on cross-examination, in answer to the following questions, plaintiff gave the following answers:

"Q. Now, Mr. McConkey, on the 4th of July, yesterday, you will remember, you said that in the bank Mr. Harlan and Mr. Rees and Mr. Humphrey verbally extended your right, under the option of April 19th, from the 4th of July to the 15th of July; that is correct, isn't it? A. Yes, sir. Q. That is the option of the original Peach Bottom property? A. My understanding was this: that they extended the time for me to raise this money until the 15th of July; in other words, they gave me until that time to get it."

—That the letter served on the president of defendant by the plaintiff was as follows:

"July 15th, 1892.

"Mr. Richard Rees, President of the Peach Bottom Slate Company, of Harford County—Dear Sir: I hereby give you notice of my readiness to complete the purchase of the 'Slate Properties' and to enter into a mutually satisfactory arrangement as to the terms of payment of the balance of the purchase money, and the taking possession of the properties, to wit, the lands of the York & Peach Bottom Slate Co., of Harford Co., $65,000; the lands known as the "Coleman Tract," $11,700; subject to the following credits, to wit: Seven thousand ($7,000) dollars paid your company on account of the purchase money, and five thousand ($5,000) dollars to be paid me by your company as a commission for effecting the sale of the first-mentioned lands, leaving a balance of sixty-four thousand seven hundred ($64,700) dollars, thirty thousand ($30,000) dollars of which will be secured by mortgage on the first-mentioned

lands, payable in five years, with interest at the rate of five per cent. per annum, and the remainder, to wit, thirty-four thousand seven hundred ($34,700) dollars, to be paid in cash as aforesaid.

"Very respectfully, Chas. R. McConkey."

—That to that letter the following answer was received:

"Bel Air, Md., July 16, 1892.

"Charles R. McConkey, Esq., Delta, Pa.—Dear Sir: Your letter of yesterday to Mr. Rees, in reference to purchase of quarry property of the Peach Bottom Slate Co. has been handed to us. The company has no knowledge of any arrangement for the sale of the property upon the terms stated in your letter, and desires to negative most strongly the intimation of the existence of any such arrangement. If your letter is intended as a proposition for the purchase of the company's property, it cannot be entertained on account of the inadequacy of the price offered.

"Yours, very truly, Harlan & Webster,

"Att'ys for the Peach Bottom Slate Co."

—That this answer was received by plaintiff about July 16th. That about the 20th of July plaintiff's horse ran away with him, and he met with a very severe accident. That soon after his recovery from this accident plaintiff went to Mr. Stewart, his lawyer, in York, Pa., who prepared another letter, which plaintiff copied and sent, as follows:

"Delta, Pa., Sept. 13th, 1892.

"Mr. Richard Rees, Pres. the Peach Bottom Slate Co., of Harford Co., Md.—Dear Sir: Referring to my agreement, dated the 19th day of April, 1890, with your company to purchase all the real estate then held by your company in Harford Co., Md., and which has been kept up until the present time, I beg to say I am now prepared to take and accept the land and property therein mentioned in accordance with the terms of said agreement. You will please furnish me with the deeds and other papers necessary for an examination of the title and the preparation of the deed, and you will also have the property freed from all incumbrance, so that I may be able to obtain a title in accordance with the terms of said agreement. Your immediate reply and compliance will very much oblige me, as I desire to consummate the matter at once.

"Yours, truly, Chas. R. McConkey."

To that plaintiff received answer as follows:

"Bel Air, Md., Sept. 15, 1892.

"Charles R. McConkey, Esq., Delta, Pa.—Dear Sir: Your letter of 13th inst. to Mr. Rees, president of the Peach Bottom Slate Co., has been handed to us to answer. The company denies that your option of April, 1890, has been kept up, and further denies that any agreement is in force under which you have the right to purchase all or any part of its land.

"Yours, very truly, Harlan & Webster, Att'ys."

After that, plaintiff demanded the return of the money paid, by letter, as follows:

"Delta, Pa., September 24th, 1892.

"Richard Rees, Esq., President the Peach Bottom Slate Co., of Harford Co., Md.—Dear Sir: In view of the refusal of your company to perform its contract with me, as demanded in my letter of the 13th inst. to you, and refused by letter of Harlan & Webster, your counsel, in their letter of the 15th inst., I now demand the return of the amount of seven thousand ($7,000) dollars paid on account of said contract and the interest thereon from each of said payments, and also the remainder of five thousand ($5,000) dollars commission agreed to be paid me in said transaction, and on account of which I have received two payments aggregating five hundred and thirty-eight 47-100 ($538.47) dollars. Your prompt compliance will oblige,

"Very respectfully, Chas. R. McConkey."

To this plaintiff received answer as follows:

"Bel Air, Md., Sept. 27, 1892.

"Charles R. McConkey, Esq., Delta—Dear Sir: Your letter of 24th inst. to Richard Rees, Esq., president of the Peach Bottom Slate Co., of Harford Co., has been forwarded to us. The company still insists that it has no subsisting agreement of any kind with you and respectfully declines to comply with the demand made in your letter.

"Yours, truly, Harlan & Webster, Att'ys for Company."

—That then plaintiff referred the matters to his attorneys, who brought suit that fall; but the case failed by reason of lack of jurisdiction in the Pennsylvania courts, and a short time afterwards this suit was brought in Maryland.

Plaintiff further testified that the president of the defendant, in the spring of 1891, agreed to take $3,000 of the stock of the new company formed by plaintiff in order to help plaintiff raise balance of purchase money; that from February, 1889, to July, 1892, the quarries of the defendant were worked in about the same way they had been worked for years, as far as plaintiff could judge; that from October 7, 1890, to July 4, 1892, no one ever said anything to plaintiff about the forfeiture of the $7,000 paid.

"Q. Did ever anybody connected with the company ask you to hurry to get ready to complete your purchase? A. No, sir. Mr. Humphrey, secretary of defendant, either sent me or handed me in an envelope, a copy of a letter that he had received from Col. Webster, as follows:

"'Bel Air, Md., Oct. 11, 1890.

"'John Humphrey, Treas.—My Dear Sir: Mr. Walworth's letter to Mr. McConkey of 6th inst., a copy of which you kindly inclosed on 10th inst. in reference to contract for buying the quarry, is rather an unusual business communication. Of course we highly appreciate Mr. Walworth's good opinion that we are "fair-minded men," and "will accept the situation gracefully and gentlemanly," but we certainly would like to be informed what the situation is that we are expected to accept. We have made a contract to sell a certain valuable property upon terms clearly stated. Does Mr. Walworth propose to fulfill his contract, make his cash payment, now overdue, and take his deeds, and if so, when are we to expect the cash payments? I prefer that Mr. Walworth shall take the property, but must insist that he must be either "off or on" without further delay. I trust you will make no other agreement for delay, without my consent, as you are aware the delays in payment heretofore granted have been against my judgment of what were sound business transactions. You are at liberty to show this letter to Mr. McConkey.

"'Yours, very truly, Edwin H. Webster.'

"My recollection is that Mr. Humphrey handed me the envelope containing the letter, and said, 'Here is a copy of a letter which I received from Col. Webster.' He said nothing more. He made no comments on it. I never heard it alluded to since. This was about two months before the deed was prepared by defendant. I saw Mr. Webster several times after that, possibly twice. I saw him in the latter part of February, 1891. He was returning from Baltimore. He had been down, he told me, to see Mr. Hill, a gentleman, of Baltimore, that I had had up there to look at the property some days previous. Mr. Webster told me he had missed seeing Mr. Hill. I told him I thought Mr. Hill was interested in the slate business, but he wished to satisfy himself about the profits of the business for the preceding five years, and that he had seen Mr. Humphrey, and the information he got from Mr. Humphrey was not satisfactory. The colonel said he thought he could make it clear to Mr. Hill that the company had made money, and that he would try to see him afterwards and have an interview with nim on the subject. Q. Did he say anything about hurry then on your part? A. No, sir; not a word. Q. He knew Mr. Hill had gone up with you to look at the property with a view to going

in? A. Yes, sir; I told him that, and he knew it before. Q. And he never said anything to you then about hurry now or at any time after that? A. No, sir. Q. Was that the only intimation that they wanted you to hurry up, down to the 4th of July? A. That was the only intimation up to the time that I saw Mr. Humphrey, about June 29th."

Plaintiff further testified that he had a conversation with Mr. Rees in his office, in which Mr. Rees said that, so far as he was concerned, he was perfectly willing that plaintiff should have the property, but that he was overruled by others, mentioning "parties in Bel Air" and Mr. Benjamin Williams. That the secretary of the company told plaintiff that he was perfectly willing plaintiff should have the property, and that when plaintiff met Mr. Williams plaintiff said, "Ben, Mr. Rees tells me that you objected to my having that property," and Mr. Williams replied, "Why, I never made any objection." Plaintiff further proved by Mr. William T. Smith, a competent witness, that he is and was, in 1892, a resident of Wilkesbarre, Pa. That he agreed with Mr. McConkey to furnish all the money necessary to complete the payment of the money due defendant on account of plaintiff's purchase of its property, and that on July 15, 1892, he had the money ready in bank. That he would have furnished all the money necessary to pay for both defendant's tract and the Coleman tract, or if the plaintiff could not get the Coleman tract he had the money ready which was necessary to pay the balance on the defendant's tract, and would have furnished it for that purpose. That he understood that plaintiff was to have an interest in the company to be formed to work the quarry, and that some parties who lived near the plaintiff were to have an interest. He had also mentioned the matter to some friends of his own in Wilkesbarre who might also have taken an interest, but that he stood ready to take the balance of the stock, whatever it might be, and pay the balance of the price. Plaintiff further proved by Thomas Hill that he went up to defendant's quarry in January or February, 1891, at the instance of the plaintiff, to look at the land of the defendant and the tract of land adjoining, called the "Coleman Tract," with a view of furnishing a part of the money necessary to pay for the two tracts and operate the quarries; that he was met by the president of defendant and by Mr. Humphrey; that the president of defendant walked around with him, showed how the slate was gotten out, and the extent of the property, etc.; that later he called on Col. Webster to get further information, but failed to see him then; that in response to that call Col. Webster called upon him in the city, but did not find him in; that subsequently, however, he either saw Col. Webster or heard from him in regard to the profits of the concern. Plaintiff further proved by Thomas A. Hays, a competent witness, that at plaintiff's request he endeavored to interest parties to go in with plaintiff, with a view to building up a stock company to take and operate the quarries on defendant's land together with the Coleman tract; that on May 13, 1891, witness went to the quarries with Messrs. D. H. Rice, Alex. M. Fulford, and Alex. Bell; that on May 26, 1891, witness went with Messrs. John S. Hays and L. Z. Doll and Alex. M. Fulford;

that on June 22, 1891, witness went with Messrs. J. F. Griffith and Wm. J. T. Riley; that the president of the defendant met witness and his party on each trip and showed them through the whole manufacture of slate from beginning to end; that he knew why the parties had come up, and showed them around as if he were interested. Plaintiff further proved by Robert L. Jones, a competent witness, that he went with plaintiff in February, 1891, to see Governor Jackson to get him to take stock in the new company plaintiff was trying to organize; that after that witness spoke to the president of the defendant about the matter, and the president of the defendant said that he would take a certain number of shares, probably $3,000, and that Mr. Williams would take some; that the tracts which plaintiff proposed to operate with this new company were the tract owned by defendant and also the Coleman tract; that witness had a conversation with the president of defendant at defendant's quarry, and he thinks in the fall of 1891, after the president of defendant had signified his intention to take stock in the new company, and in that conversation the president of the defendant said, upon witness pointing out to him a good showing of slate, that he, defendant's president, was saving that for the new company, that in July, 1892, witness among others had agreed with plaintiff to furnish the balance of the purchase money and to take this property. Plaintiff was among the stockholders. Mr. Smith, of Wilkesbarre, was to furnish most of the money. That witness talked very often with the president of the defendant, but never heard of the negotiations between plaintiff and defendant being broken off, and never heard of plaintiff's money being forfeited, or any claim made by defendant's president that it was forfeited. Plaintiff further proved by Watson A. McLaughlin, a competent witness, that in the fall of 1891, Humphrey D. Humphrey, the manager at the quarry of defendant and one of its stockholders, told him that the defendant had sold the quarry and had received $7,000 on it in part payment from the plaintiff, and that they expected the new company might take it every day. Plaintiff also proved by the same witness that he had offered plaintiff $1,000 for his option on the Coleman tract, but that plaintiff had refused the offer. Plaintiff further proved by Stevenson A. Williams, a competent witness, that he is an attorney at law at Bel Air, Md.; that some time in the summer of 1890 he was employed to examine the title to defendant's property, and that he some months afterwards drew the deed before mentioned to plaintiff; that about the time of the execution of the deed witness examined the minutes of the defendant and found some fault with them, and Mr. Harlan then had them corrected; that witness never notified any one connected with the defendant that plaintiff had abandoned the tract and it was "off"; that plaintiff never said anything to him to that effect; that some time after the deed was executed, probably six months afterwards, witness remembered seeing Col. Webster and asking him what had become of the McConkey matter, and Webster had replied that "McConkey was still working at it, and he hoped he would get through,

that the company felt safe because they had $7,000 in hand, and they could forfeit that whenever they wanted to; that he did not give witness to understand at all that it had been forfeited. On the contrary, witness understood that he was anxious for Mr. McConkey to succeed with it; quite anxious that he should succeed in organizing a company that could pay up the balance of the money. Plaintiff then offered the minute book of the defendant and read therefrom the following minutes:

"Harford County, June 3rd, 1890.

"The board of directors met. Present: Richard Rees, president; John Humphrey, secretary; Benjamin Williams; and Edwin H. Webster. The president and secretary reported that they had, on April 19th, 1890, closed an option with Charles R. McConkey, of York county, for the sale of the whole slate quarry, fixtures, and machinery at and for the sum of $65,000.00,—for a consideration of $2,000.00 theretofore paid in cash, $5,000.00 to be paid within 30 days from April 7th, 1890; the option to stand for six months from said 7th April, 1890, within which time $28,000.00 additional is to be paid in cash, and upon a satisfactory deed being furnished by the company a mortgage for $30,000.00 is to be given for the balance of the purchase money to run 5 years, interest at 5 per cent., payable semiannually, with right to said McConkey or his assigns to anticipate the payment of any part thereof, and if said option is not availed of all payments made to be forfeited to the company. And that the said McConkey has since paid the said sum of $5,000.00. Upon motion of Edwin H. Webster the action of the president and secretary was ratified, and the president was directed to report the facts to the stockholders' meeting. The directors' meeting then adjourned. Richard Rees, Prest.

"John Humphrey, Secretary."

Extract from minute book:

"Harford County, June 3rd, 1890.

"The adjourned annual meeting of the stockholders of the Peach Bottom Slate Company, of Harford county, was held this day at the company's office at the quarries. Benjamin Williams in the chair, and John Humphrey, secretary. The secretary and treasurer submitted the annual statement of the affairs of the company, which was directed to be recorded. The president reported that an option had been closed with Charles R. McConkey for the sale of the whole quarry, machinery, and tools, at $65,000.00 (all other assets of the company were reserved), said option to stand for six months from April 7, 1890, and that $7,000.00 had been paid on account, all payments to be forfeited if the option is not availed of as set out in the agreement which was read to the meeting. Upon motion of Edwin H. Webster the action of the directors was ratified. Upon motion, the stockholders' meeting was adjourned.

"Benjamin Williams, Chairman.

"John Humphrey, Secretary."

Extract from minute book:

"Harford County, December 2nd, 1890.

"General stockholders' meeting of the Peach Bottom Slate Co., of Harford county, was held this day. Mr. Webster then offered the following resolution, which was unanimously adopted: Resolved, that the sale of our slate quarry, its real estate and machinery thereon, as heretofore made by the board of directors to Charles R. McConkey, and according to the terms heretofore reported, be approved and ratified, and that the board of directors are hereby instructed to make a proper deed to said McConkey, upon his payment of the balance of the cash payment now due and the execution of a mortgage for the balance of the purchase money. Upon motion of Edwin H. Webster, the stockholders' meeting adjourned until Tuesday, December 23rd, 1890.

"John Humphrey, Secretary."

Plaintiff further proved that these were the only minutes in which the name of Mr. McConkey or the matter of any business transaction

in which he was interested were found. The defendant then offered evidence to support the issues on its part joined. Both plaintiff and defendant asked the court for certain instructions to the jury, which are set forth in the record, but which, in the view that we take of this case, it will not be necessary for us to consider.

Did the court below err in directing the jury to return a verdict for the defendant? We think that the contract of April 19, 1890, was an option for the sale of defendant's property, which gave the plaintiff six months from April 7, 1890, in which to complete the purchase on the terms therein set forth. All the agreements and the extensions thereof made prior to said contract by the parties thereto relative to the property mentioned therein were then null and void, and the new agreement of that date was entered into. By it the plaintiff was to pay $65,000 for the property, as follows: $2,000 in hand, $5,000 within one month from April 7, 1890, $28,000 upon the execution and delivery of the deed, and $30,000 to remain as a first mortgage on the property, but with the understanding that the $2,000, which had been paid under former contracts, and the $5,000 then provided for, were to be considered as payments for the privilege of the option, that were to be forfeited to the defendant in case the plaintiff failed to avail himself of the option to purchase by the time mentioned in said agreement. That this was the understanding between the parties to the contract is clearly shown by the papers signed by the plaintiff of the same date as the option, but shown by the testimony to have been executed a few days later. It was under this contract the money was paid by plaintiff, and for the violation of which by defendant he claims the right to recover in this action. The plaintiff, before October, 1890, did verbally notify the defendant that he would be ready to take the property, but he took no step that would bind him to do so, and the matter still remained optional with him. He had the title examined and the deed prepared, which was duly executed by defendant and ready for delivery in December, 1890. The defendant's stockholders duly ratified the contract of sale and directed the deed to be delivered upon the payment of the balance of the cash payment and the execution of a mortgage for the balance of the purchase money. But the plaintiff at this time was unable to comply with the terms of his contract for the reason that "some of the parties who were to go in * * * had dropped out." Certainly the defendant to that time had done everything that it was required by the agreement to do, and it was then ready to deliver the deed, and would have done so but for the plaintiff's failure to pay the purchase money then due. It is insisted that the defendant extended the time in which the plaintiff could purchase the property. How was such extension made? Certainly not by written agreement nor by any verbal arrangement that was to remain in force for any definite time. The plaintiff claims that when he notified the defendant that he would be ready to take the property the effect was to create a contract of sale, which was recognized by defendant and admitted by its stockholders in general meeting, as shown by the minutes thereof, which, it is said, also satisfy the requirements of the statute

of frauds. We do not find that the facts justify such a conclusion. The plaintiff at no time contracted to take the property. He did not agree to avail himself of the option by the notification he made, unless the parties with whom he was negotiating provided the money. If they dropped out he was to go with them. The fact that the defendant, acting by its officers, did encourage the plaintiff in his efforts to induce others to take the place of those who had withdrawn their subscriptions, and did assist him in his endeavors to consummate his scheme of purchase, while going to show defendant's willingness to sell and convey the property, after the expiration of the time limit fixed in the option, must not be construed as binding it in such a manner as to prevent it from withdrawing its indulgence at any time it saw proper, and treating the option as inoperative because of the plaintiff's failure to comply with it. By the plaintiff's own evidence it is shown that he was notified by defendant, considerably over one year after the deed had been executed, that the matter relating to the option and purchase must be closed, at which time he suggested the 15th day of July, 1892, as the day he would be ready, to which the defendant assented. It is plain that plaintiff did not tender himself ready on that day to take the property mentioned in the agreement of April 19, 1890, and it is equally clear that when he did (on the 13th day of September, 1892) tender himself ready to take it the defendant was under no obligation to convey the property to him. On this point the court below, in charging the jury, used the following language, which we quote approvingly as applicable to this case:

"The defendant replied that there was not any agreement then in force. It may be admitted that in an ordinary contract of purchase and sale, in which seven thousand dollars had been paid on account of a purchase amounting to sixty-five thousand dollars, that under these circumstances, which the plaintiff's evidence tends to prove, the money paid on account of such a contract could be recovered back. But this is not an ordinary contract, for by its express terms the seven thousand dollars was forfeited when the plaintiff failed to complete his purchase in December, 1890. The only meaning of the words 'to avail himself of his option to purchase the property,' must be to pay for it according to the stipulation as to the terms of payment reasonably construed. The reasonable time for payment expired when the deed was ready in December, 1890, and after that he was entitled to further time only by the indulgence of the defendant, an indulgence which could be withdrawn, and which I think must be held to have been withdrawn by the notice that the transaction must be closed by July 15th."

We conclude that, on the facts in evidence and the law applicable to them, it was proper for the court to direct the jury to return the verdict it did. It is not necessary that we consider the instructions tendered and refused other than as they have been disposed of by the conclusion just announced. The judgment of the court below is affirmed.

POLK COUNTY NAT. BANK v. FOOTE COMMERCIAL PHOSPHATE CO.

(Circuit Court of Appeals, Fifth Circuit. June 4, 1894.)

No. 366.

LEASE—CONDITIONS.

One T. leased certain lands to F. for 20 years by an instrument which provided that the lessee should construct on the premises a phosphate-mining plant with a daily capacity of not less than 100 tons, within five months from the execution of the lease, with the right, under certain circumstances, to extend this time to eight months. It was also provided that the lessee should pay the lessor a royalty of 50 cents per ton on phosphate mined, and that, immediately on completion of the plant, a monthly payment of $125 should begin, which should be made to protect the lessor from stoppages for certain causes, and should be credited on royalty account. F. assigned the lease immediately, and the assignee took possession and erected a phosphate-mining plant, but of less than 100 tons daily capacity, though how much less did not appear. *Held*, that the provision in the lease as to erection of the plant was not a forfeiture bearing condition, such as to authorize the grantees of the lessor to oust the tenant as one holding after the expiration of his right. Per McCormick, Circuit Judge, and Bruce, District Judge. Pardee, Circuit Judge, dissenting.

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

This was a proceeding under Rev. St. Fla. § 1690, by the Polk County National Bank against the Foote Commercial Phosphate Company to eject the defendant from certain lands. Judgment was rendered in the circuit court for the defendant. Plaintiff brings error. Affirmed.

H. Bisbee and C. D. Rinehart, for plaintiff in error.

Frank Clark, for defendant in error.

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

McCORMICK, Circuit Judge. This proceeding was begun May 5, 1894, under section 1690 of the Revised Statutes of Florida, which provides that if any person shall enter or shall have entered in a peaceable manner into any lands or tenements, in case such entry is lawful, and after the expiration of his right shall continue to hold the same against the right of the party entitled to the possession, the party so entitled, whether as tenant of the freehold, tenant for years, or otherwise, shall be entitled to the like summary remedy at any time within three years after the possession shall so have been withheld from him against his consent. The declaration follows the statutory form. The answer is: First, that the said plaintiff is not entitled to the possession of the real estate described in said complaint; second, that this defendant holds possession of said property under a valid lease for a term of years, which said lease was at the time of the filing of said complaint, and still is, in force and effect; third, that the holding of possession of said property by the defendant is legal, and under claim of legal right. The lease relied on in the foregoing answer is as follows: "This indenture, made and entered into on this the 26th day of November, A. D.

1892, by and between Judson H. Tatum, a bachelor, of the county of Polk and state of Florida, party of the first part, and hereinafter called the lessor, which expression shall include his heirs and assigns where the context so requires or admits, and Richard R. Foote, also of said county and state, party of the second part, hereinafter called the lessee, which expression shall include his executors, administrators and assigns, where the context so requires or admits, witnesseth: Whereas the said lessor is the owner in fee simple of certain phosphate lands situate, lying, and being in the county of Polk and state of Florida, and more particularly described as follows, to-wit: The southeast quarter of the northwest quarter; the east half of the southwest quarter; the northeast quarter of the northwest quarter; the west half of the southeast quarter, less ten (10) acres in the southeast corner of the southwest quarter of the southeast quarter, and beginning at the southeast corner of the southeast quarter of the northwest quarter, and running thence east four and ninety-hundredths ($4^{90}/_{100}$) chains, thence north twenty (20) chains, thence west four and ninety-hundredths ($4^{90}/_{100}$) chains, and thence south twenty (20) chains to the place of beginning,—all of said described land being in section twenty-two (22), and township thirty (30), south of range twenty-five (25) east, and containing in the aggregate two hundred and forty (240) acres, more or less. And whereas the said lessor is desirous of leasing said described lands to the said lessee and his assigns for a term of twenty (20) years, for the purpose of mining, preparing for market, and shipping phosphates and other minerals therefrom, on the terms and conditions hereinafter set forth and agreed upon. Now, therefore, in consideration of the sum of one dollar in hand paid to the lessor by the lessee, the receipt of which is hereby acknowledged, and of other valuable considerations hereinafter mentioned to be done and performed, the said lessor doth hereby lease and demise unto the said lessee, his executors, administrators, and assigns, the aforesaid described property for a term of twenty (20) years from the date hereof, on the terms and conditions hereinafter set forth. First. The said lessee or his assigns shall, within five (5) months from the date hereof, have erected and completed on the said described property a modern phosphate mining and drying plant, with a daily capacity of not less than one hundred (100) tons. That on the completion of said plant the said lessee, or his assigns or representatives, shall immediately commence the operation of mining said phosphate, and continue the same so long as the said phosphate can be found on the said property in quantity and quality to suit the market during the term of this lease; and that work shall be commenced on such plant within sixty (60) days from the date of this instrument. Be it understood, however, that if, from providential or other causes not arising from the negligence of the said lessee, such plant shall not be fully completed and in operation within said five months' time from the date hereof, and he or his assigns are in good faith endeavoring to complete the same, then, and in that event, the said lessee and his assigns are to have three (3) months' additional time in which to complete said plant in accord-

ance with the above description of the same. Second. That for each and every long ton of two thousand two hundred and forty (2,240) pounds of phosphate mined, cleaned, dried, and prepared for market from the said property, a royalty of fifty cents per ton shall be allowed and paid to the lessor as owner of said lands, on account of and in compensation of said lease. The said payments to be made every two months, commencing two months after the plant has been put in operation, as aforesaid, and continuing every two months thereafter until the expiration of said lease, or until no more phosphates can be found on said property in paying quantities and qualities to suit the market. Third. For the purpose of facilitating a just and equitable settlement between the parties hereto, the lessee shall always, on request, furnish to the lessor duplicate bills of lading from the railroad company, or from any other mode of transportation, as well as duplicate accounts of sale, showing what phosphate has been mined and shipped from the said property during the two months to be then settled for, which bills of lading and accounts of sales shall be accepted and conclusive as a basis of settlement between the parties hereto. It is, however, understood and agreed that said lessee is to pay, as aforesaid, at the end of each period of two months the sum of fifty cents per ton royalty for each and every ton shipped to market during said period of two months; and for each and every ton mined and housed by said lessee during any two months, and for any reason not marketed during that time, he is to pay to the lessor thereon the sum of twenty-five cents per ton, and shall not be required to pay the remaining twenty-five cents per ton until such time as that said phosphate so mined and stored shall be duly marketed. Fourth. Immediately upon completion of said plant, a monthly payment of one hundred and twenty-five ($125.00) dollars shall be made at the expiration of every month by the lessee to the lessor, and continued during the existence of this lease, and shall be credited on royalty account. It is agreed that this monthly payment shall be made to protect the lessor against stoppage of works, occasioned by a depressed market for phosphates, or breakage of machinery, or any other reasonable cause, and be made as part compensation of said lease, and to be credited on royalty account, as above stated. Fifth. It is hereby agreed that said lessee and his assigns and representatives may at all times during the term of said lease have the sole and exclusive right to mine and develop the phosphates and other minerals on said lands, together with the right of ingress and egress into and over said lands, without any hindrance whatever, with the right to build tram or railways or macadamized or other roads in, upon, and through said lands, and to erect all necessary buildings and machinery for the purpose of mining, preparing, and manufacturing said phosphates or fertilizers, and to do and perform all and singular such other acts and things as may be necessary or useful in properly carrying on and conducting thereon the business of phosphate mining. And it is further understood and agreed that said lessee and his assigns shall have the right to use, free of cost, such timber and wood and other build-

ing materials found on the property as may be required for constructing the plant or any of its works, roadways, bridges, buildings, etc., and to maintain or repair the same, or in building any addition thereto; and shall also have the right, free of cost, as aforesaid, to use such wood and timber for fuel in carrying on the business of mining, cleaning, drying, storing, and shipping said phosphates, and also for building side tracks, switches, tramways, in connection with or for the use of said business, and for any other purpose connected with or for the benefit of said mining operations. Sixth. The machinery, tools, buildings, and appurtenances thereto, shall remain on the said described property until the provisions of this lease are complied with. Seventh. It is also agreed and understood that the lessor hereby binds himself and agrees to sell to the said lessee or his assigns the said described real estate at any time within twenty-three (23) months from the date hereof at the price of two hundred ($200.00) dollars per acre, and to make, execute, and deliver to the said lessee, upon the payment of said sum per acre, a good and sufficient warranty deed of conveyance in and to the said property; and in the event that said lessee or his assigns should desire to purchase the said property with eleven (11) months from the date hereof, at the price named, then the lessor agrees that all sums theretofore paid as royalty shall be considered and credited as a part of the purchase money of said described lands. Eighth. It is mutually understood and agreed that this lease, with all its rights, privileges, and obligations, may be sold, assigned, and transferred to any individual, syndicate, or corporation, for the purpose of carrying into effect the objects herein enumerated." Three days after the making of the above lease it was assigned to the defendant in error. Seven months after granting the lease the lessor sold the 240 acres of land covered by the lease to one Warren Tyler, and conveyed the same to him by deed for a recited consideration of $36,000 cash to him in hand paid. In this deed no express reference is made to the lease in question, but on the same day (June 30, 1893), by a separate instrument attested by different witnesses, the lessor, Tatum, assigned and transferred to Warren Tyler all of Tatum's interest in the lease contract. This transfer recites that five other named parties have specified interests in the lease contract which Tatum does not assign. More than six months after these last-named transfers, on January 15, 1894, Tyler transferred by quitclaim deed all of his interest in the 240 acres to the Polk County National Bank, the plaintiff in error. On the trial, the plaintiff having put in evidence the lease and the conveyances of the land and the written instrument assigning the lessor's interest in the lease contract above referred to, introduced in evidence testimony tending to show that the defendant took possession of the lands and premises described in the first contract mentioned in the said first bill of exceptions (the lease), and tending to establish that it erected a phosphate mining and drying plant on the said property; and the plaintiff also offered in evidence testimony tending to establish that the phosphate mining and drying plant erected on the said land did not have a daily capacity of 100

tons. The trial judge directed a verdict for the defendant. Five errors are assigned, but the counsel for the plaintiff, in the outset of his argument, says that the only point in this case in controversy is the construction of the language of the lease. The contention of the plaintiff is that it is such a conveyance or contract on condition that the failure to fully perform the condition within eight months from the date of the contract, or certainly within a reasonable time from that date, worked a forfeiture of the contract, and the lessor or his assigns can maintain this statutory proceeding against the lessee in possession. It is clear that this contention would carry us beyond the express words of the instrument of lease. This is not a case where there has been no performance or attempt to perform. The record shows that the lessee did enter upon the premises and erect a phosphate mining and drying plant before the institution of these proceedings. It does not show exactly when this plant was erected, but against plaintiff's contention it is fair and safe to assume that this was done within the eight months allowed by the instrument. The proof tended to show that the plant erected did not have "a daily capacity of not less than 100 tons"; but, for all that appears, and for all that plaintiff's contention seems to care, it may have a daily capacity of 99 tons. The lessee was not bound to make a daily output of 100 tons. He was not bound under all conditions to make any daily output, but, for named causes or other good cause, might stop operation altogether, and be liable during such time for $125 a month as advance payment on royalties to begin from the completion of the plant. It is urged in argument that this would never begin if the plant was never completed. The fallacy of this suggestion is manifest. The controversy here is whether the provision is a forfeiture bearing condition or is a covenant, and not whether the lessee was bound at all, but whether he was bound under the penalty the plaintiff seeks to inflict. Even if the construction contended for by the plaintiff was tenable, considering only the terms of the instrument, a court of law would find, in the subsequent dealings of the lessor and of his assigns, sufficient ground to hold that the letter of the bond had been waived. The judgment of the circuit court is affirmed.

PARDEE, Circuit Judge, dissenting.

TOWN OF DARLINGTON v. ATLANTIC TRUST CO.

(Circuit Court of Appeals, Fourth Circuit. May 28, 1895.)

No. 116.

EVIDENCE—MEMORANDUM ON PUBLIC RECORD.

A memorandum, indorsed upon the assessment roll of a municipal corporation, to the effect that the property of a corporation, not included in any constitutional or statutory exemption, is exempt from taxation, is incompetent to prove that it is in fact exempt.

2. SAME—ACCOUNT BOOKS OF MUNICIPAL CORPORATION.

The account books of a municipal corporation are not public records in such a sense as to make their contents evidence, and the keeper of such

books cannot testify to facts appearing from them, without laying the same foundation as in the case of private books, and showing that the entries are of the character that can be given in evidence by the party making them.

3. MUNICIPAL CORPORATIONS—RAILROAD AID BONDS—SOUTH CAROLINA CONSTITUTION.
The legislature of South Carolina has power, under article 9, § 8, of the constitution of the state, providing that it may permit municipal corporations to assess and collect taxes for corporate purposes only, to authorize such corporations to issue bonds to aid in the construction of railroads.

4. SAME—LIMIT OF INDEBTEDNESS.
The charter of a town, permitting it to issue bonds in aid of the construction of railroads to any amount, is not in conflict with article 9, § 17, of the constitution of South Carolina, limiting the indebtedness of municipal corporations to 8 per cent. of their taxable property, since the provision of the charter will be held to operate only within the constitutional limit.

5. TAXATION—REFUND OF TAXES.
A statute providing that a large part of the taxes paid by a certain class of persons shall be refunded to them does not have the effect of exempting the property of such persons from taxation, so as to reduce the amount of taxable property upon which a limit of indebtedness is to be computed.

6. SAME—FAILURE TO MAKE ASSESSMENT IN TIME.
A municipal corporation cannot dispute the validity of an assessment made by its officers, on the ground that it was not completed and filed within the statutory time, so as to invalidate an indebtedness based upon such assessment.

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

This was an action by the Atlantic Trust Company against the town of Darlington, S. C., to recover the amount of certain coupons cut from bonds of the town. The circuit court, upon a trial by the court without a jury (63 Fed. 76), gave judgment for the plaintiff. Defendant brings error. Affirmed.

J. E. Burke (Henry A. M. Smith, on the brief), for plaintiff in error.

Augustine T. Smythe (Sullivan & Cromwell, on the brief), for defendant in error.

Before FULLER, Circuit Justice, GOFF, Circuit Judge, and SEYMOUR, District Judge.

GOFF, Circuit Judge. The town of Darlington, in the state of South Carolina, acting by its mayor and board of aldermen, who had been duly authorized so to do, on the 22d day of April, 1890, made an agreement with the Central Carolina Land & Improvement Company, by which that company bound itself to construct and equip a railroad that should be acceptable to the railroad commissioners of the state of South Carolina, from Sumpter, via Darlington, to Bennettsville; and in consideration thereof the town of Darlington agreed to turn over to the said land and improvement company, upon the completion of the railroad, the bonds of said town (due 30 years after date, bearing 5 per cent. interest per annum) at the rate of $2,000 per mile (not including sidings and side tracks),

and also to convey to that company a certain tract of land located in Darlington, containing 24 acres, for the use of said railroad, and, in addition, to exempt the railroad company from all taxes to be assessed for the period of five years from its completion, and also to pay the one-half of all expenses incurred in obtaining the right of way for said railroad to the town of Bennettsville. On the 23d of April, 1890, an additional agreement between the same parties relative to the same matter was entered into, by which 80 of the bonds described in the first contract, of $1,000 each, with certain other securities amounting to $5,000, were deposited in escrow with the American Loan & Trust Company of New York, which bonds and securities, or so much of the same as should be proper, were tc be delivered to the Central Carolina Land & Improvement Company upon the performance by it of the first-mentioned agreement, which was to be evidenced by the certificate of the railroad commissioners of the state of South Carolina; it also being provided that, should any of said bonds and securities so deposited remain in the hands of such loan and trust company, after the land and improvement company has been paid the full sum due it, such excess should be returned to the town of Darlington. The bonds were duly executed by the town, and deposited with the loan and trust company according to the terms of the agreement referred to; and afterwards, by an agreement between the same parties, dated April 1, 1891, the Atlantic Trust Company was substituted in the place of the American Loan & Trust Company, the bonds and securities being turned over to it.

The charter of the town of Darlington contains the following provisions:

Sec. 17. That the said mayor and aldermen shall annually appoint three citizens of said town to assess the value of real estate for taxation; and said assessors, before entering upon their work, shall take an oath to fairly and impartially assess each parcel of real estate in said town, and a report in writing of the assessment as made by them shall be signed by said assessors, and the same filed in the office of the clerk of said town within a period of ten days next ensuing upon the date of their appointment to assess the real estate of said town.

Sec. 29. That the said mayor and aldermen may, for the purpose of internal improvements, borrow money, issue bonds or scrip therefor, bearing not a greater interest than 7 per cent., payable at such times as they may think advisable, and payable out of the taxes and incomes of said town, provided said principal of bonds and scrip shall at no time exceed $5,000, except for the purpose of aiding in the construction of railroads; and for that purpose the said mayor and aldermen may issue bonds or scrip in any amount; provided, further, that the right to issue said bonds or scrip shall exist only in the majority vote of the town, as hereinafter provided. That no one shall be entitled to vote on said question, unless he or she is the owner of property within the corporate limits of said town, and has returned and paid taxes on $100 worth of property the year immediately previous to said voting, and on each $100 worth of property so returned or paid for, the person or persons shall be entitled to one vote. The manner of holding said election shall be provided for by the town council of said town; it is also further provided that the time, manner and form, of payment of said bonds or scrip, shall be provided for by the town council of said town, and that no bond shall be sold for less than its par value.

The constitution of the state of South Carolina contains the following provision:

Article 9, § 17. No bonded debt hereafter incurred by any county, municipal corporation or political division of this state shall ever exceed eight per centum of the assessed value of all the taxable property therein.

The town council of Darlington, on January 31, 1890, appointed the board of assessors, as authorized by section 17 of the charter. The board so appointed, made the assessment for the year 1890, but made no return and filed no report of assessment within 10 days after its appointment, but did file the same on the 28th of February, 1890. The assessment so made included the property of the Darlington Manufacturing Company, a corporation doing business in said town, and entitled to the benefits of the provisions of section 169, subd. 23, Gen. St. S. C., which reads as follows:

Any person who, since the 1st of January, 1872, has invested, or may invest capital in the manufacture of cotton, woolen or paper fabrics, iron from iron ores, and agricultural implements, within this state, shall, for the period of ten years from the date of his investment, be entitled to receive from the treasury of the state, a sum equal to the aggregate amount of state, and, from the county treasurer, the aggregate amount of county taxes, less the two mills for school purposes; and from the treasurers of all the municipal corporations, a sum equal to the aggregate amount of municipal taxes, which shall be levied and collected upon the property or capital employed or invested directly in such manufactures or enterprises; not including herein the tax levied upon the land upon which the factories may be erected. The sum of money so to be repaid, to be fixed and determined by the comptroller general in accordance with the tax returns, the state tax to be paid by the state treasurer on his warrant, and the county tax by the county treasurer, under the order of the comptroller general.

By virtue of section 18 of the charter of the town of Darlington, the personal property within the same is assessed for taxation by the clerk of the town upon the returns as made by the property owners. The aggregate assessment of the real and personal property located in said town made in February, 1890, was $1,119,685. Included in this aggregate was the property of said manufacturing company, its real estate being valued at $70,000, and its personalty at $125,000, on which it was entitled to receive the refund of taxes provided for in said section 169. Excluding the property of such manufacturing company from the assessment roll, the total of taxable property in the town for the year 1890 was $824,685. In April, 1890, an election was held under said section 29, and the result was in favor of issuing the bonds now in controversy, which were then duly executed and deposited, as before mentioned. Thereafter, upon the certificate of the railroad commissioners of the state of South Carolina that the railroad had been completed as contracted for, bonds to the amount of $73,000 were turned over to the order of the Central Carolina Land & Improvement Company, for which that company delivered to the town of Darlington stock of the Charleston, Sumpter & Northern Railroad Company of the par value of $73,000, as shown by that company's certificate of stock for 730 shares. Said bonds were received by the Atlantic Trust Company, and held by it to secure the payment of a loan to the Central Carolina Land & Improvement Company amounting to $75,000, which

said loan had been used by the last-named company in constructing said railroad. The town authorities afterwards surrendered the certificate for 730 shares of stock, and received in lieu thereof another for 680 shares, and other certificates for the residue, made out in the names of various parties who had subscribed for the same, and who paid the town cash for the same, at the par value of the stock. This suit was brought by the Atlantic Trust Company to recover from the town of Darlington the sum due by it for the overdue and unpaid coupons of the bonds so issued and outstanding. The case was, by agreement of the parties, tried by the court without a jury, and judgment was rendered in favor of the plaintiff below for the sum of $6,873.60 and costs. The defendant below brings the case here on writ of error.

It appears from the bill of exceptions that during the trial the defendant below offered to prove by the official custodian of its records that it was shown by the assessment roll book of the town of Darlington that there was written thereon, below the total aggregate of the property subject to taxation in said town, a statement that the property of the Darlington Manufacturing Company, which was included in such aggregate, was "exempt from taxation," and that the court refused to permit such testimony to be given. The plaintiff in error insists that the court below erred in so doing. It is claimed that it is the duty of a party entering into a contract with a municipal corporation, relative to its bonds, to examine the official records of such municipality, in order to ascertain if the several requirements of the constitution and the laws have been respected. Hence the insistence that, in this case, it was shown by the rolls that the indebtedness to be incurred by the issuing of the bonds in suit would have exceeded 8 per cent. of the property of the town as assessed for taxation,—excluding the property of said manufacturing company,—and that the parties receiving such bonds are presumed to have made such examination, and to have acted on the information so obtained. We will concede that in such cases great caution should be exercised, and that all proper efforts should be resorted to by those dealing with municipal corporations to see that they act within constitutional and statutory limitations. Still, does it follow in this case that the situation claimed by plaintiff in error would have been shown to exist by the testimony so excluded? Will a statement of the character indicated—will an indorsement made by the town clerk on the official assessment rolls to that effect—serve to release the property so referred to from taxation? Can the provision of the constitution of South Carolina, by which only property used for municipal, literary, scientific, or charitable purposes is exempt from taxation, be rendered inoperative by such action on the part of the custodian of the records of the towns in that state? Certainly not, and the mere statement of such a proposition should be its own refutation. It follows that the court below did not err in excluding such testimony.

It further appears that, pending the trial, the defendant below, during the examination of a witness who had testified that he was the custodian and bookkeeper of the town of Darlington, and who

then had its official account books before him, asked said witness to state from such books the amount of the outstanding bonded indebtedness of said town during the month of April, 1890, and that on objection of the plaintiff below the court refused to permit such question to be answered; that defendant below then offered to prove by the same witness that the books before him were the official account books of the town of Darlington, in his custody as the clerk of said town, and that the same were either in his handwriting or in the handwriting of his predecessor in office, and then to show from the same the amount of such indebtedness of said town in January and in April, 1890, which testimony so offered was also refused by the court, and the refusal is now assigned as error. The books so offered were not public records in any such sense as to make their contents evidence. There was no effort made to verify the entries, nor to lay the foundation required to authorize the witness to testify as to the entries not made by him. The party making part of the record was not produced, nor was his absence accounted for. It does not appear what part of the entries in the books were made by the witness, nor when they were made, whether before or after the institution of this suit, nor whether they were made with direct reference to the defense of the same. Again, so far as the record discloses, the entries offered and excluded may have been entirely of the character that cannot be given in evidence by the party in whose behalf they were made. It is well established that a private entry in the books of a municipal corporation will fall within the rule applicable to private books, and cannot be given in evidence by the party by whose direction it was made. Dill. Mun. Corp. (4th Ed.) § 304, note; 15 Am. & Eng. Enc. Law, 1076. It will be observed that the court below did not refuse to hear evidence tending to show what the actual bonded indebtedness of the town of Darlington was at the time mentioned, but declined only to let certain books be used for that purpose. We are of the opinion that the plaintiff in error has not been prejudiced as to the merits of the case by the action of the court now complained of. The circumstances under which the evidence excluded was offered, and the record objected to was made, were, to say the least, unusual. The town was so situated that it was to its interest to show, not that it was free from debt, but that it was largely in debt; and therefore the rule relied on as to admissions against interest, generally applicable, is out of place in this instance. But, independent of this, as we see this case, the bonded indebtedness of Darlington in January and in April, 1890, was immaterial, so far as the issue to be determined by the court was concerned. The bonds were not issued in 1890, and in fact they did not become part of the indebtedness of the town until in August, 1891, when they were delivered, when the debt was in fact incurred, and from which time it bore interest. The constitutional inhibition may have existed in April, 1890, and not have applied in August, 1891. The indebtedness of the town as it existed in August, 1891, might have been important and material, but that could not have been shown by entries made in books relating to its debts existing in January and April, 1890.

It is claimed that the court below erred in holding the act (20 S. C. St. at Large, 203) under which the bonds were issued to be constitutional, and it is insisted that the same is void, for the reason that it authorizes the issue of municipal bonds in aid of the construction of a railroad, when such authority, under the constitution of South Carolina, can only be given for corporate purposes. It is true that such legislation can only be sustained by holding that the construction of a railroad is in aid of the legitimate purposes of a municipal corporation, which, in substance, the court below found, and in which conclusion we concur. The constitution of South Carolina (article 9, § 8) authorizes the legislature to permit municipal corporations to assess and collect taxes for corporate purposes, and none other. This question is no longer a doubtful one, as the uncertainties formerly existing relative thereto have been removed by numerous recent decisions of our courts of final resort. The legislature can enlarge the powers of municipal corporations, as was done in the present case; and it may also determine what the corporate purposes are that it has authorized the municipality to exercise. Such a corporation is part and parcel of the governmental power of the state. We quote approvingly from the opinion of the learned judge who decided this case below, as follows:

"The legislature may declare that corporate purposes may be promoted by affording aid to a railroad. The unchanging course of legislation shows that this is a public purpose as well as a corporate purpose, and without question cities, towns, villages, and counties have again and again been clothed with this power. It is true that in Floyd v. Perrin, 30 S. C. 1, 8 S. E. 14, arguendo, the court says that counties have the right to aid in such construction because they have jurisdiction over highways, and a railroad is a highway. But streets in cities, towns, and villages are also highways. And, although the authority of the county over its highways ends at its boundaries, a county has the right to aid a railroad whose termini are in other counties, perhaps in other states. Floyd v. Perrin, relied on in argument, does not decide that aid to a railroad cannot be a corporate purpose. That case only decides this: Townships in South Carolina being mere territorial subdivisions of land, with no public duty or function whatever, no corporate or public purpose, an act declaring them corporations and permitting them to subscribe to a railroad is not constitutional. Why? Because, having no corporate purpose, the investment in railroad stock could be used for no purpose whatever. Making them corporations, authorizing them to invest in railroad stock, were but steps—incomplete steps—to secure the constitutionality of the action. The legislature should have given them a corporate purpose. This it did not do, and the whole thing was void. But cities, towns, villages, and counties have well-defined corporate purposes which can be promoted by such investments. The existence of these corporate purposes, and their promotion by aiding railroad enterprises, gives them their constitutional character. As a conclusion of law, this act is not in conflict with section 8, art. 9, of the constitution."

The supreme court of South Carolina in State v. Whitesides, 30 S. C. 584, 9 S. E. 661, said:

"Now, railroads have been declared by the courts in most of the states, our own included, and by the supreme court of the United States, as improved highways, and therefore as much entitled to be aided by the taxing power as ordinary highways. 1 Dill. Mun. Corp. (3d Ed.) § 158; Cooley, Const. Lim. (2d Ed.) c. 4. This may have been doubted once, and, if it was an open question, might still be doubted, but the decisions in that direction have been so numerous and so uniform that, to use the language of Judge Dillon, 'if they have not terminated doubt, they have at least ended judicial discussion.' The sub-

ject-matter, then, of this act, was within the range of a public purpose, and so far legitimate; but it may be urged that the purpose here, being confined to mere townships, limited localities, and not extending to the public at large, could not fall within the doctrine above. What is the meaning of the term 'public'? This term is opposed to the term 'private,' and, according to the best lexicographers, means 'pertaining to or belonging to the people; relating to a nation, state, or community.' But to make a matter a public matter it need not pertain to the whole nation or state. It is sufficient if it pertains to any separate or distinct portion thereof, or community."

In the case of State v. Neely, 30 S. C. 604, 9 S. E. 664, the supreme court says:

"The proposition that the construction of a railroad is such a public purpose as to warrant the levy of taxes to aid in building it is too well settled by the very decided weight of authority to admit of further discussion, although, if the question were an open one, its correctness might well be disputed. So, too, it seems to be settled by the weight of authority that the legislature may not only delegate this power of levying taxes to aid in the construction of a railroad to municipal corporations, but may also, by the exercise of its original power of taxation, directly impose such tax upon any territorial division of the state, to aid in the construction of a railroad supposed to be of special advantage to the people residing within such territorial division, provided a majority of those people have signified their assent to the imposition of such a tax."

Chief Justice McIver, in his opinion in the case of Floyd v. Perrin, supra, says:

"So, too, perhaps, the general assembly, but for the fact that the constitution (section 19, art. 4) has clothed the county commissioners with jurisdiction over roads, highways, etc., might have passed an act creating the township of Ninety-Six a corporation, and investing it with the control and management of highways; and, as promotive of that corporate purpose, might have invested it with power to levy taxes to aid in the construction of a railroad, upon the doctrine, which, after much conflict of opinion, seems to be settled, that a railroad is a highway, and therefore a municipal corporation, charged with the supervision and control of highways, may be invested with power to aid in its construction."

We conclude that the bonds were constitutionally issued, for a corporate purpose comprehended by the charter of the town of Darlington, which also contained the power to carry that purpose into effect.

It is also claimed that section 29 of the charter of the town of Darlington is in conflict with section 17, art. 9, of the constitution of the state of South Carolina, for the reason that no limit is fixed in said section as to the amount in the aggregate of aid that can be given by the town towards the construction of railroads. But we think that in construing the statute or charter, the presumption is that the legislature intended that bonds might be issued to the full limit authorized by the constitution,—"in any amount" not prohibited by the organic law. If the said section of the charter and the requirement of the constitution alluded to can be reconciled, it must be done, and, in our judgment, there is no difficulty in doing so.

It is also insisted that the assessment rolls of the real and personal estate within the town of Darlington for the year 1890 included such property owned by the Darlington Manufacturing Company, and the claim is made that the real and personal property

of that company were exempt from taxation, and should have been excluded from the amount on which the tax was levied; thus making the aggregate amount of the bonds issued a sum greater than the 8 per cent. limit mentioned in the constitution. But can the position assumed—that the property of that company was not liable to taxation by the town of Darlington—be maintained? We are unable to find any provision of the constitution under which such exemption can be justified. The said property was not used for either municipal, educational, literary, scientific, religious, or charitable purposes, and hence it was, by the express mandate of the organic law, subject to taxation, for the payment of all debts contracted under authority of law. The town authorities had no power to release it, nor did they attempt to do so. On the contrary, they assessed and taxed it. The statute cited (Gen. St. 1882, § 169, subd. 23) does not authorize the omission of such property from assessment and taxation, but requires it to be duly taxed; and the fact that such enactment permits the subsequent return of the greater part of the taxes so levied and collected is immaterial so far as the point we are now considering is concerned. The assessed value of the property of said company was properly included in the aggregate valuation of the property liable to taxation in the town of Darlington for the year 1890, and the court below did not err in so holding.

The plaintiff in error insists that the assessment made by authority of the provisions of the charter of the town of Darlington, on which the levy of taxes for the year 1890 was based, was unlawful, because not completed and filed within the time allowed by said charter, but we think that, so far as the town itself is concerned, the contention is without merit. Those whose property was so assessed, who were required to pay the taxes, and who were familiar with the mode of making and returning the assessment, made no complaint, while the authorities of the town ratified the assessment, and confirmed the legality of the return by laying and collecting the tax. It would not be proper to now permit those who so made the assessment, and who imposed, collected, and enjoyed the benefits of the tax levied by virtue of the same, to question the validity of their own act. There are many reasons why the town of Darlington should be compelled to respect its obligations in respect to the bonds mentioned and the coupons now in suit, and no good cause has been shown why it should be permitted to falsify its own representations, evade its liabilities, and involve others who have made expenditures and investments on the faith of its repeated promises and presumed honesty.

The further and last objection to the validity of the bonds we now consider, although we have, in effect, disposed of it in connection with other matters. It is insisted that the town of Darlington disposed of the bonds at less than their par value, which it is claimed was prohibited by the statute in such cases made and provided; and also it is contended that such prohibition prevented the issue of the bonds in exchange for the stock of a railroad company. But the facts are, as shown by the evidence, that the proceeds of

the bonds applied to the construction of the road constituted a fund equal in amount to the full par value of the bonds, and also that for the stock sold by the town its treasury received in cash a sum of money equal to the par value of the stock so sold. The statute authorized the town to issue the bonds, and the railroad company expended in the construction and equipment of the road a sum from the proceeds of the bonds equal to their par value. It is, we think, clearly shown that the bonds were disposed of by the town at par. It is not for us to consider whether or not the subscription made by the town of Darlington, in its bonds, towards the construction of the railroad, was a profitable one. It had the right to subscribe, and the power to issue bonds. The road desired and contracted for has been built according to the terms of the agreement relating to the same, and is now in operation. The town has received the consideration stipulated for when the bonds were issued, and is now enjoying the benefits of the same. The coupons offered in evidence were past due, and unpaid. The town of Darlington was liable for the same, and judgment was properly rendered therefor. The defense was without merit, and the judgment of the court below is affirmed.

HOLMES v. JUNOD.

(Circuit Court of Appeals, Fifth Circuit. June 4, 1895.)

No. 379.

NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE—EVIDENCE—QUESTION FOR JURY.

In an action to recover damages for a personal injury sustained by a workman by being crushed under an elevator, where there was evidence tending to show that the boy running the elevator and other agents of defendant had been warned to stop it, *held*, that the questions both of negligence and contributory negligence were for the jury.

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

This was an action by J. L. Junod against D. H. Holmes to recover damages for personal injuries sustained by being crushed under an elevator while working in the elevator shaft of defendant's building. At the trial, before the case was given to the jury, defendant moved the court to direct a verdict in his favor, which motion was denied. The jury returned a verdict for plaintiff in the sum of $1,500, and judgment was entered accordingly. Defendant brings error.

E. H. Farrar, B. F. Jonas, E. B. Kruttschnitt, and Hewes T. Gurley, for plaintiff in error.

Charles Louque, for defendant in error.

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

PARDEE, Circuit Judge, delivered the opinion of the court.

The evidence in the case tended to show that the boy in charge of the elevator and other agents of the plaintiff in error were warned

that the defendant in error was to be put to work in the elevator shaft to do the painting required by the Schneider contract, and that assent was given to the proposal to stop running the elevator while said painting was being done. Whether this, with the other circumstances shown, was sufficient notice to the plaintiff in error to charge him with negligence in permitting the elevator to be run, whereby the defendant in error was injured, was a proper question for the jury. On the facts, reasonable men might not draw the same inferences as to negligence. See Railway Co. v. Ives, 144 U. S. 408, 417, 12 Sup. Ct. 679; Gardner v. Railroad Co., 150 U. S. 349, 361, 14 Sup. Ct. 140. The same may be said with regard to the question of contributory negligence on the part of the defendant in error, as the evidence tended to show that he did take certain precautions to protect himself from running the elevator before entering upon the work. While it is true that from previous experience of the defendant in error while working in the same elevator shaft, as well as from the nature of the work, it may be said that the defendant in error knew the danger of the occupation and assumed the risks thereof, yet it cannot be said that he also assumed the risk of negligence on the part of the plaintiff in error, and whether the plaintiff in error was guilty of negligence, as said above, was a question proper to be determined by the jury. For these reasons, we are of opinion that the refusal of the trial judge to instruct the jury to find for the defendant in error on the grounds assigned was not erroneous. This refusal being the only error assigned, the judgment is affirmed.

METCALF v. CITY OF WATERTOWN.

(Circuit Court of Appeals, Seventh Circuit. July 10, 1895.)

No. 233.

1. PRACTICE—SECOND APPEAL—JUDGMENT ON MANDATE.
   Where the judgment or decree in a case, upon the mandate of an appellate court, determines questions not covered thereby, it is subject to review, by appeal or writ of error, in the proper appellate court.
2. JUDGMENT—INTEREST—SPECIAL FINDING.
   Upon trial of a case by the court without a jury, the court made a special finding of facts from which the amount then due the plaintiff for principal and interest, if he was entitled to recover, could be computed, but gave judgment for the defendant. The supreme court, on error, reversed the judgment, and directed the entry of judgment for the plaintiff on the finding. The statute of Wisconsin, where the case arose (Rev. St. § 2922), allows the recovery of interest on a verdict until the entry of judgment. *Held*, that the plaintiff was entitled to have interest computed, to the time of entry of judgment on the mandate of the supreme court, upon the whole amount of principal and interest due him at the time the finding was made.

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

This was an action by Eliab W. Metcalf against the city of Watertown, Wis., on a judgment. The case was twice carried to the supreme court on error. See 9 Sup. Ct. 173, 128 U. S. 586, and 14 Sup. Ct. 947, 153 U. S. 671. A judgment having been entered on

the mandate of the supreme court on the second appeal, the plaintiff now brings error to this court. Reversed.

Charles E. Monroe and F. C. Winkler, for plaintiff in error.
Harlow Pease, for defendant in error.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

WOODS, Circuit Judge. The plaintiff in error brought this action in June, 1883, against the appellee, the city of Watertown, Wis., to recover the amount due on a judgment rendered against that city in the circuit court of the United States for the district of Wisconsin on the 8th day of May, 1866, in favor of Pitkin C. Wright for the sum, with costs, of $10,207.83, of which judgment the appellant claimed by means of certain assignments to have become the owner. The amended declaration contained the necessary averments concerning the citizenship of the parties and of the successive owners of the judgment to give the court jurisdiction. See Metcalf v. Watertown, 128 U. S. 586, 9 Sup. Ct. 173. The city answered, denying the complainant's ownership of the judgment, and asserting the 10 years' statute of limitation; and, issue having been joined, and a jury waived by written stipulation, there was a trial by the court, which on the 2d day of August, 1889, made and filed a special finding and conclusions of law. The facts were found in full conformity with the averments of the declaration, including the statement of the recovery of judgment by Wright, as alleged, "against the said city of Watertown, upon the 8th day of May, A. D. 1866, for the sum of ten thousand one hundred and fifty dollars and forty-six cents ($10,150.46) damages, together with the sum of fifty-seven dollars and forty cents ($57.40) costs and disbursements of the action, amounting in all to the sum of ten thousand two hundred and seven dollars and eighty-six cents ($10,207.86), in an action at law upon contract," with the added statement that the "action was commenced on the 29th day of June, 1883, and not before, and was not commenced within ten years from the time the cause of action herein accrued." The conclusions of law stated were, in substance, that the cause of action, not having accrued within 10 years before suit, was barred by the statute of limitation, and the defendant entitled to judgment. Accordingly, on the same day, judgment was given, which afterwards, upon writ of error, the supreme court reversed, holding that the 10-years bar constituted no defense, and ordering that the cause be remanded, "with a direction to enter judgment for the plaintiff on the finding." Metcalf v. City of Watertown, 153 U. S. 671, 14 Sup. Ct. 947. The opinion and formal mandate, containing the customary command, "You, therefore, are hereby commanded that such execution and further proceedings be had in said cause, in conformity with the opinion and judgment of this court, as, according to right and justice, and the laws of the United States, ought to be had, the said writ of error notwithstanding," were filed in the circuit court June 19, 1894; and a motion then and there made for judgment on the mandate was argued by counsel, and submitted, but not determined until August 25, 1894, when,

after reversing its former judgment, the court gave the plaintiff judgment for the sum of $10,207.86, stated to be "the amount claimed in the complaint herein," with interest at 7 per cent, from May 8, 1866, to April 1, 1893, and at the rate of 6 per cent. from that time, amounting to $20,074.68, which, with other items of costs, amounting to $148.29, made the aggregate sum of $32,430.83, for which judgment was entered. Afterwards, at the same term of court, on the 17th day of September, on motion of the plaintiff, the record in respect to the hearing of the motion for judgment on the mandate was amended, to show that on the 19th day of June, 1894, the plaintiff's attorney presented to the court a draft of judgment proposed for entry, which is set out in full, and which, if granted, would have given the complainant $35,685.73, exclusive of the said sum of $148.29 costs, obtained by computing interest on the original judgment to the 2d day of August, 1889, when the plaintiff was erroneously denied judgment for the amount then due, namely, $26,809.23, and computing the interest on that sum, to the date of the judgment; that the attorneys for the defendant objected to the proposed entry, and the court, having taken the matter under advisement, afterwards denied the motion, and ordered that judgment be given as it was finally entered, "to which orders the plaintiff excepted so far as they disallowed his claim for interest on the accumulated interest due on the 2d day of August, 1889."

Though not suggested at the hearing, the question has arisen whether this case is properly here. Assuming that in the particular complained of the judgment of the circuit court is erroneous, is the remedy by writ of error, or by an application to the supreme court for a mandamus to compel the entry of a proper judgment? There are many cases in which the supreme court has entertained and recognized as proper appeals and writs of error prosecuted for the purpose of correcting supposed errors in carrying into effect its mandates in prior appeals. We cite: Himely v. Rose, 5 Cranch, 313; Browder v. McArthur, 7 Wheat. 58; The Santa Maria, 10 Wheat. 431, 442; Sibbald v. U. S., 12 Pet. 488, 491; Story v. Livingston, 13 Pet. 359; West v. Brashear, 14 Pet. 51; Mitchel v. U. S., 15 Pet. 52; U. S. v. Fossatt, 21 How. 446; Railroad Co. v. Soutter, 2 Wall. 510; Ex parte Morris, 9 Wall. 605; Supervisors v. Kennicott, 94 U. S. 498; The Lady Pike, 96 U. S. 461; Stewart v. Salamon, 97 U. S. 361; Linckley v. Morton, 103 U. S. 764; Ames v. Quimby, 106 U. S. 342, 1 Sup. Ct. 116; Clark v. Keith, 106 U. S. 464, 1 Sup. Ct. 568; Chaffin v. Taylor, 116 U. S. 567, 6 Sup. Ct. 518; Tyler v. Magwire, 17 Wall. 253, 290. In the case of The Lady Pike the opening sentence of the opinion is:

"Second appeals will lie in certain cases where it is alleged that the mandate of the appellate court has not been properly executed."

In Stewart v. Salamon it is said:

"An appeal will not be entertained by this court from a decree entered in the circuit or other inferior court in exact accordance with our mandate upon a previous appeal. Such a decree, when entered, is in effect our decree, and the appeal would be from ourselves to ourselves. If such an appeal is taken, however, we will, upon the application of the appellee, examine the de-

cree entered, and, if it conforms to the mandate, dismiss the case with costs. If it does not, the case will be remanded, with appropriate directions for the correction of the error. The same rule applies to writs of error. This is not intended to interfere with any remedy the parties may have by mandamus."

See, also, the dissenting opinion in that case. In Hinckley v. Morton it is said:

"Second appeals have always been allowed to bring up proceedings subsequent to the mandate, but not settled by the terms of the mandate itself."

In Ex parte French, 91 U. S. 423, the supreme court had reversed a judgment for the defendant upon a special finding of facts which did not cover all the issues, "with instructions to proceed in conformity with the opinion"; and, upon the filing of the mandate in the court below, the case was set down for a new trial, whereupon the plaintiff applied to the supreme court for a mandamus directing judgment in his favor upon the finding. This the court denied, holding that the circuit court was precluded by the mandate only from adjudging in favor of the defendant upon the special facts found, and that "in all other respects" it was "at liberty to proceed in such manner as, according to its judgment, justice may require." In Groves v. Sentell, 13 C. C. A. 386, 66 Fed. 179, the circuit court of appeals for the Fifth circuit, instead of dismissing the appeal for lack of jurisdiction, affirmed the decree below because it was in conformity with the mandate of the supreme court. In the case before us, it is to be observed that the question for what sum judgment should be given was not before the supreme court, and its mandate left the circuit court at liberty, not only to make the computation of interest, but to determine the rule or principle by which the computation should be governed. The judgment granted was the first determination by any court of the present dispute, and is, we think, subject to review in the same manner as if it had been the first judgment in the case. Under the act of March 3, 1891, therefore, the case is properly in this court.

In respect to the merits, we are of opinion that the amount of the judgment should have been determined on the basis proposed by the appellant. The direction of the supreme court was "to enter judgment for the plaintiff on the finding." That means the finding of facts, as distinguished from the conclusions of law, which were annulled by the decision of the supreme court. By section 649 of the Revised Statutes the finding of the court upon the facts, when a jury is waived, whether it be general or special, has the same effect as the verdict of a jury. In this instance the finding was special, and therefore should be given the same effect as a special verdict. The finding would be more nearly complete, technically, if, in addition to the date and amount of the judgment, it contained a statement of the amount of interest accrued to the date of the finding, or of the entire sum due; but that is certain which can be made certain, and it is a matter of computation to determine on the finding, as it is, the amount which was due and for which the plaintiff was entitled to judgment when the erroneous judgment for the defendant was entered. If the finding contained an erroneous statement of the entire sum due, it would not be controlling, and judgment would be

given upon a corrected computation. The want of a computation, when the basis for making it is given, is of no more significance. The case, therefore, is the same as if the finding of facts had contained the additional statement that the entire sum due on the judgment was $26,809.23. That is the finding, equivalent to a verdict, on which the supreme court declared the plaintiff entitled to judgment. See Ft. Scott v. Hickman, 112 U. S. 160, 5 Sup. Ct. 56. If interest is to be allowed at all, it must be on that sum. It cannot be on the cause of action or judgment sued on, because pro hac vice that is merged in the finding. Whether or not interest shall be allowed upon a verdict for the time intervening before judgment is always a question of local law. Association v. Miles, 137 U. S. 689, 11 Sup. Ct. 234, and cases cited. It is allowed in Wisconsin by section 2922 of the Revised Statutes of the state, which reads:

"When the judgment is for the recovery of money, interest from the time of the verdict or report until judgment is finally entered, shall be computed by the clerk and added to the costs of the party entitled thereto."

Whether it be added to the costs or to the principal sum found due is, of course, a matter of form merely, not affecting substantially the rights of either party. Stephens v. Magor, 25 Wis. 533. The provision of section 2894a of the Revised Statutes of Wisconsin to to the effect that unless the successful party shall enter and perfect judgment within 60 days after the filing of the finding or verdict, the failure or neglect shall be deemed a waiver of his right to the accrued costs of the action, it is plain, does not apply when the party's right to judgment is denied and he is driven to the court of last resort for its establishment. It is equally clear that the statute of the state which forbids the compounding of interest is not applicable. That provision and the one allowing interest upon verdicts must stand together.

There is a recital in the judgment entry to the effect that the recovery is the amount claimed in the complaint, and that is now urged in justification of the court's decision. If the prayer were in fact only for the amount of the judgment sued on with interest, it would, we think, be sufficient to include interest upon the verdict, in a jurisdiction where interest on verdicts is authorized; but, in this instance, there was a prayer also for costs, in which, by the statute quoted, the interest upon the verdict was required to be included. Reference has been made to the rule, which has been often declared, that interest is not allowed upon judgments affirmed by the supreme court, unless so ordered in the judgment of affirmance. That rule is founded upon the provision of the judiciary act of 1789, c. 20, § 23, whereby the supreme court is authorized, in cases of affirmance of any judgment or decree, to award the respondent just damages for his delay. Accordingly, "if upon the affirmance no allowance of interest or damages is made, it is equivalent to a denial of any interest or damages." In re Washington & G. R. Co., 140 U. S. 91, 11 Sup. Ct. 673; Boyce's Ex'rs v. Grundy, 9 Pet. 275, 289; Mitchell v. Harmony, 13 How. 115; Perkins v. Fourniquet, 14 How. 328. That rule, it is manifest, is not applicable when the question is whether interest shall be allowed upon a verdict, when an erron-

eous judgment thereon has been reversed, and direction given to enter the proper judgment in favor of the prevailing party. In Kneeland v. Trust Co., 138 U. S. 509, 11 Sup. Ct. 426, a decree was reversed for error in a part of the sum for which it was given, another distinct part, as the opinion showed, being approved. The order or mandate was "to strike out all allowances for rental prior to December 1, 1883, * * * and to allow the rentals as fixed for the time subsequent,"—saying nothing about interest. Upon that order, the circuit court gave a second decree, allowing interest from the date of the first decree, and that decree, upon a second appeal, was affirmed.

It is urged further that there is no bill of exceptions in the record; but, when the question is whether a judgment upon a special verdict or finding is supported by, or is in conformity with, the facts found, a bill of exceptions is not necessary. Suydam v. Williamson, 20 How. 427; Retzer v. Wood, 109 U. S. 185, 3 Sup. Ct. 164; Allen v. Bank, 120 U. S. 20, 7 Sup. Ct. 460; Tyson v. Milwaukee, 50 Wis. 78, 93, 5 N. W. 914; Hart v. Railroad Co., 86 Wis. 483, 57 N. W. 91; Donkle v. Milem, 88 Wis. 33, 39, 59 N. W. 586. The judgment of the circuit court is reversed, with costs, and the cause remanded, with direction that the appellant be given judgment for the amount due upon the finding of August 2, 1889, including interest to that date, with interest thereon to the date of the judgment hereby ordered, together with the sums heretofore taxed for costs and disbursements, and such further sums as shall appear to be just.

FLORIDA CENT. & P. R. CO. v. BUCKI et al.

(Circuit Court of Appeals, Fifth Circuit. June 25, 1895.)

No. 375.

1. PRACTICE—ASSIGNMENTS OF ERROR.
   An assignment of errors made up by basing a separate assignment upon every exception taken during the trial, on which exception was taken to every ruling of the judge, is equivalent to a general assignment of errors, within rule 11 of the circuit courts of appeals. 11 C. C. A. cii., 47 Fed. vi.
2. EVIDENCE—BOOKS OF ACCOUNT.
   For the purpose of showing the amount of merchandise shipped by a manufacturer over a railroad, testimony of persons is admissible which is based on a record made by them at the time from weekly reports of the railroad company, and then known to be correct, the original weekly reports having been destroyed by fire, and the best evidence of the shipments being in the hands of the railroad company, the adverse party.
3. DAMAGES—REMOTENESS.
   In an action against a railroad company for charging excessive rates of freight in violation of an alleged contract to carry lumber at specified rates during the life of certain forests owned by the plaintiff, damage claimed to have arisen from the inability, in consequence of such excessive rates, to use the lumber contained in uncut forests, is too remote.

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

This was an action by Louis Bucki & Son against the Florida Central & Peninsular Railroad Company for damages for breach

of a contract. Judgment was rendered in the circuit court for the plaintiffs. Defendant brings error. Reversed.

John C. Cooper, John A. Henderson, and George P. Raney, for plaintiff in error.

H. Bisbee and C. D. Rinehart, for defendants in error.

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

McCORMICK, Circuit Judge. L. Bucki & Son, the defendants in error, brought this action against the Florida Central & Peninsular Railroad Company, the plaintiff in error, claiming damages for the breach of a written contract made by the plaintiffs below with H. R. Duval, receiver of the Florida Railway & Navigation Company, which contract is in these words:

"This agreement, between the receiver of the Florida Railway & Navigation Company, party of the first part, and Louis Bucki & Son, party of the second part, both parties transacting business in the state of Florida, witnesseth that the party of the second part operates a lumber mill at Ellaville on the railroad operated by the party of the first part; that, by reason of the consumption of the greater part of the forests near Ellaville, it is necessary for the party of the second part to draw its material supply from tracts of forests which it owns east, northeast, and southeast of Ellaville, and for that purpose it requires railroad transportation between the said forests and said mill; and, as the construction of such railroad involves an expense of about fifty thousand dollars to the party of the second part, and it being to the interest of both parties that the operation of said mill be continued and enlarged: Now, therefore, for this and other valuable considerations, the party of the second part agrees to construct a railroad adapted to the transportation of logs from some point or points on the line of the railroad of the party of the first part, either north or south, or both, of said point or points, to be selected by both parties, and to be within a distance of not over five miles east of Ellaville, running from the line of the said railroad of the party of the first part into the forests of said party of the second part, which said log railroad said party of the second part agrees to construct, equip, operate, and maintain and connect with the railroad of the party of the first part at the expense of the party of the second part, for the purpose of transporting its logs over the railroad of the party of the first part to Ellaville, to the mill of the said party of the second part, in such quantities as said mill may require; and it is further agreed that said railroad, to be constructed as above, and the portion of the track of the party of the first part which is hereby rented to the party of the second part, shall be operated by the party of the second part, under and in conformity with such rules and regulations as may be prescribed by the party of the first part, or its agents, from time to time. The party of the second part shall pay to the party of the first part a rental for the use of its railroad between Ellaville and the point of said connection, the sum of four hundred dollars per annum, per mile, during the continuance of this contract, said rental to begin when the connection with the railroad of the party of the first part is made, payment to be made monthly. The party of the first part further agrees to provide at all times, to the extent of its ability, the necessary cars and engines to transport the product of said mill of the party of the second part to Jacksonville, Fernandina, or such other points as said party of the second part may consign, with all practicable dispatch. It is further agreed that, in consideration of the large expense which the party of the second part must incur in the construction and operation of its railroad, and the advantage of said railroad as a means of supplying product for profitable transportation by said party of the first part, that the rates of freight to be charged by said party of the first part to Jacksonville and Fernandina shall at no time during the continuance of this agreement be increased over the present rates charged

in greater amount than the percentage of increase on the present market value of the product of said mill of the party of the second part, said present rate of freight and present market value of said mill product to be stated in writing and annexed to this agreement, said price of lumber to be based upon the New York market at the date of this agreement; and that the rates of freight to be charged by the party of the first part from Ellaville to all local stations or other points than those specifically named above shall be local rates of the party of the first part, or such other rates as he may deem proper, and that the party of the second part shall pay to the party of the first part for any damage to track, bridges, etc., which may be caused by said party of the second part, except ordinary wear and tear; and that this agreement shall take effect upon the date of its execution, and continue in effect thereafter during the life of said forests.

"[Signed] L. Bucki & Son.
"[Seal.] H. R. Duval,
"Receiver Florida Railway & Navigation Co.

"January 15, 1887.
"Attest: E. R. Hoadley, Sec'y."

The declaration averred that the defendant, having become the owner of the railroads and other properties represented by the receiver when the contract was made, adopted, ratified, and confirmed it, and faithfully kept and performed its covenants and agreements for a long period after it became the owner of the railroad. That, on and continuously after the 1st of September, 1889, the defendant refused to keep and perform these covenants adopted by it, and in violation of them exacted of plaintiff largely excessive charges of freight on all of plaintiff's shipments from 1st September, 1889, till the early part of May, 1893, to plaintiff's damage $40,000. The other counts it is not necessary to notice. By a complication of demurrers, pleas, and replications customary under the practice in Florida, the issues were reached, and the plaintiff offered testimony by which it intended to show that the defendant had adopted the contract made by the receiver, and also introduced proof tending to show the amount of lumber shipped from 1st of September, 1889, to May, 1893, on which defendant exacted freight at the rate of $21 a car load of 35,000 pounds. The plaintiff also offered, and, over the objection of defendant, introduced, testimony tending to show the amount in feet of sawed lumber of the uncut lumber trees in the forests of plaintiff, which he claims he was prevented using by the defendant's alleged breach of the contract. There was a verdict for plaintiff in damages to the amount of $29,626.49, and judgment thereon, to reverse which this writ of error is prosecuted. The defendant in error has moved to strike out the assignment of errors, for failure to comply with rule 11 of this court. 11 C. C. A. cii., 47 Fed. vi. On the face of the assignment it is obvious that it is framed with a studious effort to conform to the letter of the rule, and therefore the motion will be refused, but the assignment is obnoxious to the criticism suggested in the motion. It is familiar law on this subject that a general assignment of error should be disregarded, because it does not advise the adversary as to what he is to defend and unduly taxes the time and effort of the reviewing tribunal. On this view rule 11 is founded and applied. Now, a general assignment is but the sum of all the possible particular assignments which the record could support. It is manifest, there-

fore, that if the party cast in the trial court multiplies his exceptions to cover all the action of that court, and makes each exception taken the basis of a special assignment of error, the result and effect is equivalent to a general assignment. Such unwinnowed assignments are hurtful to the interest of parties, to the credit of counsel, and to the dignity of the appellate court. In this case only 44 separately numbered errors are assigned. The forty-fourth, being the sum of all the others, is in these words: "The court erred in entering judgment for plaintiffs in said cause against defendant." The diligence and zeal of counsel were not equal to the work of taking up and urging these 43 separately assigned errors one by one in succession. At one point in the printed brief of their argument they group Nos. 16 to 26. We will pursue the lead of this wholesome forbearance on the part of counsel somewhat further than they have gone. The averment as to the adoption of the contract is sufficient, when established by proof, to charge the defendant for excessive exactions of freight on shipments made. Whether the contract was binding on the receiver or not is immaterial. Chicago & A. R. Co. v. Chicago, V. & W. Coal Co., 79 Ill. 121; Mining Co. v. Humble, 153 U. S. 540, 14 Sup. Ct. 876; Wiggins Ferry Co. v. Ohio & M. Ry. Co., 142 U. S. 396, 12 Sup. Ct. 188. We have said the plaintiff offered testimony by which it intended to show that the defendant had adopted this contract. We have the gravest doubt whether any of the testimony offered, or all of it put together, tends to show the alleged adoption. Much of it, as we view it, tends to show the contrary. The objections to the introduction of the testimony of James Veit and W. M. Christman were rightly overruled. The absence of better evidence was accounted for by the plaintiff. The best evidence was in the hands of the defendant. The entries made by the witnesses in the books of the plaintiff show the result of the witnesses' personal examination of the weekly reports made by the defendant of the shipments of lumber. These reports having been destroyed by fire, the plaintiff had the right to prove the contents by the witnesses who had examined them at the time they were rendered, and had recorded the result of that examination, basing their testimony on that record, and its verity on their knowledge that it was correctly made by them at the time of the transaction. The objection to the testimony of the witness Louis J. Brush and of other witnesses to the extent of the uncut forest was well taken, and should have been sustained, and for the error in admitting this testimony, and the consequent errors in the charges of the court and in the refusal of charges requested by the defendant, the case must be reversed; and, as we do not know that the plaintiff will not be able, on another trial, to make proof of its averment as to the adoption of the contract by the defendant, the cause will be remanded for a new trial. There is nothing in the nature and terms of the contract declared on engaging to pay, or clearly implying an obligation to pay, any such damage as those claimed on this uncut forest. If the plaintiff can lay and prove these damages so as to avoid the objection of remoteness and uncertainty, it is clear to us they have not been so laid in the declaration, and

no proof has been offered tending to support such averments, if such had been made. These objections must be avoided, and proof aliunde the contract made, to raise such an implied liability, and the special damage must be shown before the plaintiff can recover on account of its uncut forest. Howard v. Manufacturing Co., 139 U. S. 199, 11 Sup. Ct. 500. The judgment of the circuit court is reversed, and case remanded to the circuit court, with directions to award the defendant a new trial. Reversed and remanded.

McFARLIN et al. v. FIRST NAT. BANK OF KANSAS CITY, KAN., et al.

(Circuit Court of Appeals, Eighth Circuit. June 3, 1895.)

No. 586.

NATIONAL BANKS—INCREASE OF CAPITAL—SUBSCRIPTIONS TO STOCK.

Plaintiffs subscribed for certain shares of stock in the E. Bank, to be issued for the purpose of increasing its capital and changing it into a national bank, and paid certain installments on their subscriptions to the bank, to be held in trust until the whole subscription was paid and the shares legally issued. Subsequently they consented that the E. Bank should be consolidated with the F. National Bank, the capital of the latter increased from $100,000 to $200,000, and that their subscriptions should stand as subscriptions to such increase of the stock of the F. National Bank. They afterwards made some further payments on their subscriptions. Some preliminary steps were taken by the F. National Bank for the increase of its stock, but the comptroller of the currency refused to consent to an increase to more than $150,000, and, before that amount had been paid in and before any certificate had been made by the comptroller declaring the increase, the F. National Bank was declared insolvent and placed in the hands of a receiver. *Held*, that the plaintiffs had never become stockholders in the F. National Bank.

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

This was an action by William McFarlin, John B. Wright, and Charles Baird, executors of the estate of T. W. Cornell, deceased, and others against the First National Bank of Kansas City, Kan., and W. T. Atkinson, its receiver, to recover back certain moneys paid to the bank. The circuit court overruled a demurrer to the answer. Plaintiffs bring error. Reversed.

The plaintiffs in error, William McFarlin, John B. Wright, and Charles Baird, executors, et al., who were also the plaintiffs in the circuit court, filed a complaint against the defendants in error, the First National Bank of Kansas City, Kan., and W. T. Atkinson, its receiver, which contained, in substance, the following allegations, to wit: That in the year 1890 the plaintiffs were solicited to subscribe for certain shares of stock in the Exchange Bank of Kansas City, Kan., with a view of increasing the stock of that bank from $51,000 to $300,000, and of converting the same into a national bank, to be called the "Exchange National Bank of Kansas City, Kansas"; that they severally assented to such proposition, and subscribed respectively for certain shares of stock to be issued by said proposed Exchange National Bank, agreeing to pay for the same in installments, which installments were to be paid to said Exchange Bank, and were to be held by it in trust, as a special deposit, to be applied in payment for the stock subscribed when the whole subscription should be paid and the shares of stock in said proposed Exchange National Bank should be legally issued; that the plaintiffs subsequently paid to said Exchange Bank, under

the aforesaid arrangement, in installments, the sum of $12,760, on account of their said subscriptions; that it was subsequently represented to them by the president of said Exchange Bank that it would be advantageous to consolidate said bank with the First National Bank of Kansas City, Kan., and to increase the stock of the latter bank to the extent of $100,000; that said First National Bank had, by resolution duly passed, already agreed to increase its capital stock from $100,000 to $200,000, and that said First National Bank then had a paid-up capital of $100,000 and a surplus of $10,500. Plaintiffs further averred that the proposition made to them to transfer their aforesaid subscription from the Exchange National Bank to the First National Bank, so that the subscription should stand as a subscription to the increased stock of the First National Bank in lieu of a subscription to the stock of the Exchange National Bank, was assented to, and that, by the representations aforesaid, they were induced to assent to said transfer and to make a further payment on account of the stock theretofore subscribed, which last-mentioned payment was made to the First National Bank. It was further averred that, at the time the aforesaid representations were made to the plaintiffs, said First National Bank was insolvent, which fact was wholly unknown to them; that all the moneys paid by them to the Exchange Bank of Kansas City on account of their several subscriptions were by said Exchange Bank turned over to the First National Bank when the latter was utterly insolvent, and that when the First National Bank was declared to be insolvent by the comptroller of the currency it held such fund, so received from the Exchange Bank, as a special deposit made by these plaintiffs to be applied in payment for shares of its increased stock when the same should be lawfully issued. The plaintiffs also averred, in substance, that on July 6, 1891, when said First National Bank was declared to be insolvent and a receiver of its affairs was appointed, they did not own any stock in said bank; that the money theretofore paid by them to the Exchange Bank, before the attempted consolidation, was held by said First National Bank, at the date of its insolvency, as a trust fund to be applied in payment for shares of its increased stock at the rate of $100 per share, which stock was to be issued to the plaintiffs when the whole amount of the increased stock was subscribed and paid for, and when the comptroller of the currency should have issued his certificate specifying the amount of such increase and his approval thereof. In conclusion the plaintiffs averred that: "Said proposed increase of the capital stock of said bank was never lawfully authorized by the owners of two-thirds of the capital stock of said bank; nor did two-thirds of the owners of said original stock ever vote for such increase, as required by law; nor was the whole amount of $100,000 of such proposed increase of stock ever paid into said bank as required by law; nor was the amount of such proposed increase of stock, which was agreed to be taken and paid for, ever paid into said bank; nor was the certificate of the comptroller of the currency * * * specifying the amount of said proposed increase of capital stock, with his approval thereof, and that it had been paid in as part of the capital of said bank, ever obtained; but, by reason of the insolvency and suspension of said bank, and the consequent winding up of its affairs, none of said conditions and requirements have been, or can now be, fulfilled or complied with on the part of said bank, nor the contract between said bank and these plaintiffs in reference to said shares of stock ever be completed or performed." In view of the premises, the plaintiffs prayed for a judgment against the First National Bank of Kansas City, Kan., in the sum of $12,760, together with interest thereon from the time the several installments had been paid.

The defendants filed an answer to the foregoing complaint, wherein they specifically denied that the First National Bank was insolvent at the time the attempt was made to consolidate that bank with the Exchange Bank. The other material allegations of the complaint were either admitted or left undenied. For a special defense to the action, the defendants pleaded as follows: "Defendants admit that, at the time of said approval by the officers and directors of the Exchange Bank and of the First National Bank of the suggestion to attempt a consolidation, an application had been made for the increase of the capital stock of the First National Bank of Kansas City, Kan., from one hundred thousand dollars to two hundred thousand dollars, and it was supposed by the officers and directors of the Exchange Bank that author-

ity had been received from the comptroller of the currency to make such increase of stock. Defendants further say that, after said suggestion of attempted consolidation had been approved by the officers and directors of both the First National Bank and the Exchange Bank, that the said Exchange Bank removed its assets and business to the room occupied by the First National Bank of Kansas City, Kan.; and that, in pursuance of an understanding between the officers and directors of both the First National Bank of Kansas City, Kan., and the Exchange Bank, the said Exchange Bank ceased to do business, and the said I. D. Wilson, president of the Exchange Bank, in pursuance of a further understanding between the officers and directors of the two banks, became the president of the First National Bank of Kansas City, Kan. And defendants further say that, immediately after the Exchange Bank ceased to do business, and immediately after its assets and property had been transferred to the place of business occupied by the First National Bank of Kansas City, Kan., the proposed subscribers to the stock of the proposed Exchange National Bank were notified of the action of the officers and directors in closing business, and were solicited to take stock in the increase of the First National Bank of Kansas City, Kan., in lieu of the stock which they had subscribed in the proposed Exchange National Bank, and that all of the plaintiffs in this action assented to the subscription to the increase of capital stock of the said First National Bank of Kansas City, Kan., in the same amount and for the same sums as had been subscribed by them to the stock of the proposed Exchange National Bank; and that plaintiffs, with full knowledge of all the foregoing facts in connection with the First National Bank and the Exchange Bank, consented that the sum of money which had been paid in by them to the Exchange Bank be considered as payment upon their various shares of stock in said increase of the First National Bank, and afterwards made further payment to the said First National Bank, in accordance with the original subscription made to the proposed Exchange National Bank. The defendants further say that, while it is admitted that the comptroller of the currency refused to allow the First National Bank of Kansas City, Kan., to increase its capital stock from one hundred to two hundred thousand dollars, and only authorized an increase of said capital stock to one hundred and fifty thousand dollars, yet such increase to one hundred and fifty thousand was accepted and ratified by the directors and the owners of more than two-thirds of the capital stock of said First National [Bank], and that such action on the part of the comptroller and the directors and stockholders was made public as soon as the same was taken and became a part of the records of the board of directors of the First National Bank; and that plaintiffs had knowledge of the same, either actual or constructive." By way of cross petition, the receiver also demanded a judgment against the plaintiffs for the several amounts alleged to be due from them on account of their alleged subscription to the stock of the First National Bank. Judgment was also demanded against the plaintiffs for the amount of an assessment which the comptroller of the currency had caused to be made against the stockholders of said bank.

Plaintiffs filed a general demurrer to the aforesaid answer, on the ground that it stated no defense to their alleged cause of action, which demurrer was overruled; and thereupon, as the plaintiffs declined to plead further, a final judgment was entered against the plaintiffs, dismissing their complaint, together with a judgment in favor of the receiver for the various amounts claimed to be due from the plaintiffs on account of the assessment and on account of the sums unpaid on their several subscriptions. To reverse said judgment, the plaintiffs have prosecuted a writ of error.

G. Pitman Smith and Chas. Baird, for plaintiffs in error.

Samuel R. Peters (Joseph W. Ady and John C. Nicholson, on the brief), for defendants in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

The circuit court appears to have held that the answer filed by the receiver and by the First National Bank was sufficient to show that the plaintiffs occupied the relation of stockholders of the bank at the time of its insolvency, and that the grounds relied upon by the plaintiffs to show that they were not stockholders, but were merely creditors, had been held to be untenable in each of the following cases: Delano v. Butler, 118 U. S. 634, 7 Sup. Ct. 39; Aspinwall v. Butler, 133 U. S. 595, 10 Sup. Ct. 417; and Bank v. Eaton, 141 U. S. 227, 11 Sup. Ct. 984. We are of the opinion, however, that the view which seems to have controlled the decision of the circuit court was erroneous. In the cases above cited, it appeared that the directors of a national bank had voted to increase its capital stock from five hundred thousand to one million dollars; that subscriptions to the new stock had been invited from the shareholders, and that subscriptions to the amount of $461,300, and no more, had been obtained; and that the amount of such subscriptions to the new stock had been paid in full by the several subscribers. Subsequently, the directors adopted another resolution canceling so much of the proposed increased stock as was in excess of $461,300, the amount actually subscribed, and fixing the paid-up capital at $961,300, in lieu of $1,000,000, as at first proposed. The comptroller of the currency approved of the increase, to the extent of $461,300, and issued his certificate, in accordance with section 5142 of the Revised Statutes, that the stock had been increased to that amount, and that the amount of such increase had been paid in. The bank having been subsequently declared to be insolvent, and a receiver having been appointed to liquidate its affairs, certain of the shareholders who had subscribed for the new or increased stock, and who had paid the amount of their several subscriptions, attempted to escape liability as holders of the new stock on the ground that they had never assented to the resolution to cancel a portion of the increased stock and to reduce the capital of the bank from $1,000,000, as originally proposed, to $961,300. In two of the cases above cited,—Delano v. Butler, 118 U. S. 634, 7 Sup. Ct. 39, and Aspinwall v. Butler, 133 U. S. 595, 10 Sup. Ct. 417,—it appeared that the subscribers for new stock had not only paid for the same, but that they had each received and accepted stock certificates certifying to their ownership of the new stock. In the other case,—Bank v. Eaton, 141 U. S. 227, 11 Sup. Ct. 984,—the stock certificate, it seems, had not been made out or delivered. In these three cases it was held, substantially, that, although the original proposition made by the board of directors was a proposition to increase the stock to the extent of $500,000, yet the comptroller had power to assent to an increase less than was originally proposed, but equal to the amount that was actually subscribed and paid for. The court evidently entertained the view that the by-laws of the bank gave the board of directors authority to cancel such portion of the increased stock as was not taken by the shareholders, and that after the board had canceled so much as was not subscribed, and the comptroller had approved of the board's action, and had issued his certificate declaring that the stock had been increased to a given amount, it was then too

late for a subscriber to the new stock to object to the increase, or to assert that he was not a stockholder, on the ground that the increase was less than the sum originally proposed. The court also decided, in the cases above cited, that the several subscriptions then under consideration had not been made on condition that the entire amount of the proposed new stock should be subscribed. With reference to these points, Mr. Justice Bradley, in Aspinwall v. Butler, 133 U. S. 595, 607, 10 Sup. Ct. 417, used the following language:

"The deficiency under $500,000 arose from the fact that some of the stockholders did not avail themselves of their right to subscribe. The eleventh section of the by-laws of the bank has this express provision, that, 'if any stockholder should fail to subscribe for the amount of stock to which he may be entitled, within a reasonable time, which shall be stated in the notice, the directors may determine what disposition shall be made of the privilege of subscribing for the new stock.' This gave the directors full power over the deficiency of the subscriptions, and was in itself authority, if no other existed, to validate the action of the directors and the comptroller in disregarding such deficiency, and equating the new stock to the subscriptions actually made and paid in. There was no express condition that the individual subscriptions should be void if the whole $500,000 was not subscribed; and, in our judgment, there was no implied condition in law to that effect. Each subscriber, by paying the amount of his subscription, thereby indicated that it was not made on any such condition. It is not like the case of creditors signing a composition deed to take a certain proportion of their claims in discharge of their debtor. The fixed amount of capital stock in business corporations often remains unfilled, both as to the number of shares subscribed, and as to payment of installments, and the unsubscribed stock is issued from time to time, as the exigencies of the company may require. The fact that some of the stock remains unsubscribed is not sufficient ground for a particular stockholder to withdraw his capital."

We find nothing in either of these cases which lends any support to the view that the stock of a national bank can be lawfully increased before the entire amount of the new capital has been paid in and the comptroller of the currency has certified to the increase and to the fact of payment in the mode prescribed by section 5142 of the Revised Statutes. On the contrary, in Delano v. Butler, 118 U. S. 634, 649, 7 Sup. Ct. 39, it was said by Mr. Justice Matthews, and the doctrine has been adhered to in all subsequent cases, that:

"Three things must occur to constitute a valid increase of the capital stock of a national banking association—First, that the association, in the mode pointed out in its articles, and not in excess of the maximum prescribed for by them, shall assent to an increased amount; second, that the whole amount of the proposed increase shall be paid in as part of the capital of such association; and, third, that the comptroller of the currency, by his certificate specifying the amount of such increase of capital stock, shall approve thereof, and certify to the fact of its payment."

A case might possibly arise where a subscriber for new stock would be estopped from asserting, as against a creditor of a national bank, that he was not a stockholder, even though the provisions of the statute had not been strictly followed; but we are not called upon at present to deal with a case of that character. The answer filed in the suit at bar does not disclose a state of facts that is sufficient to create an estoppel. It shows affirmatively, as we think, that while certain preliminary steps had been taken, by the requisite number of shareholders, to increase the stock of the defendant

bank from $100,000 to $200,000, yet that the comptroller of the currency had refused to consent to an increase of capital stock in excess of $50,000; that the latter amount of new capital had not been paid in when the bank failed; and that no certificate had been issued by the comptroller declaring an increase of capital stock and certifying to the fact of payment. Moreover, the complaint averred, in legal effect (and the allegation in that respect was not denied), that the money paid by the plaintiffs on account of their several subscriptions was so paid in pursuance of an express agreement that it should be held in trust and applied in payment of their several stock subscriptions when the full amount of their respective subscriptions had been paid in, and when the comptroller of the currency had duly issued his certificate declaring an increase of capital. Under these circumstances, we think that the answer filed by the defendants failed to show that the plaintiffs were stockholders of the defendant bank to the amount of their several subscriptions, or that, at the time of its failure, the stock thereof had been lawfully increased to the amount of $50,000 or to any other amount. It results from this view that the circuit court erred in overruling the demurrer to the answer. Its judgment is accordingly reversed, and the case is remanded to the circuit court, with directions to grant a new trial.

AMERICAN EMPLOYERS' LIABILITY INS. CO. v. BARR.

(Circuit Court of Appeals, Eighth Circuit. June 3, 1895.)

No. 530.

1. PLEADING.
   An answer to an action on an accident insurance policy which attempts to set up that the contract was not fully consummated, because requiring the assent of the home office to the acts of an agent, but which shows that the agent was placed in a position to deliver a completed policy, and did so, and does not aver knowledge by the insured of the excess of authority, and which also attempts to set up concealment of material facts, and false representations, but states no particulars, is insufficient.
2. LIFE INSURANCE.
   A policy of accident insurance provided that the company's medical adviser might examine the body of the insured at any time. No request was made for an examination till some weeks after the insured's burial, when a request was made, not to the beneficiary, but to decedent's widow, and was refused. *Held* no defense to an action by the beneficiary.
3. SAME.
   C. took out a policy of accident insurance on his own life, paying the premium thereon, the benefits of which were payable to himself, unless he sustained an accident which resulted fatally, in which event the sum due on the policy was directed to be paid to B., the nephew of the insured. In an action by B., C. having sustained an injury which resulted in death, *held*, that B. need not allege or prove an insurable interest in the life of C.

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

This was an action by William P. Barr against the American Employers' Liability Insurance Company on a policy of insurance. The plaintiff recovered judgment in the circuit court. Defendant brings error. Affirmed.

James H. Brown and Milton Smith filed brief for plaintiff in error.

C. S. Thomas, Charles Hartzell, W. H. Bryant, and H. H. Lee filed brief for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. This writ of error was sued out by the American Employers' Liability Insurance Company, the plaintiff in error, to reverse a judgment which was recovered against it in the circuit court of the United States for the district of Colorado on an accident policy of insurance. The material provisions of the policy are as follows:

"The American Employers' Liability Insurance Company, * * * in consideration of the warranties made in the application for this policy, and of thirty dollars, does hereby insure William P. Cousley, * * * residing in Denver, county of Arapahoe, and state of Colorado, by occupation a contractor (classified by the company as ordinary), for the term of twelve months, ending on the sixth day of May, eighteen hundred and ninety-three, at 12 o'clock noon: (1) In the sum of five thousand dollars, against death resulting from bodily injuries effected during the term of this insurance through external, violent, and accidental means, which shall, independently of all other causes, result in death within ninety days from the happening thereof. (2) If such injuries shall, within three calendar months from the date of his sustaining the same, be the direct and sole cause of the loss, by actual separation at or above the ankle or wrist, (of) both feet or of both hands, or of one hand and one foot, or the irrecoverable loss of the sight of both eyes, the company will pay to the insured, if he survives the same, the full amount of the principal sum of this policy ($5,000), which payment shall terminate the policy. (3) If such injuries shall be the sole cause of the loss within three calendar months, by actual separation at or above the ankle or wrist, of one hand or one foot, the company will pay to the insured, if he survives the same, one-half of the principal sum of this policy ($2,500), which payment shall terminate the policy. (4) If such injuries shall immediately and wholly disable and prevent him from prosecuting any and every kind of business pertaining to his occupation above stated, and does not cause the loss of limbs or eyes as above, the company will pay to the insured a sum not exceeding twenty-five dollars per week for loss of time, and not exceeding fifty-two consecutive weeks. In case of death under the provisions of this policy, the company will pay the principal sum to W. P. Barr, his nephew, if surviving; in event of his prior death, to the legal representatives of the insured: provided, further, that in case of death resulting from injuries wantonly inflicted by the insured, or inflicted and caused by him while insane, the measure of this company's liability shall be a sum equal to the premium paid, the same being agreed upon as in full liquidation of all claims under this policy."

The insured sustained certain injuries on May 20, 1892, by falling from a platform in a building which was in process of construction in the city of Denver, and died four days thereafter, as it is claimed, from injuries resulting from such fall. A suit was brought on the policy by William P. Barr, the defendant in error, to whom, under the aforesaid provisions of the policy, the same was made payable in the event of the death of the assured, and a judgment was recovered against the defendant company for the sum of $5,626.58.

One of the principal errors assigned is the action of the trial court in sustaining a demurrer to the second defense which was pleaded by the defendant company. That defense was, in substance, as follows: The defendant averred that it held itself out as insuring preferred or selected risks in professional and mercantile classes,

and that it did not hold itself out as insuring persons while actually engaged in extrahazardous employments, such as "supervising contractor," in which employment Cousley appears to have been engaged when he was injured; that at the time the policy in suit was issued one Francis A. Chapman was its duly-authorized agent to solicit insurance in its behalf in the state of Colorado, "subject to and in accordance with the instructions, terms, and conditions contained in applications for insurance, prospectuses, and insurance policies, and business forms, and regulations adopted and prescribed by the board of directors and the president, secretary and general manager, at the office of the said defendant company in the city, county, and state of New York, and that said Chapman was not authorized to waive, change, or modify any of said terms or conditions in said applications for insurance, prospectuses, insurance policies, and business forms and regulations adopted and prescribed by the board of directors, or the president, secretary, or general manager, at the office of the said defendant company in the city of New York"; that the defendant company, for the purpose of carrying on its business in the state of Colorado, within the limitations aforesaid, "furnished its said agent, Francis A. Chapman, with printed blanks and other stationery reasonably proper and necessary to carry on and conduct said business"; that on May 6, 1892, William P. Cousley made a certain written application to its said agent, Chapman, for an accident policy of insurance, which application was set out in full in the answer; that, according to the established mode of doing business, it was the duty of said Chapman, on receipt of said application, to transmit the same to its branch office in the city of Chicago, and thence to its general office in the city of New York; that said application was so transmitted, but that it failed to reach New York until after the assured had sustained the injuries on account of which he ultimately died; that the statements made by the assured in said application were not "full, specific, and certain"; and that on July 28, 1892, the defendant company tendered to Cousley's administrator the premium of $30, which it had theretofore received, "for the purpose of rescinding the said contract, because of the incompleteness of said alleged contract, and for breach of warranty, in making insufficient, incorrect, and incomplete answers to the questions stated in said application for insurance, as well as concealment of material facts called for by said questions, and also for other good and sufficient reasons."

It is somewhat difficult to comprehend the precise nature of the defense intended to be stated in the foregoing paragraph of the answer. We shall assume, however, that the defendant company intended to make two defenses: First, that the contract was not fully consummated in the lifetime of the assured; and, second, that, if fully consummated, the assured was guilty of such a concealment of material facts, or made such false representations, as rendered the contract voidable at the election of the company. Conceding, for the purposes of this decision, that it was proper to plead both of the aforesaid defenses in a single paragraph of the answer, and that it was not necessary to state the defenses separately, still we think

that neither of them was well pleaded. It is clearly shown by the plea aforesaid, and by other portions of the answer as well, that Chapman was the duly-authorized agent of the defendant company to solicit insurance in its behalf in the state of Colorado; that he was provided with such policies, applications, and other printed blanks as were necessary to conduct an insurance business; that he accepted Cousley's application for insurance, executed and delivered the policy, and received the premium thereon for one year's insurance. This made the negotiation complete. If Chapman disobeyed secret instructions which he had received from the company, or if he departed from the usual and ordinary course of business, in delivering the policy and in collecting the premium before Cousley's application had been received and had been approved by the home office in the city of New York, the assured cannot be prejudiced by such misconduct on the part of the company's agent. It has been decided, time and again, that when an insurance company appoints an agent to solicit risks, and provides him with printed forms of its policies, duly signed and sealed by the proper officers of the company, it will be bound by a policy which the agent sees fit to countersign and deliver, unless the assured has notice, when the policy is delivered, that the agent is exceeding his powers or is violating his instructions. Authority to solicit risks for and in behalf of a company, coupled with possession of its printed forms of applications, and policies duly signed and sealed, vests the agent thus equipped with an apparent authority to make a binding contract of insurance without any further approval of the risk by the company. Insurance Co. v. Wilkinson, 13 Wall. 222, 234, 235; Insurance Co. v. Snowden, 7 C. C. A. 264, 12 U. S. App. 704, 58 Fed. 342; Insurance Co. v. Robison, 7 C. C. A. 444, 19 U. S. App. 266, 58 Fed. 723, and cases there cited. In the present case there was no averment in the answer that Cousley had notice that his policy would not take effect until his application was approved by the home office, nor was there any averment that he was acquainted with a mode of doing business on the part of the defendant company which necessitated an approval of the application by the home office before the contract became complete. He had a right to presume that the contract took effect when the policy was delivered to him and the premium was paid, and that Chapman was authorized to accept the risk and execute the contract.

The second defense above mentioned, which is suggested by the answer, is equally without merit. If the assured concealed any material fact which he should have made known to the company, or if any warranty was broken, the plea interposed fails to show what material fact was so suppressed, or what warranty, if any, was broken. Cousley's application for insurance, which is set out in full in the pleadings, seems to contain full and specific answers to all of the questions which the company saw fit to propound, and, if any of the answers so made were false, the fact is not averred in the plea. Among other things, the assured described his occupation as being that of "supervising contractor," and it was while following that occupation that he sustained the injuries which are alleged to have occasioned his death. Moreover, the company's prospectus show

that it made a practice of insuring builders, masons, and contractors. Without pursuing the subject at any greater length, it is sufficient to say that the "second defense," so termed, which the company attempted to make, was not well pleaded, and the demurrer thereto was properly sustained.

It is further assigned for error that the court erroneously instructed the jury with reference to the right of the defendant company to exhume and examine the body of the assured after his death. The facts pertinent to a proper understanding of the merits of that contention are as follows: The policy sued upon contains the following provision, to wit: "Any medical adviser of the company shall be allowed to examine the person or body of the assured, in respect to any alleged injury, as often as he requires." On the morning after the assured died, notice of his death was given to Francis A. Chapman, the company's agent, at his office, in Denver, Colo., by the present plaintiff, William P. Barr. The agent was asked on that occasion by Mr. Barr what should be done in reference to the matter, and what proofs, if any, should be furnished. To this inquiry the agent replied that nothing would be necessary, except to obtain a letter from the attending physician. A full statement of the cause of Cousley's death was subsequently made by the attending physician, and the same was delivered to the company, together with other proofs of his death, and proof of the nature and character of the injuries which he had previously sustained. Some three or four weeks after the deceased had been embalmed and buried, an application was made by the defendant company, to the widow of the deceased, for leave to exhume and examine the remains of her deceased husband, and such permission was by her denied. Under these circumstances the circuit court instructed the jury, in substance, that the demand for an autopsy was not made within a reasonable time. We are of the opinion that, if the defendant company intended to rest its defense to this action on the ground that it was denied the right to examine the body of the deceased, it should at least have shown that it sought permission from the plaintiff to make such an examination when it was within his power to comply with the request. There is no evidence in the present record tending to show that the plaintiff refused to allow the body of his deceased uncle to be examined on any occasion, either prior to or subsequent to its interment, or that it was within his power to allow the body of the deceased to be exhumed and examined when such a request was preferred. For this reason, if for no other, we think that the exception to the charge last above mentioned is without merit. The company certainly could not defer its request for leave to examine the body of the deceased until it was beyond the plaintiff's power to afford the company that privilege, and then plead the denial of the privilege as a defense to the action.

The remaining assignment which we deem it necessary to notice relates to a portion of the charge whereby the court instructed the jury, in substance, that the plaintiff, William P. Barr, had the right to recover on the policy without proof of an insurable interest in the life of his deceased uncle. It will be observed that the policy in

suit was taken out by Cousley, that the premium was paid by him, and that the indemnity promised in case of injuries not resulting in death was made payable to Cousley; in other words, the contract was made by Cousley with the insurance company for his own benefit. Barr was named as the person to receive and receipt for the amount due on the policy only in the event that the assured sustained injuries which resulted in his death. Whether Barr was a creditor of his uncle, or whether the deceased intended that Barr should receive and retain the amount paid on the policy as a gratuity, or should collect it as trustee, for the benefit of the assured's wife and children, was not expressly stated in the policy, and was not proven on the trial. We are of the opinion, however, that it was not necessary to allege or prove either of these facts. The insurance was obtained by the deceased on his own life, obviously for his own benefit. He had the right to designate the person to whom the indemnity should be paid in case of an injury resulting in death, and having done so, and the company having agreed to pay the indemnity to the person thus designated, it cannot now insist that such person shall prove an insurable interest in the life of the deceased, as a condition precedent to a recovery. The policy sued upon is not a wager contract, but was valid when made, and is still valid, even if it be true that Barr is not a creditor of the deceased. Olmsted v. Keyes, 85 N. Y. 593, and cases there cited. The record in the case discloses no error, and the judgment of the circuit court is therefore affirmed.

FIRST NAT. BANK OF LANSDALE v. BOARD OF COM'RS OF WYANDOTTE COUNTY.

(Circuit Court of Appeals, Eighth Circuit. June 3, 1895.)

No. 557.

ROAD-IMPROVEMENT CERTIFICATES—VALIDITY—KANSAS STATUTE.

Road-improvement certificates issued by persons purporting to act as road commissioners under Laws Kan. 1887, c. 214, for improvements on thoroughfares which are not in fact county roads, but are either located on private property or are streets within the limits of duly-organized cities, are not binding obligations of the county.

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

Winfield Freeman and Horace S. Oakley (W. J. Buchan, Silas Porter, Farlin Q. Ball, and Charles B. Wood, on the brief), for plaintiff in error.

George B. Watson (Henry McGrew and A. E. Watson, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. This was an action at law which was brought by the First National Bank of Lansdale, Pa., the plaintiff in error, against the board of county commissioners of Wyandotte county, Kan., the defendant in error. It was commenced in the

circuit court of the United States for the district of Kansas, for the purpose of recovering the amount alleged to be due on certain road-improvement certificates, which were signed and issued by certain persons while acting as road commissioners for Wyandotte county, Kan., pursuant to the provisions of an act of the legislature of the state of Kansas, approved March 5, 1887, entitled "An act providing for the improvement of county roads." Laws Kan. 1887, c. 214; Gen. St. Kan. 1889, pp. 1802, 1803.

The act last referred to has recently been declared to be unconstitutional by the supreme court of the state of Kansas in the case of Board v. Abbott, 52 Kan. 148, 157, 34 Pac. 416. The defendant county filed an answer to the complaint, wherein it alleged several defenses, among which was the defense that the act under which the certificates in suit had been issued was in violation of the constitution of the state of Kansas, and was therefore null and void. The plaintiff interposed a general demurrer to all the defenses stated in the answer, which was overruled. 61 Fed. 436. The plaintiff thereupon elected to rest its case on the demurrer, and a final judgment was entered in favor of the defendant. The case comes to this court on a writ of error, and the sole question to be considered is whether the circuit court erred in overruling the general demurrer to the answer.

The demurrer appears to have been overruled by the circuit court on the ground that the act of March 5, 1887, supra, was unconstitutional, and that the plea to that effect was well made. An inspection of the answer has satisfied us that at least one other good and sufficient defense to the action was pleaded by the defendant county, so that in any event the order overruling the demurrer to the answer was a necessary and proper order, and the judgment founded thereon cannot be disturbed.

Without stating the several defenses in detail, it will suffice to say that the road-improvement certificates in question purport to have been issued to pay for the improvement of four public county roads in Wyandotte county, Kan., termed, respectively, the Third street road, the Missouri river road, the Kansas City avenue road, and the Tenth street road. With respect to said alleged roads, the defendant county pleaded, in substance, that there never had been in Wyandotte county, Kan., any regularly laid out county roads such as were described in the certificates; that the so-termed Third street road, the Kansas City avenue road, and the Tenth street road, on which, as the complaint showed, the improvements had been made, were not county roads, but were respectively public streets in Kansas City, Kan., and in the city of Rosedale, Kan., over which the county of Wyandotte had no jurisdiction or control; that the so-termed Missouri river road was laid out on land belonging to private persons, and that, if any work had been done in the way of improving said alleged road, it was done largely on private property, in which the county of Wyandotte had no interest whatsoever. The answer further averred, in substance, that the persons by whom the certificates in suit were signed were not road commissioners for the county of Wyandotte, and had no authority as such commissioners

to bind the county by executing the certificates; that no county road was in fact improved for which the pretended road-improvement certificates in suit were issued; and that said alleged road commissioners had no authority to execute and deliver said obligations. It was also averred, and such was obviously the fact, that the certificates in suit were nonnegotiable instruments, and that the plaintiff was chargeable with notice of all the defenses thereto.

The two facts which were sufficiently pleaded in the answer—namely, that the road-improvement certificates were not negotiable instruments, and that the same had been issued for improvements made on certain thoroughfares that were not in fact county roads, but were either located on private property, or were streets within the limits of duly-organized cities of the state of Kansas—constitute in themselves a good and sufficient defense to the suit, irrespective of all other defenses.

As the action of the court in overruling the demurrer must be sustained in any event on the ground last indicated, it would be out of place to discuss the further question whether the act of March 5, 1887, above referred to, is valid or otherwise.

The judgment of the circuit court must be affirmed.

UNITED STATES v. MATTHEWS.

(District Court, S. D. New York. March 20, 1895.)

CRIMINAL LAW—PLEADING—INDICTMENT FOR PERJURY AS A WITNESS—TIME IMMATERIAL.

The indictment charged perjury by the defendant in his testimony as a witness on a trial, "to wit, on June 7, 1894." The former trial lasted several days and it was truly described and identified. By the stenographer's notes on the former trial, produced in evidence, it appeared that the defendant testified on June 6th and 7th, but that the false testimony was given on the 6th and not on the 7th as charged. On motion in arrest of judgment, *held* that, as the perjury was not charged to have been contained in a written instrument, the variance in date was immaterial.

This was an indictment against John Matthews for perjury.

Wallace Macfarlane, U. S. Dist. Atty., and John O. Mott, Asst. U. S. Atty., for the United States.

Hess, Townsend & McClelland, for defendant.

BROWN, District Judge. The defendant was indicted for perjury in his testimony as a witness on a previous trial. The indictment, after properly setting forth the court, and the trial, with time and place, states that the defendant, to wit, on the 7th day of June, 1894, appeared as a witness in his own behalf, and being sworn gave material testimony, which the indictment alleges was false. On the present trial it appeared that the former trial continued during several days, and that the accused was sworn as a witness on the 6th day of June, and testified on that day and also upon the 7th, but that the testimony alleged to be false was given upon the 6th and not on the 7th, as stated in the indictment. The question as to a fatal variance being reserved, the jury found the defendant guilty.

Numerous authorities have been cited in support of the motion to set aside the verdict on the ground of a fatal variance. I do not find those cases precisely applicable. Where the indictment alleges the perjury to have been committed in some matter of record, or in a deposition, or affidavit, of a certain specified date, and the record or other writing, on being produced, as in such case it must be produced, shows a different date from that alleged in the indictment, the variance is fatal, because the date of the record is a material part of its identity. But where the perjury is not alleged by the indictment to be upon any matter of record or other written document, and no written document is necessary for proof of the offense, I do not find that the day assigned in the indictment, when stated under a videlicet, as in this case, is deemed material, or that the rule as respects perjury is different from the rule relating to indictments for other crimes.

In the present case, the perjury charged was in the defendant's testimony in a specified cause, and at a time and place sufficiently identified to prevent any possibility of mistake or surprise as to the offense intended to be charged. The charge of perjury was not founded upon any record or written instrument. The indictment does not refer to any record or other writing, and no record or other writing was necessary for the proof of the offense. The stenographer who took notes of the former trial was, indeed, sworn as a witness, produced his original stenographic notes of the testimony, swore to their correctness, and to the true date of the defendant's testimony. But such notes do not form a part of the record of the trial, though a transcript of them may be made such, for special purposes. The indictment made no reference to them, and their use was but one of the forms of oral proof, and the transcript originally made stated the same date as the indictment. In such cases proof of the precise day as stated under a videlicet in the indictment seems not to be material. Rex v. Coppard, 3 Car. & P. 59; 3 Russ. Crimes, p. 41 note g; 2 Whart. Cr. Law, § 1291; Keator v. People, 32 Mich. 484, 487; Wood v. People, 1 Hun, 381, 384; People v. Hoag, 2 Parker, Cr. R. 9.

The motion must, therefore, be denied.

In re HUNTINGTON.

(District Court, S. D. New York. May 7, 1895.)

CRIMINAL LAW—REMOVAL OF OFFENDERS—SECTION 1014, REV. ST.—INSUFFICIENCY OF INDICTMENT—FREE PASSES—ACT FEB. 4, 1887.

The act of February 4, 1887, forbidding certain preferences, means preferences in transportation of persons or property. An indictment alleging only the issue of a free written pass, but not alleging any use of the pass, or of transportation under it, is fatally defective in substance, and therefore not a sufficient basis for removal under section 1014, Rev. St.

This was an application for a warrant for the removal of C. P. Huntington to California for trial upon an indictment charging him

with issuing a free pass for railroad transportation contrary to the interstate commerce law.

Wallace Macfarlane, U. S. Dist. Atty., for the United States.
Coudert Bros. and Maxwell Evarts, for defendant.

BROWN, District Judge. Application is made under section 1014, Rev. St. U. S., for the removal of Mr. Huntington to California for trial upon an indictment found there on January 10, 1894, for issuing to Frank M. Stone in California, in violation of the act of February 4, 1887 (24 Stat. 379), a "free pass" in the following words: "Southern Pacific Company: Pass Frank M. Stone over lines of the Southern Pacific Company 1894 until December 31, unless otherwise ordered."

The indictment charges that by this free pass the defendant did willfully and unlawfully, and knowingly, make and give an "undue and unreasonable preference and advantage" to said Stone; that the pass was delivered to him and remained in his possession in full force and effect until December 26, 1894, and that it was the intent of the defendant in issuing the pass to give said Stone unlimited privilege and opportunity "to travel without charge or compensation over all the lines of the Southern Pacific Company"; and that he was not one of the persons mentioned in the amendment to section 22 of said act by the act of March 2, 1889 (25 Stat. 855), to whom the act was not to apply.

The application for removal must be denied, on the ground that the indictment is fatally defective in not averring that any use was ever made of the pass, or that any transportation was ever furnished under it. Where the indictment is bad in substance, no removal will be granted. In re Doig, 4 Fed. 193; and see U. S. v. Fowkes, 49 Fed. 50, affirmed 53 Fed. 13, 3 C. C. A. 394; In re Terrell, 51 Fed. 213.

The various provisions of the act itself, and the rulings and adjudications of the interstate commerce commission, leave no doubt whatsoever that the act is intended to deal with transportation; and that nothing in the act makes criminal the mere issue of free tickets or passes that are never used. The indictment is drawn under the third section of the act, which provides: 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 or any particular description of traffic * * * or to subject any person or any particular description of traffic * * * to any undue or unreasonable prejudice or disadvantage." The subject of the "preference" or "prejudice" is transportation of either persons or property. The act nowhere in terms prohibits the mere issuing of free tickets, or free passes. A free ticket or a free pass not used is not transportation; it is not a preference or advantage to the holder, nor any prejudice or disadvantage to others. This precise point was so adjudged by the interstate commerce commission in the case of Griffee v. Railroad Co., 2 Interst. Commerce Com. R. (No. 137) 301. In that case an ex-employé was furnished a free pass, which on the hearing of the com-

plaint it appeared had not been used. Commissioner Schoonmaker, in dismissing the complaint, says: "On these facts a contravention of the statute has not been shown; * * * confessedly there was no transportation under the pass; nothing whatever was done under it," and the complaint was dismissed. No different adjudication, so far as I have found, has ever been made. A preference in transportation, is, therefore, of the essence of the offense. Every indictment must allege the necessary ingredients of the crime charged, or it is insufficient for putting the accused on trial. U. S. v. Hess, 124 U. S. 483, 8 Sup. Ct. 571. "Before a man can be punished, his case must be plainly and unmistakably within the statute;" and the indictment must show it to be so. U. S. v. Lacher, 134 U. S. 624, 628, 10 Sup. Ct. 625; U. S. v. Brewer, 139 U. S. 278, 288, 11 Sup. Ct. 538. The issuing of a free pass for purposes not allowable, is doubtless prima facie evidence of an intent to furnish unlawfully free transportation; but there is nothing in the act that makes criminal the intent alone, or the mere issuing of a free pass without any actual transportation under it. The cases cited by the government from the reports of the interstate commerce commission show, on examination, that they are all dealing with "free carriage," and "free transportation," not with free tickets alone. See In re Boston & M. R. Co., 5 Interst. Commerce Com. R. (Off. Ed.) 69–83, and Harvey v. Railroad Co., Id. 153, where nearly all the authorities are reviewed. An occasional ambiguity arises from the use of the words "free pass," as synonymous with a free ride. In the latter sense, and in that alone, a free pass may be unlawful. This indictment, by describing the "free pass" as a writing and in haec verba, prevents any possible construction of the words of the indictment in the unlawful sense of free transportation, and as it does not charge any transportation, it is not sufficient to put the defendant on trial, and therefore the application to remove must be denied.

UNITED STATES v. ARTEAGO et al. (forty cases).

(Circuit Court of Appeals, Fifth Circuit. May 7, 1895.)

Nos. 267–290, 292–296, 298–301, 303–308, and 310.

IMMIGRATION—CONTRACT LABOR LAWS—AUTHORITY OF SECRETARY OF TREASURY—JURISDICTION OF COURTS—HABEAS CORPUS.

The action of the secretary of the treasury in ordering the deportation of immigrants who have arrived within a year, on the ground that they were landed in violation of the contract labor laws (Acts February 26, 1885, February 23, 1887, October 19, 1888, March 3, 1891), cannot be reviewed or questioned in the courts; and hence there is no jurisdiction to discharge them on writs of habeas corpus when held in custody by immigrant inspectors for the purpose of deportation pursuant to an order of the secretary. Fong Yue Ting v. U. S., 13 Sup. Ct. 1016, 149 U. S. 698, applied.

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

These were writs of habeas corpus, issued upon the relation of Antonio Arteago and 39 other Italian immigrants, who were held

in custody by immigrant inspectors at the port of Key West for the purpose of deportation under the contract labor laws. The circuit court entered an order discharging the relator in each case, and the United States appealed.

The above-entitled cases are similar as to fact and the law applicable thereto, and, having been heard together, are disposed of together. About the 8th of January, 1894, the relators, cigar makers by trade, arrived in this country from Cuba, paying their own passage, and not under any contract or agreement of any kind with any person to labor in this country. On their arrival they were inspected and examined by the immigrant inspector at the port of Key West, and were permitted to land. Soon after landing, they obtained employment as cigar makers, and up to the time of the proceedings in the circuit court hereinafter mentioned were continuously employed supporting and maintaining themselves by their labor. On the 6th of February following the arrival of the relators in this country, the honorable secretary of the treasury issued a warrant directed to Frederick Deshler and William Bethel, immigrant inspectors, wherein it was recited as follows:

"Whereas, from proofs submitted to me, I have become satisfied that all alien immigrants, who landed in the United States at the port of Key West, Florida, on the 8th day of January, 1894, came into this country from Havana, Cuba, per S. S. Mascotte, contrary to the prohibition of the acts of congress approved February 26, 1885, February 23, 1887, October 19, 1888, and March 3, 1891, commonly known as the 'Alien Contract-Labor Laws'; and whereas the period of one year after landing has not elapsed: I, John G. Carlisle, secretary of the United States, by virtue of the power and authority vested in me by the above-cited acts of congress, do hereby command you to take into the custody the said * * * alien immigrants, and return them to the country whence they came, at the expense of the vessel importing them. For so doing, this shall be your sufficient warrant. Witness my hand and seal this sixth day of February, 1894. John G. Carlisle, [Seal.]
"Secretary of the Treasury."

The relators were taken into custody under this warrant, and thereupon sued out in the circuit court a writ of habeas corpus, alleging in their petition therefor as follows: "The petition of Joaquin J. Amor respectfully shows unto your honor that he is now a prisoner, illegally confined and held in the custody of F. Deshler and W. Bethel, immigration inspectors, in the city of Key West, Fla., and within the jurisdiction of this honorable court, under and by virtue of an alleged warrant issued by secretary of U. S. treasury, in which warrant petitioner is charged with a violation of the immigration laws of the United States, and by which warrant petitioner is ordered to be forthwith removed from the United States; a copy of which warrant is refused. Petitioner alleges: That he came to the United States from Cuba about the 8th day of Jany., 1894, and was examined upon his arrival by the U. S. inspector of immigration at the port of Key West, and by him was decided to be entitled to land in the United States as a lawful immigrant; and, having so landed, petitioner has ever since lawfully dwelt in said city of Key West. That petitioner has never heard of any appeal being taken from said decision of said immigrant agent, and has had no notice of any complaint or proceeding against him, and has had no opportunity to meet and answer any charges preferred against him. And petitioner avers that he has violated no law of the United States, or of the state of Florida; that he has had no hearing or trial, and it is proposed by said Deshler and Bethel, in whose custody petitioner now is, to remove the petitioner at once from the United States, without any hearing or investigation; that said arrest of petitioner, and the summary proceeding to deport him, is illegal, and is an invasion of the rights of petitioner. Wherefore your petitioner prays that a writ of habeas corpus be issued against said Deshler and Bethel, to the end that the petitioner may be discharged from said unlawful arrest and detention." The immigrant inspectors made return to the writ, showing that the relators were in their custody under and by virtue of the above-mentioned warrant. On the hearing the United States attorney for the Southern district of Florida appeared, and moved the

court to dismiss the petition for habeas corpus, for the reason that upon the return of the writ it is shown that the petitioners are held under a warrant issued by the honorable secretary of the treasury, and it appearing that, the secretary had jurisdiction and authority in the matter of issuing said warrant, the matter is not reviewable by this court. This motion having been overruled, witnesses were examined, the facts stated in the petition for habeas corpus and the above-recited facts were proved by witnesses, and thereupon the court ordered in each case as follows: "It not appearing that the petitioner had come into the United States in violation of law, it is ordered that the petition be granted, and he [naming petitioner] be discharged from custody," whereupon the United States appealed to this court, assigning errors as follows: "First, that the court erred in refusing to grant the motion of the said attorney to dismiss the petition upon the ground set forth in said motion; second, that the court erred in permitting any evidence to be introduced at the hearing; third, that the court erred in discharging the petitioner."

F. B. Earhart and Frank Clark, for the United States.

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

PER CURIAM. A majority of the judges being of opinion that these cases are controlled by the principles declared in the opinion of the supreme court in Fong Yue Ting v. U. S., 149 U. S. 698, 13 Sup. Ct. 1016, and consequently that the action of the secretary of the treasury in ordering the deportation of aliens who have arrived in this country within a year cannot be reviewed nor questioned by the courts, it is ordered that the judgments of the circuit court for the Southern district of Florida in the above-entitled cases be, and the same are, reversed, and the said cases, and each of them, are remanded, with instructions to enter judgments discharging the writ of habeas corpus, and remanding the relators to the custody of the immigrant inspectors of the United States.

UNITED STATES v. AMOR et al. (six cases).

(Circuit Court of Appeals, Fifth Circuit. May 7, 1895.)

Nos. 265, 266, 291, 297, 302, and 309.

IMMIGRATION—CONTRACT LABOR LAWS—DEPORTATION—HABEAS CORPUS.

Aliens held in custody by immigrant inspectors for deportation under the contract labor laws, and by virtue of a warrant from the secretary of the treasury, which does not contain the names of the prisoners, or any names idem sonans, are *held* without authority, and may be released by habeas corpus. U. S. v. Arteago, 68 Fed. 883, distinguished.

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

These were writs of habeas corpus issued upon the relation of Joaquin J. Amor and five others, who were held in custody by immigrant inspectors at the port of Key West for the purpose of deportation under the contract labor laws. The circuit court entered an order discharging the relator in each case, and the United States appealed.

F. B. Earhart and Frank Clark, for the United States.

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

PER CURIAM. These cases, in the main similar to U. S. v. Arteago (just decided) 68 Fed. 883, are distinguished from them in that the warrant of deportation issued by the honorable secretary of the treasury does not contain the names of the petitioners in the court below (appellees here), nor any name or names idem sonans, and there is no evidence, even if such were admissible, tending to identify the appellees with any name or names recited in the warrants. As the return to the writ of habeas corpus shows no authority to detain the petitioners, the judgments of the circuit court are correct, and the same are affirmed.

In re DANA et al.

UNITED STATES v. DANA et al.

(District Court, S. D. New York. June 24, 1895.)

1. CRIMINAL LAW—REMOVAL OF OFFENDERS—REV. ST. § 1014—STATE PRACTICE TO BE FOLLOWED—INDICTMENT IN ANOTHER DISTRICT INSUFFICIENT, IF INCONSISTENT AND CONTRADICTORY—LIBEL—PLACE OF COMMITMENT.

The editor of the New York Sun was indicted in Washington for an alleged libel published first in New York and afterwards circulated in Washington. On an affidavit, stating the indictment and annexing a copy, he was arrested in New York under a warrant issued by a United States commissioner, and held for trial in Washington upon proof of identity. It appeared that he had not been in Washington. Further evidence of no criminality was excluded. The indictment charged in one count the writing and publishing of the libel in New York; in another count it charged the writing in the District of Columbia; and its averments as to Mr. Dana's own acts were uncertain. On application under section 1014, Rev. St., for an order to remove the accused to Washington for trial: *Held* (1) that this proceeding was independent of that in Washington; (2) that it must conform to the state practice; (3) that facts and circumstances showing criminality must appear by oath or affidavit, and the committing magistrate be thereby satisfied of probable cause; (4) that the accused has the right to an examination, when demanded, and to show want of probable cause; and that the evidence offered should have been received; (5) that an indictment which presents a clear and consistent statement of facts is equivalent to an affidavit thereof upon the faith of the witnesses indorsed on it; (6) that such an indictment, though secondary evidence, is receivable, and is sufficient if not controverted; (7) that where, as in libel, the place where the offense was committed is material, vague and contradictory statements in the indictment forbid its reception as equivalent to an affidavit of facts, and reduce it to its strict office, viz., as a pleading only; (8) that this indictment was of that character, and hence insufficient as a basis of removal.

2. SAME—SECTION 33, JUDICIARY ACT—"OFFENSES AGAINST THE UNITED STATES"—FEDERAL OFFENSES—LOCAL OFFENSES UNDER LOCAL LAW EXCLUDED.

Removable offenses under section 1014, Rev. St., are the same as under section 33 of the judiciary act; the latter refers only to federal offenses, created by the general legislation of congress, and does not embrace offenses such as libel under the local or common law of the District of Columbia alone; the "offenses against the United States" referred to, are such as are triable in the federal courts; libel is not such an offense; the language of section 33 excludes its application to such local offenses in the District of Columbia; the acts of 1871 and 1874 do not extend the

class of offenses referred to in section 33 and section 1014; and the act of 1871 was not designed to give exceptional privileges to the District of Columbia by authorizing removals to that district for an offense like libel, which does not admit of removal as between any of the states, or any of the federal districts of all the rest of the country. *Held*, therefore, that the application for removal should be denied.

On March 8, 1895, Mr. Dana, editor of the New York Sun, was held by Commissioner Shields in this district, under section 1014 of the United States Revised Statutes, for trial in the District of Columbia upon an indictment there found against him and William Laffan for libel against Frank B. Noyes, a director of the Associated Press, contained in an editorial article printed and published in The Sun of February 22, 1895, and circulated in Washington. The defendant Laffan not having been found, application was made to the district judge for an order removing Mr. Dana to Washington, for trial in the supreme court of the District of Columbia, where the indictment was filed on March 7, 1895.

The complaint before the commissioner was made by the United States attorney for this district, in a brief affidavit, which did not itself charge any offense, but alleged, upon information and belief, the finding of the indictment, as above stated, and that the defendant was in this district. Attached were an authenticated copy of the indictment, and a copy of the bench warrant issued thereon by the chief justice of the court, directing the marshal of the District of Columbia to arrest the defendants if found in that District.

The indictment contained three counts. The first stated that the Sun Printing & Publishing Association was a New York corporation, engaged at the city of New York, in the business of printing and publishing The Sun newspaper daily; that Mr. Dana was its editor, and as such, composed, and procured for publication in The Sun, the editorial articles that appeared in the daily issues thereof; that the defendant Laffan was the manager of the paper, who had charge and superintendence of the printing, publication, and sale thereof; and that as such manager Laffan published and sold, and caused to be sold the issues of the paper in the city of New York, and at other places in the United States, among them, at the city of Washington; and that 300 copies of The Sun were regularly sent to Washington, and were sold by said Laffan as such manager for circulation there, as Mr. Dana well knew; that Mr. Dana, so being editor, and Mr. Laffan, manager, of The Sun, did, at the city of New York, on the 22d of February, 1895, maliciously write and publish, and cause and procure to be written and published in The Sun, in the form of an editorial article, the libelous matter complained of, entitled "The Work of Rascals"; and on the same day maliciously and unlawfully sent and caused to be sent to the city of Washington, for circulation there, 300 copies thereof, containing the libelous matter referred to; and did then and there on February 22, 1895, at the District of Columbia, unlawfully publish, and cause to be published, the libelous matter in the editorial article above referred to.

Two other counts in the indictment are of the same purport substantially, except that they make no reference to the publication of The Sun in New York, or to any acts of the defendants in New York; but aver that the defendants on the 22d day of February, 1895, did, at the said District of Columbia, write and publish, and cause and procure to be written and published a certain other libel, in the same words as stated in the first count. Mr. Dana, on notice of the proceedings, appeared before the commissioner. His identity was proved; and also that he was not in Washington, but in New York, during all the period alleged in the indictment, and had nothing to do with the sale or circulation of the paper; he denied the existence of probable cause, the sufficiency of the papers presented to the commissioner, and offered evidence to show want of probable cause, which was excluded, the commissioner ruling that only the question of identity was before him. The question of removal was elaborately argued before the district judge orally, and upon briefs afterwards submitted.

Wallace Macfarlane, U. S. Dist. Atty., and Max J. Kohler, Asst. U. S. Dist. Atty., for the United States.

Elihu Root, Franklin Bartlett, and Jere Wilson, for defendants.

BROWN, District Judge (after stating the facts). The indictment charges that the alleged libel was published both in New York and in Washington. But the facts stated in the indictment, and the slight evidence taken before the commissioner, are sufficient to show that whatever Mr. Dana had to do with the publication of The Sun of February 22d, containing the alleged libelous matter, was done in New York. Upon this ground it is contended by his counsel that he cannot be removed to Washington for trial, under the provisions of the United States constitution, which require the trial of offenders to be had in the state and district where the offense shall have been committed. The law of libel, however, authorizes an indictment where the libelous matter has been circulated through the defendant's instrumentality or procurement, and the common-law authorities justify the contention of the prosecution, that if the accused, within one jurisdiction has set agencies in motion for the purpose of procuring the circulation of the libelous matter in another jurisdiction, the offense is committed by him in the latter jurisdiction, though he was not physically present there.

Whether the requirement of the constitution that the trial shall be had where the offense is committed, is to be construed according to the technical common-law rule existing at the time the constitution was adopted, or in the more popular sense of the word "committed," and with reference only to the place where the defendant's own acts were done, is a mooted question, which I do not find it necessary to decide. Some very pertinent remarks on this point adverse to the contention of the prosecution, are to be found in the opinion rendered by Justice James, in the case of U. S. v. Guiteau, 1 Mackay, 544, 545, and also by Justice Hagner, in the same case (pages 553, 554), both of whom express the opinion that the constitutional provision is to be interpreted on grounds "independent of the common law," and with reference only to the "place where the manifest act of the defendant was done"—"where his active agency was employed"—and that it "forbids trial in a district where the ultimate consequence of his act happened, but where he does not act."

The language of courts, however, is to be considered with reference to the facts of the case in hand; and in that case the mortal blow was delivered in the District of Columbia, though the death resulting from it occurred afterwards in New Jersey. Such cases are distinguished from those in which the defendant's acts are direct and continuous, as when a pistol ball is fired across the boundary line of two jurisdictions; in that case, the blow is deemed given and the offense committed where the ball strikes, though the offender was across the line and in another jurisdiction. U. S. v. Davis, 2 Sumn. 482, Fed. Cas. No. 14,932. And so in libel, it is said, the injurious blow is delivered at the place where the circulation or publication is brought about intentionally through the defend

ant's procurement. If the circulation in a foreign jurisdiction arises only through the independent acts of others, without any active privity or intentional procurement of the defendant, no doubt can arise; as, for instance, in the case of a sale by the publishers of papers at the principal place of publication to a newsdealer in the ordinary course of trade, by whom the papers are forwarded to other jurisdictions in the ordinary course of his business. In such a case the remarks of Judge Cooley would certainly be pertinent:

"The actual offense, if any," he says, "was committed in New York. But a technical publication also took place in Washington by the sale of papers there. * * * It would be a singular result of a revolution where one of the grievances complained of was the assertion of a right to send parties abroad for trial, if it should be found that an editor may be seized anywhere in the Union and transported by a federal officer to every territory into which his paper may find its way, to be tried in each in succession, for offenses which consisted in a single act, not actually committed in any of them." Const. Lim. *320, note.

As the facts bearing upon this point appear very imperfectly, through the slight testimony admitted by the commissioner, it will not be useful to consider it further here, though it has an important connection with the sufficiency of the indictment; and in that relation it will be referred to hereafter. It is also unnecessary, as a careful examination of the case in other aspects satisfies me that the application for removal should be denied, (1) because of the insufficiency of this indictment as a basis for removal proceedings under the practice required by section 1014; and (2) because the offense charged, resting wholly on the common law of Maryland, continued in force there by the acts of congress, does not belong to the class of "offenses against the United States" contemplated by section 33 of the judiciary act, or by section 1014 of the Revised Statutes, upon which this application is based.

(1) Procedure: The Indictment as Evidence:

The commitment was made, and removal is asked, upon no evidence of criminality, or of probable cause, except a copy of the indictment found in the District of Columbia. Its reception as evidence of criminality was objected to. The objection was overruled, and the finding of the indictment was treated as so far conclusive on the question of probable cause, as to leave nothing for the commissioner, as a committing magistrate, to determine, except the identity of the defendant. Evidence offered by the defendant to disprove probable cause was accordingly rejected. On the question of criminality, no witnesses were called for the prosecution, and none was allowed for the defendant. It is claimed by the prosecution that the long practice of this district warrants that course. No reported decision of my predecessors on this point has been cited, and I know of none; nor has the point been before presented to me for decision. As applications for removal upon indictments found in other districts are becoming frequent, correct practice in regard to them is so important that I am constrained to give it careful attention. If the practice pursued in this case is

not warranted by law, no previous acquiescence in it can justify its continuance, when properly challenged; especially in a matter affecting personal liberty. Two points are involved, viz., whether the indictment is admissible at all as a foundation for commitment under section 1014 of the Revised Statutes; and if admissible, its effect and conclusiveness on the question of probable cause. There is not statute of the United States directly determining these questions.

In the earliest case referring to the subject (1868), and the only one in this circuit (In re Clark, 2 Ben. 540, Fed. Cas. No. 2,797), no question on this point was raised; for Benedict, J., states expressly in the opinion rendered, that the "single issue" presented to him did not include any question "whether the foreign indictment and warrant were sufficient evidence to authorize commitment"; and it was, therefore, not considered. In U. S. v. Jacobi (1871) 4 Am. Law T. 151, Fed. Cas. No. 15,460, Judge Withey states his opinion, "that a certified copy of the indictment would be sufficient not only to justify the United States attorney in making the necessary complaint, but to authorize the issuance of a warrant of arrest (i. e. the first warrant) by the proper officer." But he reiterates what he had said in U. S. v. Shepard, 1 Abb. (U. S.) 434, 435, Fed. Cas. No. 16,273, viz., that there can be no removal summarily under the thirty-third section of the judiciary act, nor until after commitment by the proper officer; and no commitment, until after an examination, and the finding of probable cause. In the Case of Shepard he discharged the defendant because his presence had been procured summarily, upon a warrant based upon an unverified information by the United States attorney.

Judge Lowell, in Re Alexander (1871) 1 Low. 530, Fed. Cas. No. 162, held, that the foreign indictment "being found upon oath and after the examination of witnesses, has a presumption of validity." But "before a committing magistrate," under section 1014, he says, "Such an indictment is only a piece of evidence, which may be met and controlled; but where it stands by itself, and is uncontradicted, it is enough to authorize the warrant." In the case of U. S. v. Pope (1879) 24 Int. Rev. Rec. 29, Fed. Cas. No. 16,069, the subject was again considered by him, and he there says that the allowance of the indictment in evidence "rests rather on long usage than on any principle of law; because, generally speaking, an indictment is evidence of nothing but its own existence, unless there is some statute giving it a greater effect (see Rex v. Eriswell, 3 Term R. 722, per Lord Kenyon); it is but secondary evidence after all, or rather a statement of the result of evidence, and the better practice is to give primary evidence of criminality." The indictment in that case was for conspiracy in Louisiana. Proof was admitted before the commissioner to show that the defendant was not in Louisiana at the time alleged. "The allegations of the date of the conspiracy," says Judge Lowell, "involve the indictment in contradictions, which, if they are errors, must be corrected by evidence, and none is offered. The indictment itself must stand or fall, by its own

dates. * * * It is, therefore, worthless as evidence of a conspiracy, just as an affidavit would be which contained such inconsistencies."

In the case of U. S. v. Rogers, 23 Fed. 658, 661–663, Parker, J., says:

"In the discretion of the judge he may take the indictment as prima facie evidence of jurisdiction"; but if the question of the jurisdiction is raised, (i. e., the place where the offense was committed) the judge, either on application for removal, or on habeas corpus, "may go behind the indictment to ascertain where the trial is to be (i. e. may lawfully be) had"; and upon the additional proofs taken on that point, the defendant was in that case discharged. On the same ground, removal was denied in the cases of In re Buell, 3 Dill. 116, Fed. Cas. No. 2,102; In re Terrell, 51 Fed. 213; and In re Corning, Id. 205,—upon an analysis of the averments of the indictment itself. In the case of In re Wolf, 27 Fed. 606, 608, Parker, J., says:

"If the indictment contains allegations sufficient to show a crime has been committed by the party charged, it is the practice of the federal judges to take the same as a prima facie showing that a crime has been committed at the place alleged by the party charged; and, if nothing else appears, to order a removal of the party charged. But I have no doubt the judge, in his sound discretion, may go into the whole case, if necessary, to enable him to determine whether the party is to be removed from his home to a distant part of the country. This is a law in restraint of liberty, and, like all laws of this character, while the very substance of the law is not to be construed away, yet it is to be strictly construed, and strictly pursued. The government asking a removal is required to fully comply with the law."

The defendant was there also discharged.

In U. S. v. Fowkes, 49 Fed. 50, Butler, J., treated the subject in substantially the same manner; admitting the indictment in evidence, but finding it insufficient, on hearing the defendant's evidence. "The court," he says, "may treat an indictment as sufficient authority for holding the relator, or it may not, as circumstances seem to require." When found at a distance, at the instance of the prosecuting officer, and without any previous commitment, notice, or binding over, and not supported by any further proofs, he regards the grand jury's "finding, as little more than matter of form."

The circuit court of appeals, in affirming this decision (53 Fed. 13, 3 C. C. A. 394), say:

"We do not doubt that a district court may, in its discretion, and in a proper case, order a warrant of removal upon an indictment alone; but it would be going much too far to hold that in all cases * * * the judge is precluded from hearing any other evidence than" the indictment; and the court held that the judge was in that case justified in requiring that he should be satisfied, before he would deprive the relator of his personal liberty and order his transfer to a distant state for trial (Missouri) that there was evidence on which a jury might convict in that state; and that there was no error by the judge in his requiring, after the evidence given by the defendant, "other evidence than the indictment itself, that the court in Missouri had cognizance of the offense; and in discharging the

accused, upon failure of the government to comply with that requirement." The question there was similar to one of the principal questions here, viz., did the defendant commit any offense in the District of Columbia where the indictment was found, so as to give the court in that district any cognizance of the offense, or any jurisdiction to try him? In that aspect the indictment is always open to criticism, and contradiction. In re Terrell, 51 Fed. 213; In re Corning, Id. 205, 206.

The above are the only cases I have found in which the effect of the indictment as evidence is considered. According to them, an indictment in another district, though admissible as prima facie evidence, is not conclusive, and cannot shut out evidence for the defendant to show that no offense was committed by him within the district to which removal is sought.

The statutory provisions bearing on the subject, as well as the practice before committing magistrates, though sometimes referred to, have in nearly all the cases cited been so little considered, that it will be useful to recur to them.

The proceedings for commitment and removal are founded solely upon section 1014 of the Revised Statutes. Plainly, therefore, they must conform to the conditions enjoined by that section. Cases like U. S. v. Berry, 4 Fed. 779, and U. S. v. White, 2 Wash. C. C. 29, Fed. Cas. No. 16,685, which did not arise under section 1014, nor involve its application, have little bearing on the question. The proceedings must also conform to the fourth amendment of the constitution, which provides that "no warrant shall issue but upon probable cause, supported by oath or affirmation." Section 1014 is as follows:

"For any crime or offence against the United States the offender may * * * by any justice or judge of the United States, or by any commissioner, etc., or by any judge of the supreme court, etc., * * * justice of the peace, or other magistrate, of any state where he may be found, and agreeably to the usual mode of process against offenders in such state, be arrested and imprisoned or bailed for trial before such court of the United States as by law ["as by this act," says section 33 of the judiciary act] has cognizance of the offence. Copies of the process shall be returned as speedily as may be unto the clerk's office of such court, together with the recognizances of the witnesses for their appearance to testify in the case; and where any offender or witness is committed in any district other than that where the offence is to be tried, it shall be the duty of the judge of the district where such offender or witness is imprisoned, seasonably to issue, and the marshal to execute, a warrant of removal to the district where the trial is to be had."

The whole structure of this section, its provisions in regard to bail, recognizances, witnesses, and commitment, and the express provision that the proceeding shall be "agreeably to the usual mode of process against offenders in such state," show that the familiar common-law proceeding upon complainant for the arrest and commitment of offenders by committing magistrates was intended to be adopted and followed, subject to the provision adopting the procedure of the several states. Even the magistrates named are almost identical with those named in the state statutes.

The proceeding contemplated by section 1014 is, moreover, an original and independent proceeding. It makes no reference to any indictment found elsewhere, nor is there any different provision for

such cases. In those cases, by the common-law practice, and by the state practice, the defendant, if within the state or kingdom, was arrested upon a bench warrant, or a warrant signed by a justice of the peace, issued directly upon the finding of the grand jury. The bench warrant ran throughout the state, or kingdom; a justice's warrant had to be "backed," or indorsed, by a justice in the county where the defendant was found. 1 Chit. Cr. Law, 342; Code Cr. Proc. N. Y. § 304. As congress has not authorized that mode of proceeding upon federal indictments, if the defendant is not within the district where the indictment is found, resort must be had, as it is now considered, to an original proceeding by complaint under section 1014; and whenever that section is appealed to, the procedure required by it must be observed, whether there has been a previous indictment found elsewhere, or not. The requirement that the proceeding shall be "agreeably to the usual mode of process against offenders in such state," "was designed," says Mr. Justice Curtis, in U. S. v. Rundlett, 2 Curt. 41, Fed. Cas. No. 16,208, "to assimilate all the proceedings for holding accused persons * * * to the proceedings had for similar purposes by the laws of the state where the proceedings should take place." The words "mode of process," he says, are synonymous with "mode of proceeding."

This must embrace the preliminary examination usual in the state, including the taking of evidence, depositions, and the examination of witnesses, and the duty of the magistrate in finding probable cause; because, aside from this clause, there is no rule on those subjects; and it cannot have been intended that the proceedings should be conducted arbitrarily, and without any rule at all. The provision also for the commitment of witnesses, contemplates their presence and examination. In making this provision for an observance of the practice in use in the state where the arrest is made, it may be reasonably presumed that the intention of the judiciary act was to prevent the hateful appearance of employing summary and arbitrary methods of removal, and to avoid creating prejudice against the new government which would be likely to be engendered through courses of procedure to which the people of the several states were not accustomed, and against which they had just successfully fought. The construction of treaty stipulations is analogous. In re Farez, 7 Blatchf. 345, 357, Fed. Cas. No. 4,645.

Although the state rules of evidence are not applicable in criminal proceedings in federal cases, unless congress has so provided, the above clause of section 1014 sufficiently shows the intent of congress in this instance. It also imports that the rules of procedure to be followed in proceedings under section 1014 are those in force in the state at the time and place of the removal proceeding. This construction has been adjudged either directly, or by necessary implication in many cases; by Woodruff, J., in U. S. v. Case, 8 Blatchf. 251, Fed. Cas. No. 14,742; by Judge Dillon, in U. S. v. Horton, 2 Dill. 94, Fed. Cas. No. 15,393; by Hammond, J., in U. S. v. Brawner, 7 Fed. 86, 90; by Deady, J., in U. S. v. Martin, 17 Fed. 150, 156; and by Dyer, J., in Re Burkhardt, 33 Fed. 25, 26. It is implied also in Mr. Justice Miller's language in the Case of Bailey, 1 Woolw.

422, 426, Fed. Cas. No. 730, holding that although no examination is provided for in express terms by section 1014, it is necessarily implied in the reference to the state practice. "It would be a waste of time," he says, "to attempt to show that an imprisonment or order for bail is never made in any state, without a previous examination into the probable guilt of the prisoner, unless he voluntarily waives such examination." Hammond, J., says: "That the preliminary examination is to be in accordance with the usages of the district, seems to be a plain requirement of the statute." Deady, J., referring to the clause in question, says, "The validity, etc., is to be determined by the law of Oregon for the arrest, examination, and commitment of offenders"; and Dyer, J., says that the act "requires a preliminary examination, so that the committing magistrate, and the judge signing the order of removal, may be satisfied of the probable guilt of the accused." I do not find any reported case dissenting from these views. The state practice, therefore, as regards examinations before committing magistrates, must be followed, so far as applicable, in proceedings under section 1014.

At common law a magistrate could not lawfully commit except upon oath. When the witnesses were brought before him, he was required to take their depositions as to the facts and circumstances within their knowledge showing criminality; the defendant at length acquired the right to cross-examine the complainant's witnesses, and to produce witnesses on his own behalf; and on the facts thus ascertained, the magistrate was to determine the question of probable cause. 1 Chit. Cr. Law, 33, 34, 78, 79; 1 Tayl. Ev. § 484, note 2. Provisions to this effect were early incorporated in the statutes of New York, were re-enacted in the Revised Statutes (2 Rev. St. 706), and are all stated in fuller detail in the existing Code of Criminal Procedure, adopted in 1881 (Laws 1881, c. 442; Code Cr. Proc. §§ 148–150, 194, 207, 208). If a magistrate commits upon oath of belief or suspicion only, without any statement of facts and circumstances showing probable guilt, he is liable to an action for false imprisonment. 1 Chit. Cr. Law, 34; Blodgett v. Race, 18 Hun, 132. See In re Rothaker, 11 Abb. N. C. 122.

The construction given to the fourth amendment of the constitution is to the same effect. Chief Justice Marshal, in the Case of Bollman, 4 Cranch, 75, says:

"This probable cause, therefore, ought to be proved by testimony in itself legal, and which, though from the nature of the case must be ex parte, ought in most other respects to be such as a court and jury might hear."

In Re Rule of Court, 3 Woods, 502, Fed. Cas. No. 12,126, Mr. Justice Bradley says:

"It is plain upon this fundamental enunciation * * * that the probable cause referred to, which must be supported by oath or affirmation, must be submitted to the committing magistrate himself, and not merely to an official accuser; so that he, the magistrate, may exercise his own judgment on the sufficiency of the grounds shown for believing the accused person guilty. In other words, the magistrate ought to have before him the oath of the real accuser, presented either in the form of an affidavit, or taken down by himself by personal examination, exhibiting the facts on which the charge is based, and on which the belief or suspicion of guilt is founded. The magistrate can

then judge for himself and not trust to the judgment of another, whether sufficient and probable cause exists for issuing the warrant."

Accordingly, a rule was formally established in that circuit that—

"No warrant of arrest shall be issued by any commissioner upon mere belief or suspicion of the person making such charge; but only upon probable cause, supported by oath or affirmation of such person, in which shall be stated the facts within his own knowledge constituting the grounds for such a belief, or suspicion."

The same rule applies as on informations. U. S. v. Tureaud, 20 Fed. 621; U. S. v. Polite, 35 Fed. 58.

The fundamental requirements, therefore, of the fourth amendment, and of the practice of this state, made applicable by section 1014, are that the facts and circumstances tending to show criminality shall be made to appear to the magistrate on oath, whether upon examination by the magistrate himself, or by affidavit, or deposition; that if the defendant demand an examination, the complainant's witnesses, if within the county, shall be recalled, if desired, for cross-examination, and the defendant allowed witnesses in his own behalf; and that the magistrate must himself find in the facts thus shown sufficient probable cause, independent of the belief of other persons.

There is no express provision either by congress, or by the law of this state, as to the reception or effect of an indictment found in another state or district as evidence before a committing magistrate; though in California a state statute is said to make such an indictment legal evidence. U. S. v. Haskins, 3 Sawy. 262, Fed. Cas. No. 15,322. In New York such a question in the state practice never arises; because after indictment found in one county the offender, if in another county, is removed by a bench warrant, and not by proceedings before a committing magistrate. In proceedings under section 1014 in this state, therefore, a certified copy of a foreign indictment must stand upon the general rules applicable to preliminary examinations; and by these rules it is at best, as stated by Lowell, J., in U. S. v. Pope, supra, but secondary evidence of the facts constituting the offense, and hence in no way conclusive.

Section 905 of the Revised Statutes, as respects the faith and credit to be given to the "records and judicial proceedings of the courts of other states," etc., is not applicable; for the reasons, (1) that a grand jury is not a court (U. S. v. Clark, 1 Gall. 497, Fed. Cas. No. 14,804; Todd v. U. S., 158 U. S. 278, 15 Sup. Ct. 889); (2) that if it were, its proceedings, being ex parte and without notice to the defendant, are in no way binding upon him elsewhere (Pennoyer v. Neff, 95 U. S. 714, 733; Scott v. McNeal, 154 U. S. 34, 46, 50, 14 Sup. Ct. 1108); (3) that the indictment as a record, even in the court where found, is not evidence of anything more than the finding of the grand jury. The warrant against the defendant in that jurisdiction is, indeed, based upon the action and the finding of the grand jury, of which the indictment is evidence; because they are each parts of one constitutional proceeding for bringing the accused to trial; but on the trial there the averments of the indictment are not the least evidence against the accused; nor are they primary legal evidence in any in-

dependent proceedings elsewhere. No one would contend that aside from statute, an indictment in one district or state would be a sufficient basis for an indictment in another state or district in which legal evidence was required. King v. Willett, 6 Term R. 294; Code Cr. Proc. N. Y. § 256.

As the object of every preliminary examination, however, is not to determine finally the question of guilt, but only the existence of probable cause to believe an offense has been committed, more latitude in receiving evidence is allowed than upon a trial. In the Case of Bollman, supra, before Chief Justice Marshall, an affidavit taken in Louisiana stating facts and circumstances within the knowledge of the affiant was accordingly held admissible in Virginia, the witness not being procurable; although from the remark of the chief justice that commitments were made ex parte, it would seem that the state practice there was different from ours; and so in U. S. v. White, 2 Wash. C. C. 29, Fed. Cas. No. 16,685. Under the law of this state ex parte commitments are not allowed, if an examination is demanded. The witnesses are not required to be produced, however, for cross-examination, if they are not within the county; and committing magistrates are not, like a grand jury, limited by statute to strictly legal proof. Code Cr. Proc. N. Y. § 256; King v. Willett, 6 Term R. 294. Under the Criminal Code of this state, it has been held that a complaint upon information and belief is sufficient for issuing the warrant, if the particulars of the information and the informants are also stated. People v. McIntosh (1886) 5 N. Y. Cr. R. 39, and such is the common practice. It would, in many cases, defeat the ends of public justice, and the guilty would often escape before the necessary proof could be procured, if in issuing an order of arrest nothing but strictly legal evidence could be considered by the magistrate. But complaints on information and belief are to be closely scrutinized. Headley, N. Y. Cr. Just. 80–82.

An indictment found in another district, though not primary evidence of the facts stated in it, may, however, be secondary evidence of a more or less persuasive character. It contains the finding of a body specially constituted by law to inquire into offenses; it is required to be based either upon the examination of witnesses, or upon the knowledge of the grand jury itself; it is a record of their presentment or complaint, and purports to be made upon oath, and is delivered to the court upon their oath to make true presentments. Beyond that jurisdiction, it may, therefore, be received as any complaint on information and belief would be received, and its sufficiency should be judged by the same rules. The question of probable cause, the magistrate must himself determine from all the facts ascertained by him. The judgment of a foreign grand jury is not to be a substitute for his own. If the narrative of facts contained in the indictment is clear, consistent, and unambiguous in showing the commission of the offense charged, I think it may be regarded as equivalent to a deposition of the facts ascertained by the grand jury upon the sworn examination of the witnesses whose names are indorsed on it; and as such, sufficient evidence for the issue of the

warrant of arrest, under section 1014, when other evidence of the facts is not conveniently attainable; and hence it is also sufficient for commitment, if examination is waived, or when the averments of the indictment are not contradicted.

But indictments are often of quite a different character. An indictment is not, in fact, prepared, or designed, as an affidavit, or a deposition. It is, in reality, a charge, an accusation, a pleading, designed to put the defendant on trial. Though presumed to embody the material facts proved before the grand jury, it is not necessarily confined to those facts. It is drawn up by the district attorney as a legal accusation. It is not formally verified. The matters stated in it are not necessarily stated as they were proved before the grand jury; they may be pleaded according to their legal effect; i. e., as the district attorney may understand their legal effect. Legal inferences are often stated as facts; facts and law indistinguishably blended; and in the use of different counts for the same actual offense, although by a legal fiction the different counts are supposed to relate to different offenses, the law tolerates such inconsistencies and even contradictions in indictments, as in a deposition would constitute perjury. An indictment that appears on its face to be of this character, cannot be deemed or treated as equivalent to a deposition or an affidavit of facts; because it plainly is not designed to be so treated, and its form and contents forbid it to be so regarded. It must be judged by its statements, altogether; and if taken as a whole, it is contradictory on material points, it becomes worthless as an affidavit of facts, however perfect as a pleading; and such an indictment is, therefore, insufficient as a foundation for removal proceedings.

Such, I think, is the indictment in this case. The main questions involved make it most material to know what acts of each defendant were committed here, and what, if any, in Washington. There is no definiteness or certainty in the essential statements in this regard, as respects Mr. Dana. He denies that any acts of his were done in Washington. The first count alleges that Mr. Dana wrote the libel in New York; the second and third counts allege, on the contrary, that Dana and Laffan wrote, or caused it to be written, in Washington. The indictment in the first count alleges a circulation and publication of the libel in Washington, and also alleges a prior publication of the same libel in New York. It does not distinctly allege any direct agency of Mr. Dana in the circulation in Washington. The averment of publication there by Mr. Dana is evidently a legal conclusion only. It states that Mr. Dana was the editor of the paper; but that Mr. Laffan was the manager, and that Laffan had charge and superintendence of its publication and sale; that Laffan, as manager, sold and caused it to be sold in New York and other places, including Washington; that 300 copies were regularly sold by Laffan for circulation in Washington, and were sent there; but in what place and to whom Laffan sold them, and by whom the 300 copies were sent to Washington, are not definitely stated. The indictment in the same count afterwards alleges that

Mr. Dana and Mr. Laffan sent and caused to be sent to Washington 300 copies for circulation there. All the averments as respects Mr. Dana's agency in the circulation of the paper in Washington are uncertain, and in part contradictory. Its averments might all be true, in the alternative and conjoined way in which they are stated, though the simple fact was that the 300 copies were sold in New York in the usual course of trade to a newsdealer here, who was accustomed to dispose of them in Washington, and sent them there on his own account, in the usual course of business. Such an indictment cannot be treated as equivalent to a complaint on oath; or if so treated it would discredit itself by its inconsistencies and contradictions. A magistrate could not properly act upon an affidavit of that character; and hence it cannot serve as the necessary legal basis for a proceeding under section 1014.

It is, moreover, the duty of a committing magistrate, as above observed, to scrutinize closely a complaint founded on information only, and to require the production of such original evidence as is near at hand and easily procurable, in support of such a complaint. The office of The Sun was but a few hundred feet distant, and original evidence as to the alleged libel and other important averments were easily procurable. The alleged libel consists of a few lines only extracted from an alleged editorial article in The Sun of February 22, 1895. But the article itself was not produced, nor the paper in which it appeared; nor are either of them before me. Non constat, but if produced, they might have turned out to be only fair comments on the result of a judicial investigation. Other original evidence upon material facts was equally easy of production, but was not sought. Under such circumstances, to permit an investigation before a grand jury in a distant place, and such uncertain results of that investigation as are exhibited in this indictment, without the production of any original evidence easily available concerning facts occurring close at hand, to stand as a substitute for an investigation by a committing magistrate on the spot, and as a substitute for the magistrate's judgment on the facts that in such a proceeding would be ordinarily procured, would be to sustain the very practice which section 1014 was designed to prevent, in requiring the investigation to be conducted according to the usages of the state where the proceeding is had.

(2) Libel not a Removable Offense:

I am equally satisfied that libel in the District of Columbia does not belong to the class of offenses contemplated or provided for by the thirty-third section of the judiciary act, or by section 1014 of the Revised Statutes, which re-enacted it.

The slight change of phraseology in section 1014 (shown in the quotation, supra) does not import any intent to change the meaning or effect of the original act. The verbal change was appropriate in order to avoid the incongruity arising from the wording of section 33, when applied to new states, whose courts, though of the same character as those created by the judiciary act, and within its gen-

eral intent, were not within its letter, because not created "by that act." The change has no other significance. The rule laid down by Spencer, J., in Taylor v. Delancy, Caines' Cas. 149, 151, for construing the revision of statutes, which was adopted by Kent, J., in Yates' Case, 4 Johns. 359, and which has since been so generally followed, is applicable here, viz.: "That mere change of phraseology shall not be deemed or construed a change of the law, unless such phraseology evidently purports an intention in the legislature to work a change."

Mr. Justice Miller, in U. S. v. Bowen, 100 U. S. 508, 513, says: "This principle is undoubtedly sound." In Murdock v. City of Memphis, 20 Wall. 617, he says the revision of the United States statutes was "based on the idea that no change in the existing law should be made"; and in Smythe v. Fiske, 23 Wall. 382, Mr. Justice Swayne says: "It was the declared purpose of congress to collate all the statutes as they were at that date, and not to make any change in their provisions." See, also, U. S. v. Lacher, 134 U. S. 626, 627, 10 Sup. Ct. 625; U. S. v. Hirsch, 100 U. S. 35.

In The L. W. Eaton, 9 Ben. 289, 301, 302, Fed. Cas. No. 8,612, Blatchford, J., says that "the presumption is that new language is the result simply of revision, simplification, rearrangement and consolidation, with a view to re-enactment of the same substance and meaning"; unless the words clearly indicate a different intent. If, therefore, up to the time of the revision of 1874, section 33 of the judiciary act did not authorize removals for libel to the District of Columbia, it cannot be seriously contended that section 1014 of the Revised Statutes warrants such removals now.

It is plain, however, that the judiciary act did not contemplate any such local offenses as libel in the District of Columbia. In the federal system, there are no common-law crimes. It was early adjudged in the case of U. S. v. Hudson, 7 Cranch, 32, that even libel against the government, or its officers, could not be punished criminally, without a statute therefor. Mr. Justice Johnson says:

"The legislative authority of the Union must first make an act a crime, affix a punishment and declare the court that shall have jurisdiction of the offense." U. S. v. Coolidge, 1 Wheat. 415; U. S. v. Britton, 108 U. S. 206, 2 Sup. Ct. 531; Benson v. McMahon, 127 U. S. 457, 466, 8 Sup. Ct. 1240; Manchester v. Massachusetts, 139 U. S. 262, 11 Sup. Ct. 559; U. S. v. Eaton, 144 U. S. 677, 687, 12 Sup. Ct. 764; In re Greene, 52 Fed. 111.

There has never been any statute either of the United States or of the state of Maryland, making libel a criminal offense, or defining its punishment. The present indictment rests wholly upon the old common law of Maryland, and upon the act of congress of February 27, 1801 (2 Stat. 104), accepting the cession of that district, and providing that "the laws of Maryland as they now exist shall be and continue in force," except as modified, etc.

Assuming, though that point also is disputed, that libel in the District of Columbia is a criminal offense, it is nevertheless a purely local offense. It is no part of the federal system of laws, nor related to the general legislation of congress. In administering the local law of the District of Columbia, the national government there acts as

the state governments act within their several limits in administering the ordinary rights of person and property. That is an exceptional and a wholly different field of action from what is embraced in ordinary federal legislation; and it was evidently wholly foreign to the scope of the judiciary act. Offenses against the local law of the District of Columbia are, in a sense, offenses against the United States, because the United States is the local governing authority. Metropolitan R. Co. v. District of Columbia, 132 U. S. 9, 10 Sup. Ct. 19. But the judiciary act was not dealing with, or contemplating this exceptional and local relation. The District of Columbia had then no existence. The scope and aim of the judiciary act were manifestly purely federal and national. It created the federal courts authorized by the constitution for the country at large; it defined their jurisdiction, civil and criminal; and it established the districts in which each might act. As an incident to that distribution of federal jurisdiction, and to enable federal offenses to be tried in the proper district, it provided by section 33 that for offenses against the United States, offenders found in other districts might be committed and removed to the proper district for trial. What offenses are referred to? Manifestly those federal offenses only of which the courts thereby created had jurisdiction; offenses which those courts were designed to try, and could try; since the only subject of consideration was the national, federal courts, and trials in those courts alone. Those offenses were federal offenses arising under federal statutes applicable throughout the country.

The first of these statutes, known as the "Crimes Act" (1 Stat. p. 112, c. 9), was passed soon after the judiciary act. It defined as "crimes against the United States" (when committed within its exclusive jurisdiction), treason, murder, manslaughter, forgery, larceny, perjury, bribery, etc. Later statutes have added many other offenses. These statutes cover the whole field of the federal criminal law, and all the offenses triable by the federal courts in the different federal judicial districts of the country; and these alone are the offenses contemplated and referred to in the thirty-third section of the judiciary act.

At that time a territorial government and territorial courts had been organized under the ordinance of 1787 in the Northwest Territory. But no one would contend that mere local offenses committed in that territory, and not embraced in any general legislation of congress, were removable "offenses" under the judiciary act, any more than that its territorial courts were "courts of the United States" in the sense of the judiciary act, or of ordinary legislation. When the District of Columbia was afterwards acquired, its courts and local offenses under the local law alone, were in the same category as those of the territories. That none of those courts were "courts of the United States," in the sense of ordinary legislation, has been long adjudicated, because they do not belong to the federal system, and are not courts of the constitution, nor created under the judicial power, but under a separate authority in the constitution to make "all needful rules and regulations for the territories" (article 4, §

3), and to "exercise exclusive legislation over the seat of government" (article 1, § 8). Insurance Co. v. Canter, 1 Pet. 511, 546; Clinton v. Englebrecht, 13 Wall. 447; Hornbuckle v. Toombs, 18 Wall. 648, 655; McAllister v. U. S., 141 U. S. 182–184, 11 Sup. Ct. 949. There is the same distinction between local and federal offenses.

That offenses under the local law of the District of Columbia are not embraced in section 33, also results necessarily from its particular provisions. The commitment and removal are by that section required to be (1) to the proper "district," i. e., to one of the federal judicial districts; and the District of Columbia is not such a district (U. S. v. Guiteau, 1 Mackay, 564); (2) for trial in a "court of the United States," which (3) has cognizance of the offense by virtue of "that act"; and the courts of the District of Columbia, as above stated, are neither "courts of the United States" in the sense of the judiciary act, nor do they derive their authority from the judiciary act.

While each of these three conditions would exclude mere local offenses in the District of Columbia from the removable class, it is important to note still further, that the same conditions, and particularly the provision that the trial must be had by one of the courts established "by that act," show by irresistible inference that the offenses contemplated and intended by section 33 are such offenses only as could be tried in the federal courts established by that act. But libel, either against the government or against private persons, is not and never has been a criminal offense anywhere triable in the federal courts of the country. U. S. v. Hudson, 65 Fed. 68. Section 33 in all its parts is, in fact, wholly inapplicable to offenses under the mere local law of the District of Columbia; and in no contested case reported do I find that any removal to that district has been had for libel, or for any other merely local offense. In the Case of Buell, 3 Dill. 116, Fed. Cas. No. 2,102, the objections here considered were not brought to the attention of the court.

For these reasons, I have no doubt that libel in the District of Columbia was never a removable offense under section 33 of the judiciary act alone.

The only additional acts of congress bearing on the question, are those of 1871 and 1874. The act of 1871 (16 Stat. 426), now section 93 of the Revised Statutes of the District of Columbia, is as follows:

"Sec. 93. The constitution and all the laws of the United States, which are not locally inapplicable, shall have the same force and effect within the District of Columbia as elsewhere within the United States."

The act of June 22, 1874 (1 Supp. Rev. St. p. 38) was passed on the same day the United States Revised Statutes were adopted, and in section 2 declares that "the provisions of the thirty-third section of the judiciary act shall apply to courts created by act of congress in the District of Columbia."

The statute last cited is so vague that it is difficult to determine its intention or effect. It is more noticeable for what it omits than for what it contains. It does not make the District of Columbia a federal district; nor declare that offenders may be removed

thither in like manner as to other federal districts, nor removed thither for violations of the local law; nor does it purport to enlarge the class of offenses contemplated by section 33. It is, therefore, immaterial here. It does not even make the provisions of section 33 applicable in general to the District; but only to "courts created by congress in the District of Columbia." No one court is specified. It extends, therefore, to all the courts, from the highest to the lowest. What provisions of section 33 can be made applicable to all the courts of the District of Columbia? Apparently, those only by which all the judges and magistrates of the courts in the several states are authorized to act as committing magistrates. This, I think, is its only effect, and it has been so held by Treat, J. See In re Buell, 3 Dill. 116, Fed. Cas. No. 2,102.

Such also was the construction given to the act of 1874 by the judiciary committee of the senate, upon a special resolution of inquiry referred to that committee on the 15th of December, 1874, less than six months after the act was passed, and directing the committee to inquire as to the extent and meaning of that act, and particularly, "whether under or by its provisions persons charged with or indicted for libel, or other crime, in said District of Columbia, can be brought from a state or other place within federal jurisdiction, to said District to answer therefor; and also whether said act has any application to prosecution or indictment for the crime of libel in any case, and report thereon."

On the following 16th of February, 1875, the judiciary committee made its report (No. 658). It considers at some length and analyzes the provision of the thirty-third section of the judiciary act, and concludes as follows:

"The sum of the matter, therefore, is, that the second section of the act of June 22, 1874, confers upon the courts of the District of Columbia the power to arrest offenders found in the District who are charged with crime committed within the District, and hold them for trial, (which was the law before,) and to arrest offenders found in the District who have committed crimes against the United States in some judicial district of the United States, and to send them to such district for trial. And that is all. No person can be brought into the District of Columbia under it, either for libel, or any other crime. The committee are of opinion that both the sections of the act are necessary and proper, and in perfect accordance with the principles of justice and the course of civilized jurisprudence. Without provisions of this character the District of Columbia would be an asylum for offenders committing crimes against the laws of the United States and escaping hither.

"It also remains to report, as directed by the resolution of the senate, 'whether said act has any application to prosecution or indictment for the crime of libel in any case.'

"We are of opinion that, as before stated, no person charged with the crime of libel can be brought into the District of Columbia under it, for no person can be brought here under it, for any crime whatever. * * *

"The result is that the act of June 22, 1874, is not, in our opinion, obnoxious to any criticism; and, in respect of the crime of libel, it confers no power either to bring a person charged with it into the District of Columbia or to send him out of it."

The report was signed by Senators Edmunds, Conkling, Frelinghuysen, Wright, Thurman, and Stevenson.

Upon this report no further action was taken, nor any further legislation proposed. So high is the character of that committee,

that nothing short of express legislation or adjudication by the courts, could be weightier as contemporaneous construction. Though not literally, yet substantially, their report covers the whole ground of removability to the District of Columbia for mere local offenses; and as the legal status reported by that committee was acquiesced in, the necessary inference, considering the specific nature of the inquiry is, that the existing status as reported by the committee was satisfactory, and in accord with the legislative intent.

Another inference warranted by the passage of the act of 1874 on the same day the Revised Statutes was enacted is, that section 1014 of the Revised Statutes was not intended or understood by congress to apply to the District of Columbia, nor any new legislation intended by the slight change of phrase in the revision of that section; because if section 1014, as revised, or the original section 33, already embraced the District of Columbia, or applied to it, the act of 1874 would have been wholly superfluous. And it follows further, that the act of 1874 must be deemed to be intended to express just how far section 33 of the judiciary act was designed by congress to be extended to the District of Columbia; viz., to its "courts" alone, i. e., for the purposes above stated, and no further; thus excluding any construction of section 1014 as new legislation for that district. Had the intent of the act of 1874 been to authorize removals for local offenses in the District of Columbia for trial there by its local courts, the act would naturally have said so; or else would have declared section 1014 to be applicable generally to the District of Columbia, to its courts, and to offenses there committed.

The act of 1871, above quoted, adds nothing to the case of the prosecution, but rather makes against it; for not only is it doubtful to what extent the language of section 33 and of section 1014 may be made "locally applicable" to the District of Columbia, but the general intent of the act of 1871 was evidently to do nothing more than to place the District of Columbia, so far as practicable, on an equality of privilege with the various states and judicial districts of the rest of the country. The "force and effect" of the "laws" referred to are, as the act of 1871 says, to be "the same in the District of Columbia as elsewhere within the United States." This act, if applicable (as to which I would not intimate any opinion) would, therefore, extend section 33 to removals for federal offenses alone, (see Hovey v. Elliott, 145 N. Y. 126, 139, 39 N. E. 841) since that is the limit of its "force and effect elsewhere"; and libel is not a federal offense.

Plainly the act of 1871 was not designed to create peculiar privileges in the District of Columbia, nor to impose exceptional burdens on all the rest of the country. Yet that is the precise aim of this application, and that would be the precise effect of granting it. For as between all the states and all the federal districts in the country, there could be no removal in a case like the present. No federal court has jurisdiction to try the offense here charged; and as between the states there is no extradition, (under

other provisions of the constitution and other acts of congress) except of fugitives from justice. This defendant is not a fugitive; he has not fled from the District of Columbia. He was not there; and there is no such thing as constructive flight.

If the acts of 1871 and 1874, above cited, were sufficient to extend section 33 to the District of Columbia (as to which I express no opinion), then removals to that district under section 1014 may now be had for all federal offenses committed there, "the same as elsewhere within the United States"; i. e., for all offenses created under the general legislation of congress, which embraces all the crimes for which removals may be had as between the different federal judicial districts of the country. That is the full scope of section 1014 and section 33. Beyond this, that is to say, in the cases of merely local offenses, which stand on the same level as ordinary offenses in the several states, if the existing laws in regard to interstate extradition passed in pursuance of a separate clause of the constitution, are not "locally applicable" to the District of Columbia under the act of 1871, so as to give a right of removal to that district in accordance with, or in analogy to, the mode of procedure in interstate extradition, the remedy is with congress, if, indeed, congress desires to change the existing conditions; and the report of the senate judiciary committee above cited is sufficient evidence to show that congress has not been under any misapprehension as to what the existing legal status of local offenses in the District of Columbia is, as respects the right of removal. Meantime, it is not for this court to anticipate or presume upon the intent of congress on that subject; or to attempt to supply any supposed defects in the statutes by wrenching them from the true meaning and intent with which they were enacted; least of all when doing so would introduce a new class of removals in favor of the District of Columbia alone, while similar removals are denied, under the constitution and laws, to every other district and state in the country.

Without reference, therefore, to other important points discussed by counsel, the application is denied, on the above grounds, and the defendant discharged.

UNITED STATES v. KENWORTHY.

(Circuit Court of Appeals, Third Circuit. June 3, 1895.)

No. 4.

1. CUSTOMS DUTIES—COMMISSION—REV. ST. § 2907—ACT MARCH 3, 1883—POWERS OF CUSTOMS OFFICERS.
   In determining the dutiable market value of imported merchandise, it is within the authority of the designated customs officers, under Rev. St. § 2902, and Act March 3, 1883, § 7, to inquire into the origin of disputed items claimed by the importers to be commissions and charges, and to ascertain whether they are truly such, or part of the wholesale price which the importers paid for the merchandise.

2. SAME—CONCLUSIVENESS OF VALUATION.
   It appearing to the customs officers that certain wool purchased from M. & Son, in Glasgow, for importation by K. & Bro., had previously been

sold by other persons to M. & Son, and a commission paid by M. & Son upon their purchase; that the price paid by K. & Bro. included such commission; and that they also paid their brokers a commission on their purchase of the wool,—those officials, in determining the dutiable market value of the wool, refused to treat the commission paid by M. & Son in the prior and independent transaction as a "charge," within section 7 of the act of March 3, 1883, and took into consideration the fact that that commission was a part of the price which the importers paid for the wool. *Held* that, in the absence of fraud, their decision and valuation were final and conclusive.

3. SAME.

Upon the facts so found the commission paid by M. & Son on their prior purchase was not a "charge," to be excluded in ascertaining value within the meaning of the act of March 3, 1883, § 7.

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

This was an action by the United States against John Kenworthy, surviving partner of T. Kenworthy & Bro., to recover duties. At the first trial the court directed a pro forma verdict for the government, reserving the right to enter judgment for the defendant after argument. Upon argument, the court directed a new trial (59 Fed. 570), upon which a judgment was entered for the defendant. Plaintiff brings error. Reversed.

Ellery P. Ingham, for the United States.

Leonard Myers, for defendant in error.

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

ACHESON, Circuit Judge. On June 19, 1884, T. Kenworthy & Bro. imported into the United States, at Philadelphia, by the steamship Phoenecian, from Glasgow, a lot of wool, 24,238 pounds. Schedule K of the tariff act of March 3, 1883 (22 Stat. 488, 508), under which this merchandise was dutiable, provides:

"Wools of the third class, the value whereof, at the last port or place whence exported to the United States, excluding charges in such port, shall be twelve cents or less per pound, two and a half cents per pound; wools of the same class, the value whereof, at the last port or place whence exported to the United States, excluding charges in such port, shall exceed twelve cents per pound, five cents per pound."

The entire value, as stated by the importers, was £596. 14s. 10d., which, if correct, entitled the wool to come in on the payment of a duty of 2½ cents per pound. The dutiable value of the wool, however, was raised by the appraiser, and fixed by him at a sum which subjected the wool to a duty of 5 cents per pound. The duty having been assessed by the collector in accordance with the report of the appraiser, the importers asked for a reappraisement of the wool; and thereupon the collector selected a merchant appraiser, who acted conjointly with the general appraiser, agreeably to the provisions of section 2930 of the Revised Statutes. The merchant appraiser and the general appraiser were unable to agree, and they submitted to the collector two separate reports, showing different appraisements. The collector sustained the appraisement made by the general appraiser, under the authority conferred upon him by section 2930,

which provides that, in case the merchant appraiser and the general appraiser shall disagree, "the collector shall decide between them; and the appraisement thus determined shall be final, and be deemed to be the true value, and the duty shall be levied thereon accordingly."

By section 2902 of the Revised Statutes it is made "the duty of the appraisers of the United States, and every of them, * * * or of the collector, * * * as the case may be, by all reasonable ways and means in his or their power, to ascertain, estimate, and appraise the true and actual market value and wholesale price, any invoice or affidavit thereto to the contrary notwithstanding, of the merchandise, at the time of exportation"; and, by section 2922, "the appraisers or the collector, * * * as the case may be, may call before them and examine upon oath any owner, importer, consignee, or other person, touching any matter or thing which they may deem material in ascertaining the true market-value or wholesale price of any merchandise imported, and require the production, on oath, to the collector or to any permanent appraiser, of any letters, accounts, or invoices, in his possession relating to the same." By section 2907, in determining the dutiable value of merchandise, there was to "be added to the cost, or to the actual wholesale price or general market-value, * * * the cost of transportation, shipment, and transshipment, with all the expenses included, from the place of growth, production, or manufacture * * * to the vessel, * * * the value of the sack, box, or covering of any kind in which such merchandise is contained; commission at the usual rates, but in no case less than two and a half per centum; and brokerage, export duty, and all other actual or usual charges for putting up, preparing, and packing for transportation or shipment." The seventh section of the act of March 3, 1883, however, repealed section 2907 and section 2908, and further declared: "And hereafter none of the charges imposed by said sections or any other provisions of existing law shall be estimated in ascertaining the value of goods to be imported, nor shall the value of the usual and necessary sacks, crates, boxes, or covering of any kind be estimated as part of their value in determining the amount of duties for which they are liable."

The controversy here relates to the action of the general appraiser and the collector with respect to an item among the "charges" in the invoice as presented by the importers to the customhouse. That invoice, upon its face, shows that the importers paid for the wool, net £636. 5s. 2d., including £10 for cost of bags and all charges. Among these charges, as set down in this invoice, is the item, "Commission, 2½ per cent.," amounting to £15. 2s. 11d. Now, in appraising the wool, the general appraiser and the collector each decided that that item was not truly a charge, but that in fact it was part of the price which the importers paid for the wool, and they took that fact into consideration in determining the value of the wool. That this is the true state of the case, and that the United States officials did not, as is asserted, add to the actual market value or wholesale price of the wool the alleged commission for the purpose of customs duty, is clearly shown, we think, by this record.

Upon the trial, the government put in evidence a letter addressed to the collector by the general appraiser, and which accompanied his report or certificate of appraisement. In the course of that letter the general appraiser states:

"The importers produced an affidavit or declaration of Alexander Campbell, of the firm of R. & A. Campbell, of Glasgow, with a copy of an invoice from the said firm to B. H. Moore & Son annexed, showing a prior sale of the wool in question, from them, as agents of other parties, to the said Moore & Son, and upon this they (the Campbells) charged a commission of 2½ per cent. Moore & Son, as the papers and testimony show, sold the wool to the importers at a price including this so-called 'commission,' under the following circumstances: The importers had directed their brokers to purchase 100 bags of wool for them at a price which would entitle the same to entry here at a duty of 2½ cents per lb. I am satisfied that they did this in good faith, and without any intention to defraud the revenue; but while they admit that they actually paid Moore & Son about $12^{23}/_{100}$ cents, or nearly 12¼ cents, per pound for the wool over and above all other charges, they claim that this so-called 'commission,' under a prior transaction between other parties, shall be deducted from the price paid, and thus reduce the same to an almost infinitesimal fraction (about $^{3}/_{100}$ of a cent) below twelve cents, which is the dividing line between the higher and lower rates of duty. It seems to me that such a claim cannot lawfully be allowed. Its allowance would certainly establish a very dangerous precedent. It is based solely upon a charge paid under a prior contract or sale, and which became part of the price paid for the wool by the importers, whose brokers charged a separate commission of 1½ per cent. as 'brokerage' for their services, to which no exception is taken. One of the latter, Mr. Kitching, testified that this 1½ per cent. was divided between his firm and Moore & Son (the latter receiving two-thirds thereof); and from the testimony it is clear that this was the only commission charged for any services rendered the importers by their own agents or brokers."

From this letter it appears that the evidence before the general appraiser satisfied him that the disputed item—the alleged charge—was not a commission paid by the importers to their agents, nor a commission appertaining at all to this importation, but that it was something which entered into a previous and independent transaction (the prior sale to the vendors of these importers), and constituted part of the price that the importers paid when they purchased the wool. As the appraisement made by the general appraiser was sustained by the collector, presumably the latter official, upon proper investigation, found the facts to be as above stated. Now, certainly, if such be the facts, the so-called "commission" is not the commission mentioned in section 2907 of the Revised Statutes, or a "charge," within the meaning of the act of March 3, 1883.

Was it within the lawful authority of the customs officers to inquire into the origin of the disputed item, and to ascertain whether it was a true charge, and therefore to be excluded in fixing the actual market value, or whether it was a part of the price of the wool, and to be taken into consideration in determining the true valuation? In view of the statutory provisions relating to their duties in this regard, we cannot doubt that such inquiry and determination were within the rightful power of those officers. As we have already seen, by section 2902, it is incumbent on these officials, "by all reasonable ways and means, * * * to ascertain, estimate, and appraise the true and actual market-value and wholesale price" of the imported merchandise, "any invoice or affidavit thereto to

the contrary notwithstanding"; and, by section 2922, they may examine on oath any person "touching any matter or thing which they may deem material in ascertaining the true market-value or wholesale price of any merchandise imported." It cannot be successfully maintained that, under the seventh section of the act of March 3, 1883, all so-called "commissions" and other charges which may be claimed by an importer are to be allowed without inquiry as to their real nature and rightfulness. Undoubtedly, it is the right and duty of those appointed and empowered to pronounce judgment upon the question of dutiable valuation to make such inquiry; and when, as the result of such investigation, the designated officials find that an alleged commission has no proper relation whatever to the importation, but that it is really part of the price of the merchandise, and they take that fact into consideration in making their appraisement, they do not transcend their rightful authority. But, if the general appraiser and the collector acted here within the limits of their statutory authority, then, in the absence of fraud (of which there is no pretense), the valuation made by the former, when confirmed by the latter, became final and conclusive. Hilton v. Merritt, 110 U. S. 97, 3 Sup. Ct. 548; Auffmordt v. Hedden, 137 U. S. 310, 11 Sup. Ct. 103; Muser v. Magone, 155 U. S. 240, 15 Sup. Ct. 77. It follows, therefore, that it was error to allow the witness Culver to testify that the disputed charge was paid as a commission, and did not enter into the price or value of the wool, for that was a question of fact, which had been finally determined by the authorized officials, and was not retriable by the jury. Muser v. Magone, supra.

We are of opinion that the court should have given peremptory instructions in favor of the government.

The judgment of the court below is reversed, and the case is remanded, with a direction to grant a new trial.

MURPHY et al. v. UNITED STATES.

(Circuit Court, S. D. New York. June 10, 1895.)

No. 2,107.

1. CUSTOMS DUTIES—CLASSIFICATION—WORSTED DRESS GOODS.
   Under the act of 1894, "worsted dress goods" are dutiable at 50 per cent. ad valorem, under paragraph 283, Schedule K, and not at 12 cents per square yard and 50 per cent.

2. SAME.
   Paragraph 297, postponing reduction of duty on "manufactures of wool," does not include manufactures of "worsted," and the distinction between "wool" and "worsted," stated in the earlier tariff acts, still exists, though omitted in the act of 1894.

3. SAME—CONSTRUCTION OF STATUTE.
   Where language of a statute is explicit, it must be strictly construed; and *held*, that "worsted dress goods" are not "manufactures of wool," but of "worsted."

This was an appeal by Alexander Murphy and others, importers, from a decision of the board of general appraisers sustaining the

action of the collector of the port of New York in respect to the classification for duty of certain merchandise.

W. Wickham Smith, for importers.
Jas. T. Van Rensselaer, Asst. U. S. Atty., for the United States.

TOWNSEND, District Judge. On August 30, 1894, the appellants imported and entered for duty at the port of New York certain worsted dress goods. The importers claimed they were dutiable at 50 per cent. ad valorem, under paragraph 283, Schedule K, of the tariff act of August, 1894. They were classified for duty at 12 cents per square yard and 50 per cent. ad valorem, under the provisions of paragraph 395, Schedule K, of the tariff act of October 1, 1890. The board of general appraisers sustained the assessment, and the importers appealed. The single question presented by the appeal is whether these goods are dutiable under the earlier or later act.

It is admitted that these goods are made from the fleece of the sheep, and are, in that sense, a product of wool. The earlier tariff acts provided rates of duty on manufactures of wool differing from those on manufactures of worsted, and recognized wool and worsted as different materials. The tariff acts of 1890 and 1894, while retaining the distinction in terminology, provided the same rates of duty for woolen as for worsted goods. The courts have repeatedly recognized and enforced this distinction between wool and worsted, and have uniformly held that manufactures of worsted were not manufactures of wool, within the meaning of the tariff acts. Elliott v. Swartwout, 10 Pet. 137; Riggs v. Frick, Taney, 100;[1] Seeberger v. Cahn, 137 U. S. 95, 11 Sup. Ct. 28; Ballin v. Magone, 41 Fed. 921. It is urged on behalf of the government that the term "manufactures of wool" is used descriptively, and not denominatively, in this act of 1894. Paragraph 297 of said act reads as follows: "The reduction of the rates of duty herein provided for manufactures of wool shall take effect January 1, 1895." The heading of said Schedule K is, "Manufactures of Wool." In support of this contention, counsel for the government introduced in evidence various official documents, letters to the chairman of the finance committee of the senate, and other papers, tending to show that the same reasons existed for a postponement of duties on all the products of the sheep's fleece. It appears, however, that in the tariff bill as it first passed the house of representatives there was a further provision applying to all rates of duty in the woolen schedule except carpets, which provision was afterwards stricken out in the senate. Counsel for the government further claims that the distinction between wool and worsted in the decisions cited is based upon the fact that congress had in these earlier acts created and preserved the distinction for tariff purposes, thus creating a statutory, as contrasted with a commercial, distinction; and that, as this artificial distinction no longer exists, it should not be applied in the construction of the present act. But the

[1] Fed. Cas. No. 11,825.

distinction in terminology, as already shown, has been uniformly preserved, and in Ballin v. Magone, 41 Fed. 921, Judge Lacombe, referring to the provisions of the act of 1883, says:

"The tariff act itself, however, recognizes a difference between woolen and worsted articles; between goods composed of worsted and goods composed of wool. We find the words 'wool' or 'worsted' used in contrast at least six times in this very schedule; and the examination of successive tariff acts, back to, I think, 1816, shows an unbroken continuance of such contrasting use. It seems plain, therefore, that the words 'woolen cloths,' used in the paragraph on which the defendant relies, are to be taken as including only those woolen cloths which are not worsted, or composed of worsted, within the meaning of those terms (that is, 'worsted,' or 'composed of worsted'), as used in this tariff."

In five of the instances above referred to as illustrations of this distinction the rates of duty were the same. The schedule in question is entitled "Wool and Manufactures of Wool." It is well settled that the title of an act may legitimately be resorted to as an aid in determining legislative intent when that intent is otherwise ambiguous. But the supreme court of the United States has recently held, in Hollender v. Magone, 149 U. S. 586, 13 Sup. Ct. 932, and Seeberger v. Schlesinger, 152 U. S. 581, 583, 14 Sup. Ct. 729, that such titles to the schedules in a tariff act are merely intended as general suggestions of the character of the articles within such schedule. Under the above title are included not only articles made from the fleece of the sheep, but also those made from the hair of the camel, goat, alpaca, and other animals, and certain manufactures of flax and cotton. It is not claimed by the government that the paragraph in question refers to goods made from the hair of animals other than sheep, or to any goods except such as are composed of wool or worsted. In Reiche v. Smythe, 13 Wall. 162, 164, and Maddock v. Magone, 152 U. S. 368, 371, 14 Sup. Ct. 588, it is held, in reference to the construction of tariff acts, that when the same word is used in successive acts, and special meaning was attached to said word in a former act, it will be presumed, in the absence of evidence of a contrary intention, that it was intended that said word should receive the same interpretation in the later act. It is claimed by the government that such evidence of a contrary intention is furnished in this case by the policy of the government as indicated in the letters and official documents already referred to, and in the considerations of inconvenience which would arise from the construction contended for by the importer. That the distinction was directly brought to the attention of congress and acted upon by it; that congress has failed to use the word "worsted" in said paragraph 297; that under the title "Wool and Manufactures of Wool" are included articles not composed of wool,—strongly suggest that congress may not have intended to include "worsted" under "manufactures of wool," and seem to rebut the claim of the counsel for the government that congress intended to give to the word "wool" a different signification from that which it had previously borne. The opinion of the supreme court of the United States in Refrigerating Co. v. Sulzberger, 15 Sup. Ct. 508, states the guiding principles of construction and interpretation in

such a case. The court there holds that when the language of an act is explicit there is great danger in departing from the words actually used, in order to give effect to the supposed intention of the legislature, and that in such circumstances the court should not so construe the statute as to embrace cases, because no good reason can be assigned why they were not included within its provisions. The court further emphasizes the rule that it is not for the court to add to or subtract from the express provisions of the law, but only to interpret the law as it exists, leaving to congress to make provision for cases where such enactment may operate unjustly. In view of the failure of congress to make any distinction between the various classes of articles in said schedule, other than by the use of a word in the title, which, by the settled definition of courts and legislature, excluded the articles in question, and in the absence of any positive evidence of intention to include said articles within the provisions of said paragraph, I think it would be a violation of the principles of construction and interpretation to extend the language of said paragraph so as to include "worsted goods." The decision of the board of general appraisers is reversed.

EVERETT v. HAULENBEEK et al.

(Circuit Court, S. D. New York. July 8, 1895.)

1. JURISDICTION OF FEDERAL COURTS—PATENT INFRINGEMENT SUITS—LICENSES.
   The federal courts have jurisdiction of a suit for infringement of a patent notwithstanding that a license is set up in defense, so that the question of its existence is involved, and must be tried in trying the question of infringement. Jurisdiction in respect to infringement includes jurisdiction of all questions whether the license covered the infringement.
2. PATENTS—INVENTION.
   The discovery of a method of preparing peas by cooking and flattening them while moist without breaking or comminuting them, producing flat disks, while preserving the individuality of the peas, *held* to show invention over the old methods of preparing various grains by cooking and crushing, comminuting, desiccating, or otherwise breaking or dividing them while soft.
3. SAME—PREPARATION OF PEAS.
   The Beach patent, No. 215,313, for an improvement in the preparation of peas, by cooking and flattening them while moist, without breaking them, *held* valid and infringed.

This was a bill by William W. Everett against John W. Haulenbeek and others for infringement of a patent for an improved method of preparing peas.

Walter D. Edmonds, for plaintiff.
Nelson Smith, for Peter Haulenbeek.
Clarkson A. Collins, for John Haulenbeek and William Mitchell.

WHEELER, District Judge. The plaintiff, a citizen of Missouri, brings this suit against the defendants John W. Haulenbeek and William L. Mitchell, as principals, and Peter Haulenbeek, as aider and abettor under a pretended license, citizens of New York, for

infringement of patent No. 215,313, dated May 13, 1879, and granted to Henry H. Beach, for an improvement in preparation of peas by cooking them in hot vapor, and flattening them while moist, without breaking or comminuting them, thus changing their shape from globular to that of flat disks, and preserving their individuality. The claim is for, as a new article of manufacture, cooked and flattened peas, as set forth. The defendant Peter Haulenbeek sets up a license by plea supported by answer. The defendants John W. Haulenbeek and Mitchell set up by answer anticipations, with two years' prior use, and deny the validity of the patent; and admit making and selling steamed and flattened peas substantially the same as those described and claimed in the patent. Both answers are traversed.

Question is made whether this court has jurisdiction touching the license; but the suit is not brought upon the license, nor against it, but for infringement; and when the license is set up as an answer to allegations of infringement the existence of the license is involved, and must be tried in trying the question of infringement. Hammacher v. Wilson, 26 Fed. 241. More clearly, jurisdiction of a question of infringement must include all questions whether the license covers the infringement. This license was personal, for practicing the invention within prescribed territory, and required a monthly account, with payment of royalties. This would not seem to carry any right to aid and abet others in practicing the invention. The testimony of Peter Haulenbeek exhibits a desire to show that John W. Haulenbeek, with Mitchell as partner, practiced it for him, under this license; but the form of defense, the circumstances, and Mitchell's testimony, are opposed to this view, and John W. has not testified. Upon the whole, their infringement seems to have been done in their own behalf, independently of, and not for, Peter. In trespasses all who are guilty are principals, and those who do not so far participate as to be principals are not guilty; and Peter Haulenbeek does not appear, on all the evidence, to have so far had a part in what John W. and Mitchell did as to be liable for it. The bill must therefore be dismissed as to him, but, in consideration of his attitude, without costs.

The question remaining as to the other defendants, as made by their answer, is solely as to the validity of the patent. That the cooking, or partial cooking, of various grains, and crushing, comminuting, desiccating, or otherwise breaking or dividing them, while in a soft state, were old and well-known processes, many of them patented, and all of them in use at the time of this invention, is amply shown by the evidence. None of these methods merely flattened the kernels, but all included some form of breaking them. The patent distinguishes this invention from all of those things by providing for flattening and preserving individuality without any breaking. The two-years prior use rests substantially upon the same things. The want of patentable novelty, as illustrated in Glue Co. v. Upton, 97 U. S. 3, is strongly urged in behalf of these defendants. The substance of a pea is said to be, and is, the same, whether left round or made flat. The change is of form, merely,

and the patent is solely for this change of form after cooking. In that case Mr. Justice Field, in delivering the opinion of the court, after stating the substance of the specification, said:

"It thus appears that the invention claimed is not any new combination of ingredients, creating a different product, or any new mechanical means by which a desirable change in the form of a common article of commerce is obtained, but it consists only of the ordinary flake glue reduced to small particles by mechanical division."

This invention is not applicable to, not useful for, single peas, but to masses of peas, of varying diameters, reducing them to uniform thickness for evenness in drying or roasting. The patent covers such a desirable and useful change of form, which is more than a mere reduction in size. If any part of the invention is in the process of cooking the peas first, so that they can be flattened to uniform thickness without breaking, and then flattening them, the process so inheres in the product, like that in Smith v. Vulcanite Co., 93 U. S. 486, as to make the product of the process patentable. Upon these considerations the patent seems to be valid, and the plaintiff to be entitled to a decree against those infringing it. Let a decree be entered for the plaintiff against John W. Haulenbeek and Mitchell for an injunction and an account, with costs; and dismissing the bill as to Peter Haulenbeek, without costs.

UNION SWITCH & SIGNAL CO. et al. v. PHILADELPHIA & R. R. CO. et al.

(Circuit Court, E. D. Pennsylvania. May 28, 1895.)

No. 66.

PLEADING IN PATENT CASES—MULTIFARIOUS BILL.

A bill which alleges infringement of five different patents, without showing that the inventions or improvements covered by them are conjointly used by defendants, or all used in or upon the same machine, device, article, or apparatus, or are capable of such conjoint use, is bad for multifariousness. Consolidated Electric Light Co. v. Brush-Swan Electric Light Co., 20 Fed. 502, followed.

This was a bill by the Union Switch & Signal Company and others against the Philadelphia & Reading Railroad Company and others for infringement of five patents relating to apparatus for electric railway signaling. Defendants demurred to the bill.

J. Snowden Bell and George H. Christie, for complainants.
Witter & Kenyon, for defendants.

DALLAS, Circuit Judge. Upon the argument I inclined to think that it might be possible to sustain this bill against the charge of multifariousness, and so avoid multiplicity of suits. After careful examination of the bill, however, and upon full consideration of the authorities, especially of the case of Consolidated Electric Light Co. v. Brush-Swan Electric Light Co., 20 Fed. 502, I am convinced that it would be a mistaken and oppressive exercise of the discre-

tion of the court to require the defendants to meet in a single answer, and by connected proofs, the allegations made with respect to the five patents which the complainants have here set up.

The second and third grounds of demurrer need not be considered. It is not necessary to pass upon them in the present case, and it may be that they will not be applicable to any case which may be presented hereafter.

The cause of demurrer first assigned is as follows:

"First. That it appears from the face of the bill of complaint that the said bill of complaint is altogether multifarious, in that suit is thereby brought against said defendants for five separate and distinct matters and causes,—to wit, for an infringement of letters patent No. 233,746, granted to Oscar Gassett, for improvements in circuits and apparatus for electric railway signaling; for an infringement of letters patent No. 246,492, granted to Oscar Gassett, August 30, 1881, for improvements in electric railway signaling apparatus; for an infringement of letters patent No. 270,867, granted to George Westinghouse, Jr., for an improvement in electric circuits for railway signaling; for an infringement of letters patent No. 227,102, to Oscar Gassett and Israel Fisher, for an improvement in rail connectors for electric track circuits; and for an infringement of letters patent No. 273,377, granted to Charles J. Means, for an improvement in electric railway signals. That these several matters and things cannot be properly joined in one suit, and that these defendants, being by this bill of complaint required to litigate five distinct and unconnected controversies in this one suit, are thereby put to great and serious inconvenience and disadvantage, contrary to the spirit and purpose of equity, and cannot properly make answer thereto, as in right and justice they are entitled. That it nowhere in said bill of complaint appears, nor is it alleged, that the improvements recited in said patents are all conjointly used or infringed by these defendants, or are all conjointly used or infringed by the defendants in or upon one and the same machine, device, article, or apparatus, or are all capable of conjoint use in or upon one and the same machine, device, article, or apparatus, but, on the contrary, it appears on the face of the said bill of complaint, and of the aforesaid patents forming part thereof (profert of each and all of which having been made therein), that the said improvements described and claimed in said several letters patent are of such a diverse nature and character that they are incapable of conjoint use, and cannot be used conjointly, or conjointly in one and the same machine, device, article, or apparatus."

For the cause thus assigned, the demurrer is sustained, and the bill adjudged insufficient.

UNION SWITCH & SIGNAL CO. et al. v. PHILADELPHIA & R. R. CO. et al.

(Circuit Court, E. D. Pennsylvania. June 18, 1895.)

No. 66.

PLEADING IN PATENT CASES—MULTIFARIOUSNESS—AMENDMENTS TO BILL.

Where a bill for infringement of five separate patents was declared bad for multifariousness, *held*, that an amendment averring the conjoint use by defendants of the subject-matter of each of the patents in one and the same connected machine, mechanism, or apparatus should be allowed.

This was a bill by the Union Switch & Signal Company and others against the Philadelphia & Reading Railroad Company and others for infringement of five separate patents relating to improvements in electric signaling apparatus for railroads. The bill was hereto-

fore, on demurrer, held bad for multifariousness. 68 Fed. 913. Complainants now move to vacate the order sustaining the demurrer, and for leave to amend the bill.

J. Snowden Bell and George H. Christie, for complainants.
Witter & Kenyon, for defendants.

DALLAS, Circuit Judge. When the demurrer to the bill in this case was originally argued, the impression was made upon my mind that it was conceded by complainants that the respective subjects-matter of the five patents sued on were not used in one mechanism, but upon different, though contiguous, parts of the same railroad. Upon this understanding, I held the bill to be multifarious, and upon that ground sustained the demurrer. The complainants now move to vacate that order, and for leave to amend their bill by adding thereto the following:

"And your orators in this behalf further aver the fact to be that the conjoint use made by the defendants herein as herein averred includes a use of a material and substantial part of the subject-matter of each of the said recited patents in one and the same connected machine, mechanism, or apparatus."

This proposed amendment is accompanied by an affidavit that, to the best of the affiant's knowledge and belief, the facts therein stated are true; and upon the argument of the present motions, complainants' counsel has strenuously insisted that the statement it embodies is supported by the several patents themselves. Counsel for defendants has quite as earnestly contended, on the other hand, that a proper understanding of the patents requires the negation of the averment sought to be introduced by amendment. Waiving any doubt as to whether it would be permissible to now enter upon a discussion of the question thus raised, I decline to do so, because I deem it inexpedient to express any opinion respecting the patents sued upon at this stage of the cause. For the present purpose, I assume the truth of the matter which the complainants ask leave to insert in their bill. The amendment is allowed. The order heretofore made is vacated, and the demurrer overruled. Any question regarding costs, which may call for further consideration of this matter, is reserved. The defendants are assigned to answer or plead sec. reg.

COLLINS v. GLEASON.

(Circuit Court, S. D. New York. June 28, 1895.)

1. PATENTS—NOVELTY.
   The discovery that sheets of celluloid, which, by reason of their frangibility, were not adapted for use as card cases and book covers, could be sewed between leather bindings, and held by their stitches so as to be used for these purposes, *held* to be sufficiently novel to support a patent.

2. SAME—CELLULOID BINDINGS.
   The Collins patent, No. 405,874, for celluloid bindings of leather for card cases and book covers, *held* valid and infringed.

This was a bill in equity by Kate J. Collins against Thomas Jay Gleason for infringement of a patent for bindings of leather for celluloid card cases and book covers.

Edwin H. Brown and James C. Chapin, for plaintiff.
L. J. Morrison, for defendant.

WHEELER, District Judge. This suit is brought upon patent No. 405,874, dated June 25, 1889, and granted to the plaintiff, for celluloid bindings of leather for card cases and book covers. The defenses set up in the answer are, in substance, that the specification is insufficient; that, to deceive the public, it was made to contain too much,—with denials that the invention was of any utility; that it was, "in any respect, novel"; and of infringement. The defenses set up wholly fail, and the denials, except as to novelty, are overcome; and as no prior knowledge and use by any person is set up, with place, as required by the statute, or at all, the question of novelty rests upon this general denial, to be determined, as to patentability, upon common knowledge. Celluloid sheets apparently were not, and, from their frangibility, could not well be, used for these purposes without such bindings; for they could not be held by stitches, nor otherwise held in place. The plaintiff discovered that they could be sewed between leather bindings, and be held by the stitches. For this discovery, and the combination of these parts in this way into these new articles of manufacture, she was awarded this patent. Binding the edges of material with other material to hold or strengthen it was not at all new, and a patent for this only would wholly fail. But here was peculiar material, not used before by being sewed, nor practically sewable alone, made sewable and brought into use by this invention. This does not appear to be a merely mechanical double use, but a new use brought about by contrivance, experiment, and adaptation. Such bringing to a new use seems to be patentable. Potts v. Creager, 155 U. S. 597, 15 Sup. Ct. 194. Decree for plaintiff.

SALISBURY v. SEVENTY THOUSAND FEET OF LUMBER et al.

(District Court, S. D. New York. March 26, 1895.)

DEMURRAGE—DELIVERY OF CARGO—SALE "FREE ON BOARD"—VESSEL TO ARRIVE—DELAY AT SELLER'S RISK.

The defendant B. (brought in by petition of defendants) loaded the libelant's boat C. with lumber at Albany, and consigned it to himself at New York. He then sold the lumber to H. who bought it for export by the steamer A. P.; B. agreed to deliver it "f. o. b. vessel where she lies" (meaning free on board the A. P., and clear of all claims or liens). When B. sent the boat alongside the A. P. to deliver the lumber, the A. P. was not ready to receive it, and the boat was detained six days before the lumber was received, for which delay the lumber, after delivery on the steamer, was libeled for demurrage. B. claimed to have followed H.'s orders and those of the agents of the steamer as to the time of tender alongside, but upon conflicting evidence on this point, it being found that the lumber was received as soon as the customary permit obtained from the steamer specified: *Held*, that the risk of delay in the readiness of the steamer, and the burden of proving directions to go alongside earlier than the permit stated, were on the seller, B.; that the weight of evidence did not support his contention, and that though the lumber was liable for the demurrage, B. was personally bound to indemnify H. against the claim, and to pay the same with costs.

This was a libel by Nelson H. Salisbury, as executor, etc., against 70,000 feet of lumber and Horace F. Burroughs, Sr., to recover demurrage.

Hyland & Zabriskie, for libelant.
Convers & Kirlin, for Herbst, claimant of the lumber.
Charles H. Hough, for Horace F. Burroughs, Sr.

BROWN, District Judge. The libel was filed to recover freight and demurrage upon the delivery of 70,000 feet of lumber from the river boat E. J. Carroll, upon the steamship Afghan Prince on November 21, 1894. The lumber had been shipped on board the Carroll at Albany by the defendant Burroughs, consigned to himself at New York, and he had thereafter sold the lumber to Herbst who bought it for the purposes of export by the Afghan Prince. The contract between Mr. Burroughs and Mr. Herbst was that the lumber should be "delivered f. o. b. vessel where she lies within lighterage limits, shipping instructions hereafter." The proofs show that by the language used it was meant that the lumber in question should be delivered by the seller free from all claims or charges alongside the ship, by which it was intended to be exported, and into her custody, at the time when the ship was ready to receive it; and that the seller should procure, according to custom, the ship's receipt therefor, and deliver it to the buyer.

The boat with lumber on board was sent by Mr. Burroughs alongside the steamer on the afternoon of November 15th; but the steamer not being ready to receive it, the lighter was moved to the opposite side of the slip, where it remained until the 21st, when it was hauled alongside and the lumber removed to the ship on that day. For this delay in unloading, demurrage for six days is claimed. Mr. Herbst contends that he was not liable for the delay, because he was entitled to have the lumber delivered free of all charges, and because he had not caused any delay in the delivery. Mr. Burroughs claims that the lighter was taken alongside on the 15th under directions of Mr. Seager, the agent of the steamer, or of other persons representing the line of steamers, to whom he had been referred for instruction by Mr. Herbst, while the latter denies that any such reference for instructions was given. Mr. Burroughs was made a party defendant upon petition.

By the contract between Burroughs and Herbst the latter was bound to give instructions as to the time when the lumber should be taken alongside the steamer for delivery. If, instead of giving such instructions himself, therefore, he referred Mr. Burroughs to the agents of the steamer for instructions, Mr. Herbst, as between him and Burroughs, would be bound by any instructions given to Burroughs by the representatives of the steamer, and therefore bound to pay any legal claims for demurrage arising through compliance with such instructions, and look to the steamer or her agents for his own indemnity. Mr. Herbst denies, however, having referred Mr. Burroughs to the agents of the line for any instructions, though admitting that he referred him to them for information, stating that

he had been unable to ascertain from them when the steamer would be ready.

On the 16th of November Mr. Goudie, an employé of Mr. Herbst, obtained a permit for loading the lumber upon the steamer upon the 20th; and the cargo as received within 48 hours after that day, which was sufficient under the custom proved. Both Mr. Herbst and the representatives of the steamer deny any appointment, or the designation of any fixed day for the receipt of the lumber, other than the 20th. The chief reliance of Mr. Burroughs is upon an alleged conversation between his salesman, Mr. Oleson and Captain Saunders, one of the superintendents of the steamship line. The latter testified that in answer to Mr. Oleson's urgent request to receive the cargo without delay, he merely promised that the ship would take it as soon as she could, if he chose to send the lighter to the ship at the Atlantic Basin. Mr. Oleson testified that he promised that if he would send the lighter there that the discharge should be commenced on Friday the 17th.

Mr. Burroughs had, for a week previous, been employing the lighter in other work with this lumber on board, to prevent demurrage accruing, and when he received word that the lumber would be received on the 15th, had other employment engaged for the lighter on that day. I have no doubt that he supposed the lumber would be received at once. On the other hand it was known that the steamer had been delayed in her arrival; had afterwards been obliged to go upon dry dock, and that the time of her loading this lumber, which was to go upon her deck, was uncertain. The ordinary practice of the agents of the line was to give a written permit fixing the time for unloading. In claiming to rely upon oral directions, instead of upon the ordinary written permit as to the time of receiving cargo, the burden of proof is upon Mr. Burroughs to show clearly that a definite time was undoubtedly and definitely fixed. In the contradiction between the two principal witnesses in this regard, I do not think that there is such a preponderance of evidence on the side of Mr. Burroughs as justifies the court in holding that such a definite agreement was made. The testimony of Mr. Oleson, the chief witness on that point, is weakened by errors in other respects, which the preponderance of evidence seems to show that he has made in other parts of the case; first, as respects a time fixed by Mr. Seager, in a conversation which is said to have been had before the vessel arrived; and secondly, as respects the permit for the delivery given to Mr. Oleson on the 16th of November, and Oleson's statement on that day, that he had been unable to obtain from the agent of the ship any definite time to be fixed.

I must hold, therefore, upon the testimony, that Mr. Burroughs in sending the lighter alongside before the permit was obtained, sent her there without any definite appointment, and at his own risk. In selling the lumber free on board of a vessel which was to arrive, Mr. Burroughs took the risk of the delay until the time when the vessel was ready to receive the goods. Upon such a contract he could only avoid that risk, by fixing a time for the delivery, when it should be the duty of the vendee or of the ship to receive it. In this

case, the contract was silent as to the time of delivery, and I cannot find that any fixed day was subsequently agreed upon before the time named in the permit of the 16th for delivery on the 20th. The carrier, however, was entitled to compensation for the use of his boat. She was under the direction of Mr. Burroughs, the shipper; he is liable to the lighter for her detention, and has not sufficiently shown that Mr. Herbst, through any reference to the steamship agents, or any fixed time agreed on with them has relieved him of that liability or entitled him to call upon Mr. Herbst for indemnity.

Mr. Burroughs, before suit, tendered to the libelant's attorneys the freight, though refusing to pay demurrage. The attorneys refused to receive it, lest by receiving it they should release any lien for demurrage. There must be a decree, therefore, for the freight and demurrage against the lumber and the defendant Burroughs, with the provision that he is primarily liable to pay the amount; with an order of reference to ascertain the value of the use of the lighter, if it is not agreed on. The question of costs reserved as between him and the libelant.

The defendant Herbst is entitled to a decree against Burroughs, with costs.

THE MARY L. PETERS.

HOWELL et al. v. THE MARY L. PETERS.

(District Court, S. D. New York. June 25, 1895.)

CARRIERS—DAMAGE TO CARGO—SEA PERILS—LEAKY DECK—UNSEAWORTHINESS—HARTER ACT—"DUE DILIGENCE" REQUIRED OF SUPERINTENDENT OF REPAIRS.

The Mary L. Peters with a cargo of sugar from Sagua La Grande to New York met extraordinary weather in February and March, and the sugar was damaged by water through leaks about the waterways, and hatches, and through the decks; the evidence showed the deck in poor condition before sailing, and unfit for such a voyage and cargo. *Held* (1) that the vessel was answerable for the damage from leaks through the deck; (2) that there was no such "due diligence" exercised by the persons employed by the owners to see to the repair of the ship as to exempt the ship and owners.

This was a libel by Benjamin H. Howell and others against the schooner Mary L. Peters to recover damages to a cargo of sugar.

George A. Black, for libelants.

Goodrich, Deady & Goodrich, for respondent.

BROWN, District Judge. The above libel was filed to recover for damages to bags of sugar upon a voyage from Sagua La Grande to New York in February and March, 1894. The damage arose from sea water taken in through the decks, and in the waterways and around the coamings of the hatches.

The evidence of very severe weather on the voyage is in this case much stronger, in my judgment, than in the case of The Centurion, 68 Fed. 382, in which the court of appeals in this dis-

trict has recently held the ship exempted by reason of sea perils. If I were satisfied of the reasonably fit condition of the schooner to encounter the ordinary perils of a winter voyage, I should have held her excused, as I did in the case of The Sintram, 64 Fed. 884, for some water damage arising through strains in the waterways. But the evidence shows not only the bad condition of the schooner's deck, but leaks also through the deck, besides what water might have been taken in around the coamings and the waterways compatibly with a seaworthy ship, under the circumstances of the voyage.

I must, therefore, hold the ship answerable in this case for insufficiency for the voyage and cargo (The Edwin I. Morrison, 153 U. S. 199, 14 Sup. Ct. 823; The M. R. Bohannon, 64 Fed. 883; Hubert v. Recknagel, 13 Fed. 912; The Giles Loring, 48 Fed. 463); and there is no such evidence of "due diligence" on the part of the owner, or of those who represented him in the inspection and repair of the ship before sailing, as to exempt the ship under the Harter act (Act Feb. 13, 1893).

Decree for libelant, with costs.

HINE et al. v. NEW YORK & BERMUDEZ CO.

(District Court, S. D. New York. April 9, 1895.)

CHARTER PARTY—ASPHALT—FITTINGS INSUFFICIENT—PORT OF REFUGE—NO GENERAL AVERAGE—HARTER ACT—EXPRESS CONTRACT.

A charter of the S. D. to bring asphalt to New York provided that the ship should be "fitted with shifting boards and bulkheads suitable for carrying asphalt cargo safely, to be done by owner's agents, but at charterer's expense"; after loading at Guanaco, the ship on the first day out took a list, and she then put in to Port of Spain where the list increased, and on the third day the forward bulkhead and fittings gave way, which necessitated unloading, stowage, and refitting and reloading before the vessel could proceed. On the evidence, it being found that this expense and the delay thereby caused arose from the insufficiency of the bulkhead and fittings: *Held* (1) that the providing of a suitable bulkhead and fittings was under the charter one of the owner's duties and risks, though at charterer's expense; (2) that the owners could not recover charter hire or a general average expense for the delay and costs at Port of Spain; (3) that though the owner's agents used "due diligence" in directing the master to shipwrights of high repute, who made the bulkhead, the Harter act was inapplicable; because that act does not interfere with the liberty of contract, as respects matters not within its prohibition.

This was a libel by Wilfrid Hine and others against the New York & Bermudez Company to recover charter hire of the steamship San Domingo, together with certain port of refuge expenses, and for detention during the voyage.

Convers & Kirlin, for libelants.

George A. Black, for respondents.

BROWN, District Judge. The above libel was filed by the owners of the steamship San Domingo against the charterers of the vessel to recover $3,912.37 charter hire, and $11,803.24 for port of refuge

expenses, and for detention of the vessel at Port of Spain, Trinidad, upon a voyage with a cargo of asphalt from Guanaco to New York in September and October, 1892.

The charter was for a period of two months, and provided that the vessel should be tight, stanch, and in every way fitted for the service; that the owners should maintain the vessel in a thoroughly efficient state in hull and machinery for the service, and that the steamer should be "fitted with shifting boards and bulkheads suitable for carrying asphalt cargo safely, to be done by the owners' agents, but at charterers' expense; that the captain should be under the orders and direction of the charterers, as regards employment; that in the event of loss of time * * * or damage preventing the working of the vessel for more than 24 running hours, the payment of hire shall cease until she be again in an efficient state to resume her service; and should the vessel be driven into port * * * from any accident to cargo, such detention or loss of time shall be at the charterers' risk and expense."

The cargo of asphalt was loaded at Guanaco, where the weather was warm; and on the first day out, probably through the melting of the asphalt and some overflow towards the starboard side, the vessel took a list to starboard, which increased on the second day, while she lay in the harbor of Port of Spain. On the morning of the third day it was found that the fittings had been carried away, and the forward bulkhead burst through, from the pressure of cargo against them, so that it became necessary to beach the vessel, discharge and store her cargo, and put up new fittings, in order to complete the voyage. The expenses thus incurred, and the hire of the vessel during her detention in Port of Spain, form the subject of this controversy.

The libelants contend that the fittings were at the charterers' risk; and that the extra charges occasioned by their giving way should, therefore, be borne by the charterers, or else placed to account of general average, as caused by an unexpected sea peril. The respondent contends that all these expenses, as well as the detention, were caused through the insufficiency of the fittings of the vessel for the service; and that under the express provisions of the charter, the owners were legally responsible for the sufficiency of the fittings; and that the latter have no claim, therefore, either for the detention of the vessel or even for any contribution in general average, as against the respondent, for the expenses of discharging, reloading, etc., at Port of Spain.

Upon consideration of the evidence as regards the shifting boards and bulkhead, I feel constrained to find that the cause of the loss was the insufficiency of the fittings and bulkhead for the asphalt cargo designed to be taken on board and subsequently taken; and that no such difference is established between the asphalt loaded, and the kind of asphalt which the owners were entitled to expect would be taken on board at Guanaco, as to absolve the owners from responsibility for this insufficiency.

In behalf of the libelants, it is earnestly contended that the clause in the charter providing that the fittings were "to be done by own-

ers' agents at charterers' expense," was designed only to enable the charterers to avail themselves of the superior knowledge of the owners' agents in preparing the vessel for the service; that the provision that the work was to be at the charterers' expense, shows that this was not for the owners' benefit, and was not expected to be done by the owners at all; and that the reference to the owners' agents indicates that these agents were to act in the matter personally, as the agents of the charterers, and not as the representatives of the owners, or so as to bind the owners by their acts, or omissions in this regard.

Notwithstanding the ingenious arguments of the libelants' counsel, I do not feel justified in adopting this construction. The clause in question was a substantial and necessary part of the charter. The nature of the cargo, a peculiar one, is not elsewhere referred to. Special fittings for such a cargo were necessary to be made by some one; and as the clause in question is made a part of the charter itself, I feel bound to construe it in connection with the previous clause, providing that the ship shall be "in every way fitted for the service" and as an amplification, and further specification of what the service was expected to be, and what was necessary to make the ship fit. The provision that the expense of the fittings should be borne by the charterers, was but a mode of fixing the terms and consideration to be paid by the charterers for the use of the vessel; and I must hold, therefore, that the requirement that fittings "suitable for carrying asphalt cargo safely" should be done by the owners' agents, was a part of the owners' engagement under the charter, and placed upon them the responsibility for the sufficiency of the fittings.

I do not think there was any such acceptance of the fittings as sufficient by the respondents' representative, Capt. Cann, in Guanaco, as to absolve the libelants. Capt. Cann objected to the sufficiency of the fittings on the arrival of the vessel, and suggested additional supports, which were accordingly put in by the captain. But I judge that the principal cause of the subsequent trouble was the bursting of the bulkhead, which may have been due either to insufficient supports, or to weak and brittle material, some of which, consisting of hemlock, the evidence shows was undoubtedly used in the construction. Of the latter fact neither the respondents nor their representatives were aware.

Inasmuch as the damage in question was the immediate result of the failure of the ship to perform her own charter obligations, the clauses in the charter imposing on the charterer the cost of detention are inapplicable; and for the same reason no claim for a general average contribution can be sustained; since it was the fault of the ship that brought about the situation in which the alleged general average expenses were incurred. The Ontario, 37 Fed. 222, and cases there cited; The Energia, 61 Fed. 222, 224.

I do not think that the provisions of the Harter act (Feb. 13, 1893) apply on facts such as I have found. Neither the owners nor indeed the owners' agents in this port were chargeable with any personal negligence, the vessel having been accepted in Philadel-

phia, and the duty of the owners' agents personally having been fully performed by directing the master of the ship to persons in Philadelphia in good repute there and with large experience in building bulkheads.

It is immaterial, however, how it happened that the fittings were insufficient, so long as the respondents did not relieve the libelants of their contractual obligation under the charter, as I find that they did not. The Harter act does not interfere with the liberty of contract in regard to the proper fitting of the vessel for the voyage, or with any contract the parties may make as respects the responsibility for the sufficiency of special fittings, or as regards other matters not within the prohibition of that act; nor was the melting of the asphalt in the warm climate of the port of shipment, any "inherent defect, quality, or vice of the thing carried"; but, on the contrary, it was one of its natural qualities, against which the provisions of the charter stipulation must be deemed intended to provide.

The libel must, therefore, be dismissed, with costs.

WESTERN ASSUR. CO. v. SOUTHWESTERN TRANSP. CO.

(Circuit Court of Appeals, Fifth Circuit. June 4, 1895.)

No. 377.

1. MARINE INSURANCE—PARTIAL LOSS—AMOUNT RECOVERABLE.
   Where the vessel insured is valued in the policy at a specified amount, and a partial loss is incurred, the insurer pays only such proportion of the actual loss as the sum insured bears to the value of the vessel.
2. COSTS ON APPEAL—APPARENT ERROR NOT EXCEPTED TO BELOW.
   Where the amount of a decree is reduced on appeal for an apparent error in the commissioner's report, which was not excepted to below, such reduction should not affect the costs.

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

This was a libel by the Southwestern Transportation Company against the Western Assurance Company, to recover upon a policy of marine insurance insuring the model barge Charlie Pierce in the sum of $1,250. The damage for which recovery was sought was occasioned by the springing of a leak in the barge while she was lying at New Orleans moored on the outside of another barge; and the cause thereof, as alleged in the libel, was the surging and straining of the Charlie Pierce against the barge to which she was fastened, by reason of heavy winds and the waves caused thereby and by passing steamers. The defense was that the barge was not seaworthy, and that the loss was not caused by any peril insured against. The issues raised were wholly of fact, and the court determined them in favor of libelant, and referred the cause to a commissioner to ascertain the damages suffered by libelant. The commissioner reported the damage to be $1,275.83, and his report was confirmed by the court, and a decree entered against defendant for $1,250, being the full amount of the policy, with interest. From this decree the defendant appealed.

Howe, Spencer & Cocke, for appellant.
Guy Hornor, for appellee.

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

PARDEE, Circuit Judge. This is a suit in admiralty to recover for a partial loss under a marine policy of insurance. As the issues are presented by the libel and answer, the burden of showing that the model barge insured was seaworthy, and that the loss happened through perils of the river, is on the libelant. The issues are wholly of fact; and, the district court having found them in favor of the libelant in the court below (appellee in this court), we might affirm, on the general rule declared by this court in The City of Macon, 2 U. S. App. 396, 2 C. C. A. 564, 51 Fed. 949: "On an appeal in admiralty a circuit court of appeals will not reverse the decision of a district court on a question of fact depending on conflicting evidence, unless it clearly appear to be against the weight of evidence." It is not necessary, however, to put our decision on such narrow ground, for from our examination of the evidence we find that it is decidedly in favor of the libelant on both propositions. A review is unnecessary, and we only remark that to find that the barge was not seaworthy or was lost through other than perils of the river requires the rejection of facts, to wander into the domain of conjecture. In our opinion, the libelant proved its case. Our attention is, however, called to an error on the face of the record which requires a reduction of the amount awarded in the court below. In the policy of insurance, the model barge insured was valued at $2,000, and the amount of insurance was $1,250, or five-eighths of the value. The rule in cases of marine insurance where a partial loss is incurred is that the insurer pays only such a proportion of the actual loss as the sum insured bears to the value of the property at risk. See Ang. Ins. (2d Ed.) § 249. The amount of loss proved in the case was $1,275.83. Five-eighths of the same amounts to $797.40. In the district court no exceptions were taken to the report of the commissioner as to the amount of damages libelant was entitled to recover. As the point is first made in this court, the reduction here allowed ought not to affect the costs. The decree appealed from is amended by reducing the amount of recovery from the sum of $1,250 to the sum of $797.40, and, as thus amended, it is affirmed; the appellant to pay the costs of this appeal.

WESTERN ASSUR. CO. v. SOUTHERN COTTON OIL CO.

(Circuit Court of Appeals, Fifth Circuit. June 4, 1895.)

No. 378.

MARINE INSURANCE—ESTOPPEL AGAINST INSURER—CERTIFICATE OF SEAWORTHINESS BY BOARD OF UNDERWRITERS.

It seems that a certificate by the inspector of a local board of underwriters that a certain vessel is in good condition, privileged to carry cotton seed and cotton to a certain amount, and that cotton and other merchandise shipped on her would be insured at the usual rates by the companies com-

posing the board of underwriters, estops a company which is a member of that board to question the seaworthiness of the vessel, as against a shipper of cotton seed thereon whom it insured shortly after the issuance of the certificate.

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

This was a libel by the Southern Cotton Oil Company against the Western Assurance Company to recover upon a policy upon a cargo of cotton seed shipped on board the model barge Charlie Pierce and damaged by the filling of that barge while moored at New Orleans. See Western Assur. Co. v. Southwestern Transp. Co., 68 Fed. 923. There was a decree below, based upon the report of a commissioner, in favor of libelant for $6,354.99. Defendant appealed.

Howe, Spencer & Cocke, for appellant.

Guy M. Hornor, for appellee.

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

PARDEE, Circuit Judge. This is an appeal from a decree in admiralty condemning the appellant, as insurer of the cargo of the model barge Charlie Pierce, to pay the loss occasioned by the sinking of said barge on November 12, 1891. The whole contention is whether the barge was seaworthy. The evidence thereon is the same as in Western Assur. Co. v. Southwestern Transp. Co., (No. 377 of the docket of this court, just decided) 68 Fed. 923, and, on the issue of unseaworthiness of the barge, must be ruled the same way. At the same time, we notice that the case in favor of the Southern Cotton Oil Company, libelant in the court below, is much stronger than in favor of the libelant in No. 377. While the contract of insurance sued on assumes risks only "on all cotton seed in bulk or in bags owned by the assured, or consigned to them and shipped to their address in New Orleans on board good and seaworthy steamboats and barges," there is no contract, express or implied, on the part of the assured, that after shipment the steamboat or barge should continue in a seaworthy condition. Now, as we read the evidence, it is all in favor of the seaworthiness of the barge at the time the cargo was shipped, except the presumption which arises from the fact that November 12th, some 16 days thereafter, the barge sunk while tied up to a wharf in the port of New Orleans, and in the absence of known extraordinary perils of the river at the time. Shortly prior to the attaching of the risk under the policy in suit, and on the 28th of September, 1891, the inspector of the board of underwriters, to which board the respondent insurance company belonged, issued and delivered to the manager of the Southern Cotton Oil Company the following certificate:

"Office Board of Underwriters.

"No. 306.

"New Orleans, September 28, 1891.

"The undersigned having this day made a thorough examination of the model barge 'Charlie Pierce,' captain, Southern Transportation Company, and found

her in good order and well conditioned, privileged to carry 650 tons of cotton seed for Mississippi river and its tributaries, or 1,500 bales of cotton for Mississippi river only, and not on tributaries, does hereby certify that cotton or other produce or merchandise shipped on board of her will be insured at the usual rates of premium by the insurance companies composing the board of underwriters of this city, for one year from the above date, subject, however, to reinspection at any time. The above boat shall not tow any flatboat, barge, or other craft, except in case of distress.

"[Signed] P. C. Montgomery,
"Inspector of Hulls, Board of Underwriters."

As no fraud or concealment is alleged or suggested, there is strong reason for holding that the respondent insurance company is estopped by the said certificate of the board of underwriters, as against a shipper who relied thereon in making shipments and in taking insurance. It is true that Mr. Landry, president of the corporation which owned the barge, was also president of the corporation shipping the cargo; but, as it is not pretended that Mr. Landry, the common agent of the two corporations, knew or had any reason to know that the barge was even suspected of unseaworthiness, this common agency cannot affect the estoppel which ought to exist in the case. The decree appealed from is affirmed.

THE GEORGE DUMOIS.

GULF CITY COAL & WOOD CO. v. BRU.

(Circuit Court of Appeals, Fifth Circuit. May 21, 1895.)

No. 361.

1. MARITIME LIEN—SUPPLIES—BURDEN OF PROOF.
Where necessary supplies are furnished to a ship in a foreign port, and are received by the master and used in the service of the ship, a maritime lien results, unless it is shown that the furnisher of the supplies relied on the credit of the owner, not of the ship; and the burden of showing such fact, to defeat the lien, rests on the ship and her claimants.

2. SAME—EVIDENCE.
Coal was furnished by libelant, at Mobile, Ala., to the ship G., upon the personal order of one D., the president of the C. Co., the charterer of the ship. The C. Co. was a Louisiana corporation, and D. a resident of New Orleans, neither appearing to have had any property at Mobile. The ship was not in a port of distress, but was running regularly between Mobile and foreign ports. No reference was made to the vessel as a source of credit when the coal was ordered, but it was received by the master, and used in prosecuting a voyage, which could not have been made without it, and it was charged on libelant's books to the ship. *Held*, that libelant had a lien on the ship for the price of the coal.

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

This was a libel by the Gulf City Coal & Wood Company against the steamship George Dumois, Johan Bru, claimant, for supplies. The district court dismissed the libel. 66 Fed. 353. Libelant appeals. Reversed.

L. H. Faith, for appellant.

Gregory L. Smith and H. T. Smith, for appellee.

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

PARDEE, Circuit Judge. The Gulf City Coal & Wood Company, an Alabama corporation, filed a libel in the district court against the George Dumois, a Norwegian steamship, then in the port of Mobile, to recover the sum of $276 for 115 tons of coal supplied to and used by said steamship to prosecute a voyage to Bocas del Toro, Central America, and return to the port of Mobile. On the hearing in the district court, the judge found facts as follows:

"I find the facts in this case to be that the coal was furnished to the ship in Mobile, Alabama, on the personal order of one Dick, the president of the Columbian International Colonization & Improvement Company of New Orleans, La., who were the charterers of the ship for the term of one year; that the ship was a foreign vessel; that libelant knew that the C. I. C. & I. Co. were the charterers; that the ship was not in a port of distress; that she was running in a regular line between the port of Mobile and foreign ports; that in the negotiation for the coal no reference was made to the vessel as a source of credit, and there was no inquiry made of or dealing with the master or any agent of the ship. I further find that the charterers had, by the terms of the charter party, agreed to pay for such supplies, but that the libelant had no actual knowledge of this provision of the charter party. In short, the C. I. C. & I. Co. were the known owners of the ship, and Charles I. Dick was the president and representative of the company. The coal was obtained on the personal order of Dick in a foreign port, where he was at the time of giving the order. * * *"

On examination of the evidence, we concur with the district judge in these findings, but we also find from the evidence the additional facts that the coal was received by the master and officers of the steamship, and was used by the ship in prosecuting the voyage, and was a necessary supply to the ship, without which the voyage could not have been prosecuted; and that, while the agent of the charterers was in Mobile, and ordered the coal, both the agent and the charterers were nonresidents, not shown to have either credit or visible property in Mobile or elsewhere. The coal furnished by libelant was charged at the time on the books as follows:

S. S. Geo. Dumois (for C. I. C. & Imp. Co.)
Fleming & Gelpi, (Agents.)

115 Tons $2.40 ..... $276.00

The entry on the ledger reads as follows:

S. S. Geo. Dumois.
Fleming & Gelpi, Agts. for Columbian I. C. & Imp. Co. N. O. La.

1894.			1894.		
Oct. 27.	115 Tons Coal, $2.40 (165)	$276.00	Nov. 1.	By sight draft (155)	$276
Nov. 6.	Sight draft unpaid (507)	276.00			
Nov. 6.	Protest fees	2.50			
		$278.50			

The district judge dismissed the libel, because, from the facts as above recited by him, he inferred that the coal was not furnished on the credit of the ship, but on the personal credit of the charterer only. The judge cited in support of his conclusion: The Stroma, 41 Fed. 599 (s. c., 3 C. C. A. 530, 53 Fed. 281); Stephenson v. The Francis,

21 Fed. 715; Neill v. The Francis, Id. 921; Herreshoff Manuf'g Co. v. The Now Then, 50 Fed. 944 (s. c., 5 C. C. C. A. 206, 55 Fed. 523); and The Kong Frode, 13 U. S. App. 459, 6 C. C. C. A. 313, 57 Fed. 224, —and said:

"The substance of these decisions is that in dealing with a known charterer, even in a foreign port, for mere ordinary supplies, the dealings are prima facie upon his personal credit only; and no lien will be implied, unless the libelant satisfies the court, from the negotiations or the circumstances, that there was a common understanding or intention to bind the ship."

The Stroma, supra, decided in the circuit court of appeals, Second circuit, and The Francis, decided in the district court for the Southern district of the same circuit, are cases in which it was found that the furnisher of supplies was charged with notice that the charterer ordering the supplies was obligated by the charter to pay for the same, and hence this rule:

"When the known foreign special owner, not being the master, orders the supplies in a foreign port, and the libelant has reason to know that, as between the special and the general owner, the former is not the agent of the latter, but is personally, solely liable for the debt, and he furnished the goods in silence, there being no acts or circumstances from which it can be inferred that the credit of the ship was either within the contemplation of both parties, or was recognized by both, a maritime lien will not be implied."

In Herreshoff Manuf'g Co. v. The Now Then, supra, decided in the circuit court of appeals, Third circuit, which was a case in which the repairs were made upon the ship on the order and credit of the owner's husband, known to be wealthy, the court, while recognizing the general rule to be:

"If necessary repairs and materials be made and furnished to a vessel in a port other than her home port, the prima facie presumption is that they were made and furnished on the credit of the vessel, unless the contrary appears from the evidence in the case."

—Held that this general rule was subject to qualification, as follows:

"When the work is done by order of the master, a lien is implied; but for work done by order of the owner no lien will exist, unless proved by the agreement of parties."

Without questioning the correctness of the decisions in these cases on the facts as therein found, we are of opinion that the true rule to be applied in cases like the one under consideration is broader than as given above. In The Kong Frode, supra, decided by this court, the following principles were declared:

"Where a necessary maritime service, or a necessary service which gives a maritime lien, is rendered to a foreign vessel upon the application of the master, or in his behalf, the presumption is that it is rendered upon the credit of the vessel, and the burden of proof is upon him who contends otherwise. The fact that a merchant purchases supplies for, or procures services to be rendered to, a vessel, raises no presumption that he therefore sustains relations with the owners that make him responsible, and relieve the vessel from a lien. It is not enough to show that an agent who employs labor for a vessel is a charterer, and is, under the charter, liable for the bills incurred, but it is necessary that the creditor should also be aware of the relation and furnish the supplies or services with such an understanding. Ordinarily, where a material man or stevedore contracts with, and takes his bill for payment to, the agent of the ship, whether he represents the owners or charterers, without the intervention of the master, he does not abandon his right to look to the vessel in the event of nonpayment."

And further, Judge Locke, speaking for the court, said, as applicable to that case:

"The duties of consignees or agents of ships, or of the agents of charterers or owners, are so similar and indistinguishable that, without some positive knowledge of their relations, contracts, and agreements, it is impossible to determine to which class an agency may belong; and the fact that a merchant purchases supplies or procures services to be rendered a vessel raises no presumption that he therefore sustains relations with the owners that make him responsible, and relieve the vessel from a lien. In the great majority of instances in ordinary practice the material man or stevedore contracts with and takes his bill for payment to the agent of the ship, whether he represents the owners or charterers, without the intervention of the master; but by so doing he does not abandon his right to look to the vessel in the event of nonpayment. It cannot be presumed or expected that he can be informed as to the exact provisions of the charter, or the responsibilities of the parties in each particular case." 13 U. S. App. 463, 6 C. C. A. 313, 57 Fed. 224.

In The Patapsco, 13 Wall. 329, which was a case in which it was sought to relieve a ship from the maritime lien resulting from coal supplied in a foreign port, Mr. Justice Davis, for the court, said:

"Whether the coal was furnished on the credit of the vessel or of the owners is the only point of inquiry in this case. * * * It is undisputed that the Patapsco was in a foreign port, and that the coal was ordered for her specifically by name, and delivered to the officers in charge of her. It is equally free from dispute that the supply of coal was necessary—indeed, indispensable—to enable her to make her voyage at all. In such a case the inference is that the credit was given to the vessel, unless it can be inferred that the master had funds, or the owners had credit, and that the material man knew of this, or knew such facts as should have put him on inquiry. * * * If the credit was to the vessel, there is a lien, and the burden of displacing it is on the claimant. He must show affirmatively that the credit was given to the company to the exclusion of a credit to the vessel."

From the principles declared in The Kong Frode and in The Patapsco and cases there cited by Mr. Justice Davis, we understand the rule to be that, where necessary supplies are furnished to a ship in a foreign port, and they are received by the master, and used by him in the service of the ship, a maritime lien results, unless it shall appear that the furnisher of supplies did not rely upon the ship, but trusted solely to the personal credit of the owner; and the burden of proof in such a case to defeat the lien lies upon the ship and her claimants. Applying this rule to the case in hand, we are compelled to differ with the learned judge of the court below as to the proper decision of this case. Taking the facts to be as we find them in the record, we cannot infer from them that the libelant in the court below (appellant here) furnished the coal on the personal credit of the charterers, and did not rely upon the credit of the ship. While it is true the coal was supplied to the ship on the order of the agent of the charterers with knowledge on the part of the libelant that the ship was under charter, yet he did not know, nor was he bound to know, the terms of the charter party. It does not appear that the charterer had credit in the port of Mobile, or was so represented. The libelant sold the coal for cash, and at the lowest market price. While the bill was sent to charterers for payment, it was so done by request, and the bill and libelant's book entries were against the ship. In our view, the burden of showing that the coal was furnished on the credit of owners was on the claimant, and he

has not supported his contention with sufficient evidence. Further than this, we notice that by the law of Alabama (Code Ala. § 3054) a lien is given on any ship supplied or victualed within the state, irrespective of whether she is in her port or a foreign port, and irrespective of whether the supplies are furnished and the victualing done on the order of the master, or of any other agents of charterers or owners. With this in mind, it would be a very violent presumption upon the undisputed facts of this case, where the goods were sold for cash, and at the lowest market price, to infer that the libelant intended to waive both the domestic and the regular maritime lien to rely upon the credit of a foreign company with no established credit. The decree appealed from is reversed, and the cause is remanded, with instructions to enter a decree for the libelant for the amount claimed in the libel and costs.

THE YUMURI.

BEEBE v. THE YUMURI.

(District Court, S. D. New York. March 6, 1895.)

PILOTAGE—TENDER AT SEA—SHIP LIABLE.

The display of the customary pilot signals on the usual cruising ground of pilot boats at sea, and the visible approach of the boat towards an incoming vessel, are a sufficient tender of off-shore pilotage, with the customary waiver of extra charge; and if the vessel does not heed the tender, but comes in without a pilot, she is liable under the statute for the usual pilotage fees.

This was a libel by George W. Beebe against the steamship Yumuri to recover pilotage.

Carpenter & Park, for libelant.
Carter & Ledyard, for claimant.

BROWN, District Judge. 1. I find that the pilot boat approached the Yumuri within the customary cruising ground for incoming vessels, and displayed her blue flag as a signal, which was recognized, or ought to have been recognized, by the master and mate of the Yumuri, when the pilot boat was within a reasonable distance; and that this was, in legal effect, a tender and offer of her services as pilot to the Yumuri.

2. That under the fixed and well-known practice and custom not to make any claim to off-shore pilotage for pilots taken on board in that region, the above tender was also virtually an offer of pilotage with a waiver of any claim to such extra pilotage charge.

3. That the failure of the Yumuri to slow down or turn towards the pilot boat and accept the offered services, was a refusal of such service; and having taken no pilot subsequently, she became answerable to the libelant, under the statute, for the amount of ordinary pilotage, viz. $47.32, for which, with interest, a decree may be entered, with costs.

GYPSUM PACKET CO. v. HORTON.

(District Court, S. D. New York. June 6, 1895.)

PILOTS—UNKNOWN OBSTRUCTION—FAILURE OF PROOF.

The keel of the G. P. while being towed through the middle channel in Hell Gate rubbed some object unknown. Subsequent examination of the bottom showed no obstruction in the location where the libelant's evidence placed the course of the G. P. *Held*, that the evidence failed to show any negligence or lack of nautical skill in the pilot, and the libel was dismissed without costs.

This was a libel by the Gypsum Packet Company against George W. Horton to recover damages occasioned to the keel of the schooner Gypsum Princess by striking some object in Hell Gate while under pilotage of the respondent.

Wing, Putnam & Burlingham, for libelant.

George A. Black, for respondent.

BROWN, District Judge. The libel was filed to recover damages for the alleged negligence of the respondent as pilot on board the schooner Gypsum Princess, in causing her to strike the bottom and injure her keel while going down middle channel in Hell Gate in the ebb tide, at about quarter past 6 of July 3, 1894, while in tow of the tug W. J. Kennedy, on a hawser of 75 fathoms. The tide was about two-thirds ebb.

The draft of the schooner was 19 feet, 6 inches. The chart shows a reasonable channel-way of 19 feet depth at low water. At the time when the schooner went through this channel, there should have been, considering the wind, weather, and the tide, at least 2 feet in addition, or 18 inches more than the draft of the schooner. The schooner rubbed upon something so as to be plainly felt by all on board, but her way was not checked. A subsequent resurvey, made under government inspection, two or three weeks afterwards, showed nothing with which the schooner should have come in contact. The respondent is unable to give any other explanation than that there was some temporary obstruction as from portions of sunken wrecks, which are frequently in that vicinity and are carried off in the changes of the tide.

A pilot is in no sense an insurer. His contract of pilotage imports only acquaintance with the channel in its ordinary condition, and nautical skill in avoiding all known obstructions. Had the schooner in this case been shown to have struck any known obstruction, or to have been in an improper part of the channel-way, the case against the respondent might be considered sufficiently made out. But the libelant's testimony here fails to show anything of that kind. What was struck or rubbed is not known; not only is there no evidence, presumptive or otherwise, that it was the bottom, or any known obstruction that was struck, but the evidence indicates the contrary. For the only points that are indicated upon the government chart, or in the resurvey, where any contact could have been had with the natural bottom are much nearer to Mill Rock than any of the libelant's witnesses place the course of this

vessel. In other words, there is an entire failure of proof to show that the schooner was in any improper part of the channel, or to show with what objects the vessel came in contact, or where such objects were, or that there were any known obstructions, or dangers, in the course actually taken by the vessel.

For these reasons, I must find that the burden of proof incumbent on the libelant in such a case as this, is not sustained, and that the libel should, therefore, be dismissed, but without costs.

CHAPMAN DERRICK & WRECKING CO. v. PROVIDENCE-WASHINGTON INS. CO. et al.

(District Court, S. D. New York. April 27, 1895.)

SALVAGE—EMPLOYMENT BY INSURERS—ACCOUNT OF WHOM IT MAY CONCERN—RULE 19.

Upon the sinking of a steamer in the North river under suspicious circumstances, the insurers employed the libelant to raise her, and not to permit owners to board or examine her till after their own examination. Upon some conflict as to whether the service was rendered "on account of whom it may concern," and upon the sole credit of the wreck, *held*, that the direct pecuniary interest of the insurers in the raising and examination, and their employment of the libelant, made them liable under Sup. Ct. Rule 19, in admiralty, for the salvage compensation of $5,000, as agreed upon.

This was a libel by the Chapman Derrick & Wrecking Company to recover salvage from the Providence-Washington Insurance Company and others, insurers of the steamer River Belle, for raising the said steamer, which had been sunk in the Hudson river.

Wing, Putnam & Burlingham, for libelant.

Butler, Stillman & Hubbard and Mr. Mynderse, for respondents.

BROWN, District Judge. The evidence leaves no doubt that the libelant undertook the raising of the River Belle as a salvage operation; that it was undertaken solely upon the direction of Capt. Baird, the general representative of one of the insurers, for the protection of their interests after the occurrence of a loss; that the raising of the River Belle, if practicable, was of special interest and concern to the insurers, in order to ascertain the cause of the loss, and the extent of their liability upon their valued policies of $20,000; and that the settlement which it enabled them to make, viz. for $2,500, in addition to $5,000 for raising the vessel, was very greatly to their pecuniary advantage; that the salvage service was worth at least the sum of $5,000, and in their settlement with the owner, Frederic Jansen, for $7,500, in full, the four insurance companies paid to him that sum upon his undertaking to pay $5,000 to the libelant for its salvage services, and received from him an agreement in writing to hold them harmless therefrom; that shortly afterwards, the respondents, upon being applied to for payment for the salvage service, referred the libelant to Jansen, who, on demand, evaded payment, and soon after died insolvent. The above libel was thereupon filed.

I do not think the respondents have established any legal defense to the libelant's demand. As insurers of the vessel upon valued policies in the sum of $20,000, the respondents were directly interested and "concerned" in the raising of the steamer, both for the ascertainment of the amount of the loss, as well as its cause, as I have already stated, and for the purpose of enabling them to settle as advantageously as possible with the insured.

The engagement of the salvage service was manifestly within the general powers of Capt. Baird; and his procurement of the libelant company to raise the boat, was upon the previous authority of at least two of the companies; and his proceeding was afterwards adopted and ratified by the other two, as well as the adjustment of the compensation at $5,000. The employment of the libelant was so exclusively in the interest of the respondents, that the unusual agreement was made that neither the insured nor any representative of his, should be admitted to the steamer while raising, or when raised, until after the respondents' examination of her. Such an employment would be sufficient to maintain a common-law action against the respondents; and it is within the express language of the nineteenth rule of the supreme court in admiralty, which provided that "in all suits for salvage the suit may be in personam against the party at whose request, and for whose benefit, the salvage service has been performed."

I do not perceive that the "sue and labor clause" in the policies at all affects the respondents' liability. It provides that such acts "shall not be considered a waiver or an acceptance of an abandonment, nor as affirming or denying any liability; but such acts shall be considered as done for the benefit of all concerned and without prejudice to the rights of either party." This clause deals with the rights of the parties to the policy; and the libelant was not a party to the policy. The insurers, as I have already said, were deeply "concerned" in the raising of the vessel, and in ascertaining the loss and its cause. So far as the sue and labor clause is concerned, the situation of the respondents is precisely the same as if they had raised the vessel immediately by their own hands, paying the charges incurred from day to day, instead of procuring the work to be done through the means of a contract with the libelant company to perform the service. As I have already said, the libelant in fact acted solely upon the request of the insurers; and if they had not considered it to their advantage or benefit to have the work done, the insurers would not have employed the libelant to do it.

The respondents' only means of escape from responsibility must be by proof that the libelant undertook the work solely on the credit of the wreck, and without a right in any event to any personal demand upon the respondents, even though it was successful. While there is some difference in the versions of the oral engagement, the preponderance of proof seems to me very clear that the libelant refused to engage in the work on these terms, and Capt. Baird does not, in fact, contradict this. For doing the work "on account of whom it may concern," even if the libelant had agreed to that, would not in the least have relieved the respondents from liability in a

case like the present, where the respondents were, in fact, most deeply interested and "concerned" in raising the vessel, engaged the work, and profited largely by it. Capt. Baird may have lacked authority to bind the companies to any specific salvage compensation; but he did not lack authority to engage the service. He did engage it; the four companies ratified it; they profited greatly by it, and themselves adjusted the compensation at $5,000; and I think they are legally bound to pay it.

Decree for $5,000, with interest and costs.

THE C. R. STONE.

O'CONNELL v. THE C. R. STONE.

(District Court, S. D. New York. April 26, 1895.)

SALVAGE—NEGLIGENCE—RECOVERY OVER—JOINT NEGLIGENCE OF TUG AND TOW—SALVAGE COSTS.

The libelant's scow, while left temporarily by her tug, having drifted out to sea through insufficient anchoring, and $1,200 adjudged against her for salvage having been paid by libelant, *held*, that libelant was entitled to recover against the tug in fault, but not for costs of the salvage suit; and it appearing that it was the duty of the libelant's man on board the scow, as well as of the tug's captain, to attend to suitable anchoring, *held*, that but half of the salvage paid was recoverable.

This was a libel by Daniel O'Connell against the steam tug C. R. Stone to recover the amount of a salvage award paid by libelant.

Stewart & Macklin, for libelant.

Wing, Putnam & Burlingham, for claimants.

BROWN, District Judge. The libelant's dumper scow No. 2 having been in charge of the steam tug C. R. Stone after dumping part of her load off Rockaway Beach, and refusing to dump the residue, was brought a few miles towards the shore and there anchored in a fresh breeze. The scow drifted out to sea and was picked up by the Idlewild, for which a salvage award of $1,200 was allowed in this court. This libel is filed to recover the amount of the award, together with the costs and expenses of that suit.

The costs and expenses of the salvage suit, under the authorities, cannot be allowed. Greenwood v. The Fletcher, 42 Fed. 504; La Champagne, 53 Fed. 398. The salvage award should be allowed if going adrift was through the fault of the Stone.

Whatever the fact may be as regards the other faults alleged on either side, viz., the lack of a sufficient hawser by the Stone, or of a good spare hawser, or of sufficient water and coal, or whether the towage of the scow was made materially more difficult by the moderate list occasioned by her failure to dump her cargo completely, the direct and immediate cause of her going adrift and incurring a salvage expense was plainly the lack of sufficient anchorage. Besides the anchor put out, there was another anchor belonging to the scow with sufficient line to have added materially to the strength of the anchorage, and that anchor was not made use of.

The libelant claims that the whole responsibility for not sufficiently anchoring the scow rested with the tug. The testimony as respects the duties of the boatmen in charge of the scow is slight. From previous cases of the kind before me, my impression has been that it was a part of the duty of the boatmen to look after the security of his boat, and this is inferentially sustained by some passages in the testimony in this case. In the absence of contrary testimony on this point, therefore, I think I ought to find that under circumstances like the present, it was the duty of the boatmen, as well as of the tug having the tow in charge, to make use of both the anchors available for secure anchorage, when they proposed to leave the scow for the night unattended and in a strong wind; and that the failure to put out two anchors instead of one was culpable in both. The libelant, therefore, can recover but half the amount of the salvage award, viz., $600, with interest, and the costs of this suit. Decree accordingly.

THE MERJULIO.

(District Court, S. D. New York. April 26, 1895.)

SALVAGE—FIRE IN HEMP CARGO AT WHARF—HOSE COMPANY.

While the M. was lying at a wharf at Progreso, a fire broke out in her cargo of hemp. It was put out by the steam pump and hose from a neighboring vessel, aided by a shore hose and pump company and a small tug. The value of ship and cargo being $55,000, and nearly all saved, $2,100 was allowed as salvage.

This was a libel against the steamship Merjulio for salvage.

Wilcox, Adams & Green, for New Blue Star S. S. Co.
Goodrich, Deady & Goodrich, for New York & C. Mail S. S. Co.
Wing, Shoudy & Putnam, for the Agencia Commerciale.
Convers & Kirlin, for The Merjulio.
Carter & Ledyard, for the cargo.

BROWN, District Judge. The service for which a salvage award is here claimed is for pumping water upon and into the steamship Merjulio, with her cargo of hemp, and putting out a fire which occurred in her forward port bunker, while the vessel was lying near the end of a wharf at Progreso on the 19th of July, 1894. The fire broke out between 12 and 1 o'clock p. m. The steamer Polano lay on the opposite side of the wharf with steam up. She had not sufficient length of hose, however, to reach the bunkers of the Merjulio, and two lengths were obtained from the Agencia Commerciale by means of which she was able to reach the Merjulio, and she then continued pumping, as I find, from one to two hours. Not long afterwards the Agencia Commerciale likewise got another powerful stream at work. The small tug Moran was also near at hand, and her small fire hose was called for and used for a short time. The fire was thus speedily put out.

In behalf of the steamer it is claimed that her own appliances, which were also used, would, in fact, have been sufficient. This possibly might have been so had her men at first known the exact location and the extent of the fire, and precisely how best to deal with it. Those things, however, were not at first known, and all the appliances available were prudently called for, and made use of, as such fires are always more or less dangerous.

The value of ship and cargo was $55,000, and the damage was comparatively small. Besides the supply of help above stated, there does not seem to have been any other help available. While these circumstances enhance the claims of the salvors, the fact that all these appliances were near the ship, and involved very moderate labor, and no danger, require but a moderate award to be given. The Polano was not called on to change her position, but merely to give the use of her steam pumps and hose to her neighbor on the other side of the wharf; while her own appliances without the hose obtained from the Agencia Commerciale were insufficient for effective service; and her officers and crew rendered very small aid.

Upon all the circumstances, I think $2,100 will be quite a sufficient award, of which $100 should be allowed the Moran, and $1,000 each to the Polano and the Agencia Commerciale. Of the amount awarded to the Polano, one-fifth only will go to the officers and crew, of which $50 should be paid to the master, $40 to the chief engineer, and the residue to the other officers and crew in proportion to their wages. Decree may be entered in accordance herewith, with costs.

THE HUDSON.

THE THOMAS QUIGLEY.

THE JEREMIAH F. BARNES.

TICE et al. v. THE HUDSON et al.

(District Court, S. D. New York. May 13, 1895.)

SALVAGE—ICE—STANDING BY—PROOF OF BENEFIT.

Barges in Huntington Bay were in a situation of apprehended danger from ice in a sudden gale; the tug C., upon request, stood by, and for 18 hours did various services in aid of the barges. *Held*, that the service was of a salvage nature, and presumably beneficial, and that absolute proof that the result would have been worse but for such help was not requisite; and upon a value of $3,000, $250 was allowed.

This was a libel for salvage filed by Charles O. Tice and others against the barge Hudson and the canal boats Thomas Quigley and Jeremiah F. Barnes.

Stewart & Macklin, for libelants.

Hyland & Zabriskie and Charles M. Hough, for the Hudson and the Thomas Quigley.

George A. Black, for the Jeremiah F. Barnes.

BROWN, District Judge. The service rendered to the respondents' boats by the libelants' tug Crossman, during the night of March 4, 1895, and the following day, was, I am satisfied, in the nature of a salvage service. The boats were made fast to a buoy about 200 feet off Godfrey's Canal, in the entrance to Huntington Bay. The Crossman was lying alongside for a harbor. During the night the wind shifted to the northwest, and blew very hard. A field of ice was driven down upon the boats, causing the buoy to drag, and the Hudson went ashore. The tug Golden Rule was in charge of the flotilla.

The evidence leaves no doubt that there was at that time considerable apprehension for the safety of the boats, and that the Crossman remained by during the night to render such assistance as might be needed. She acted in conjunction with the Golden Rule in attempting to take the tow across the bay during the night; and when that was found to be impracticable, they returned to the previous anchorage ground where for several hours the Crossman alone kept the flotilla away from the ice and the shore, although ultimately the Hudson again grounded. The following day, when the wind moderated, the Crossman took a part of the tow to New York. The fact of lying by during a period of apprehended danger, and rendering more or less service for the protection of the boats, is sufficient, within a number of adjudicated cases, to constitute this service of a salvage nature.

For the defendants it is contended, that inasmuch as the Hudson, notwithstanding the Crossman's efforts, grounded a second time, the Crossman's efforts were of no benefit. But this does not follow. The evidence indicates the probability that but for the Crossman's assistance the tow would have got aground several hours earlier, and in a situation more difficult to be extricated. Where services are rendered continuously for nearly 18 hours as in this case, with a view to the assistance of boats in a situation of apprehended danger, it is quite too much to say that in order to claim any salvage compensation, the party rendering the service must prove absolutely that the result would have been worse but for the service rendered. Such requirement would discourage assistance in many cases in which it ought to be rendered, and tend to prevent help which it is the policy of the law to encourage and to compensate, in accordance with the actual circumstances. The service rendered on request is presumably beneficial. In the present case, the evidence makes probable that the damage to the boats without the Crossman's assistance could not have been very great; and hence that only a moderate compensation should be allowed. The boats being valued at only $1,000 each, I allow the Crossman $250 for the three boats, with costs. Of the $250, I allow $150 to owners, $25 to master, and divide the remaining $75 among master and crew in proportion to their wages.

THE JOHN T. WILLIAMS.

THE R. J. MORAN.

BARNEY DUMPING-BOAT CO. v. THE JOHN T. WILLIAMS.

APPLEGATE v. THE R. J. MORAN.

(District Court, S. D. New York. June 11, 1895.)

COLLISION—TOW AND SAIL—WEARING ROUND—INATTENTION—LOOK OUT.

The schooner J. T. W. bound down the North river hauled stern first out of her slip, Jersey City, in the ebb tide, and her stern being swung down, she wore round, the wind being from the Jersey shore, and in doing so came in collision with a tow on a hawser from the tug M. going up in about mid-river. *Held*: (1) The W. was in fault for dilatoriness and inattention, in not effecting a reasonably speedy turn. (2) The M. was in fault for lack of sufficient attention to the slow turn of the W. and delay of effective efforts to haul away.

These were libels filed respectively by the Barney Dumping-Boat Company against the schooner John T. Williams, and by Ivans D. Applegate against the steam tug R. J. Moran, to recover damages resulting from a collision.

Carpenter & Park, for Barney Dumping-Boat Co.

Owen, Gray & Sturges, for the John T. Williams and the R. J. Moran.

BROWN, District Judge. I find that the schooner John T. Williams having backed out of the slip at the foot of Morris street in the ebb tide, naturally swung her stern down, and being bound out to sea with the wind about west-north west wore around so slowly that before she had got headed straight down she came in contact with the Barney Dumping-Boat Company's dumper, which was going up river in tow of the Moran on a hawser; that her navigation in wearing around in this manner was negligent, in that no good lookout was kept ahead, nor any pains taken to come around quickly, no attention being given to the management of the main sail, and all the crew being forward; and that there was no diligence in endeavoring to bring the ship around quickly, either by the captain or by the men forward; that the collision was about in mid-river; and that it is faulty and blameable navigation for a schooner to proceed in that manner, having reference to the custom of towing on a hawser, and the difficulty that tugs with such tows have in performing the duty of keeping out of the way of sailing vessels; and that, therefore, it was the duty of the sailing vessel to use reasonable and appropriate means to avoid careless and misleading navigation.

2. I find the Moran is in fault for not giving sufficient attention to the course of the schooner, which, had it been observed in time, would have been seen to threaten danger before she was within a few hundred feet of the Moran, when it was too late for the Moran to make any effectual maneuvers to aid her tow; that had the Moran observed the very slow coming about of the schooner in wearing around, she would have been able, as it was her duty, to

haul her tow to starboard, and that she might have done so sufficiently to avoid collision.

3. I do not find any error in the management of the tow which should be considered as amounting to legal fault. What was done by the tow was done practically in extremis.

The Moran and the Williams are both in fault. Decrees should be entered accordingly.

THE HENRY A. CRAWFORD.

THE BLANCHE L.

THE THOMPSON.

FISHER et al. v. THE HENRY A. CRAWFORD et al.

MORRIS et al. v. SAME.

BRESETTE et al. v. THE HENRY A. CRAWFORD et al.

(District Court, S. D. New York. June 21, 1895.)

COLLISION—TOWAGE—GETTING ADRIFT—SINGLING OUT.

The tug C. took out of a slip in East river two barges abreast, and when a little out in the flood tide, ordered one of them to "single out" so as to be towed astern of the other; in doing so she got adrift, and damaged three other vessels. *Held*, that the C. was alone to blame: (1) for not "singling out" in the slip; (2) after going out, for giving her order while too near the shore in the strong crossing tide.

These were three libels for collision, the first two of which were brought respectively by Charles B. Fisher and another and by one Morris and others against the steam tug Henry A. Crawford and the barge Blanche L. The third was filed by Bresette and others against the Crawford and the scow Thompson.

Stewart & Macklin, for Fisher and the Thompson.

Robinson, Biddle & Ward and Mr. Hough, for the Henry A. Crawford.

Foley & Wray, for the Blanche L.

Mr. Berrier, for Bresette.

BROWN, District Judge. The three collisions in the above cases all occurred because the Blanche L. got adrift while in process of "singling out" to go astern of the scow Atalanta, for the purpose of being towed up the East river by the Crawford. Before the man on board the Blanche L. could make fast the hawser around the forward bitt, the Crawford started up so rapidly that he could not hold the line, and the Blanche L. drifted away in consequence, and caused the three collisions that followed.

The witnesses for the tug contend that the fault was that of the man on board the Blanche L. in casting off the wrong line; that is, so as to let his boat drop astern of the Atalanta, instead of keeping his stern line fast to the Atalanta, and swinging round astern of her, as upon a hinge. The evidence as to the directions given by the captain of the Crawford before leaving the bulkhead, is contradictory. Though the tug has more witnesses on that point, their tes-

timony, on the cross-examination of all of them, except the master and mate of the Crawford, deprives it of any value; and it is extremely improbable that the man on board the Blanche L. should have done the opposite of what he was previously directed to do by the captain of the Crawford, if any definite instructions were, in fact, given to him, beyond the direction to "single out" on notice after getting into the stream, which I very much doubt.

The proper cause of the trouble, and the real fault are to be looked for in the general management on the part of the tug, rather than in any of the minute details when trouble arose. In this case there are two clear faults of management that properly charge the tug with responsibility for this accident:

(1) In needlessly taking the two scows abreast out into the strong flood tide before "singling" them out, instead of putting them in position, as the tug might easily have done, in the still water of the Thirtieth street slip, before going out.

(2) After having got out into the tide, in prematurely giving the order to "single out," i. e. before the tug was sufficiently away from the docks to allow waiting a sufficient time for the Blanche L. to be properly made fast astern of the Atalanta, whichever mode of singling out might be adopted. The tide set strongly towards the docks; and by stopping to single out while still near the docks, the Crawford was soon compelled to start up full speed to avoid drifting against vessels along the docks, although her captain saw that something was wrong with the Blanche L. It was this start that prevented properly making fast the hawser on the Blanche L. The mode of "singling out" adopted by the Blanche L. was not improper or unusual; while the mode which the master of the Crawford testifies that he directed in this instance, contrary to the testimony of the man on the Blanche L., would have placed the latter in an undesirable position for towing, viz., with her stern ahead and much deeper in the water than the other end.

There is no sufficient evidence in my judgment to convict the Blanche L. of blame; the immediate fault which caused the accident being in ordering the Blanche L. to single out before the boat got far enough away from the docks to do so safely, whichever mode of singling out was adopted.

Decrees against the Crawford in the three cases. The libels against the Blanche L. and the Thompson are dismissed.

THE FLORENCE.

THE ELDORADO.

CLYDE STEAMSHIP CO. v. THE FLORENCE et al.

(District Court, S. D. New York. May 2, 1895.)

COLLISION—RIGHT OF WAY—STARBOARD-HAND RULE—LEAVING DOCK—CONTRARY SIGNALS.

The large steamer E., on leaving her dock in North river, gave a signal of two whistles to the tug F., which was coming down river on the E.'s

starboard hand with a tow on a hawser. The attention of the master of the F. was then occupied with another tug which was crossing his bow, and he did not hear the E.'s signal, but soon gave to the E. a signal of one whistle, which was not heard on the E.; and the E. came in collision with the tow about 800 or 1,000 feet outside of the piers: *Held*, that the E. was alone to blame for not stopping in time, as she might have done, after the course of the F. was seen; and that the E.'s failure to get a signal in reply to her two whistles was equivalent to a dissent by the F., which held the E. bound to observe the starboard-hand rule, and go astern of the F., which had the right of way.

This was a libel by the Clyde Steamship Company, owner of the lighter Potomac, against the steam tug Florence and the steamer Eldorado, to recover damages for a collision.

Robinson, Biddle & Ward, for libelant.
Carpenter & Park, for the Florence.
Charles H. Tweed and R. D. Benedict, for the Eldorado.

BROWN, District Judge. As the steamship Eldorado, 355 feet long, was leaving her berth on the south side of pier 25, in the afternoon of October 23, 1894, and rounding down the North river, she came in collision with the libelant's lighter Potomac, which was going down river in tow of the tug Florence, upon a hawser about 70 feet long. The collision was nearly at right angles, and from 800 to 1,000 feet off the end of the piers. The tide was the last of the flood, and the wind was light. The above libel was filed for damages to the lighter and cargo.

The Eldorado, on starting ahead, gave the long whistle required by law, which was not heard by the pilot of the Florence, whose attention was occupied probably with the Peene, a propeller which had just started from the pier below the Eldorado, and was proceeding to cross the Florence's bows, compelling the latter to slacken her speed. A shed on the pier prevented the master of the Eldorado, on starting, from seeing what was in the river above, until he had moved ahead about 150 feet. When his pilothouse had got beyond the outer end of the shed, he saw the Florence coming down on his starboard hand, and he gave her a signal of two whistles, indicating that he intended to go ahead of her. That signal also was not heard by the Florence; but soon afterwards she gave a signal of one whistle to the Eldorado, which was not heard by the latter. The Eldorado, however, soon gave another signal of two whistles, to which the Florence replied with one, which also was not heard by the Eldorado. Soon afterwards the Eldorado reversed, but too late to avoid collision.

There is some difference in the testimony as to the distance of the stern of the Eldorado from the ends of the piers when her second signal of two whistles was given. Not only the captain's testimony, however, but the weight of the other testimony, indicates that this second signal was given before the stern of the Eldorado was outside of her dock. The master of the Eldorado seems to have supposed that by giving a signal of two whistles he had the right of way, and that the Florence was bound to stop, although she was on the Eldorado's starboard hand. The requirement of the nine-

teenth article of the rules of navigation is, however, precisely opposite; and the case of The Breakwater, 155 U. S. 252, 15 Sup. Ct. 99, is a recent instance of the enforcement of that article.

I think that the blame for this collision must rest wholly with the Eldorado. The Florence, under the rules, was bound to keep her course, and the Eldorado to keep out of her way. There was abundant room for the latter to do so, had she chosen to observe the nineteenth article, and go astern of the Florence. In proposing, by her signal of two whistles, to go ahead of the Florence, contrary to the rule, "she took the risk, both of her own whistles being heard, and in turn of hearing the response, if a response was made." The St. John, 7 Blatchf. 220, Fed. Cas. No. 12,224; The Milwaukee, 1 Brown, Adm. 313, Fed. Cas. No. 9,626; The John King, 49 Fed. 472, 479. See, also, The El Rio, 66 Fed. 360. The collision was at such a distance from the docks that it could not possibly have occurred had not the Eldorado too long persisted in her proposal, without any assent by the Florence, to go ahead of her in violation of rule 19.

I do not perceive that the Florence is chargeable with fault contributing to the collision. It is true that her master testifies that if he had observed the long whistle of the Eldorado, while he was slowed up for the Peene to pass ahead of him, he would not have gone ahead full speed, but would have waited to let the Eldorado also go ahead of him. This, however, would have been a voluntary concession. It was not obligatory. But he did not observe the Eldorado's long whistle, because preoccupied, probably, with the navigation of the Peene. The failure to hear the Eldorado's whistles was not, however, a contributing cause of the collision; because it did not mislead the Eldorado, nor give her the least apparent right to go ahead of the Florence. It was practically equivalent to an express dissent; because the Eldorado had no right to go ahead without an express assent of the Florence. It is evident, moreover, from the testimony, that the Florence had already started up before the Eldorado's pilothouse had got beyond the shed; for the master of the Eldorado makes no mention of any change in the Florence's speed, and he was in no way misled by it. When the Florence gave the Eldorado a signal of one whistle, there was abundant time for the Eldorado to keep away by reversing, and the Florence had a right to expect her to do so. The Potomac being on a hawser, it is doubtful whether the Florence could then, by reversing, have kept her tow away from the Eldorado. Whether that was so or not, the Florence was justified in relying on the duty of the Eldorado to avoid the Florence by reversing in time, as she might have done, and was bound to do.

Decree dismissing the libel as to the Florence, with costs, and against the Eldorado, with costs.

DININNY v. MYERS.

(District Court, S. D. New York. April 27, 1895.)

MARINE INSURANCE—COLLISION—DAMAGES—ABANDONMENT — TITLE — BILL OF SALE—DELIVERY IN ESCROW.

Upon a marine insurance of a yacht by a valued policy for $12,000, the libelant upon an abandonment by him to the insurers, sued as for a total loss, for alleged damages by collision exceeding $6,000; his title, and his right to abandon were denied. The evidence showed a sale to libelant by the former owner for $12,500, of which $5,000 was paid down, and the rest in two notes, and that the bill of sale was delivered to a trustee upon a contract that if either of the notes should not be paid, the money paid should be forfeited, and the yacht, and the bill of sale returned; and the former owner agreed to deliver the yacht seven days after the contract "in perfect order ready for use." The yacht was delivered to the libelant, but not in good order; the first note was paid; the former owner refused to make compensation for the bad condition of the yacht, and before the second note became due sold and indorsed the note "without recourse" to a bona fide purchaser who had no knowledge of the above dealings. *Held* (1) that the trustee was not a trustee of the title, but of the bill of sale only, for the former owner's benefit; (2) that the latter could not have enforced forfeiture, except on nonpayment after he had made compensation for his own default; (3) that by the sale "without recourse," and without reference to the contract, he had waived all further interest in the contract and its conditions; (4) that the libelant was sole owner at the time of the loss, and that the abandonment by him was valid and timely.

This was a libel by Ferral C. Dininny, Jr., against Charles Myers, to recover under a contract of marine insurance as for a total loss upon an abandonment.

Benedict & Benedict, for libelant.

George A. Black, for respondent.

BROWN, District Judge. The general principles contended for by the respondent are undoubted. But they seem to me not properly applicable to the present case. The libelant cannot, indeed, recover for a total loss of his yacht as against the insurers, except upon abandonment; nor can he abandon unless he has such title as authorizes him to abandon.

On the 3d of May previous to the accident he had made a contract for the purchase of the yacht from Mr. Loring for the price of $12,250, of which $5,000 was paid down, and the balance was to be paid in two notes, one dated on May 20, 1894, and the other August 20, 1894, the last for $2,000; and the contract provided that in case of failure in payment of either of these notes the amount or amounts already paid were to be forfeited, and the yacht to be immediately returned to said owner. The owner also agreed to deliver the yacht on the 10th of May following "in perfect order ready for use."

The contract further provided that the bill of sale of the yacht was to be delivered to Thomas Manning, yacht broker, and held by him "in trust until the final payment shall be made, and shall then be delivered to said purchaser, and in case of default in said payment as above mentioned, said bill of sale is then to be returned to said owner and shall be null and void."

The proof shows that the $5,000 was paid down in cash; the two notes given; the bill of sale delivered to Mr. Manning; the note due on the 20th of May paid; the yacht delivered to the libelant May 10th, and in his sole possession thereafter; but that the seller did not put the yacht in "perfect order ready for use" as agreed, and that the libelant had expended a considerable sum in making good that breach of the contract; that the seller had paid no attention to the libelant's demand for compensation for these expenditures, but on the 21st of May had sold and indorsed the note due on August 20th "without recourse"; and that the purchaser of the note had no knowledge of the bill of sale, or that the note was given for the yacht, or had any connection with the yacht; and that no reference was made to either in the sale of the note.

Upon these facts, I am of the opinion that Manning was not a trustee of the yacht, or of the title to the yacht; but was merely a trustee of the possession of the bill of sale for the benefit of Loring the seller, in case he should wish to call for the return of the bill of sale, upon default of payment; that Loring being himself in prior default in the performance of the agreement on his part, in not putting the yacht "in perfect order ready for use," could not, in equity, recall the bill of sale from Manning, or annul it, until some default by the libelant after Loring had made good, or offered to make good, the expenditure which his default had occasioned the libelant; that the right to recall or annul the bill of sale was not a right inseparably attached to the note, but a personal right belonging to the seller, which he could waive or extinguish at his option, and that his sale of the note, without recourse, and without any reference to the bill of sale after his neglect to put the boat in order, or make any compensation therefor, is sufficient evidence of such an intended waiver and extinguishment, and that no interest in the yacht, or in the bill of sale, and no right to demand the bill of sale from Manning passed to the purchaser of the note; and that no interest in the contract, or in the yacht thereafter, remained to Loring, such interest having wholly ceased upon the sale of the note without recourse.

The dealings between the libelant and the insurers subsequent to the accident, seems to me to show a sufficient and timely abandonment, and sufficient proof of loss; and that any technical objections or defects in either that might possibly have existed, were waived by the insurers. Steinbach v. Insurance Co., 2 Caines, 129, 132; Bradlie v. Insurance Co., 12 Pet. 397.

In the conflict concerning the amount of the loss, the case should be sent to a commissioner to ascertain and report whether the loss exceeded the sum of $6,000, so as to entitle the libelant to payment in full as upon a constructive total loss, the libel being sufficient, as it seems to me, in that regard.

HOOVER & ALLEN CO. v. COLUMBIA STRAW-PAPER CO.

(Circuit Court, S. D. Ohio, W. D. July 22, 1895.)

No. 4,801.

1. CIRCUIT COURTS—JURISDICTION—AMOUNT IN CONTROVERSY.
   Where an action commenced in a state court by attachment of property of the defendant exceeding in value $2,000, upon a claim of less than $2,000, is removed into the circuit court by a receiver of the defendant's property, who has been made a party because he claims the exclusive possession of the attached property, the amount in controversy, so far as it relates to the receiver's right to remove the cause, is the value of the property attached.
2. SAME—PROPER DISTRICT—WAIVER.
   The objection that a suit in the circuit court, when the jurisdiction depends upon the citizenship of the parties, is not brought in the district where either the plaintiff or the defendant resides, is waived by a general appearance or pleading to the merits; and the court can proceed to hear and determine the cause.

Little & Spencer, for plaintiff.
Kittredge, Wilby & Simmons, for defendant.

SAGE, District Judge. Motion to remand overruled for the following reasons:

First. Although the plaintiff's claim, upon which the attachment was issued from the state court, is for less than $2,000, the removing defendant, George P. Jones, receiver of the defendant company, was made a defendant in the state court upon supplemental petition, on the ground that by virtue of his receivership he claimed an interest in the property attached, and in the controversy pertaining thereto, adverse to the plaintiff. The claim of the receiver is that he is entitled to the exclusive possession and control of the attached property. He has no interest whatever in the matter of the claim of the plaintiff against the defendant company, and is not authorized to represent that company in that behalf. The value of the attached property far exceeds $2,000, according to the appraisement made, in pursuance of the statute, when the attachment was levied. The value is to govern in determining the amount in controversy so far as it relates to the right of the receiver to remove the case to this court. Lehigh Zinc & Iron Co. v. New Jersey Zinc & Iron Co., 43 Fed. 545. In that case a bill was filed to quiet title, and it was held that, for the purpose of determining the jurisdictional amount, the whole value of the property, the possession and enjoyment of which was threatened by defendant, was the measure of the value of the matters in controversy.

Second. It was further objected that the circuit court of the United States at Chicago, which appointed the receiver, had no jurisdiction in the case, for the reason that the original bill shows that the Northern Trust Company is and was a citizen of the state of Illinois, and Ovid B. Jamison is and was a citizen of the state of Indiana. These two are the plaintiffs; and the defendant, the Columbia Straw-Paper Company, is a corporation and citizen of the state of New Jersey. It is contended, under the doctrine of Smith v.

Lyon, 133 U. S. 315, 10 Sup. Ct. 303, cited with approval in Harvesting Mach. Co. v. Walthers, 134 U. S. 44, 10 Sup. Ct. 485, that the court had no jurisdiction, and, having no jurisdiction, it had no power to appoint a receiver. The receiver's action, therefore, it is urged, is void. The rule in the cases cited is based upon the first section of the act of Congress of March 3, 1887, as amended by the act of August 13, 1888 (25 Stat. 433) c. 866, to amend the act of March 3, 1875, to determine the jurisdiction of circuit courts of the United States, and to regulate the removal of causes from state courts, and for other purposes. The court in Smith v. Lyon refers to the first section of the act, which provides that no person shall be sued in any other district than that whereof he is an inhabitant, "but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant." In that case one of the plaintiffs was a citizen of the state of Missouri, where the suit was brought, the defendant was a citizen of the state of Texas, and another plaintiff was a citizen of the state of Arkansas. The court said that the suit, so far as the last plaintiff was concerned, was not brought in the state of which he was a citizen, and that the statute made no provision in terms for the case of two defendants or two plaintiffs who were citizens of different states, and that in that case, there being two plaintiffs, citizens of different states, there did not seem to be, in the language of the statute, any provision that both plaintiffs might unite in one suit in a state of which either of them was a citizen. In that case the defendant filed a plea to the jurisdiction of the court, appearing specially for that purpose alone. In the case at Chicago, the appearance of the defendant company was general, and no objection to the jurisdiction has been made. It has been repeatedly held that the provision that suit shall be brought only in the district of the residence of either the plaintiff or the defendant, where the jurisdiction is founded only on the fact that the parties are citizens of different states, merely confers upon the defendant a personal privilege of exemption, which may be waived by a general appearance, or by pleading to the merits of the action; and that an objection to the jurisdiction on this ground, made for the first time by motion in arrest of judgment, is too late. Express Co. v. Todd, 5 C. C. A. 432, 56 Fed. 104. In that case the court said that no authority had been cited "where any federal court has dismissed an action on the sole ground that it was brought in the wrong district, after the defendant had appeared generally, or pleaded to the merits, without first objecting that the action was not brought in the district of the residence of either of the parties to the action. This objection relates, not to the jurisdiction of the court, but to the personal privilege or exemption of the defendant. Where he makes the objection seasonably, before appearing generally, or pleading to the merits of the action, his privilege is inviolate, and the action against him cannot be maintained in that court." The court proceeded to say that the defendant had the option to waive his privilege, and consent to be sued and to try his case in the

wrong district, and that a general appearance or a plea to the merits without first claiming the privilege was such a waiver. After that it was too late to make the objection. Where the objection is to the jurisdiction over the subject-matter of the litigation, it may be made at any time; but where it is to the jurisdiction over the person of the plaintiff or defendant—provided they are citizens of different states, and citizenship is the assumed ground of jurisdiction— it may be waived, and is waived by a general appearance without having made the objection.

But, even if the circuit court of the United States for the Northern district of Illinois had no jurisdiction in the original case, that fact would not help the motion, because the bill filed in this court, although filed as an ancillary bill, would be permitted to stand as an original bill if that were necessary to support the jurisdiction. Neither of the plaintiffs is a resident of this district, nor is the defendant, the Columbia Straw-Paper Company; but the defendant has not objected to the jurisdiction, and does not object, and, on the other hand, has appeared generally, and thereby waived all objections. The motion to remand will be overruled.

VOSS et al. v. NEINEBER et al.

(Circuit Court, S. D. Ohio, W. D. July 22, 1895.)

No. 4,814.

FEDERAL COURTS—JURISDICTION—CITIZENSHIP—NEXT FRIEND.

Where a suit is brought in a federal court on behalf of an infant by his next friend, the jurisdiction depends on the citizenship of the infant, not that of the next friend. Woolridge v. McKenna, 8 Fed. 668, followed.

This was an action by Maria A. E. Voss and others against Maria A. Neineber and others, commenced in the superior court of Cincinnati, Ohio, and removed by the defendants to this court. The plaintiffs moved to remand.

Mackoy & Lowman, Howard Douglass, and Champion Muir, for plaintiffs.

William Goebel, for defendants.

SAGE, District Judge. The plaintiffs move to remand this case to the superior court of Cincinnati, for the reason that Frank J. Isphording, one of the plaintiffs, who sues as the next friend of the infant plaintiff, John B. Joseph Neineber, is, and was at the commencement of the action, a citizen and resident of the state of Kentucky, of which state the defendants are, and were at the time of the commencement of the action, citizens and residents, and because there is no separable controversy, which is wholly between citizens of different states and can be fully determined between them, nor is there any controversy in the action which can be determined without regard to said Frank J. Isphording. The proposition that there is no separable controversy is not pressed, and need not be considered. It is not, in the opinion of the court, well founded.

The motion to remand will be overruled, upon the authority of Woolridge v. McKenna, 8 Fed. 668, which cites Williams v. Ritchey, 3 Dill. 406, Fed. Cas. No. 17,734, to the point that jurisdiction depends upon the citizenship of the infant, not that of the next friend, where he is a plaintiff; and Wormley v. Wormley, 8 Wheat. 451, to the point that the same is true of a married woman as plaintiff, as is also held in Ruckman v. Land Co., 1 Fed. 367. Judge Hammond refers to the cases of executors, administrators, and trustees, where generally the rule is that the citizenship of the real, and not the nominal, party, governs. So, in Wiggins v. Bethune, 29 Fed. 51, it was held that, in a suit brought by the next friend of one who is non compos mentis, federal jurisdiction cannot be based on the citizenship of the next friend, as he is only a nominal party.

It is urged for the plaintiff that, under the Ohio statute, the next friend is a real and necessary party, and that the action of an infant must be brought by his guardian or next friend. In support of this contention cases are cited from other states, where it is properly held that the next friend is a necessary party where there is an infant plaintiff or defendant. This is not denied. I suppose that in no case has a suit been brought by a next friend unless it was necessary that it should be so brought. As Judge Hammond said, in Woolridge v. McKenna, where an infant is a party to the record the necessity of binding him to what he has done by proper process and method of procedure is apparent, and to accomplish this the interposition of some one in his behalf as next friend is regarded as indispensable. But the real party in interest, the party whose contractual or property rights are to be determined, is the infant or non compos mentis litigant. The next friend is only his representative, and in that capacity alone appears. Unless he has in his own right some interest in the subject-matter of the litigation, his only relation to the cause is to protect the interest of the infant, demented, or imbecile whom he represents. He is neither a merely formal nor an unnecessary party. But it by no means follows that because he is a necessary party he is the real party in interest.

BRADLEY et al. v. FALLBROOK IRRIGATION DIST. et al.

(Circuit Court, S. D. California. July 22, 1895.)

No. 553.

1. FEDERAL COURTS—EFFECT OF STATE DECISIONS—VALIDITY OF STATE LEGISLATION UNDER THE FEDERAL CONSTITUTION.
   Decisions by the supreme court of a state that certain state legislation is not in contravention of the constitution of the United States, while entitled to the greatest respect, do not absolve the federal courts sitting within the state from the duty of exercising an independent judgment upon the same question.

2. SAME—QUESTIONS OF GENERAL LAW—EMINENT DOMAIN.
   The federal courts are not conclusively bound by decisions of the state supreme courts that certain uses for which private property is to be taken under state legislation are public uses, and so within the power of the state in respect to the appropriation of private property. Nor are the fed-

eral courts bound by a legislative declaration in the statute by which the appropriation is authorized to be made that the use is a public use.

3. EMINENT DOMAIN—WHAT IS PUBLIC USE—IRRIGATION LAWS.
The taking of private property within limited districts organized as irrigation districts under a state law (St. Cal. 1887, p. 29), for the purpose of furnishing water to the landowners alone, and not for the general use on equal terms of all inhabitants of the district, is not a public use such as will legally justify the exercise of the power of eminent domain.

4. CONSTITUTIONAL LAW — DUE PROCESS — ASSESSMENTS FOR LOCAL IMPROVEMENTS—IRRIGATION LAWS.
A state statute providing for the creation of irrigation districts of such extent as to comprise lands susceptible of one mode of irrigation, from a common source and by the same system of works, upon the petition of 50 or a majority of the landowners therein, confirmed by a vote of two-thirds of the qualified voters residing within the district, with power to issue bonds, levy assessments to pay the same, and to condemn lands for the construction of canals, works, etc., cannot be sustained under the power to make assessments for local improvements, where the county supervisors to whom the petition is to be addressed have no authority to adjudicate upon the merits thereof, and no opportunity is given to landowners to contest the validity of the petition, or the proceedings thereunder, which may finally result in the taking of private property. Such a statute is invalid as authorizing the taking of private property without due process of law; nor can this fatal defect in the foundation of the proceedings be cured by the fact that each landowner is entitled to be heard in determining the valuation of his land for purposes of assessment, or by the fact that, by an amendatory act (St. Cal. 1889, p. 212) the board of directors of an irrigation district are, in their discretion, authorized to institute a special proceeding in the courts to determine the validity of the proceedings, previously had, organizing the district, on publication of notice, and with the right in any person interested to appear and contest the same.

Lee & Scott and Chapman & Hendrick, for complainants.
Aitken & Smith, for defendants.

ROSS, Circuit Judge. This is a suit in equity, by which it is sought to have enjoined the execution of a deed for certain land of the complainant Maria King Bradley under a sale made by the collector of the defendant irrigation district, to satisfy a delinquent assessment against the property levied under and by virtue of the provisions of an act of the legislature of the state of California, and its amendments, known as the "Wright Act" (St. 1887, p. 29; St. 1889, pp. 15–18, 212, 213; St. 1891, pp. 53, 142, 145, 147, 244), providing for the organization and existence of irrigation districts, and to obtain a decree adjudging the proceedings under that legislation, in so far as concerns the property of the complainant Maria King Bradley, void and of no effect. The regularity of the proceedings under the act is not questioned, and as the supreme court of the state has sustained its validity in a number of cases hereinafter referred to, and as the statute itself makes the deed executed pursuant to its provisions (except as against actual fraud) conclusive evidence of the regularity of all the proceedings from the assessment to the execution of the deed, and declares that it conveys to the grantee the absolute title to the lands described therein free of all incumbrances,

except when the land is owned by the United States or this state, in which case it is prima facie evidence of the right of possession, it cannot admit of doubt that a bill in equity is the proper mode of obtaining relief, if there is any to which the complainants are entitled. Gage v. Kaufman, 133 U. S. 473, 10 Sup. Ct. 406. The principal ground of the suit is the alleged unconstitutionality of the Wright act, it being contended by the complainants that it not only conflicts with certain provisions of the constitution of the state of California, but also violates that provision of the constitution of the United States which declares that no person shall be deprived of his property without due process of law, and, moreover, provides for the taking of private property for private use.

The act of California under which the proceedings complained of were had provides, in its first section, as amended by the act approved March 20, 1891 (St. 1891, p. 142), that whenever 50 or a majority of the holders of title or evidence of title to lands susceptible of one mode of irrigation, from a common source and by the same system of works, desire to provide for the irrigation of the same, they may propose the organization of a district under the provisions of the act, and, when so organized, such district shall have the powers conferred or that may thereafter be conferred by law upon such irrigation districts. The equalized county assessment roll next preceding the presentation of the petition for the organization of an irrigation district, under the provisions of the act, it is declared, shall be sufficient evidence of title for the purposes of the act. Its second section, as amended by the act of March 20, 1891, is as follows:

"A petition shall first be presented to the board of supervisors of the county in which the lands, or the greatest portion thereof, is situated, signed by the required number of holders of title, or evidence of title, of such proposed district, evidenced as above provided, which petition shall set forth and particularly describe the proposed boundaries of the district, and shall pray that the same may be organized under the provisions of this act. The petitioners must accompany the petition with a good and sufficient bond, to be approved by the said board of supervisors, in double the amount of the probable cost of organizing such district, conditioned that the bondsmen will pay all the said costs in case said organization shall not be effected. Such petition shall be presented at a regular meeting of the said board, and shall be published for at least two weeks before the time at which the same is to be presented, in some newspaper printed and published in the county where said petition is presented, together with a notice stating the time of the meeting at which the same will be presented; and if any portion of such proposed district lie within another county, or counties, then said petition and notice shall be published in a newspaper published in each of said counties. When such petition is presented, the said board of supervisors shall hear the same and may adjourn such hearing from time to time, not exceeding four weeks in all; and on the final hearing may make such changes in the proposed boundaries as they may find to be proper, and shall establish and define such boundaries; provided, that said board shall not modify said boundaries so as to except from the operation of this act any territory within the boundaries of the district proposed by said petitioners which is susceptible of irrigation by the same system of works applicable to the other lands in such proposed district; nor shall any lands which will not, in the judgment of the said board, be benefited by irrigation by said system be included within such district; provided, that any person whose lands are susceptible of irrigation from the same source may, in the discretion of the board, upon application of the owner to said board, have such lands included in said district. Said board shall also make an or-

der dividing said district into five divisions, as nearly equal in size as may be practicable, which shall be numbered first, second, third, fourth, and fifth, and one director, who shall be a freeholder in the division and an elector and resident of the district, shall be elected by each division; provided, that if a majority of the holders of title or evidence of title, evidenced as above provided, petition for the formation of a district, the board of supervisors may, if so requested in the petition, order that there may be either three or five directors, as said board may order, for such district, and that they may be elected by the district at large. Said board of supervisors shall then give notice of an election to be held in such proposed district, for the purpose of determining whether or not the same shall be organized under the provisions of this act. Such notice shall describe the boundaries so established, and shall designate a name for such proposed district, and said notice shall be published for at least three weeks prior to such election in a newspaper published within said county; and if any portion of such proposed district lie within another county or counties, then said notice shall be published in a newspaper published within each of said counties. Such notice shall require the electors to cast ballots, which shall contain the words 'Irrigation District —Yes,' or 'Irrigation District—No,' or words equivalent thereto, and also the names of persons to be voted for to fill the various elective offices hereinafter prescribed. No person shall be entitled to vote at any election held under the provisions of this act, unless he shall possess all the qualifications required of electors under the general election laws of this state."

The third section provides how such election shall be conducted and for the canvass of the vote, and that if, upon such canvass, it appear that at least two-thirds of all the votes cast are "Irrigation District—Yes," the board of supervisors shall, by an order entered on its minutes, declare such territory duly organized as an irrigation district under the name and style theretofore designated, and shall declare the persons receiving respectively the highest number of votes for the several offices, to be duly elected thereto, and shall cause a certified copy of such order to be immediately filed for record in the office of the county recorder of each county in which any portion of such land is situated, and shall also immediately forward a copy thereof to the clerk of the board of supervisors of each of the counties in which any portion of the district may lie, and, from and after the date of such filing, the organization of such district shall be complete, and the officers thereof shall be entitled to enter immediately upon the duties of their respective offices upon qualifying according to law, and shall hold such offices respectively until their successors are elected and qualified. The third section of the act, as amended by that of March 20, 1891, also provides that "no action shall be commenced or maintained or defense made affecting the validity of the organization, unless the same shall have been commenced or made within two years from the making and entering of said order" of the board of supervisors declaring the territory duly organized as an irrigation district. Section 4 et seq. provides for subsequent elections, at which an assessor, a collector, a treasurer, and a board of directors for the district shall be elected. Section 11, as amended March 20, 1891, provides for the organization of the board of directors after their election; and by section 12, as so amended, it is provided that the board shall, among other things, have the right to enter upon any of the land to make surveys, and may locate the necessary irrigation works and the line for any canal or canals, and the necessary

branches for the same, on any of the lands which may be deemed best for such location, and shall also have the right to acquire, either by purchase, condemnation, or other legal means, lands, waters, water rights, and other property necessary for the construction, use, supply, maintenance, repair, and improvements of said canal or canals and works, including canals and works constructed by private owners, land for reservoirs for the storage of needful waters, and all necessary appurtenances, and may also construct the necessary dams, reservoirs, and works for the collection of water for the district, and do any and every lawful act necessary to be done that sufficient water may be furnished to each landowner in the district for irrigation purposes. And it is declared by the twelfth section of the act, as so amended, that the use of all water required for the irrigation of the lands of any district formed under the provisions of the act, together with the rights of way for canals and ditches, sites for reservoirs, and all other property required in fully carrying out the provisions of the act, is a public use, subject to the regulation and control of the state, in the manner prescribed by law. By section 13 it is provided that the legal title to all property acquired under the provisions of the act shall vest in such irrigation district, and shall be held by such district in trust for the uses and purposes therein set forth, and the board of directors is authorized to hold, use, acquire, manage, occupy, and possess the property as provided in the act. By section 15, as amended by an act approved March 20, 1891 (St. Cal. 1891, p. 147), it is provided that, for the purpose of constructing necessary irrigating canals and works, and acquiring the necessary property and rights therefor, and otherwise carrying out the provisions of the act, the board of directors of such district must, as soon after such district has been organized as may be practicable, and whenever thereafter the construction fund has been exhausted by expenditures authorized therefrom, and the board deem it necessary or expedient to raise additional money for such purposes, estimate and determine the amount of money necessary to be raised, and shall immediately thereafter call a special election, at which shall be submitted to the electors of the district possessing the qualifications prescribed by the act the question whether or not the bonds of the district shall be issued in the amount so determined. Notice of such election is required to be given, and such notices are required to specify the time of holding the election, and the amount of bonds proposed to be issued; and, in the event a majority of the votes cast at the election are favorable to the issuance of the bonds, the board of directors are required to immediately cause them to be issued, such bonds to be payable in gold coin of the United States in 10 series, as follows, to wit: At the expiration of 11 years, 5 per cent. of the whole number of said bonds; at the expiration of 12 years, 6 per cent.; at the expiration of 13 years, 7 per cent.; at the expiration of 14 years, 8 per cent.; at the expiration of 15 years, 9 per cent.; at the expiration of 16 years, 10 per cent.; at the expiration of 17 years, 11 per cent.; at the expiration of 18 years, 13 per cent.; at the expiration of 19 years, 15 per cent.; at the expiration of 20 years, 16 per cent.,—all of which

bonds shall bear interest at the rate of 6 per cent. per annum, payable semiannually, on the 1st days of January and July of each year. Section 16 provides for the sale of the bonds by the board of directors from time to time, in such quantities as may be necessary and most advantageous to raise money for the construction of the canals and works, the acquisition of property and rights, and otherwise to fully carry out the objects and purposes of the act. Notice of such sale is required to be given, and bids therefor received, but with the provision that in no event shall the board sell the bonds for less than 90 per cent. of the face value thereof. By section 17 it is provided that the bonds and the interest thereon shall be paid by revenue derived from an annual assessment upon the real property of the district; and all the real property in the district, it is declared, shall be and remain liable to be assessed for such payments, as provided in the act. Provision is made for the assessment of all such real property annually by the assessor. By section 20 it is provided that, on or before the first Monday in August of each year, the assessor must complete his assessment book, and deliver it to the secretary of the board of directors, who must immediately give notice thereof and of the time the board of directors, acting as a board of equalization, will meet to equalize assessments, by publication in a newspaper published in each of the counties comprising the district. The time fixed for the meeting shall not be less than 20 nor more than 30 days from the first publication of the notice, and, in the meantime, the assessment book is required to remain in the office of the secretary for the inspection of all persons interested. Section 21 is as follows:

"Upon the day specified in the notice required by the preceding section for the meeting, the board of directors, which is hereby constituted a board of equalization for that purpose, shall meet and continue in session from day to day, as long as may be necessary, not to exceed ten days, exclusive of Sundays, to hear and determine such objections to the valuation and assessment as may come before them; and the board may change the valuation as may be just. The secretary of the board shall be present during its sessions and note all changes made in the valuation of property, and in the names of the persons whose property is assessed; and within ten days after the close of the session he shall have the total values, as finally equalized by the board, extended into columns and added."

Section 22, as amended by the act of March 20, 1891 (St. Cal. 1891, p. 149), is as follows:

"The board of directors shall then levy an assessment sufficient to raise the annual interest on the outstanding bonds, and at the expiration of ten years after the issuing of bonds of any issue must increase said assessment to an amount sufficient to raise a sum sufficient to pay the principal of the outstanding bonds as they mature. The secretary of the board must compute and enter in a separate column of the assessment book the respective sums, in dollars and cents, to be paid as an assessment on the property therein enumerated. When collected, the assessment shall be paid into the district treasury, and shall constitute a special fund, to be called the 'Bond Fund of —— Irrigation District.' In case of the neglect or refusal of the board of directors to cause such assessment and levy to be made as in this act provided, then the assessment of property made by the county assessor and the state board of equalization shall be adopted, and shall be the basis of assessments for the district, and the board of supervisors of the county in which the office of the board of directors is situated shall cause an assessment roll for said district

to be prepared, and shall make the levy required by this act, in the same manner and with like effect as if the same had been made by said board of directors, and all expenses incident thereto shall be borne by such district. In case of the neglect or refusal of the collector or treasurer of the district to perform the duties imposed by law, then the tax collector and treasurer of the county in which the office of the board of directors is situated must, respectively, perform such duties, and shall be accountable therefor upon their official bonds as in other cases."

By section 23, as amended by the act of March 20, 1891 (St. Cal. 1891, p. 149), the assessment upon real property is made a lien against the property assessed, from and after the first Monday in March for any year, and such lien is not removed until the assessments are paid or the property sold for the payment thereof. Subsequent sections of the act provide that in the event the assessments become delinquent the property shall be sold to pay such assessments, and, in the event the property so sold is not redeemed within 12 months from the sale, the collector or his successor in office is required to make to the purchaser or his assignee a deed of the property, which deed, duly acknowledged or proved, is (except as against actual fraud) made conclusive evidence of the regularity of all the proceedings from the assessment by the assessor, inclusive, up to the execution of the deed, which deed, the statute declares, conveys to the grantee the absolute title to the lands described therein, free of all incumbrances, except when the land is owned by the United States or this state, in which case it is prima facie evidence of the right of possession.

The bill alleges, among other things, that, included within the boundaries of the defendant irrigation district as established by the board of supervisors of San Diego county, within which county the district is situated, is a certain 40-acre tract of land owned by the complainant Maria King Bradley as her separate estate, which is of more than $5,000 in value, and which is known as the southwest quarter of the southeast quarter of section 30, township 9 south, range 3 west of the San Bernardino base and meridian; that, also included within the boundaries of the district as so established, is a certain tract of land known and described as lots 1, 2, 3, and 4, and the east half of the northwest quarter of section 7, township 10 south, range 3 west of the San Bernardino meridian, containing 251.84 acres, which the state of California owned on the 5th day of March, 1885, and which, on that day, the said state contracted to sell to one A. J. Foss, receiving from him 20 per cent. of the purchase price, and issuing to him a certificate of purchase therefor, but that the balance of the purchase price has not been paid, and the state is still the owner of the land, subject to the contract of sale; that, also included within the boundaries of the irrigation district in question, as so established, is a certain other tract of land, containing 80 acres, and known and described as the southeast quarter of the northeast quarter and the northeast quarter of the southeast quarter of section 30, township 9 south, range 3 west of the San Bernardino meridian, which the United States owned on July 7, 1887, and which on that day one Henry Wilbur was allowed to enter as a homestead in the local land office of the United States, pursuant to the provisions of sections 2289 and 2290 of the Revised Statutes of the United States,

but in respect to which Wilbur has never made his final proof, and of which the United States remains the owner, subject to the rights of Wilbur. The bill alleges that the said respective tracts of the United States, of the state of California, and of complainant Maria King Bradley are similarly situated in respect to irrigation facilities, and are equally susceptible of one mode of irrigation, from a common source and by the same system of works. It is therein averred that on the 2d day of July, 1892, an election was held in the defendant irrigation district, at which was submitted to the qualified electors of the district the question whether an assessment of $6,000 should be levied for the purpose of raising money to be applied to the defraying of the expenses of the organization of the district, and for the care, operation, management, repair, and improvement of the property of the district, and the salaries of the officers and employés thereof, which election resulted in the affirmative, and which assessment was afterwards levied, under which, for delinquency, the 40-acre tract of the complainant Maria King Bradley was sold. It is averred that, on the 27th of October, 1891, the board of directors of the defendant irrigation district estimated and fixed upon, as the amount of money necessary to be raised for the purpose of constructing the necessary irrigation canals and works, and acquiring the necessary property and rights therefor, and otherwise carrying out the purposes and provisions of the act in question, the sum of $400,000, and that, at an election thereafter called to determine whether bonds in that amount should be issued for those purposes, the vote was favorable to the issue of the bonds, after which, on the 5th day of January, 1892, the board of directors ordered that bonds of the district, negotiable in form, be issued, to the amount of $400,000, which order is still in force, and which will be carried into execution, according to the averments of the bill, as soon as purchasers for the bonds can be secured. It is averred that the complainant Maria King Bradley did not sign or join in the petition for the organization of the defendant irrigation district, and that all proceedings in regard to the issuance of bonds and in regard to the assessment were had and taken against her will and consent; that the legislation under which the proceedings were had and taken is in violation of certain provisions of the constitution of the United States, as well as of the constitution of the state of California; that there is no stream or body of water in existence from which the district can obtain water with which to irrigate the lands within the district, but that the district was organized with the intention and sole object of building a dam to catch rain and flood water in the wet season of the year, extending from the month of November to the following May, and to divert such water by means of ditches, flumes, and pipes, and conduct the same to and upon the lands in the district. It is averred that the contemplated dam and other works are intended to be constructed on private property, none of which has been acquired by the district, and that the whole scheme is entirely experimental, uncertain, and problematical, and that all of the money to be raised by the sale of the bonds so authorized to be issued, and which, when issued, will constitute a lien upon all of the land within the district, may be ex-

pended by the district without obtaining any water for the irrigation of the land therein. It is averred that the defendant irrigation district was organized for the purpose of supplying the aforesaid 241.84-acre tract owned by the state of California, and the aforesaid 80-acre tract owned by the United States, with water for irrigation, and that the board of directors of the district, in estimating and determining the amount of bonds necessary to be issued, made such estimate and determination upon the basis that it would be necessary to construct works and acquire water rights sufficient to irrigate all of the lands in the district, including the 80 and 251.84-acre tracts, and that the estimated costs of the works, and that the amount of bonds necessary to be issued, were increased at least $9,000 by reason of those two tracts being included. It is alleged that the actual cash value of the 251.84-acre tract is not less than $7,500, and that the actual cash value of the 80-acre tract is not less than $5,000, and that the actual cash value of all of the land within the district, including the improvements, does not exceed $400,000.

A demurrer interposed by the defendants raises the question of the sufficiency of the bill, which, in turn (the proceedings being regular), depends upon the validity of the legislation under which the proceedings were had. Its invalidity is asserted by the complainants, upon the grounds, among others, that it provides for the taking of private property without due process of law, contrary to the provisions of the fourteenth amendment of the constitution of the United States, and that the use for which such property is thereby authorized to be taken is not a public use. Similar objections to the legislation were urged in some, if not in all, of the cases involving its validity that were determined by the supreme court of California, and were by that court held not well taken. Irrigation Dist. v. Williams, 76 Cal. 360, 18 Pac. 379; Irrigation Dist. v. De Lappe, 79 Cal. 352, 21 Pac. 825; Crall v. Irrigation Dist., 87 Cal. 140, 26 Pac. 797; Board of Directors v. Tregea, 88 Cal. 334, 26 Pac. 237; In re Madera Irr. Dist., 92 Cal. 296, 28 Pac. 272, 675. While the decisions of that court in those, as well as in all other, cases are justly entitled to great respect, this court is not at liberty to decline to exercise its own independent judgment in determining whether any state legislation violates a provision of the constitution of the United States. Nor can the decision of any state court be conclusively binding upon any federal court in respect to the question whether or not the use on behalf of which the power of the state is sought to be exercised is of such a nature that it can be legally exercised. "Its solution," said the supreme court, in Olcott v. Supervisors, 16 Wall. 678, "must be sought, not in the decisions of any single state tribunal, but in general principles common to all courts. The nature of taxation, what uses are public and what are private, and the extent of unrestricted legislative power, are matters which, like questions of commercial law, no state court can conclusively determine for us." Nor does the legislative declaration found in the act here in question that the use in relation to which the authorized power is to be exercised is a public use, necessarily make it so. Cooley, Const. Lim. (5th Ed.) p. 666, and cases there cited. If it did, the constitutional provision

that private property may be taken for a public use, and the converse of this,—which is everywhere maintained by all courts, and which nobody doubts, that private property cannot be taken for a private use,—might, as said by counsel for complainants, just as well not exist. It is the purpose and use of a work which determine its character. Olcott v. Supervisors, supra. Streets and highways are in their nature public; for the very purpose of their construction is the accommodation of the public, to the use of which every person is entitled upon the same terms and conditions as every other person. Water appropriated or designed for the use of cities and towns becomes charged with a public use; for the very purpose of such appropriation is the supplying of the public with that necessary element, and every person within such cities and towns is entitled to it upon precisely the same terms and conditions. So, also, in dry and arid regions, like many and great sections of California, where water is their very life blood, is water appropriated or designed for the use of the public for purposes of irrigation. See, in this connection, Osgood v. Mining Co., 56 Cal. 571; my dissenting opinion in Lux v. Haggin, 69 Cal. 442, 10 Pac. 674, and Live Stock Co. v. Booth, 102 Cal. 151, 36 Pac. 431. But can this be properly said in respect of a district, however extensive its boundaries, where only certain persons are entitled to enjoy the use,—that is to say, where only the landowners in the district are entitled to the use? Such landowners may be many in number, or they may be few. It is manifest, however, that the character of the use is not to be tested by the mere number of persons who may enjoy it. No man's property can be constitutionally taken from him without his consent, and transferred to certain other men for their use, however numerous they may be. And that is just what the legislation in question authorizes to be done. Private property is thereby authorized to be assessed and sold to provide water to supply the landowners in a certain district, more or less limited in extent, for irrigation purposes. Every person within such district is not entitled to the use of the water so provided upon the same terms and conditions as every other person, but only those persons who happen to own land in the district. Of course, the property of those individuals would thereby be improved, and, indirectly, the public good be thereby advanced. But every improvement advances the public good. Every enterprise, no matter how strictly private it may be, if it be lawful, and adds to the wealth, comfort, and happiness of the people, is for the public good. The building of a house, or the planting of a useful or beautiful tree, is for the public good. But surely private property cannot be taken against the owner's consent, on the ground that the public interest would be thus promoted. Judge Cooley, in his work on Constitutional Limitations (5th Ed., p. 658), says it is not important "that the public would receive, incidentally, benefits such as usually spring from the improvement of lands or the establishment of prosperous private enterprises. The public use implies a possession, occupation, and enjoyment of the land by the public at large or by public agencies, and a due protection of private property will preclude the government from seizing it in the hands of the

owner and turning it over to another on vague grounds of public benefit to spring from the more profitable use to which the latter may devote it." And, after referring to the statement of a learned jurist that, "if the public interest can be in any way promoted by the taking of private property, it must rest in the wisdom of the legislature to determine whether the benefit to the public will be of sufficient importance to render it expedient for them to exercise the right of eminent domain, and to authorize an interference with the private rights of individuals for that purpose," says:

"It would not be entirely safe, however, to apply with much liberality the language above quoted, that 'where the public interest can be in any way promoted by the taking of private property' the taking can be considered for public use. It is certain that there are very many cases in which the property of some individual owners would be likely to be better employed or occupied to the advancement of the public interest in other hands than in their own, but it does not follow from this circumstance alone that they may rightfully be dispossessed. It may be for the public benefit that all the wild lands of the state be improved and cultivated, all the low lands drained, all the unsightly places beautified, all dilapidated buildings replaced by new, because all these things tend to give an aspect of beauty, thrift, and comfort to the country, and thereby to invite settlement, increase the value of lands, and gratify the public taste; but the common law has never sanctioned an appropriation of property based upon these considerations alone, and some further element must, therefore, be involved before the appropriation can be regarded as sanctioned by our constitutions. The reason of the case and the settled practice of free governments must be our guides in determining what is or is not to be regarded a public use; and that only can be considered such where the government is supplying its own needs, or is furnishing the facilities for its citizens in regard to those matters of public necessity, convenience, or welfare which, on account of their peculiar character, and the difficulty—perhaps impossibility—of making provision for them otherwise, it is alike proper, useful, and needful for the government to provide. Every government is expected to make provision for the public ways, and for this purpose it may seize and appropriate lands. * * * The government also provides courthouses for the administration of justice, buildings for its seminaries of instruction, aqueducts to convey pure and wholesome water into large towns. It builds levees to prevent the country being overflowed by the rising streams. It may cause drains to be constructed to relieve swamps and marshes of their stagnant water. And other measures of general utility, in which the public at large are interested, and which require the appropriation of private property, are also within the power, where they fall within the reasons underlying the cases mentioned."

Can it be properly held that within the reasons that underlie any of the cases in which private property may be taken for a public use falls the case where it is sought to take such property in order to supply water only to certain individuals within a certain district? I think not. The property to be held by the corporation whose creation is provided for by the legislation in question is not, as said by the supreme court of California in Re Madera Irr. Dist., 92 Cal. 322, 28 Pac. 272, 675, to be held "in trust for the public," but in trust for the landowners of the district, and for nobody else. Manifestly, they do not constitute the public, whether they number many or few; and for their exclusive use the private property of no man can be taken without his consent. "To lay, with one hand," said the supreme court of the United States, in Association v. Topeka, 20 Wall. 655, "the power of the government on the property of the citizen, and with the other bestow it on other individuals to aid

private enterprises and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation." In Cummings v. Peters, 56 Cal. 593, it was held that several owners of mines could not condemn a right of way for a ditch through which to convey water to work their mines, because the use was a private one, being limited to specific individuals, and not intended for the general public. Precisely the same thing is true in respect to the legislation in question. It is wholly immaterial whether the specific individuals are named or are designated as the owners of the lands within the district, or whether they number a half dozen only, or as many hundred. The important and controlling fact in respect to this point is that, in the case at bar, as in the case of the mine owners referred to in 56 Cal. 593, the use of the water is limited to specific individuals, and the interest of the public is nothing more than that indirect and collateral benefit that it derives from every improvement of a useful character that is made in the state.

In Re Pequest River, 41 N. J. Law, 175, Chief Justice Beasley, speaking for the court of errors, in respect to a state statute which he explained as designed to enable one set of landowners to compel another set to co-operate, against their will, to drain that body of meadow land in which they had separate interests, said:

"The persons thus coerced manifestly suffer an invasion of their ordinary proprietary rights. Why should they thus be forced either to improve their own land or help to improve the land of others? It cannot reasonably be contended that this burden must be borne because the improvement is a public one. This was the view of the effect of this act expressed in the case of In re Drainage of Lands, 35 N. J. Law, 497; but, as such view was founded on the notion that a legislative requisition that private lands should be drained at the expense of their owners was an exercise of power similar in kind to a proceeding to condemn private property for the uses of a public road, I am compelled to think that decision rests upon a basis that is manifestly indefensible. I can see no rational ground for the assumption that the schemes to be executed by this act are, in the main, matters which, in any just sense, can be said to be of public concern. It is true that, under certain conditions, the reclamation of very extensive tracts of land which are subject to overflows by the tides, or which are otherwise submerged, may assume the importance of a public undertaking. Such was the case presented in the litigation between Tidewater Co. v. Coster, 18 N. J. Eq. 519. Such would be the case if the condition of a tract of land was such as to be detrimental to the public health. But the law is not confined to such cases as these, for its scope embraces every case of a tract of meadows, no matter how small its area, which is distributed among as many as five separate owners. It is extremely plain, therefore, that the legislative purpose embodied in this act cannot be vindicated on the plea that it directly conduces to the general welfare of the community. It does not seem open to question that it is the owners alone who are interested in the compulsory improvement of these lands. True, in such cases there is a resulting gain to the public, but this is nothing more than the inevitable incident of individual prosperity. The effect of drainage is to cause a more plentiful product than the land would yield in its unreclaimed condition. In this result the owner is directly interested, the community indirectly only, and it is a perversion of legal terms to call the enterprise, on account of such collateral advantage, a public one. So false is such a contention that, if yielded to, it would legalize the compulsory establishment of manufactories, or the converting of forests into arable land, or the execution of any private enterprise whatever, as in all such matters the state has a remote interest. To call the legislative fiat that a half-dozen persons shall drain their land at their joint expense and for their

private advantage an exercise of the taxing power of the state is, in my judgment, simply a misnomer. Nor is such an exercise of power any more justifiable, if it is to be derived merely from the nature of the legislative authority, than would be an enactment commanding A. and B. to farm their several lands at their joint expense; and yet no one will pretend that this can be done. Under a constitution that guaranties the inviolability of private property, and limits the lawmaking power to the function of legislation, it appears to me entirely inadmissible to claim that it is a legitimate use of the prerogative to legislate, to enact a law such as the present one, requiring a few landowners to improve their lands for their own profit and at their own expense. I regard it as a clear infringement of the constitution to take, by force of a statute, the money of a person from him, even though such money should, against his will, be used for his private benefit, in the improvement of his land. Such an act has nothing in common, with respect to legal principles, with the condemnation of property for the uses of the community, and to the charging, to a limited extent, of the costs of such improvement upon the landowners specially benefited. I cannot assent to the hypothesis that this law can rest on the state's right to tax, or on its eminent domain."

Like the case last cited, the scope of the legislation under consideration is not limited to cases where the territory designed to be supplied with water for irrigation is so extensive as to assume the importance of a public undertaking, and where, when provided, the water is available to every person within the district upon the same terms and conditions, but it embraces every case where a tract of country, be it large or small, is susceptible of one mode of irrigation from a common source and by the same system of works, and a majority of the holders of title or evidence of title thereto petition for the organization of an irrigation district, and two-thirds of the qualified voters within the boundaries of the district as established by the board of supervisors vote in favor of it. A half-dozen persons, as well as as many hundred, may constitute a majority of the holders of title or evidence of title to the lands falling within the designation of the statute, and the water to be secured by the means provided for, so far from being available to every person within the district, upon the same terms and conditions, is limited to the use of specific individuals, namely, the landowners of the district.

Another fatal objection to the maintenance of the legislation here in question, under the right of eminent domain, is that, if it be regarded as undertaken by the public primarily as a matter of public concern, the assessment upon the landowners must be limited to benefits imparted, which is not the case with this statute. Wurts v. Hoagland, 114 U. S. 613, 5 Sup. Ct. 1086; Tide-Water Co. v. Coster, 18 N. J. Eq. 527. It does not seem to me to admit of doubt that, if the act in question can be maintained at all, it must be under the power of assessment for local improvements, or, as expressed by the supreme court in Wurts v. Hoagland, supra: "The power of the legislature to establish regulations by which adjoining lands, held by various owners in severalty, and in the improvement of which all have a common interest, but which, by reason of the peculiar natural condition of the whole tract, cannot be improved or enjoyed by any of them without the concurrence of all, may be reclaimed and made useful to all at their joint expense." But no more than any other can that power be exercised without "due process of law." Not only does the legislation in question provide

for the assessing and selling, and thus for the taking, of private property, in order to supply water for irrigation to specific persons within the district, and to those only, but all of this is authorized to be done without affording the owner any opportunity to be heard in opposition to the validity of the proceedings. As has been seen, the act provides, as a condition precedent to the organization of the district, the presentation to the board of supervisors of the county in which the lands or the greater portion thereof are situated, at a regular meeting of such board, of a petition signed by 50 or a majority of the holders of title or evidence of title to lands susceptible of one mode of irrigation, from a common source and by the same system of works, as shown by the equalized county assessment roll next preceding the presentation of the petition, which petition shall specifically describe the proposed boundaries of the district and ask that it be organized under the provisions of the act. The supreme court of California said, in the Madera Irr. Case, 92 Cal. 323, 28 Pac. 272, 675, in answer to the present objection to the act, that the proceeding for the organization of the district—

"Does not affect the property of anyone within the district, and that he is not, by virtue thereof, deprived of any property. Such result does not arise until after the delinquency on his part in the payment of an assessment that may be levied upon his property, and before that time he has opportunity to be heard as to the correctness of the valuation which is placed upon his property, and made the basis of his assessment. He does not, it is true, have any opportunity to be heard otherwise than by his vote in determining the amount of bonds to be issued, or the rate of assessment with which they are to be paid; but in this particular he is in the same condition as is the inhabitant of any municipal organization which incurs a bonded indebtedness or levies a tax for its payment. His property is not taken from him without due process of law, if he is allowed a hearing at any time before the lien of the assessment thereon becomes final."

A hearing as to what? The only hearing provided for by the statute is as to the correctness of the valuation put by the assessor upon the property assessed. Nor can I at all agree that the proceeding for the organization of the district "does not affect the property of any one within the district." The petition for the organization of the district was the foundation of the whole proceeding, just as the petition for the opening of Montgomery avenue, in San Francisco, lay at the foundation of the proceedings involved in Mulligan v. Smith, 59 Cal. 206, the ruling in which case was approved by the supreme court of the United States in Zeigler v. Hopkins, 117 U. S. 687, 688, 6 Sup. Ct. 919. Without the required petition, no step could be taken looking to the organization of the district here in question. It was jurisdictional in the strictest sense. Two weeks' notice of the time of presentation of the petition is required to be given by publication. When presented, the statute declares the board of supervisors—

"Shall hear the same, and may adjourn such hearing from time to time, not exceeding four weeks in all, and, on the final hearing, may make such changes in the proposed boundaries as they may find to be proper, and shall establish and define such boundaries; provided, that said board shall not modify said boundaries so as to except from the operation of this act any territory within the boundaries of the district proposed by said petitioners which is susceptible of irrigation by the same system of works applicable to other

lands in said proposed district, nor shall any of the lands which will not, in the judgment of said board, be benefited by irrigation by said system, be included within such district; provided, that any person whose lands are susceptible of irrigation from the same source may, in the discretion of the board, upon application in writing to said board, have such lands included in such district." Laws 1887, p. 30.

Notwithstanding the fact that the petition is by the statute made the basis of the proceeding which is to culminate in divesting the title of the owner of land against his consent, there is here not only no opportunity afforded such owner to test the sufficiency of the petition, but the power of the board of supervisors is in terms limited to making such changes in the boundaries proposed by the petitioners as it may deem proper, subject to the condition that it shall not except from the operation of the act any territory within the boundaries proposed by the petitioners which is susceptible of irrigation by the same system of works applicable to the other lands in said proposed district, nor include within the boundaries, which it is required to establish and define within four weeks after the presentation of the petitioner, any lands, which, in its judgment, will not be benefited by irrigation by the same system of works. Every one must admit that in the matter in question the board of supervisors has only such power as is expressly or by necessary implication conferred upon it by the statute itself. Not only is it not thereby given the power to inquire into the sufficiency of the petition, but the express statutory requirements preclude any such inquiry by it, at the instance of any owner of land adversely affected, or at all. Yet the petition may not have been signed by the required number of holders of title or evidence of title to lands within the district, and, if not, there was no basis upon which the proceedings could rest. Whatever construction might otherwise be placed upon the word "hear," used in the statute, it cannot be held to include the power to determine the entire merits of the petition, in view of the affirmative requirement contained in the same sentence that on its final hearing the board "shall establish and define such boundaries." The board is of necessity required to determine for itself whether the petition upon its face is sufficient to put its powers in motion; yet its determination in that respect is not conclusive upon any one. As said by Judge Bronson, in speaking of a similar petition, in Sharp v. Speir, 4 Hill, 88:

"They could not make the occasion by resolving that it existed. They had power to proceed if a majority petitioned, but without such a petition they had no authority whatever. They could not create the power by resolving that they had it."

The statute does not require or authorize the board of supervisors to hear any contest in respect to the truth of the allegations of the petition, further than is implied by the provision that it may make such changes in the proposed boundaries as it may deem proper. Had it been impowered to entertain a contest, for example, by a landowner in respect to the question whether those signing the petition were, in truth, the holders of title or the evidence of title to lands susceptible of one mode of irrigation, from a common source and by the same system of works, and it should find in favor of the

contestant upon that issue, it would necessarily be obliged to deny the petition and dismiss the proceedings. Yet, so far from that course being allowed by the statute, it provides, as has been seen, that the board of supervisors shall hear the petition, and may adjourn such hearing from time to time, not exceeding four weeks in all, and, in express terms, declares that on the final hearing of such petition it may make such changes in the proposed boundaries as it may find to be proper, and shall establish and define such boundaries. After the board of supervisors shall have so established and defined the boundaries of the proposed district, and shall have divided it into divisions, the board is, by the statute, required to give notice of an election to be held in such proposed district for the purpose of determining whether or not the same shall be organized under the provisions of the act. The notice is required to describe the boundaries so established, and to designate a name for such proposed district. In the event two-thirds of the votes cast at such election are in the affirmative, the board of supervisors is by the statute required to declare, by an order entered on its minutes, such territory duly organized as an irrigation district under the name and style theretofore designated, and to declare the persons receiving respectively the highest number of votes for the several offices to be duly elected thereto, and to cause a certified copy of such order to be immediately filed for record in the office of the county recorder of each county in which any portion of such land is situated, and to also immediately forward a copy thereof to the clerk of the board of supervisors of each of the counties in which any portion of the district may lie. And the statute declares that, from and after the date of such filing, the organization of such district shall be complete, and the officers thereof shall be entitled to enter immediately upon the duties of their respective offices, upon qualifying according to law, and shall hold their respective offices until their successors are elected and qualified. The organization of the district is thus completed, according to the statute, without at any time or place affording the owner of any land within the boundaries of the district the opportunity to question or contest the sufficiency of the petition which lay at the very foundation of the whole proceedings. After the organization of the district has been so completed, its subsequent management and control are, by the statute, placed in the hands of the officers of the district, whose assessor is required to annually assess all the lands within the district to pay the costs of the irrigation works, the salaries of its officers, etc., and the principal and interest of such bonds of the district as may have been authorized to be issued, and which, by the statute, are made a lien upon all of the lands within the district. The assessments so made are, by the statute, required to be equalized by the board of directors of the district, sitting as a board of equalization, notice of which is required to be given by publication, which board is required to meet at the time designated in the notice, and to continue in session from day to day as long as may be necessary, not to exceed 10 days, exclusive of Sundays, to hear and determine such objections to the valuation and assessment as may come

before them. The board of directors, sitting as a board of equalization, is given the power to change the valuation as may be just, and its secretary is required to note all changes made in the valuation of the property assessed, and in the names of the persons whose property is assessed. The board of directors is then required to levy an assessment sufficient to raise the required amount of money, which is made a lien upon the property assessed, and, in the event of delinquency, the property is directed to be sold by the collector of the district to pay the assessment, and, if not redeemed within 12 months from sale, the collector, or his successor in office, is required to execute a deed to the purchaser, the consequences attaching to which deed have already been stated. From first to last, at no time or place is the owner of land within the district given the opportunity to be heard in respect to the essential and all-important question whether the petition upon which all of the proceedings rest, and under which his property is to be assessed, sold, and conveyed, conforms to the requirement of the statute,—whether it was, in fact, signed by 50 or a majority of the holders of title or evidence of title to lands within the district, as shown by the last equalized assessment roll immediately preceding the presentation of the petition. Without such a petition, as has been said, no step could be taken looking to the organization of the district (Mulligan v. Smith, 59 Cal. 206; Zeigler v. Hopkins, 117 U. S. 688, 6 Sup. Ct. 919); and, of course, without a legally organized district, there can be no such thing as an assessment. To say, therefore, as did the supreme court of California in the Madera Irr. Case, that the landowner "has opportunity to be heard as to the correctness of the valuation which is placed upon his property and made the basis of his assessment," does not at all answer the objection. That hearing, as stated by that court, was limited to the question of the correctness of the valuation placed by the assessor upon the assessed property. It did not, and could not, under the terms and provisions of the statute, reach the vital question of the sufficiency of the petition. With that the directors of the district, sitting as a board of equalization, had nothing whatever to do. So that, under the provisions of the statute in question, the land of an individual may be assessed and sold, and, according to the averments of the bill, will, unless the court intervenes, be conveyed, and thus taken, without affording its owner any opportunity whatever to question the sufficiency of the petition upon which the whole proceedings are based. That this would be to deprive such owner of his property without due process of law would seem to be very clear. In judging what is "due process of law," said the supreme court of the United States, in Hagar v. Reclamation Dist., 111 U. S. 708, 4 Sup. Ct. 663:

"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 some 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.'"

Is it not arbitrary, oppressive, and unjust to take one's property without affording him any opportunity to show the insufficiency of the very thing that forms the basis of the proceedings under which the taking is to occur,—without allowing him to show that the petition required by the statute as a condition precedent to the organization of the district, without which there could be no district, no assessment, no sale, no conveyance, never, in fact, existed? Surely, upon that vital, all-important question, the owner is entitled to be heard; and, just as surely, to take his property without affording him that opportunity is arbitrary, oppressive, and unjust. Assessments in California for the purpose of reclaiming overflowed and swamp lands, to which the supreme court of California, in the cases cited, likened the irrigation districts, are enforced by suits in which, as held by the supreme court of the United States in Hagar v. Reclamation Dist., supra, the owner may set up, by way of defense, all his objections to the validity of the proceedings, and he is, therefore, in such proceedings, afforded "due process of law." In the present case, however, as has been shown, the owner whose property is authorized to be taken is not afforded any opportunity whatever, at any time or place, before any board or tribunal, to question the sufficiency of the very thing that lies at the foundation of the whole proceedings. This vital objection to the legislation in question is in no manner answered by the fact that, by a supplemental act of the legislature of California approved March 16, 1889 (St. Cal. 1889, pp. 212, 213), the board of directors of any irrigation district is authorized to commence a special proceeding in a superior court of the county in which the lands or some portion thereof are situated, in which, after the publication of notice of the proceeding, any person interested may come in and contest the legality and validity of "each and all of the proceedings for the organization of said district under the provisions of the said act, from and including the petition for the organization of the district, and all other proceedings which may affect the legality or validity of said bonds and the order for the sale and the sale thereof." Such a proceeding may or may not be instituted by the board of directors of the district, and was not instituted in the present instance, so far as appears from the bill. No man's constitutional rights can depend upon an option which may or may not be exercised by another.

Apart from the objections already considered, which go to the validity of the statute itself, it would be difficult, I think, if not impossible, to sustain its applicability to a case where there is no stream or body of water in existence from which the district can obtain water with which to irrigate the lands within the district, and where, according to the averments of the bill, the proposition is to take private property to build works to catch and distribute, for the purposes of irrigation, rain and flood water, which may or may not come in sufficient volume. It would seem quite unreasonable to hold that private property can be taken for any such experimental purpose,—especially where, as here, according to the allegations of the bill, one piece of land within the district designed to be thus irrigated belongs to the United States and another to the state of California, both of

which are exempt from assessment, but whose inclusion for irrigation purposes adds $9,000 to the amount for which bonds have been authorized, and which, when issued, will be a lien upon the property of the complainant Maria King Bradley, and under which it may be sold and conveyed. The fact that vast sums of money have been invested in works constructed under and in pursuance of this legislation, and that bonds running into the millions have been issued and sold thereunder, and that many individuals may not otherwise be able to secure water for the irrigation of their respective tracts of land, and that the validity of the legislation has been several times sustained by the supreme court of the state, while demanding on the part of this court great care and caution in the consideration of the case, and casting upon it a very grave responsibility, cannot justify it in failing to declare invalid legislation which, in its judgment, violates those principles of the constitution of the United States which protect the private property of every person against forcible taking without due process of law and for any other than a lawful purpose. Such questions are not to be determined by considerations of expediency or hardship. Unfortunate as it will be if losses result to investors, and desirable as it undoubtedly is, in this section of the country, that irrigation facilities be improved and extended, it is far more important that the provisions of that great charter, which is the sheet anchor of safety, be in all things observed and enforced. The views above expressed render it unnecessary to consider other objections urged on the part of the complainants. Demurrer overruled, with leave to the defendants to answer within the usual time.

PACIFIC ROLLING MILLS CO. v. JAMES STREET CONST. CO.

(Circuit Court of Appeals, Ninth Circuit. June 24, 1895.)

No. 208.

1. MECHANICS' LIENS — WASHINGTON STATUTE — RAILROAD STRUCTURE IN STREETS.
   The lien law of Washington (1 Hill's Ann. Code, § 1663) provides that every person performing labor or furnishing materials for the construction of any building, railroad, or other structure has a lien upon the same for such labor or materials, and (section 1665) that the land upon which any building, improvement, or structure is constructed, or the interest therein of the person who caused such building, etc., to be constructed, shall be subject to the lien. *Held*, following the decisions of the supreme court of Washington, that a material man who furnishes materials for the construction of a street railway can obtain no lien upon the structure in the streets of a city.
2. SAME—POWER HOUSE OF CABLE ROAD.
   Held, further, that a material man who furnishes materials for the construction of the tracks and conduit of such railway, operated by cable, can obtain no lien upon the power house from which the cable is operated, and the land on which it stands, though owned by the railway company and essential to the operation of the road, none of the materials furnished having been used in the building or upon the land.
3. SAME—WHO ARE MATERIAL MEN.
   Plaintiff sold certain materials for the construction of a street railway to one H., and accepted his note in part payment therefor, knowing at the

time that the materials were to be used in the construction of defendant's railway, and that H. had a contract with defendant, made through one of its directors, who also participated in the negotiations with plaintiff, for the sale to defendant of the materials so purchased from plaintiff. *Held*, that plaintiff was not entitled to a lien for such materials upon defendant's property.

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

This was a suit by the Pacific Rolling Mills Company against the James Street Construction Company to foreclose a mechanic's lien. The circuit court dismissed the bill. 61 Fed. 476. Complainant appeals. Affirmed.

T. Z. Blakeman, for appellant.

Lorenzo S. B. Sawyer, for appellee.

Before McKENNA and GILBERT, Circuit Judges, and KNOWLES, District Judge.

GILBERT, Circuit Judge. The Pacific Rolling Mills Company brought a suit to foreclose a mechanic's lien for a balance of $6,731.22 against the street cable railway and power house of the James Street Construction Company, of Seattle, and the lots on which the power house was erected. The lien so claimed is for materials furnished for and used in the construction of the street cable railway, and it consisted of rails, slot steel, bolts, plates, and shims. All the materials so furnished and used went to the construction of the cable railway in the streets, and none thereof was used in the improvement upon the lots where the power house was erected. The negotiations for the sale of the materials were opened by one C. L. Hamilton, of Seattle, who first telegraphed to the complainant for prices. He thereafter telegraphed again, instructing the complainant to send its answer to J. D. Lowman, of Seattle. The complainant wired its terms to Lowman. Negotiations were continued until they resulted in a sale of the materials from the complainant to C. L. Hamilton for a purchase price of about $13,000. Lowman was a director and was the manager of the defendant. That fact was known to the complainant, and was referred to in the correspondence. The complainant also knew that the materials were to be used in the construction of the defendant's cable railway. It also appeared in one of Lowman's dispatches to the complainant before the sale that he used these words: "Before contracting with Hamilton I had him wire you requesting answer to me to know if you would fill his orders. Receiving affirmative reply, I contracted same day with him, rail at fifty-five twenty-three," etc. When the material was shipped by the complainant, it was consigned to Lowman, at Seattle, by Hamilton's direction. The shipping receipts, with a draft attached for one-half the purchase price, to wit, $6,485.31, were mailed to the Puget Sound National Bank, at Seattle, with instructions to collect the draft on delivery of the receipts, and to take Hamilton's note at 60 days for the other half of the purchase price. The material arrived at Seattle on August 25, 1890. Lowman and Hamilton called at the bank to get the draft and the shipping receipts. It was after banking hours, and the cashier declined to de-

liver the same. Later, on the same day, Lowman called at the bank, and stated that it was a strange proceeding for Hamilton to receive the bill of lading and give his note. To this the cashier agreed, and thereupon he telegraphed to the complainant's bank in California for information and instructions. On August 26th Lowman telegraphed to the complainant, saying: "Hamilton says you have taken his note and released iron; wants me to pay him. Shall I do so?" During the same day, and before receiving an answer to this telegram, which did not arrive until the 27th, Lowman and Hamilton went to the bank. In the meantime the bank had received an answer from the complainant's bank in San Francisco, as follows: "Our collection Hamilton of the 19th, $12,970, accept one-half cash, note balance in sixty days." Lowman and Hamilton were thereupon informed by the cashier of the Seattle bank that such were the terms on which the shipping receipts were sent. Accordingly, the shipping receipts were delivered to Lowman upon the payment of the draft by Hamilton and the execution of Hamilton's note for the other half of the purchase price. At the same time, Lowman paid Hamilton $8,074.85 in cash and delivered to him the note of the defendant for the remainder of the purchase price, which note was subsequently paid. On the 27th Lowman received the answer to his dispatch of the day before, informing him that in taking Hamilton's note for one-half the value of materials at 60 days the complainant did not relinquish its right to file a lien in case of nonpayment of the note. On the trial in the circuit court it was held that the complainant had no lien upon any of the defendant's property, and the bill was dismissed.

On the appeal to this court, the question principally discussed is whether or not the law of the state of Washington gives to the complainant a lien which may be enforced, either against the railway or against the lots upon which the power house stands, or against both. The lien law of Washington (1 Hill's Ann. Code, § 1663) 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, dike, 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 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."

It was held in Kellogg v. Littell, 1 Wash. St. 408, 25 Pac. 461, that there can be no lien upon a building separate from the land whereon the same is situate; and in Railroad Co. v. Johnson, 2 Wash. St. 113, 25 Pac. 1084, it was held that unless there can be a lien upon the land there can be none upon the structure, and that no lien is given under the lien law for materials which enter into the construction of a cable railway, since the person or company constructing the same has no interest in the land; but the fee thereof is vested in the city for the public use, the railway company having only the

easement of use and a license to occupy and a franchise to collect fares; and it was further held that a street cable railway is not a railroad, and is not within the purview of the lien law. The decision of the highest court of a state in regard to the meaning of the statutes of that state is to be considered the law of that state, under the requirement of section 721 of the Revised Statutes. Leffingwell v. Warren, 2 Black, 599; Luther v. Borden, 7 How. 40; Post v. Supervisors, 105 U. S. 667; Bucher v. Railroad Co., 125 U. S. 555, 8 Sup. Ct. 974. It is contended by the appellant that the construction so given to the law of Washington by the supreme court of that state is not conclusive upon this court; that a decision so made in February, 1891, does not control the decision of rights which accrued in the preceding year; and it is said that federal courts will not give a retroactive effect to the construction of state statutes adopted by the state courts. It is true that in certain cases the federal courts have declined to give to the decisions of the state courts a retroactive effect; but, in order that a decision may be subject to objection because retroactive, there must have been a prior ruling of the state court holding the reverse of the later construction, under which former ruling, and upon the theory that the decision of the court has the same effect as statute law, rights shall have become vested. It is held, indeed, that, where the state courts have in one line of decisions given a construction to state laws and have subsequently overruled such decisions, and adopted a different construction, the federal courts will not adopt the new interpretation so as to affect rights that accrued before it became announced as the law of the state courts. Douglass v. County of Pike, 101 U. S. 686; Carroll County v. Smith, 111 U. S. 562, 4 Sup. Ct. 539. But in the state of Washington there have been no conflicting decisions upon the construction of the words of the lien law which are involved in this case. The cases cited from the decisions of that state do not overrule prior decisions of the same court. They contain only the court's opinion of the meaning of the law from the time the statute was promulgated. Their effect is to declare that the meaning therein given to the lien law was its meaning at the time of its enactment and at all times since. The federal court, in following that construction, as it is bound to do, does not give a retroactive effect to the construction given by the supreme court of Washington, but it adopts the meaning of the law as the same has been declared by the state court. Said the court, in Leffingwell v. Warren, supra:

"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 the courts of the United States as the text."

Under the lien law of Washington, therefore, as expounded by the courts of that state, a material man who furnishes material for the construction of a street railway can obtain no lien upon the structure in the streets of a city.

A question of more difficulty concerns the further contention of the appellant that the defendant's power house and the lots whereon the same is constructed, and which are used in connection with the cable road, are subject to the lien. It is argued that the case of

Railroad Co. v. Johnson is not decisive of this question; that, although it was said in the opinion in that case that a street cable railway is not a railroad, and is not within the description of the structures for which a lien is provided, it does not necessarily appear that such was the view of the majority of the court, since but three of the five judges who composed the court concurred in the decision, and the assent of one of those so concurring was expressly limited to the conclusion arrived at, which was that no lien was given upon a street cable railway in the streets of a city. It is admitted that none of the material furnished by the lienor in this case has been used in the improvements upon that portion of the property of which the title is vested in the defendant in fee; but it is said that the road and the power house are one, and indissolubly connected; that the cable railway is incapable of operation except in connection with the power house wherein the cable is operated, and whereby all the movement of cars is accomplished; that the road without the power house, and the power house without the road, are equally impotent to accomplish results; and that, notwithstanding the fact that the appellant has furnished no material for the power house, it has a lien thereon from the fact that it has furnished material for the railway track, which is so intimately and necessarily connected therewith. Upon careful consideration of this question, and the language of the law applicable thereto, we are inclined to the view that, if the lien is denied upon the road whereon the material was used, for the reason, as held by the state authorities, that the railway company has no interest in the road sufficient to sustain such a lien, it is also true that no lien attaches to property upon which none of the materials have been placed, and which, although it is used in connection with the road, and as a part of the system thereof, rests upon a title entirely distinct from that whereon the road rests. Section 1665 provides that the land upon which any building, improvement, or structure is constructed shall be subject to the lien if the same belonged to the person who caused the building, improvement, or structure to be constructed, altered, or repaired, but that, if he owned less than a fee simple estate in such land, then only his interest therein is subject to such lien. The lots owned by the defendant are not the land upon which the improvement was constructed with the plaintiff's material. That improvement is in the public streets. In a certain sense it is true that the cable road in the street and the power house on the lots are so intimately connected that the one may be said to be appurtenant to the other. But by the terms of the statute no reference is made to appurtenances, and no lien is expressly created therefor, and there is nothing in its provisions, or in the interpretation given thereto by the state courts, to justify the court now in holding that it contemplates a lien upon a building, or upon the lot on which it stands, for materials furnished in the construction of appurtenances not included in the contract for the construction of the building, nor situate upon land in which the owner of the building has an interest. The cases relied upon by the appellant's counsel come short of sustaining the doctrine on which his contention rests. In Beatty

v. Parker, 141 Mass. 526, 6 N. E. 754, a drain pipe, extending from the cellar of a house through the cellar wall and the yard and the street into a sewer, the construction of which was included in the contract for building the house, was held to be a part of the house, and it was held that a lien is provided therefor under the lien law, and that it was immaterial that the title to the street is not in the owner of the house. But the decision was based upon the fact that a portion of the drain pipe was in, and was a part of, the house on which the lien was attempted to be enforced, and was included in the contract for its construction. In this respect the facts differ materially from those in the case at bar. In Badger Lumber Co. v. Marion Water, etc., Co., 48 Kan. 182, 29 Pac. 476, it was shown that the defendant company owned land on which was a building and machinery for generating electricity to be used in connection with its electric wires and poles, which it had placed through the streets under a franchise therefor. The plaintiff furnished poles to support the wires in the streets. It was held that he had a lien on the lots on which the building and machinery were situated, but it was so expressly decided under the language of the Kansas statute, which provided liens for materials furnished to "any building, or to the appurtenance of any building"; and it was found by the court that the wires and poles were appurtenances to the building. But in Parmelee v. Hambleton, 19 Ill. 614, in a case where a house and a vault under the sidewalk of a street were constructed under a single contract, it was held that the vault, although an appurtenance to the house, was not subject to a mechanic's lien under a statute which conferred a lien upon any one who, under a contract with the owner of a lot, should furnish "labor or materials for erecting or repairing any building or the appurtenances of any building on such land or lot." The court said: "This certainly means that both the building and appurtenance shall be upon the lot."

Nor do we think that the relation of Hamilton to the defendant was such that, under any view of the meaning of the lien law, a lien could be created in favor of the vendor of materials sold in the manner indicated in the record in this case. If we concede that Lowman was acting on behalf of the defendant, and that the defendant, through his agency, was to all intents the purchaser from Hamilton, still it cannot be said that the complainant, in selling the goods to Hamilton, and in looking to him for the payment of the same, sold the same "at the instance of the owner," within the meaning of those words as they were used in the statute. They sold rather at the instance of Hamilton. Nor was Hamilton a "contractor," such as is contemplated in the statute. It is true he had a contract with Lowman, but it was only a contract of sale and delivery. It involved no labor or supervision upon Hamilton's part. While the latter might have claimed a lien for his own benefit, because standing in the attitude of a vendor to the owner of the road, his own vendor, the complainant in this case, furnished the materials neither to the owner nor to the owner's agent, nor to a contractor in charge of the construction of any part of the improvement. Hamilton was in charge of nothing connected with the construction. The correspond-

ence so advised the complainant. The statute does not contemplate a lien in favor of him who sells materials to one who in turn sells the same to the owner or his agent. It gives the lien only to him who deals with the owner or his agent, or with a contractor in charge, or with some other person in charge of some part of the improvement for which the materials are to be used. The decree is accordingly affirmed, with costs to the appellee.

BUCKSPORT & E. R. R. CO. et al. v. EDINBURGH & SAN FRANCISCO REDWOOD CO., Limited.

(Circuit Court of Appeals, Ninth Circuit. July 15, 1895.)

No. 216.

1. CORPORATIONS—RIGHTS OF STOCKHOLDERS—ENJOINING MANAGEMENT.
A lumber company on the one part, and certain individuals on the other, owned together a large tract of inaccessible timber land, and the latter party also owned certain adjoining tracts. By agreement they joined in organizing a railroad company and building a road to reach the lands, each party taking half the stock therein. Afterwards the corporation sold to the individual party its interest in the timber. The purchasers exhausted all the timber within reach of the road, and, being in the majority in the directory of the railroad company, passed a resolution authorizing an extension of the road to reach timber lands owned by them alone, and appropriating the money in the treasury for that purpose. The rate agreed on for carrying lumber from the new tract was the same that was originally fixed by both parties. The road was useless, except for transporting the timber, and would be entirely worthless without the extension. *Held*, that the lumber company, as a stockholder in the railroad company, was not entitled to enjoin the proposed extension on the ground that it was solely in the interest of the individual party, as owner of the timber land, and against the interest of the stockholders in the railroad company.

2. SAME—CONSTITUTIONAL LAW—CARRIERS.
The provision in the constitution of California (article 12, § 18) forbidding an officer of a company to engage "in the business of transportation, as a common carrier of freight or passengers over the works owned, leased, controlled, or worked by the company," does not apply to the act of an officer of a railroad company in causing his own freight to be transported over the company's road.

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

This was a bill by the Edinburgh & San Francisco Redwood Company, Limited, against the Bucksport & Elk River Railroad Company and others to procure an injunction restraining defendant company from building an extension of its road. An injunction was granted by the circuit court, and the defendants appeal.

S. M. Buck and F. A. Cutler, for appellants.

Charles Page, for appellee.

Before GILBERT, Circuit Judge, and KNOWLES and BELLINGER, District Judges.

BELLINGER, District Judge. The complainant, the appellee company, is the successor to all the rights and interests of the Cali-

fornia Redwood Company, Limited, a Scotch company, by purchase, on the liquidation of that company for insolvency, at the suit of creditors. This Scotch company, at the time of its liquidation, was the owner of the entire capital stock of another California redwood company, a domestic corporation, which latter corporation owned sawmills and vessels and large bodies of redwood-timber lands on Elk river and its branches, in Humboldt county, Cal., and was engaged in the lumber business on a large scale. The capital stock of the domestic redwood company so held by the Scotch redwood company constituted the property, rights, and interests to which the complainant succeeded on the liquidation of the Scotch company. The defendant W. H. Carson and one Dolbeer were also large owners of redwood-timber lands adjacent to the lands of the California Redwood Company, and had other interests in such lands in common with that company. To promote their common interests, it was agreed between the company, through its general manager, and Dolbeer and Carson, to build a railroad from Humboldt Bay to and up Elk river and its branches, to reach the redwood-timber lands of the parties, and of others in that vicinity. In pursuance of this agreement, the defendant the Bucksport & Elk River Railroad Company was organized, and its stock subscribed for and held in equal amounts by the two parties,—Dolbeer and Carson of the one part and the redwood company of the other. The enterprise contemplated was the building of about 30 miles of road, and the articles of incorporation of the company thus organized specify a line running from the forks of said Elk river, up and along the North Fork thereof, to the east line of township 4 N., of range 1 E., Humboldt base and meridian, as a part of the road which the company is incorporated to build. The board of directors of the railroad company consisted of five members. Of these, three were elected in the interest of the California Redwood Company, and two, including William Carson, in the interest of Dolbeer and Carson. This continued from the organization in July, 1884, up to February 9, 1886. In the meantime the company contracted with the Elk River Mill & Lumber Company to complete its road to a point where the latter company proposed to erect a large sawmill during 1884, transport the machinery therefor, and thereafter haul all the lumber manufactured at such mill to Humboldt Bay for $1.50 per 1,000 feet, board measure. The work was begun and carried forward under the management of the manager of the California Redwood Company, who was a director in the railroad company. Surveys were made for lines up the North Fork of Elk river, and up some tributary streams to the south of the main stream. In 1886, following the insolvency of the Scotch company, the work of building was stopped by the refusal of the managing directors of the railroad company, who were in the interest of, and presumably subject to, the direction of the California Redwood Company, to continue it. Thereupon, Dolbeer and Carson advanced $36,000, necessary to the completion of the line agreed to be built in the contract with the Elk River Lumber Company, which was subsequently repaid them out of earnings of the company. In consequence of the responsibility thus assumed by

Dolbeer and Carson, the membership of the board of directors of the Bucksport & Elk River Railroad Company was changed by the resignation of two members of the majority, whose places were filled in conformity with the wishes of Dolbeer and Carson. The road was completed to the mills of the Elk River Lumber Company, and the product of such mills carried to Humboldt Bay, but without making any profit on such freight. In October, 1886, Dolbeer and Carson entered into a contract with the California Redwood Company by which they purchased the entire one-half interest of the company in the redwood timber suitable for lumber upon the lands owned jointly by the parties, and all the timber on lands owned by the company, within the watershed of what is known as "Tom's Gulch," within the district tapped by the company's road. There were 800 acres of land owned jointly, and 400 acres exclusively owned by the company. The price agreed to be paid was $1.50 per 1,000 feet, board measure, for the logs taken from this land. Under this contract, Dolbeer and Carson, between 1887 and 1892, shipped 80,000,000 feet of logs, for which they paid freight to the railroad company at the rate of $2 per 1,000 feet,—a total of $160,000. Before the change in the directory of the company, some $20,000 had been expended towards an extension of a branch of the road up Tom's Gulch, which branch was completed under the new management. Having exhausted Tom's Gulch, Dolbeer and Carson, in 1892, made a second contract with the redwood company, in terms like the former, for the timber in Clapp's Gulch, and to reach this timber a branch road about one mile in length was built. This source of timber supply will be exhausted during this year. Anticipating this fact, the company, by a majority vote of its directors, on May 5, 1892, decided to apply the money on hand, amounting to about $24,000, to making extensions of the road to reach new sources of timber supply, and on the 12th of the following December, in pursuance of this policy, formally authorized the building of extensions up Clapp's Gulch and up the North Fork of Elk river. In view of this action, the complainant corporation, having in May, 1892, caused a transfer to itself of the shares of stock of the Bucksport & Elk River Company standing in the name of the California Redwood Company, began this suit to restrain the defendant company from building the extensions proposed, and particularly from building the extension up the North Fork of Elk river. Upon the hearing, the court granted the prayer of the complainant, subject to the right of Carson and the stockholders co-operating with him to build the extensions at their own expense. From the decree so rendered, this appeal is taken.

The court below concluded, from the fact that Carson and Dolbeer own large bodies of timber land on the North Fork of Elk river, and are large manufacturers of lumber on Humboldt Bay, and that the extension up this fork will enable them to transport their logs to their mills, that Carson, through his control of a majority of the board of directors of the railroad company, proposes to use the road for his own private interests, regardless of the real interests of the road and of its stockholders, and that it is the duty of the court to restrain

the directors of a corporation "from controlling the corporate property for the enhancement of their personal and private interests." Furthermore, the court found that Dolbeer and Carson belonged to a syndicate which had limited the lumber product of its members, and that from all the facts there was no prospect that the road as extended would be profitable to the stockholders; but it declined to consider the question of probable profits as one that should control the decision. The uncontroverted facts as to the business and prospects of the road are "that the timber accessible to the road is practically exhausted"; that the road will become valueless unless another source of supply is reached; and that the proposed extension will reach "large bodies of valuable timber, which will give the road business for years to come." The court below was of the opinion that it might be conceded that the road, as now existing, will soon be valueless, and that by the proposed extension such large bodies of valuable timber will be reached as will make it, if operated to its full capacity, profitable to its stockholders; but that, notwithstanding this, the private interests of Dolbeer and Carson to be served by such extension, the limitations they are under to the lumber trust, the fact that they are the only present patrons of the road, and the conclusion therefrom that there is no present prospect that the investment would be profitable to the stockholders, require the intervention of the court by its injunction to prevent such extension. In short, the conclusion is reached that the case is within the established principle which precludes a person from acting for himself and at the same time for another in respect to the same matter, when the two interests are conflicting.

The Bucksport Railroad Company was organized to build the road in question, and this power was assumed, not merely as a provision for contingencies that might arise in the future, but as one fairly within the main scope of the organization. It was a vital part of the enterprise, the object of which was to reach with a road valuable redwood-timber lands of the parties on both forks of Elk river. The stockholders of the complainant were the organizers and beneficiaries of the California Redwood Company of California. That company was largely interested in timber lands, and in mills and vessels engaged in the lumber manufacture and trade, which it carried on at the time the Bucksport & Elk River Railroad Company was incorporated. The new enterprise was intended primarily to serve the interests of the California Redwood Company and Dolbeer and Carson as a means of outlet for their own timber,—to carry their own freight and supply their own mills. It was, in effect, a private road for the private use of the two interests that combined to organize the company that built it. At least, it was mainly for such use that the venture was gone into. Evans, one of the original stockholders in the California Redwood Company, and its manager in 1884 and 1885, testified, as a witness for defendants, that the railroad was built for the purpose of hauling logs for Dolbeer and Carson and the California Redwood Company. Carson testifies that he was first approached by parties in the California Redwood Company with the proposition to incorporate the railroad company, and that their prop-

osition was that, if Dolbeer and Carson would take half the stock in such a company, they would furnish more than one-half its business. Bell, a witness for complainant, testified that, if Dolbeer and Carson had not furnished any freight for the road, the amount of profit left to the railroad during the seven years it has been operated would have been "on the wrong side." As it turned out, the redwood company furnished but little, if any, business for the road; having sold its timber to Dolbeer and Carson, to be by them cut and hauled over it. It is not a ground of complaint that the road is to be used to haul the freight of Dolbeer and Carson, nor that, being so used, Dolbeer and Carson do not concede to the minority in the board the right to fix the rate of freight to be paid by them. Upon the principle contended for by complainant, the road cannot be used by one of the two parties concerned in building it, although it was intended for both, for the reason that the management, including the right to fix rates of freight, must necessarily be in the control of one.

The complainant also contends that the defendants are forbidden by section 18, art. 12, of the constitution of California, to have an interest as a carrier in the freight transported. That provision forbids an officer of a company to engage "in the business of transportation as a common carrier of freight or passengers over the works owned, leased, controlled or worked by the company," etc. Such officer is prohibited from using the road under his control to engage in the business of common carrier on his own account. There is no relation between such business and the act of an officer of a company in carrying his own freight over the company's lines. In one case he takes the company's place as a carrier and diverts its earnings to himself; in the other, he originates business for the company, and becomes himself a payer of tolls to it.

The North Fork extension was presumably one of the inducements for the undertaking in question. It may have been the controlling inducement so far as Dolbeer and Carson are concerned, since, in addition to their joint interest with complainant in lands to be reached by the proposed extension, they own large bodies of timber further up this fork, ultimately to be reached by the road. Good faith requires that the parties shall keep to their undertaking until its substantial ends are accomplished. In no case can the court enjoin the building of a road because of what is proposed upon the one side or feared upon the other as to the rates of toll that will be adopted when the road is built. Carson is bound to the exercise of good faith in this, as in all other matters relating to his office as director. The contention of the complainant that his relation to the road as a patron disqualifies him from fixing a rate of toll is an attempt to apply a general rule that obtains where a party, as the agent of others, attempts to deal with himself, to a case not within the rule. Such rule cannot, in the nature of things, be applied with reference to matters of legitimate and necessary corporate administration. These are matters that compel action, and the obligation to act is devolved upon the majority. It is the abuse of the right, and not the exercise of it, that furnishes the occasion for legal remedies.

There is nothing in this case that tends to show bad faith on the part of the defendants. It is proposed to build an extension of road four miles in length up the North Fork of Elk river, in accordance with the object for which the company was incorporated. The cost of this road is variously estimated. One witness, a surveyor, testifies that he has made a careful estimate of the cost, which he places at a little below $44,000, not including rolling stock, with which the company is presumably supplied. There has already been considerable work done on the line,—$5,800 having been expended therefor. This first extension will make available some 300,000,000 feet of logs, without further expense than the construction of a mile and a half of what is called a "donkey-engine road," which Dolbeer and Carson propose to construct at their own expense. The extension is to be built with earnings of the road on hand and advances to be made by Dolbeer and Carson, for which they are to look only to earnings for reimbursement. The net earnings of the road have averaged 3½ per cent. per annum, and this is referred to for the purpose of showing that the extension will be a poor investment. In this estimate the cost of building the road into Tom's Gulch and of repairing and maintaining it are included. This cost has been exceptionally great, due to the fact that there were two or three heavy freshets, to which that section is especially exposed, that greatly damaged the road. This section is exceptional, also, in respect to grades, some of them being as much as 300 feet in a mile. The proposed extension is free from both of these difficulties. The admitted fact is, as already stated, that the present source of freight supply is practically exhausted, and the road will soon be without business, and valueless. The net earnings from business created by the proposed extension, in determining the advisability of it, should not be estimated with reference to the cost of the road as now built. That is beyond recovery. The estimate of net earnings at 3½ per cent. per annum, made by complainant to show that the proposed branch is a poor investment, and is therefore prompted by bad faith, makes no account of the benefits that have accrued to the stockholders in disposing of timber owned by them. The California Redwood Company sold its timber to Carson and Dolbeer at the rate of $1.50 per 1,000 feet. The road was built to enable the parties to realize on this timber, or its manufactured product. By its means the California Redwood Company sold timber upon about 1,000 acres owned by it in Tom's Gulch and Clapp's Gulch, and the undivided half of the timber upon more than 800 acres in Tom's Gulch owned jointly with Dolbeer and Carson. It must have realized a large amount of money from these sales, and it is shown by the testimony of complainant's witnesses that the road has increased the value of this timber land from $30 per acre to $90 per acre. The complainant omits to credit the railroad enterprise with this benefit, although it is apparent that such credit is necessary to a correct estimate of the value of the road to its owners as an investment.

The complainant is willing that the road shall be extended, provided a freight rate to be paid by Dolbeer and Carson can be agreed

upon beforehand agreeable to it. In the brief filed in its behalf, it is stated that complainant is opposed to the extension of the road "unless a freight rate be agreed upon which shall furnish the company some adequate return for the moneys to be invested, and it has objected strenuously to the extension upon any other condition." As already stated, the court is not required by the justice of the case, nor authorized, to pass upon the adequacy of the $2 per 1,000 feet freight rate in question. Nevertheless, so far as appears, such rate is not inadequate. It was the rate adopted when the California Redwood Company controlled the board of directors of the railroad company. That rate was adhered to, without objection or complaint, for many years. It was proposed by the officer who represented complainant's interests. The haul over the proposed extension will be but little longer than that from Tom's Gulch. The witnesses for the complainant say that this increased haul increases the cost of transportation 15 cents per 1,000 feet. But, admitting this to be true, for this increased haul complainants, demand, not 15 cents, but $1. The extension will have better grades than the Tom's Gulch extension, and, while portions of the latter have been frequently washed away by freshets, the proposed road will be free from such danger, and will be maintained and kept in repair at a much less cost. One witness for the defense testified that it will cost less to haul logs from the North Fork than it costs to haul out of Clapp's Gulch, owing to the excellence of the timber on the North Fork and the little waste there is in sawing it into lumber. It is probable that these advantages in favor of the proposed road will compensate for the increased length of haul over it; and, besides this, the $2 rate was established many years ago, and it is common knowledge that wages and supplies of all kinds are lower now than then, and that fares and tolls throughout the country have been correspondingly reduced. Carson testifies that if he was not interested in the road it would be cheaper for him to get his logs from other sources of timber supply owned by him than by the proposed road; and he testifies, with reference to his relations with the trust, that half his product goes to foreign markets, while the limitations of the trust apply only to the San Francisco market, and that this does not affect the output of his mills, which run right along, the lumber being stacked in the yard. There is nothing in the case that conflicts with these statements or renders them improbable.

The entire road to be operated when the proposed extension is built will be about 12 miles. The complainant, through a trust company, owns, jointly with Dolbeer and Carson, more than 2,600 acres of timber lands and nearly 1,000 acres of stump land, besides some land of which it has the entire beneficial interests. Its own witness testifies, and the fact is not questioned, that a road is necessary to make these lands available, and would increase their value threefold. When, for these advantages, it is considered that complainant is only required to risk its interest as a stockholder in about $24,000 of money on hand belonging to the railroad company; that Dolbeer and Carson are to advance what more is required, and take their chances for reimbursement on the earnings of the road;

that the entire investment as now made will be lost without the extension,—it is difficult to avoid the conclusion that the complainant does not wish to prevent the proposed extension, otherwise than as a means to force Dolbeer and Carson to concede in advance a rate of freight for their business satisfactory to itself, and one-half greater than that in force by the agreement of its agents during all the years the road has been operated. It is enough that the defendants, in what is proposed, are merely carrying out the objects for which the company was organized, and are in the legitimate exercise of the authority conferred upon them, as directors of the company, to determine its policy and manage its business. The decree appealed from is reversed, and the cause will be remanded to the court below, with directions to dismiss the bill of complaint.

SPOKANE COUNTY v. FIRST NAT. BANK OF SPOKANE et al.

(Circuit Court of Appeals, Ninth Circuit. June 24, 1895.)

No. 209.

TRUSTS—FOLLOWING TRUST PROPERTY.

The owner of property intrusted to another, by whom it has been misapplied, is not entitled to a general lien upon the assets of the trustee for the value of such property, and can only follow the same so far as it can be traced, either in its original form or in other forms into which it has been converted.

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

This was a suit by the county of Spokane, Wash., against the First National Bank of Spokane and F. Lewis Clark, its receiver, to impress a trust upon assets of the bank in the receiver's hands. The circuit court sustained a demurrer to the bill for want of equity. Complainant appeals. Affirmed.

James E. Fenton and D. W. Henley, for appellant.

C. S. Voorhees, for appellees.

Before McKENNA and GILBERT, Circuit Judges, and KNOWLES, District Judge.

GILBERT, Circuit Judge. The county of Spokane brought a suit against the First National Bank of Spokane and its receiver to recover the balance of public funds deposited with said bank by the treasurer and tax collector of said county between the 9th day of January, 1893, and the 26th day of July of the same year, alleging that between said dates there was deposited with said bank by said officer for safe-keeping $81,257.55, all of which had been repaid to the complainant save and except the sum of $11,355.68, "which said sum the said defendant the First National Bank does now wrongfully retain and hold, and has wrongfully retained and held ever since the 26th day of July, 1893." It is further alleged in the bill that on or about the 26th day of July, 1893, the bank became insolvent and suspended payment, and has not since resumed business, and that

the receiver, since his appointment as such, has received of the assets of the said bank "sufficient money and funds wherewith to pay and satisfy the said balance deposited and received as aforesaid." A demurrer to the bill for want of equity was sustained by the circuit court, and from that ruling this appeal is taken.

It is contended on behalf of the appellant that the money deposited with the bank by the county treasurer was impressed with the character of a trust fund, and that the trust may be enforced against any assets of the bank in the hands of its receiver. It is not alleged in the bill that any of the money of the complainant, or any assets or property thereby procured, has come into the hands of the receiver. It is true it is averred that the bank still retains $11,355.68 of the complainant's money, but it is not said that any portion of that sum was in the possession of the bank when it closed its doors. We interpret the averments of the bill to mean, as in fact it was conceded upon the argument, that the money which the receiver holds is not that which was turned over to him as such when the bank was closed, but that it is the proceeds of collections by him made since that date. If it had been alleged in the bill that at the time of its failure the bank held a sum of money equal to or less than the amount here sued for, the court might lawfully presume that sum to be of the public funds of Spokane county, since it will be presumed that trust funds have not been wrongfully misappropriated or criminally used by the officers of the bank. But while that presumption would prevail as to money on hand, it would not be extended to other assets, for the officers of the bank had as little right to divert the public funds into investment in other property as they had to appropriate them to their own use. But it is said that the complainant has a lien upon the funds in the hands of the receiver upon the theory that the estate of the bank has received the benefit of the complainant's money, and its present assets are thereby increased. There are some decisions of the courts, particularly in cases of suit to recover public funds, that go to the extent of supporting this doctrine, and while the public benefit to be derived from the application of that rule to cases where school and county funds have been misappropriated by banks appeals strongly to the consideration of the court, we are unable to discover that the power to dispense such relief rests upon any of the established principles which govern the action of courts of equity.

There is no recognized ground upon which equity can pursue a fund and impose upon it the character of a trust, except upon the theory that the money is still the property of the plaintiff. If he is permitted to follow it and recover it, it is because it is his own, whether in the form in which he parted with its possession, or in a substituted form. Under the earlier rule, he was required to identify it as the very property which he had confided to another. The newer and more equitable doctrine permits him to recover it from any one not an innocent purchaser, and in any shape into which it may have been transmuted, provided he can establish the fact that it is his property or the proceeds of his property, or that his property has gone into it and remains in a mass from which it cannot be distin-

guished. The earlier English doctrine, as declared in the opinion of Lord Ellenborough in Taylor v. Plumer, 3 Maule & S. 575, in which were reviewed the prior decisions of the English courts, was to the effect that the owner of property intrusted to another could follow and retake the same from the possession of the holder, whether he were agent, bailee, or trustee, or from others who were in privity with him, so long as they were not bona fide purchasers for value, and this irrespective of whether such property remained in its original form or had been changed into some other form, so long as it could be ascertained to be the same property or the proceeds of the same property, but that the right ceased when the means of ascertainment failed, and it was held that such means of ascertainment failed whenever the property was in the form of money, and had been then mixed and confused in a general mass of money of the same description. The more recent doctrine, however, follows the rule announced in Re Hallett's Estate (Knatchbull v. Hallett) 13 Ch. Div. 696, which is that, if money held by one in a fiduciary character has been paid by him to his account at his banker's, the person for whom he held the money can follow it, and has a charge on the balance in the banker's hands, and that if the depositor has commingled it with his own funds at the bank, and has afterwards drawn out sums upon checks in the ordinary manner, he must be held to have drawn out his own money in preference to the trust money, and that if he destroyed the trust fund "by dissipating it altogether, there remains nothing to be the subject of the trust, but so long as the trust property can be traced and followed into other property into which it has been converted, that remains subject to the trust."

The American courts, while uniformly approving the doctrine of that decision, have exhibited a diversity of holding as to its meaning. Some, as we have shown, have interpreted it to mean that, in a suit brought to pursue trust property and affix upon it the character of a trust, it is only necessary to show that the defendant's estate, although insolvent and in the hands of an assignee or receiver for distribution, has actually received the benefit of the trust fund, and that it makes no difference that the plaintiff is unable to show that his fund, or property which represents it, is then in the estate in any form, or has actually come into the hands of the assignee or receiver. Harrison v. Smith, 83 Mo. 216; Jones v. Kilbreth (Ohio) 31 N. E. 346; Independent Dist. v. King, 80 Iowa, 497, 45 N. W. 908; Peak v. Ellicott, 30 Kan. 156, 1 Pac. 499; McLeod v. Evans, 66 Wis. 401, 28 N. W. 173, 214; Plow Co. v. Lamp, 80 Iowa 722, 45 N. W. 1049; Myers v. Board of Ed., 51 Kan. 87, 32 Pac. 658; San Diego Co. v. California Nat. Bank, 52 Fed. 59. Decision in these cases would seem in the main to have been influenced by the consideration that the estate of the insolvent, and thereby the general creditors thereof, must have received the benefit of all trust funds unlawfully used by the insolvent in the course of business or the payment of debts. Said the court in Peak v. Ellicott:

"As the estate was augmented by the conversion of the trust fund, no reason is seen under the equitable principle which has been mentioned why they should not become a charge upon the entire estate."

In Plow Co. v. Lamp, 80 Iowa, 722, 45 N. W. 1049, the court said:

"The creditors, if permitted to enforce their claims as against the trust, would secure the payment of their claims out of trust moneys."

In Harrison v. Smith, the court said, while it would "be impossible to make it a charge upon the estate or assets to the increase or benefit of which it has been appropriated, the general assets of the bank having received the benefit, there is nothing inequitable in charging them with the amount of the converted fund."

We are unable to assent to the proposition that, because a trust fund has been used by the insolvent in the course of his business, the general creditors of the estate are by that amount benefited, and that therefore equitable considerations require that the owner of the trust fund be paid out of the estate to their postponement or exclusion. If the trust fund has been dissipated in the transaction of the business before insolvency, it will be impossible to demonstrate that the estate has been thereby increased or better prepared to meet the demands of creditors, and even if it is proven that the trust fund has been but recently disbursed, and has been used to pay debts that otherwise would be claims against the estate, there would be manifest inequity in requiring that the money so paid out should be refunded out of the assets, for in so doing the general creditors whose demands remain unpaid are in effect contributing to the payment of the creditors whose demands have been extinguished by the trust fund. Both the settled principles of equity and the weight of authority sustain the view that the plaintiff's right to establish his trust and recover his fund must depend upon his ability to prove that his property is in its original or a substituted form in the hands of the defendant. Little v. Chadwick, 151 Mass. 109, 23 N. E. 1005; Cavin v. Gleason, 105 N. Y. 256, 11 N. E. 504; Association v. Austin (Ala.) 13 South. 908; Shields v. Thomas (Miss.) 14 South. 85; Silk Co. v. Flanders (Wis.) 58 N. W. 383; Slater v. Oriental Mills (R. I.) 27 Atl. 443; Bank v. Armstrong, 39 Fed. 684; Multnomah Co. v. Bank, 61 Fed. 912; Massey v. Fisher, 62 Fed. 958.

The decree is therefore affirmed, with costs to the appellees.

CITY OF SPOKANE v. FIRST NAT. BANK OF SPOKANE et al.

(Circuit Court of Appeals, Ninth Circuit. June 24, 1895.)

No. 210.

TRUSTS—FOLLOWING TRUST PROPERTY.

Where trust funds have been wrongfully invested by the trustee in securities which remain in his hands, the owner of such funds is entitled to follow the same, in the form into which they have been converted, and impress a trust thereon for his benefit. Spokane County v. First Nat. Bank, 68 Fed. 979, followed.

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

This was a suit by the city of Spokane against the First National Bank of Spokane and F. Lewis Clark, its receiver, to impress a trust upon assets of the bank in the receiver's hands. The circuit court

sustained a demurrer to the bill for want of equity. Complainant appeals. Reversed.

James Dawson, for appellant.
C. S. Voorhees, for appellees.

Before McKENNA and GILBERT, Circuit Judges, and KNOWLES, District Judge.

GILBERT, Circuit Judge. This case is similar to the foregoing suit of Spokane County v. Same Defendant, 68 Fed. 979. The bill of complaint differs, however, from the bill in that case in one important particular. It contains the averment that the city treasurer has deposited with the First National Bank of Spokane public moneys of the city, known by the officers of the bank to be such, and that said officers failed to keep said money separate and distinct from other funds, but wrongfully mixed and commingled the same with the money of the bank, and that it has used the same in paying its employés, patrons, clients, and depositors, "and in the purchase by said defendant First National Bank of the property, notes, bills, and securities now constituting and forming the assets of said defendant First National Bank, in the possession of the receiver, hereinafter mentioned." Thereafter follows the allegation that the receiver has, since his appointment, collected of the assets of said bank a sum equal to the amount still due the city. We construe these averments of the bill to distinctly allege that the assets that came into the hands of the receiver were purchased by the bank with the city's money.

In the light of the authorities cited in the foregoing decision, and of the conclusions there reached, we are of the opinion that the demurrer to this bill should have been overruled. It is our judgment, therefore, that the decree be reversed at the cost of the appellees, and that the cause be remanded to the circuit court for further proceedings not inconsistent with this opinion.

DUGAN et al. v. O'DONNELL.

(Circuit Court, N. D. California. July 2, 1895.)

1. LIMITATIONS—DISAVOWAL OF TRUST.
   Though mere lapse of time will not ordinarily bar the enforcement of a clearly-established trust, time will begin to run as soon as the trustee disavows the trust and claims adversely; and unless the cestui que trust was ignorant of the claim and of his own rights, lapse of time is a complete bar to relief.

2. LACHES—RELATIONSHIP OF PARTIES.
   The doctrine of laches for delay in the enforcement of rights is not so strictly applied where the parties are relatives as in the case of strangers, but close relationship will not prevent its application if the delay is so great as to affect the memory of witnesses and destroy evidence.

3. SAME—NONRESIDENCE.
   The nonresidence of the complainants, in a bill to declare respondent a trustee for them of an interest in an estate alleged to have been procured from them by fraud, will not, of itself, excuse a want of diligence in ascertaining and enforcing their rights.

4. SAME.

Where complainants, after actual notice that respondent, in possession of an estate in which they claimed an interest, was holding and claiming adversely to them, delayed 17 years in bringing suit, they are barred by their laches, though they were without full knowledge of all the facts, on the ground that equity will regard possession of the means of knowledge as equivalent to actual knowledge.

5. SAME.

In a suit to declare respondent a trustee for complainants of an interest in an estate and to set aside a probate decree of distribution confirming such estate in respondent, it appeared that respondent was a nephew of complainants' intestates, who were residents of a foreign country, and that he had possession of an estate in which all parties had an interest. By exaggerating the difficulty of preserving it, he induced his aunts to deed their interests therein to him, representing it to be for their interest, and, on presenting the deeds to the probate court, procured the decree giving him title. Thereafter he expressly informed them that he claimed all such interests as his own. It was alleged that they trusted him implicitly, but the evidence showed that they had agents secretly looking out for their interests, and accepted the consideration for the deeds on the advice of such agents. Suit was not brought until 20 years after the execution of the deeds, 17 years after notification of the adverse claim, and 11 years after the entry of the probate decree. *Held*, that after such lapse of time, and the death of some of the original parties and many of the witnesses, positive proof of the good faith of the transaction could not reasonably be required, and that in the absence of clear proof of fraud good faith will be presumed.

In Equity. Suit by Mary Dugan and others against Roger O'Donnell to declare respondent a trustee for complainants of an interest in the estate of Hugh O'Donnell, deceased, to set aside a probate decree for distribution of the estate, and for an accounting.

John J. Coffey, for complainants.
Galpin & Zeigler, for respondent.

HAWLEY, District Judge. This is a suit in equity to obtain a decree that the respondent holds in trust for the use and benefit of complainants certain property and interests in the estate of Hugh O'Donnell, deceased; that the judgment of distribution of the probate court of the city and county of San Francisco in said estate be set aside and vacated, on the ground of fraud upon the rights of complainants; that an accounting be had of all the dealings and transactions of respondent with said estate; and for such other and further equity as complainants may be entitled to.

Hugh O'Donnell died intestate February 6, 1868, at San Francisco, Cal., leaving one brother, Jeremiah O'Donnell, and three sisters, Catherine O'Donnell, Mary Gallagher, and Margaret McGonigle, residents of the county of Donegal, Ireland. All of them are now dead. The complainants are, respectively, the minor child and heir of Mary Gallagher, deceased, and the administratrix with the will annexed of the estate of Catherine O'Donnell, and guardian of the heirs. It is averred and claimed that complainant Mary Dugan is entitled to a one-fourth interest in the estate of Hugh O'Donnell, deceased, as the only child and heir of Mary Gallagher, and that the other complainants are entitled to one-fourth of the estate, as legatees of Catherine O'Donnell, deceased. It appears

from the testimony that the appraised value of the property of the estate of Hugh O'Donnell, deceased, in 1868, real and personal, was $48,510.50; that in 1871 there was an additional appraisement of $1,400, making a total of $49,910,50. Upon the real estate in the city of San Francisco there were certain incumbrances, viz. a mortgage lien of $25,000, held by the Hibernia Savings & Loan Society; allowed claims against the estate for about $6,000; a suit pending against the estate, brought by S. C. Hastings upon a rejected claim, for $20,000. To these would naturally be added the probable amount of the administrator's commissions, court costs, and attorney fees. The respondent is the son of Jeremiah O'Donnell, and, at the time of the death of his uncle Hugh, was, and for a long time prior thereto had been, a resident of the city and county of San Francisco, in the employ of his uncle, having active charge of all his property and business affairs, and was well advised in regard thereto. On the 13th day of February—one week after the death of Hugh O'Donnell—the respondent wrote a letter to his aunts in Ireland, informing them of the death of their brother, wherein he stated that their brother might have been worth £200,000 were it not for certain habits of his, which were minutely given; also stating an account of his sickness, the cause of it, the attendance during his illness, and the care given to him by the nurses, employed by the priests and by himself; that he died without a will,—and proceeds as follows:

"There are now forged wills, false claims, and heavy debts, twenty deep. He owes the Hibernia Bank $25,000, and over $5,000 current account. There is a large amount due other parties. But the worst of all is the public administrator, who will take all, if I can't prevent him, 30 days after my uncle's death. If he succeeds, never will a dollar reach Ireland at all; nor is it likely that I will get a cent, even, for all my time. If I defeat him, you will have more riches than you ever dreamed of. I am in possession. I have collected rents for last year and a half. I got power of attorney from my uncle before he left here; but all will be too little, I fear. I have the best lawyer in the city. He tells me [to] get power of attorney from my father and you, both; and then I can act as agent against all false papers, claims, or public administrator. This man, if he gets the property, would sell all out, after a certain number of days, to some friend of his own, or by bribe, for half its value. He would charge 10 per cent. commission. The fees of his officials and probate court expenses would be at least $10,000. These papers enclosed will give me your power of attorney, which, with my own power, will defeat all of them here. Go, both of you, to Derry, with my father, immediately, before the American consul, to sign them. I write my father to-day. If you get this letter before his reaches, go up to him. If his should not reach in two days, let him go with you both to Derry. Have them signed and posted at once. I have no time to write further.

"I am, affectionately, your nephew, R. O'D."

On the margin of this letter appears the following:

"All the priests here are extremely anxious about this matter. Speak not a word of this. Say nothing until I write you again, when I trust in Almighty you'll have good news."

On the 28th of February, 1868, the public administrator filed a petition for letters of administration upon the estate of Hugh O'Donnell. On March 13, 1868, the respondent was appointed administrator of said estate. On June 29, 1868, the respondent sent

a letter to his aunts, wherein he said, after referring to certain stories about Reverend Hugh P. Gallagher:

"It is a sad case to see quarrels so early after my uncle's death. You'll understand we have got very formidable enemies outside to contend with, without disgracing ourselves and disgusting the few good friends here who interested themselves for the benefit of all concerned. If I wanted to take any advantage of my people, there was nothing to prevent me, nor more easy. I have written you already that my uncle's mind was not clear after the first week's illness. I wrote so, least you thought a will was then made which I put aside. I was told more than once to get a will made, which must have certainly been in my favor. My reply was that my father and aunts were alive, and that they and I would settle all peaceably and justly. You ought not to think that I did away with the old will, in which it is well known I was left a large share, and appointed executor. If I destroyed it, I would ruin myself. What I have written before and now are facts, and my letters there or here will bear me out in truth, and that I wanted nothing done but justice to you all. You could not believe there would be false claims; but, unfortunately, there are many and large claims presented to me already, and sworn to, amounting to almost $47,000. * * * And you'll think it strange that, about the very day Aunt Mary's letter reached here, I was served with summons and complaint by Judge Clinton S. Hastings for the recovery of $20,000. * * * I have sent a copy of both to my father, which you can get from him. He was formerly judge of the supreme court here, and a man of great wealth and influence. * * * My uncle's property was appraised some time ago by three real estate agents, who were sworn, at the amount of $48,510.50; so, you see, if false claims are allowed, all is done. My grief is great to-day, to see my own nearest and dearest maligning me, all alone among strangers in a strange land; and to see a fortune in my hands now going to be eaten up by lawyers and unscrupulous cormorants. * * * The papers you signed for me were worthless,—of no consequence. I administered in the beginning of March. I defeated the administrator. A great blessing that was, under present circumstances. Your kind letter came to hand, and gave me pleasure. Lawyers, doctors, and nurses are daily asking money, which they must have. * * *

"Affectionately yours, R. O'Donnell."

There is in the record a letter from respondent to his father, which bears no date; and it is left in doubt as to the time it was written,—whether before or after the execution of the deeds hereinafter mentioned. It contains directions as to how the deeds should be executed. The writer, among other things, said:

"I now tell you I never would get a dollar of the money I sent aunt, only it was well known these Gallaghers wanted to wrong me. This Father Gallagher thought I would just do everything he wanted to have done; but not yet. I'll never enter his door, and I have no correspondence with any of the crowd. I again state to you that I will not be able to send you the money as I stated. It is doubtful whether the bank will give me $6,000 on my one-half interest. If I had three-fourths interest, I could draw $7,000, or $8,000, to pay my creditors and you. * * * You did not say if I was right about him [refers to Rev. Hugh Gallagher] sending the second part of checks to aunt. They said long ago that my uncle's estate came badly, and would have a bad end (when Hastings sued for all), but they would take a slice of it after all. With the help of Providence, I'll keep it together, and in my hands it will yet grow to be large."

It appears that, prior to October 11, 1869, an offer was made to the aunts through Father McGroarty, of £300 sterling for their interest in the estate. Afterwards, an offer was made for both their interests for $5,235. As a result of these negotiations, deeds regular upon their face were executed, whereby respondent acquired their right, title, and interest in and to all the property inherited by them

from the estate of Hugh O'Donnell. The first deed, executed October 11, 1869, was acknowledged before William F. Black, J. P., at Lislap, Omagh, County Tyrone, Ireland; and the fact of Black being a justice of the peace is properly certified to by the American consul for Londonderry. The respondent, after the receipt of this deed, to wit, on April 21, 1870, sent a letter to his father stating that the deed could not be recorded, whereas, as a matter of fact, it had, three days prior to that time, been duly recorded at the request of respondent. The letter explained the imperfect acknowledgment, and the necessity of having the particular acknowledgment of deeds executed outside of California, as required by the statute. This letter mentions, at great length, the difficulties under which respondent was laboring to raise ready money, and states that his father ought to be happy "if I'm able to pay you more than a stranger now for your share, and keep the estate together"; that the ratio is a fair one; that if the writer had not been in this country, not a dollar would have reached Ireland; that, to quote his language, "had I done anything wrong or wanted to defraud one, any or the other, those false friends of mine would expose it. How easy was it not for me to have a will made giving me all I wanted, and which I was advised to do; but, for sake of home, I did not do so, because, had a will been made, Ballinamore would get but little." There is a lengthy and detailed statement as to what the writer could afford to pay the father for his fourth interest, how the property is incumbered, the amount of the debts, interest due, etc., and closes as follows:

"And if I did get the estate a few thousand cheaper than some Jew or speculator, who has a better right? And when I give the full price, I think you ought to be proud and happy I am able to keep it out of passing into strangers' hands, perhaps at a sacrifice. I'm sorry you wrote this Father Gallagher, the sharpest speculator of all. He wanted my aunt's power of attorney to make me pay him heavy commissions; but he is out now. * * * Have I not need to pray to the Almighty God to extricate me out of my great difficulties? Again I earnestly crave your immediate attention to having those two deeds of my aunts properly executed, and register the letter to me."

On July 30, 1869, the aunts executed the second deed, confirmatory of the prior deed, signing it in the presence of Jeremiah O'Donnell, who signed as a witness thereto. The acknowledgment to this deed was made by him, in the usual form of a subscribing witness, before the American consul at Londonderry, Ireland, on the 10th of August, 1870, and the deed was duly recorded in the office of the recorder in San Francisco, on the 20th of October, 1870. On September 21, 1871, the probate court, in the estate of Hugh O'Donnell, made an order appointing an attorney to represent the absent heirs. Jeremiah O'Donnell died in 1872, and in 1873 the respondent visited his aunts in Ireland, and then claimed to be the sole owner of three-fourths of the estate of Hugh O'Donnell. On May 1, 1876, the Hibernia Savings & Loan Society commenced a suit to foreclose its mortgage, and on February 27, 1877, a decree of foreclosure was regularly made and entered therein. The other proceedings thereafter had in said suit may be briefly stated. The property was sold by the sheriff, and a certificate of sale was given

to James McDevitt, who paid no money therefor. On May 7, 1877, McDevitt assigned this certificate to the Hibernia Savings & Loan Society. On December 15, 1877, a sheriff's deed was executed in pursuance of the proceedings, and delivered to said banking society. On January 17, 1878, the Hibernia Savings & Loan Society executed a deed of the property, described in the certificate of sale, to James McDevitt, and on the next day he executed a mortgage to the bank for the purchase money. On November 11, 1879, a decree of final distribution in the estate of Hugh O'Donnell was regularly made and entered in the probate court, giving to respondent three-fourths of said estate, and to Margaret McGonigle one-fourth. On October 30, 1880, James McDevitt deeded the property which had been conveyed to him to the respondent. Mary Gallagher died in 1882. Margaret McGonigle died in 1888. The original bill of complaint was filed December 1, 1890. Catherine O'Donnell died March 12, 1892. Several demurrers to the original and amended bills filed by complainants were sustained. The bill of revivor was filed November 13, 1893.

Upon the facts, complainants' contention is that there was a gross inadequacy of consideration for the deeds; that the respondent, being a man of education, experience, and shrewd business habits, was regarded by his aunts as worthy of their confidence; that they had implicit faith in his justice and honesty of purpose towards themselves; that they accepted without inquiry all representations made by him concerning the estate, as true; that he constituted his father, by the correspondence between them, as his agent to convey his representations concerning the estate to the aunts; that, by virtue of his appointment as administrator of the estate, he became, and was, the trustee of the heirs of said estate; that, pretending to discharge the duties of his trust as such administrator, he did, knowingly, dishonestly, and fraudulently, and in direct violation of his duties and obligations as such trustee, procure from his aunts the deeds of their interests in said estate, upon false representations that the property of the estate was in danger of being lost, and that it was necessary to have said deeds to enable him to resist the threatened litigation against the estate; that the money paid to them for the execution of their deeds was represented by respondent as being a portion of the estate due to them; that neither of them ever understood that any part of said money was paid from the private funds of respondent; that all of respondent's dealings with them concerning the estate were deceptive and fraudulent, and were carried on with the object and purpose of defrauding them of their just rights; that his letters were so written, and couched in such language, as to wholy allay their fears, by appealing to their religious faith and close relationship with respondent; that, while pretending to be frank, open, and fair, he concealed from them the true condition of affairs, etc. From the statement of facts, it will readily be seen that the ground floor upon which complainants' rights are based is primarily founded upon the two letters written by respondent to his aunts. The letters written by respondent to his father, not referred to in the statement of facts, were written after

the execution of the confirmatory deed by the aunts, and anything therein contained could not be said to have in any manner influenced their action in the execution of said deeds. Moreover, the answer specifically denies the averment in the bill that Jeremiah O'Donnell was appointed the agent of respondent to negotiate with the aunts for the sale of their interest in the estate, and there is no proof in the record to sustain this averment. It is contended, on behalf of respondent, that there is nothing in either of the letters which was false. This, if true, would virtually constitute a complete defense to the suit; for, if the deeds from the aunts were executed with full knowledge of all the facts, without any false representations upon the part of the respondent, there would be no solid foundation upon which complainants could stand in a court of equity. Without stopping to closely analyze the contents of the letters, or to point out the statements therein made that were true, it is enough to say that some material facts were not stated. There was a detailed reference to the claims, just and unjust, against the estate, but no reference whatever to the rents and income from the property, which, within a year, amounted to as much as was paid to the aunts for their interest in the estate. There were no forged wills. The difficulties in preserving the estate from unjust claims and keeping it out of the hands of the public administrator, while not untrue, were greatly magnified.

Assuming, therefore, that the aunts could have maintained their suit, upon its merits, if it had been brought within a reasonable time, the question arises whether they have not lost their rights by laches and lapse of time after acquiring knowledge, or having the means to obtain knowledge, of the true state of the facts. The office of trustee is important to the community at large, as well as to the parties immediately interested, and is especially so to parties who are, from any cause, unable to care for themselves. It is naturally one, in all cases, of great confidence. The law wisely and justly regards every person holding such a position with jealous scrutiny, and denounces in severe terms even the slightest attempt to pervert his position, duties, and powers for his own interest, profit, or benefit. As a general rule, mere lapse of time is no bar to the enforcement of a trust clearly established; and, where fraud is imputed and clearly proved, length of time ought not, of itself, to exclude relief. Prevost v. Gratz, 6 Wheat. 481, 497; Michoud v. Girod, 4 How. 503, 560; Lewis v. Hawkins, 23 Wall. 119, 126; Railroad Co. v. Durant, 95 U. S. 576. This rule is in accordance with the reason upon which it is founded, and is subject to many qualifications, which are as well established as the rule itself. For instance, time begins to run against a trust as soon as it is openly disavowed by the trustee, by insisting upon an adverse right and interest which is clearly and unequivocally made known to the cestui que trust. Unless there has been a fraudulent concealment of the cause of action, and the complainants have remained in ignorance of their rights, lapse of time is as complete a bar in suits of equity as in actions at law. Elmendorf v. Taylor, 10 Wheat. 168; Badger v. Badger, 2 Wall. 87; Speidel v. Henrici, 120 U. S. 377, 386, 7 Sup. Ct.

610. Every case must necessarily be decided in accordance with its own particular circumstances, after taking into consideration all of the elements which, in any manner, affect the question. If it could be said in this case, as it was in Michoud v. Girod, supra, that the court could only see in the conduct of the complainants "the fears and forbearance of dependent relatives, far distant from the scene of the transactions of which they complain, desirous of having what was due to them, and suspecting it had been withheld, but unwilling to believe that they had been wronged" by their nephew, in whom they reposed confidence, there would be no difficulty in declaring, as was done in that case, that complainants had not lost their rights "by negligence, or by the lapse of time." It is unquestionably true that the relationship of the parties always has an important bearing on the question of laches, and that delay under such circumstances is not as strictly regarded by the courts as in cases where the parties are strangers to each other. Paschall v. Hinderer, 28 Ohio St. 568; 2 Story, Eq. Jur. § 1520. But if the delay is of so great a time as to destroy evidence, it may and will, even in cases of close relationship, be such as to require a court of equity to refuse relief. Haff v. Jenney, 54 Mich. 513, 20 N. W. 563. The nonresidence of the complainants, while a proper matter for consideration in the determination of the facts, does not of itself excuse a want of diligence upon their part in endeavoring to ascertain and enforce their rights. Broderick's Will Case, 21 Wall. 519; San Jacinto Tin Co. Case, 7 Sawy. 433, 9 Fed. 726; Teall v. Slaven, 14 Sawy. 364, 370, 40 Fed. 774. But in this case, independent of the relationship of the parties and the nonresidence of the complainants, it affirmatively appears from the evidence that the aunts, pending the negotiations between the respondent and themselves for their interests in the estate, did not confide in the representations and statements made by respondent, as claimed in the bill of complaint; but, on the contrary, they had two agents to look after their interests in said estate, in whom they especially confided. Both were priests,—one, Father Hugh Gallagher, residing in San Francisco, the other, Father McGroarty, in Ireland. Both are now dead. In answer to certain cross interrogatories propounded to her, Catherine O'Donnell said, with reference to one of the letters she received: "When I saw this letter, I found that Roger O'Donnell was not, in my opinion, intending to [do] right by me." She also testified that "Father John McGroarty, who lived in Killygonden, held the money that was to be paid for the deed. * * * I was paid £524 by Bernard Martin, shop assistant to William McGroarty, brother of Father McGroarty. * * * Father McGroarty first received £300 to offer to us, but we refused it. Afterwards the offer was increased to £524. I was acquainted with Father Hugh Gallagher. I had one letter from him in regard to the estate of Hugh O'Donnell. I wrote to him in answer, and sent him a power of attorney to act for me in looking after my interest in said estate." After these negotiations as to the price to be paid, the aunts received and accepted the sum of $5,235 for the execution of of a deed of their interest in the estate. Some months after the

execution of the first deed, owing to defects in the acknowledgment thereof, they executed a second deed. There is no denial of the signing of these deeds; but it is claimed by counsel for complainants that the aunts were at the time totally ignorant of the true character of the documents they signed, and that they supposed them to be only powers of attorney authorizing the respondent to act as administrator, so as to defeat the application of the public administrator. Catherine O'Donnell, after stating in her deposition that she did not know William F. Black, the justice of the peace who took the acknowledgment to the first deed, and was never at his office, said:

"I signed a paper at Raphal, County of Donegal, in Mr. Wilson's office, as also did Mary Gallagher; but Jeremiah O'Donnell was not present. I do not recollect who advised us to sign. I only signed the papers altogether. The first I was made to believe was a power of attorney to Roger O'Donnell; but, from something I afterwards heard, I signed the second paper, recalling the first. Jeremiah O'Donnell told Mary Gallagher and myself that if we did not sign the first paper, giving power of attorney to Roger O'Donnell, we would get nothing."

This testimony is not clear. It is, in several respects, confusing and uncertain in its character. The aunts were not wholly uneducated. Both could read, and one, at least, could write. They knew something about business. They did not trust their nephew. They relied upon the priests,—confided in and consulted with them about accepting the price offered by the respondent. They agreed upon the amount, accepted the money, and then executed the deeds. That a power of attorney was signed by them, at some stage of the transactions, seems probable and reasonable, as it was asked for in the first letter written by the respondent, in order to enable him to defeat the application of the public administrator that was likely to be—and was, thereafter—made to the probate court for letters of administration; but no money was offered for the execution of any power of attorney, and it seems unreasonable to believe that the aunts would have demanded any money for the execution of such a power of attorney. The reference made by the respondent, in the second letter, to "papers," evidently referred to the deeds, because at the time this letter was written he had already received letters of administration from the court, and no power of attorney was then necessary to enable him to act. In the light of all the facts, it seems improbable that the aunts could, at the time of the execution of the instruments, have thought that either one of the deeds which they signed was only a power of attorney. It is more natural and reasonable to believe that, owing to the great lapse of time, the recollection of the witness is rendered somewhat uncertain as to the real character of the papers she had signed, and of the time, place, and manner of their execution. But, be that as it may, it further affirmatively appears that, if the aunts did sign the deeds in ignorance as to their true character, they afterwards became aware that the respondent claimed the property as his own. In 1873 —more than two years after the execution of the second deed—the respondent visited his aunts in Ireland, and, in conversations with

them, claimed to be the owner of three-fourths of the estate. Catherine O'Donnell testifies, in regard to his visit:

"He remained in Ireland over a year. I saw him frequently during his stay. He lived around among friends, and was occasionally at my house. There was nothing particular took place between myself and Mary Gallagher. Roger O'Donnell seemed to be glad in his idea that he was the sole owner of Hugh O'Donnell's estate."

It thus appears that the aunts had notice in 1873 that respondent was claiming interests in the estate adverse to them. The law does not require actual knowledge of all the facts. If the aunts failed, or omitted, to obtain knowledge, when it was obtainable after notice, or the circumstances were such as would reasonably have induced an inquiry and an effort to obtain full knowledge, it is sufficient to hold the parties guilty of laches in exercising reasonable diligence to enforce their rights; because "the possession of such means of knowledge is, in equity, the same as knowledge itself." New Albany v. Burke, 11 Wall. 96, 107; Bowman v. Wathen, 1 How. 189; Wood v. Carpenter, 101 U. S. 139; Teall v. Slaven, supra; Sedlak v. Sedlak, 14 Or. 540, 13 Pac. 452. In 2 Pom. Eq. Jur. § 965, the author, in announcing the general principles applicable to acquiescence and lapse of time, among other things, said:

"When a party, with full knowledge, or at least with sufficient notice or means of knowledge, of his rights, and of all the material facts, freely does what amounts to a recognition of the transaction as existing, or acts in a manner inconsistent with its repudiation, or lies by for a considerable time and knowingly permits the other party to deal with the subject-matter under the belief that the transaction has been recognized, or freely abstains for a considerable length of time from impeaching it, so that the other party is thereby reasonably induced to suppose that it is recognized, there is acquiescence, and the transaction, although originally impeachable, becomes unimpeachable in equity."

Numerous authorities are cited in support of this text, and the cases of Gresley v. Mousley, 4 De Gex & J. 78, Baker v. Bradley, 7 De Gex, M. & G. 597, and Michoud v. Girod, 4 How. 503, 561, which are cited and specially relied upon by complainants, are referred to as "remarkable instances of relief given after a considerable lapse of time." These cases, however, as before intimated, are essentially different in their facts from the present case.

The failure of complainants to specifically state and prove the impediments, if any existed, to an earlier prosecution of the suit, is another reason, often assigned by the courts, why the relief asked for should be denied. Badger v. Badger, 2 Wall. 87; Sullivan v. Railroad Co., 94 U. S. 806; Godden v. Kimmell, 99 U. S. 211; Lansdale v. Smith, 106 U. S. 394, 1 Sup. Ct. 350. It was 20 years after the execution of the deeds before the original bill herein was filed,—17 years after the original complainants had knowledge that respondent claimed the property adversely to them, and 11 years after the final decree of distribution of the property of the estate. Length of time necessarily obscures, or tends to obscure, all human evidence, and very often removes from the parties the means of verifying and making certain the exact nature of all the original transactions. These things are said to operate, by way of presumption,

in favor of innocence and against the imputations of fraud. It is unreasonable, after such a great length of time, to require positive proof of all the minute circumstances of any transaction, or to expect a satisfactory explanation of every difficulty, real or apparent, with which it may be incumbered. The most that courts can expect, if the parties are all living, owing to the frailty of memory and human infirmity, is that the material facts can be given with certainty to a common intent. But, if some of the parties and many of the witnesses are dead, as is the case here, the most that can ordinarily be expected is to arrive at probabilities, and substitute general presumptions of law for actual knowledge. It therefore follows that, in all such cases, fraud and wrongdoing ought not to be imputed to the living, unless the evidence of fraud upon one side, and lack of knowledge, or means of knowledge, upon the other side, are made clear beyond a reasonable doubt. U. S. v. Beebee, 17 Fed. 37; Hinchman v. Kelley, 4 C. C. A. 189, 54 Fed. 63; Hammond v. Hopkins, 143 U. S. 224, 274, 12 Sup. Ct. 418. Having carefully examined all the facts and circumstances of this case, and duly considered the principles of law applicable thereto, my conclusion is that the defense of laches and lapse of time must be sustained.

The views already expressed are conclusive of the case, and render it unnecessary to consider the further question presented by the facts, whether the title of the respondent derived from the proceedings had in the probate court was of such a character as would, of itself, enable the respondent to defeat the suit as to the property therein involved. The respondent is entitled to a decree dismissing the bill, with costs.

NORTHERN PAC. R. CO. et al. v. MUSSER SAUNTRY LAND, LOGGING & MANUF'G CO. et al.

(Circuit Court of Appeals, Seventh Circuit. July 9, 1895.)

No. 208.

1. PUBLIC LANDS—GRANTS TO RAILROADS—RESERVATIONS.

By act of July 2, 1864 (13 Stat. 365), congress granted to the N. P. Co., in aid of the construction of its railroad, "every alternate section of public land not mineral, designated by odd numbers * * * on each side of said railroad line * * * not reserved * * * or otherwise appropriated * * * 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." On July 6, 1882, the N. P. Co. filed a plat of the definite location of its line, within the state of Wisconsin, in the office of the commissioner, and in September, 1882, had completed such line. By act of June 3, 1856 (11 Stat. 20), congress had granted to the state of Wisconsin, in aid of the construction of a railroad, certain public lands in that state on each side of the road as it should be located, providing that if any lands within such grant had been sold or appropriated, other lands, within 15 miles from the road, might be selected by the state, subject to the approval of the secretary of the interior. The state bestowed this grant upon the S. C. Co. By act of May 5, 1864, congress made a further grant to the state in aid of the construction of such road, and provided that the indemnity lands might be selected within 20 miles from the line as definitely located. The state also bestowed this grant on the S. C. Co., which adopted a definite line, and notice of such bestowal and adoption was given to the secretary of the

interior. On February 28, 1866, the commissioner of the general land office directed the officers of the local land office to withhold the lands within the limits of such grants to the S. C. Co. from sale or location, and such lands were withdrawn accordingly, including certain lands more than 15 and less than 20 miles from the line of the S. C. Co., and within the place limits of the grant to the N. P. Co., as afterwards definitely fixed by the location of its line. The rights of the S. C. Co. afterwards passed to the C. & O. Co. which in 1882 completed the line, and in 1883 selected, as indemnity lands, part of the lands so withdrawn, within the limits of the grant to the N. P. Co. In 1885, the C. & O. Co. conveyed such lands to the M. Co. In 1889, it having been ascertained that the grant to the C. & O. Co. was satisfied without such lands, that company canceled its selection thereof. The M. Co. then made a cash entry of such lands, which was accepted, without regard to a protest made by the N. P. Co. *Held*, that the reservation of said lands by the land department excepted them from the operation of the grant to the N. P. Co., and that company acquired no right to them, either before or after the definite location of its line.

2. SAME—POWER OF LAND DEPARTMENT.

Held, further, that it was within the power, and was the duty, of the land department, even after the passage of the act of July 2, 1864, making the grant to the N. P. Co., to reserve for the benefit of the C. & O. Co. the lands necessary to satisfy the prior grant made to it.

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

This was a suit by the Northern Pacific Railroad Company and Thomas F. Oakes, Henry C. Payne, and Henry C. Rouse, its receivers, against the Musser Sauntry Land, Logging & Manufacturing Company and the Chicago, St. Paul, Minneapolis & Omaha Railway Company to quiet the complainants' title to certain lands. The circuit court sustained a demurrer to the bill. Complainants appeal. Affirmed.

The appellants, complainants below, claim title to the lands in controversy under the third section of an act of congress approved July 2, 1864, which, so far as it bears upon the questions involved, is as follows: "Sec. 3. And be it further enacted, that there be, and hereby is, granted to the Northern Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific Coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war and public stores, over the route of said line of railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof the United States have full title, not reserved, sold, granted or otherwise appropriated, and free from pre-emption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the commissioner of the general land office; and whenever prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the secretary of the interior, in alternate sections and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections: provided, that if said route shall be found upon the line of any other railroad route to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act: provided further, that the railroad company receiving the previous land grant may assign their interest to said Northern Pacific Railroad Company, or may consolidate, confederate, and associate with said company upon the terms

named in the first section of this act." 13 Stat. 367. The Northern Pacific Railroad Company, hereafter called the "Pacific Company," accepted this grant on December 29, 1864. On July 30, 1870, it fixed the general route of its road, extending through Wisconsin, within 20 miles of the lands in controversy. Thereafter it proceeded with the survey and location of its line, and on July 6, 1882, definitely fixed that portion of its line extending opposite these lands by filing a plat thereof in the office of the commissioner of the general land office. The lands in controversy are within the limits of the grant, as defined by the plat of definite location filed July 6, 1882. By September, 1882, the Pacific Company had completed the line of its road coterminous with these lands; and such line, having been examined by commissioners appointed for that purpose by the president, was reported by them to have been completed in a good, substantial, and workmanlike manner, as required by the act of congress; and thereafter, on September 16, 1882, the president approved said report, and ordered that patents for the lands earned by the construction of the road should be issued to the company. These facts show that the legal title to these lands is vested in the Pacific Company, if not within the exceptions enumerated in the granting act. Whether these lands are within any of these exceptions depends upon the following facts: By an act entitled "An act granting lands to the state of Wisconsin to aid in the construction of railroads in said state," approved June 3, 1856 (11 Stat. 20), congress granted to that state, for the purpose of aiding in the construction of a railroad from Madison or Columbus, by way of Portage City, to St. Croix river or lake, between townships 25 and 31, and thence to the west end of Lake Superior and to Bayfield, every alternate section of land designated by odd numbers, for six sections in width, on each side of said road. The act further provided that in case it should appear that the United States had, when the line of said road was definitely located, sold any sections or parts thereof granted as aforesaid, or that the right of pre-emption had attached to the same, then it should be lawful for any agent or agents to be appointed by the governor of the state to select, subject to the approval of the secretary of the interior, from the lands of the United States nearest to the tier of sections or parts of sections above specified, so much lands, in alternate sections or parts of sections, as should be equal to such lands as the United States had sold or otherwise appropriated, or to which the right of pre-emption had attached: provided that the lands so located should in no case be further than 15 miles from the road, and selected for and on account of such road. The state accepted this grant, and bestowed that portion of it which pertained to the line from the St. Croix river or lake to the west end of Lake Superior and to Bayfield upon the St. Croix & Lake Superior Railroad Company. On September 20, 1858, this company definitely located the line of its road between these points. The lands in controversy did not fall within either the place or indemnity limits as established under this grant. By an act approved May 5, 1864 (13 Stat. 66), entitled "An act granting lands to aid in the construction of certain railroads in the state of Wisconsin," it is provided: "Section 1. That there be and is hereby granted to the state of Wisconsin, for the purpose of aiding in the construction of a railroad from a point on the St. Croix river or lake, between townships twenty-five and thirty-one, to the west end of Lake Superior, and from some point on the line of said railroad, to be selected by said state, to Bayfield, every alternate section of public land, designated by odd numbers, for ten sections in width on each side of said road, deducting any and all lands that may have been granted to the state of Wisconsin for the same purpose, by the act of congress of June three, eighteen hundred and fifty-six, upon the same terms and conditions as are contained in the act granting lands to the state of Wisconsin, to aid in the construction of railroads in said state, approved June three, eighteen hundred and fifty-six. But in case it shall appear that the United States have, when the line or route of said road is definitely fixed, sold, reserved, or otherwise disposed of, any sections or parts thereof, granted as aforesaid, or that the right of pre-emption or homestead has attached to the same, then it shall be lawful for any agent or agents, to be appointed by said company, to select, subject to the approval of the secretary of the interior from the public lands of the United States nearest to the tier of sections above specified, as much land in alternate sections or parts

of sections, as shall be equal to such lands as the United States have sold or otherwise appropriated, or to which the right of pre-emption or homestead has attached as aforesaid, which lands (thus selected in lieu of those sold, and to which pre-emption or homestead right has attached as aforesaid, together with sections and parts of sections designated by odd numbers as aforesaid, and appropriated as aforesaid) shall be held by said state for the use and purpose aforesaid: provided, that the lands to be so located shall in no case be further than twenty miles from the line of the said roads, nor shall such selection or location be made in lieu of lands received under the said grant of June three, eighteen hundred and fifty-six, but such selection and location may be made for the benefit of said state, and for the purpose aforesaid, to supply any deficiency under the said grant of June third, eighteen hundred and fifty-six, should any such deficiency exist." The state accepted this act March 20, 1865, and on the same day conferred all the lands, rights, and privileges granted by the above section upon the St. Croix & Lake Superior Railroad Company. That company accepted the grant April 22, 1865, and, by a resolution of its executive committee, adopted the line as already located under the act of June 3, 1856, as the line of the road under the act of May 5, 1864. On May 5, 1865, copies of these resolutions, and of the act of the legislature of Wisconsin conferring this grant upon the St. Croix & Lake Superior Railroad Company, were filed with the secretary of the interior. On February 28, 1866, the commissioner of the general land office directed the register and receiver of the district land office to withhold the odd-numbered sections within 10 and 20 miles of said line, so fixed, from sale or location, pre-emption settlement, or homestead entry. This order was received and filed in the district land office on March 17, 1866.

The lands in controversy lie within the 20-mile limits of this withdrawal, but are more than 15 miles from the line as fixed. The St. Croix & Lake Superior Railroad Company having failed to construct said railroad, the grant to it was declared forfeited to the state. In February, 1882, the appellee the Chicago, St. Paul, Minneapolis & Omaha Railway Company, hereinafter called the "Omaha Company," succeeded, under the legislation of the state, to the rights of the St. Croix & Lake Superior Railroad Company; and during that year it completed the road past these lands and to the west end of Lake Superior. On May 12, 1883, and June 14, 1883, one W. H. Phipps, as agent for the Omaha Company, filed lists for selection of indemnity lands claimed as inuring to said company under said grant, including, among others, the lands in controversy. These selections were allowed by the officers of the district land office, but were never approved by the commissioner of the general land office nor by the secretary of the interior. The governor of the state caused patents for the lands in controversy, with other lands, to be issued to the Omaha Company. In 1885 and 1886 the Omaha Company executed deeds for these lands to the grantors of the Musser Sauntry Land, Logging & Manufacturing Company, which company acquired whatever interest in these lands was conveyed to the Omaha Company by the state. The secretary of the interior having completed the adjustment of the grants made by the acts of 1856 and 1864, it was ascertained in 1889 that these grants were satisfied without the lands in controversy; and on November 25, 1889, the Omaha Company relinquished these lands, with others, and requested that the attempted selection should be canceled, which cancellation was made in February, 1890. In November, 1889, the Musser Sauntry Company, having ascertained that these lands would not inure to the railroad company under the grant, applied to purchase the same, under the provisions of an act of congress approved March 3, 1887. The register and receiver of the district land office, disregarding the Pacific Company's protest, allowed the application, and accepted the cash tendered for the lands. In February, 1890, the secretary of the interior, in a ruling made in the course of the adjustment of the Omaha Company's grant, held that the indemnity lands, under the act of May 5, 1864, reserved by order of the commissioner of the general land office of February 28, 1866, were, by reason of such reservation, excepted from the operation of the grant to the Pacific Company in the act of July 2, 1864. On December 19, 1890, this ruling was reaffirmed, and is still in force. On March 5, 1891, in accordance with the rulings of the secretary of the interior, the Musser Sauntry Company made a new application to

purchase the lands in controversy, which was allowed; and on May 5, 1891, the Musser Sauntry Company was allowed to, and did, make a cash entry of these lands. The Pacific Company appealed from this allowance, but, on October 3, 1892, the commissioner of the general land office affirmed it, holding that these lands were excepted from the operation of the grant to the Pacific Company by the withdrawal order of 1866. To the complainants' bill setting out these facts, and praying that their title to these lands might be quieted, and that the defendants be enjoined from receiving or accepting patents therefor from the United States, and from cutting and removing the timber therefrom, the defendants interposed a demurrer, on the ground that the bill did not state a case entitling the complainants to any equitable relief. The demurrer was sustained, and, the complainants electing to stand upon their bill, a decree was entered dismissing the same for want of equity. From this decree the present appeal is prosecuted.

James McNaught and F. M. Dudley, for appellants.

Thomas Wilson, for appellees.

Before WOODS and JENKINS, Circuit Judges, and BAKER, District Judge.

After making the foregoing statement, the opinion of the court was delivered by BAKER, District Judge.

The lands in controversy are within the place limits of the Pacific Company's road. The title, therefore, passed to that company, if the lands were subject to the operation of the grant made by the third section of the act of July 2, 1864. The contention is that these lands were not subject to the operation of this grant, for the reason that they were withdrawn by the land department, in February, 1866, in order to satisfy the grant of indemnity lands made by the earlier acts of June 3, 1856, and May 5, 1864. These lands are within the indemnity, and not within the place, limits of the grant to the Omaha Company. The grant to the Pacific Company is of "every alternate section of public lands, * * * to the amount of twenty alternate sections per mile on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad, whenever it passes through any state, and whenever on the line thereof the United States have full title, not reserved, sold, granted or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the commissioner of the general land office; and whenever prior to said time any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof." The rule that a grant by congress does not operate upon lands theretofore lawfully reserved, for any purpose whatever, has too often been declared to be longer open to discussion. As was observed by the supreme court in the case of Railroad Co. v. Forsythe (decided June 3, 1895, and not yet officially reported) 15 Sup. Ct. 1020, "there can be no doubt as to this rule, or as to the fact that lands withdrawn from sale by the land department are considered as reserved within its terms." The lands in controversy within the indemnity limits of

the Omaha Company's road were not granted by the acts of 1856 or 1864. They were simply withdrawn from sale, pre-emption, or homestead entry by the action of the land department, in order that the beneficiary of the grant might, in case the full amount of lands granted was not found within the place limits, select therefrom enough to supply the deficiency. These lands, being within the indemnity limits of the Omaha Company, might be required to satisfy the earlier grant; but not being granted, they were still within the disposing power of congress. It has often been held that "until selection was made, the title remained in the government, subject to its disposal at its pleasure." Kansas Pac. R. Co. v. Atchison, T. & S. F. R. Co., 112 U. S. 414, 421, 5 Sup. Ct. 208; U. S. v. McLaughlin, 127 U. S. 428, 450, 455, 8 Sup. Ct. 1177; Wisconsin Cent. R. Co. v. Price Co., 133 U. S. 496, 511, 10 Sup. Ct. 341; U. S. v. Missouri, K. & T. Ry. Co., 141 U. S. 358, 374, 12 Sup. Ct. 13. It follows that, notwithstanding the grant in the acts of 1856 and 1864 to the Omaha Company, the title to the indemnity lands which might be required to supply the deficiency in its place limits remained in the government, and was subject to its disposal at its pleasure. The congress might, without any violation of the rights of the Omaha Company, have granted to the Pacific Company all the lands within the indemnity limits of the former company, if it had chosen to do so. It is insisted that, as such grant might have been made, the act of July 2, 1864, ought to be so construed as to deny to the land department the power to withdraw any lands which, upon the definite location of the line of the Pacific Company, might be found to be within its place limits, although such withdrawal was made in order to satisfy the claims of an earlier grant to indemnity lands. The grant in the act of July 2, 1864, is a grant in praesenti. Its language is, "that there be, and is hereby granted." The construction and effect of such words of grant have often been considered by the supreme court. In the case of St. Paul & P. R. Co. v. Northern Pac. R. Co., 139 U. S. 1, 5, 11 Sup. Ct. 389, Mr. Justice Field, speaking for the court, said:

"The language of the statute is, 'that there be, and hereby is granted' to the company every alternate section of the lands designated, which implies that the property itself is passed, not any special or limited interest in it. The words also import a transfer of a present title, not a promise to transfer one in the future. The route not being at the time determined, the grant was in the nature of a float, and the title did not attach to any specific sections until they were capable of identification; but, when once identified, the title attached to them as of the date of the grant, except as to such sections as were specifically reserved. It is in this sense that the grant is termed one in praesenti; that is to say, it is of that character as to all lands within the terms of the grant and not reserved from it at the time of the definite location of the route. This is the construction given to similar grants by this court, where the question has been often considered; indeed, it is so well settled as not to be open to discussion. Schulenberg v. Harriman, 21 Wall. 44, 60; Leavenworth, Lawrence, etc., R. Co. v. U. S., 92 U. S. 733; Missouri, Kansas, etc., Ry. Co. v. Kansas Pac. Ry. Co., 97 U. S. 491; Railroad Co. v. Baldwin, 103 U. S. 426."

The foregoing statement of the law was quoted and approved in the recent case of U. S. v. Southern Pac. R. Co., 146 U. S. 570, 593, 13 Sup. Ct. 152. The lands in controversy were reserved, at the

time of the definite location of the line of the Pacific Company, by an order of the land department made after the passage of the act of July 2, 1864. These lands, having been reserved, were excepted out of the grant as much as if, in a deed, they had been excluded from the conveyance by metes and bounds, provided the reservation was one which the land department had the power to make. The true question for decision is, did the land department have lawful authority to reserve, after the passage of the act of July 2, 1864, lands which on the definite location of the road were found to be within the place limits of the Pacific Company, in order to satisfy the claims of an earlier grant to indemnity lands? The act of July 2, 1864, contains no limitation in this regard on the power of the land department. By excepting out of the grant all lands reserved for any public use, it impliedly recognizes the power of the land department to make such reservations. There is no language in the act which denies or limits the authority of the land department to make reservations for public purposes at any time before the definite location of the line shall have been fixed. What lands ought to be reserved in order to satisfy the various acts of congress, must, in the nature of things, be left largely to the discretion of this department. It is said that it would lead to monstrous injustice if the land department were clothed with such power. We see no force in this suggestion. No injustice will be done to the Pacific Company by holding that the land department has authority to reserve enough of the public domain to satisfy all earlier grants. In our judgment, that department is invested with such authority. A reference to some of the cases will, we think, make this apparent. The case of Wolcott v. Des Moines Co., 5 Wall. 681, is a leading case, and one of the earliest in which the effect of a reservation by the land department was considered. On August 8, 1846, congress granted to the then territory, now state, of Iowa, for the purpose of aiding it to improve the navigation of the Des Moines river from its mouth to the Raccoon Fork, one equal moiety, in alternate sections, of the public lands, in a strip five miles in width on each side of said river. In 1856, congress made a grant of lands to the state of Iowa, in alternate sections, to aid in the construction of certain railroads, by which act it was provided, "that any and all lands heretofore reserved to the United States by any act of congress, or in any other manner by competent authority, for the purpose of aiding in any object whatsoever, be and the same are hereby reserved to the United States from the operation of this act." It was decided, in the case of Railroad Co. v. Litchfield, 23 How. 66, that the grant of August 8, 1846, did not extend above the mouth of the Raccoon Fork. Lands above the mouth of that fork had been reserved for the improvement of the navigation of the Des Moines river, first by the secretary of the treasury, and afterwards by the secretary of the interior. The lands the title to which was in controversy were situated above the mouth of the Raccoon Fork, and were within the place limits of the grant in aid of the railroads. It was contended that these lands had not been reserved by competent authority; that they were not within the limits of the

grant of August 8, 1846; and therefore that the railroad took the title to them under the latter grant. This contention was denied, the court observing:

"It has been argued that these lands had not been reserved by competent authority, and hence that the reservation was nugatory. As we have seen, they were reserved from sale for the specific purpose of aiding in the improvement of the Des Moines river, first by the secretary of the treasury, when the land department was under his supervision and control, and again by the secretary of the interior, after the establishment of this department, to which the duties were assigned, and afterwards continued by this department, under instructions from the president and cabinet. Besides, if this power was not competent, which we think it was ever since the establishment of the land department, and which has been exercised down to the present time, the grant of 8th August, 1846, carried along with it, by necessary implication, not only the power, but the duty, of the land office to reserve from sale the lands embraced in the grant. Otherwise, its object might be utterly defeated."

So the acts of 1856 and 1864, by necessary implication, carried not only the power, but the duty, of the land department, to reserve for the benefit of the Omaha Company the lands necessary to satisfy the grant made to it. In the case of Kansas Pac. Ry. Co. v. Dunmeyer, 113 U. S. 629, 5 Sup. Ct. 566, it was held that, where a homestead right had attached to a tract after the grant, and before the time of definite location of a railroad company's line, which homestead was afterwards abandoned, the tract was simply restored to the public domain, and did not pass to the railroad company under its grant; that the grant only attached to lands which were the subject of the grant at the time of definite location; and that the company had no interest in the question as to what afterwards became of a tract which was not public land at the time the grant became fixed. On page 644, 113 U. S., and page 566, 5 Sup. Ct., Mr. Justice Miller, in delivering the opinion of the court observed:

"The right of the homestead having attached to the land, it was excepted out of the grant as much as if, in a deed, it had been excluded from the conveyance by metes and bounds."

This doctrine was affirmed in Railroad Co. v. Whitney, 132 U. S. 357, 10 Sup. Ct. 112; Land Co. v. Griffey, 143 U. S. 32, 12 Sup. Ct. 362; Bardon v. Railroad Co., 145 U. S. 535, 12 Sup. Ct. 856. The supreme court has decided, in many cases, that the withdrawal by the land department operated to exclude from sale, purchase, or pre-emption all lands embraced in such withdrawal or reservation, and that it also operated to exclude from the grant to a railroad company all lands so withdrawn or reserved, for any public purpose or use, at the time of the definite location of its line. Bullard v. Railroad Co., 122 U. S. 167, 7 Sup. Ct. 1149; U. S. v. Des Moines Nav. & Ry. Co., 142 U. S. 510, 12 Sup. Ct. 308. In the case last cited it is said:

"The validity of this reservation was sustained in the case of Wolcott v. Des Moines Co., 5 Wall. 681. In that case it was held that, even in the absence of a command to that effect in the statute, it was the duty of the officers of the land department, immediately upon a grant being made by congress, to reserve from settlement and sale lands within the grant; and that, if there was dispute as to its extent, it was the duty to reserve all lands which,

upon either construction, might become necessary to make good the purposes of the grant. This ruling as to the power and duty of the officers of the land department has been followed in many cases."

In the case of Hamblin v. Land Co., 147 U. S. 531, 536, 13 Sup. Ct. 353, it is said:

"A reservation by the interior department, it is well settled, operates to withdraw the land from entry under the pre-emption or homestead laws;" citing Wolcott v. Des Moines Co., 5 Wall. 681; Wolsey v. Chapman, 101 U. S. 755; Bullard v. Railroad Co., 122 U. S. 167, 7 Sup. Ct. 1149; U. S. v. Des Moines Nav. & Ry. Co., 142 U. S. 510, 12 Sup. Ct. 308.

These cases, and others to the same effect, establish the principle that the land department is invested with authority to withdraw or reserve public lands from sale, entry, or grant for the purpose of devoting them to some public purpose or use, in pursuance of an act of congress; and that the withdrawal of such lands at any time before the title to the lands attach, under a grant, by the definite location of a railroad line, excludes them from the mass of public lands upon which a legislative grant will operate. The reason is obvious. Otherwise a later grant might operate to defeat or impair the effect of a prior grant. Whenever congress makes a grant of public land in aid of a public improvement, it is not to be supposed that it was within the legislative intent to defeat or impair the full effect of the prior grant, unless such purpose is manifested in plain and unambiguous terms. When public lands have been segregated from the common mass by an act of congress, or by an order of the land department withdrawing them from entry or sale, for the accomplishment of some specific public purpose, it has never been held that such lands were embraced within the operation of a grant in aid of the construction of a railroad, should the order of withdrawal afterwards from any cause be revoked. Lands so reserved or withdrawn at the time of the definite location of a railroad line are not embraced within the terms of the grant. The grant, though made prior to the reservation, does not attach to lands withdrawn to satisfy an earlier grant, for the reason that they are excluded therefrom by the clear and explicit language of the act of congress.

It is argued that the fundamental error in the decision of the court below is in overlooking the fact that the earlier grant to the Omaha Company passed no title to, and made no grant of, the indemnity lands. It is true that no title to the indemnity lands could vest in the Omaha Company until such lands were located and selected, and such location and selection had been approved by the land department. But the earlier grant, while conveying no title to the indemnity lands, operated as a covenant or promise by the government to convey those lands, which bound it in good faith to do no act which would defeat or impair such covenant or promise. So far as the Pacific Company is concerned, it has no just ground of complaint; for, in reserving these lands for the benefit of the earlier grant, the land department has simply done what the plighted faith of the government required it to do. While the right to these indemnity lands rested in covenant or contract, it

imposed on the government a strong moral obligation to cause such acts to be done as would protect the just expectations of the Omaha Company from disappointment. And although the grant to the Pacific Company was one operating in praesenti, still its title did not, and by the express terms of the statute could not, attach to any specific lands, until the line of its definite location was fixed,—and then only to public lands, not reserved or otherwise appropriated. The lands in controversy, at the time of the definite location of its line, were reserved by competent authority, for the benefit of an earlier grant, and hence were not embraced within the operation of the grant to the Pacific Company. We have carefully examined all the authorities cited by counsel for the appellants, and find nothing in conflict with the views here expressed. The conclusion reached makes it unnecessary to consider the other questions presented. There is no error in the decree, and it will be affirmed, at the cost of the appellants.

WALTERS et al. v. WESTERN & A. R. CO. (STEWART, Intervener).

(Circuit Court, N. D. Georgia. June 1, 1895.)

No. 358.

1. TAXATION—EXEMPTIONS.

The state of Georgia, being the owner of a railroad, leased the same to certain persons who were formed into a body corporate and granted immunity from taxation upon the property used for railroad purposes, except as to a tax of one-half of 1 per cent. on their net income. Upon the expiration of the lease, when the property was about to be surrendered back to the state, the assets of the company were placed in the hands of receivers, to wind up its affairs, who thereafter received and held considerable amounts of money and other property. *Held*, that the immunity from taxation ceased with the termination of the lease and expiration of the charter, and that the property in the receivers' hands was subject to taxation.

2. SAME—PENALTY—LACHES.

Held, further, that, as the receivers had made no return of the property in their hands, the taxing officers would not be held barred from enforcing their claim because it was not presented within a period fixed by the court for the presentation of claims against the receivers; but, as they had made no application for the payment of the tax, they would not be permitted to exact a penalty for delay in payment.

This was an intervening petition, filed by A. P. Stewart on behalf of the state of Georgia and county of Fulton, and by the city of Atlanta, in the cause of William T. Walters against the Western & Atlantic Railroad Company, to enforce the payment of certain taxes by the receivers appointed in that cause. The receivers demurred to the petition.

A. P. Stewart and L. S. Rosser, for intervener.
Anderson & Colville, for city of Atlanta.
Payne & Tye, for defendant.

NEWMAN, District Judge. Taxation is the rule, and immunity from taxation is the exception. It is governmental policy that all

property should bear its just proportion of the public burden. Acts of the legislature exempting property from taxation are strictly construed, as to the extent of the exemption, in favor of the government and against the exemption. The fact that property is in the hands of a receiver of a court does not exempt it from taxation. The foregoing well-recognized and fundamental rules are stated for the purpose of applying them to the following state of facts: The state of Georgia is the owner of the Western & Atlantic Railroad, a line of road extending from Atlanta to Chattanooga, Tenn. On the 24th day of October, 1870, the legislature of the state passed an act for the lease of this road, and providing for the incorporation of the lessees as a body politic, and granting them certain immunities and exemptions, among which were, as construed by the supreme court of the state, exemption from taxation, except as to a tax of one-half of 1 per cent. on their net income; the exemption to be confined, however, to property used for railroad purposes. The lease in pursuance of this act was executed on the 27th day of December, 1870, the lessees becoming a body corporate by the provisions of the act referred to, under the name of the Western & Atlantic Railroad Company. The road was operated by that company during the lease which, having expired on the 27th day of December, 1890, and the property about to be surrendered back to the state, on the application to this court, by certain shareholders, the assets of the company were placed in the hands of receivers, who were to hold such assets and wind up the affairs of the company for the benefit of the creditors and shareholders. The receivers have had in their hands considerable funds from time to time, but have not returned the same for taxation to the state, county, or city of Atlanta, in which city the office of the receivers is, and where the principal office of the Western & Atlantic Railroad Company was located. The state, county of Fulton, and city of Atlanta now bring their petition in this court and ask to be allowed to intervene in the equity cause to have the amount of the taxes due on the funds in the hands of the receivers ascertained, and pray an order requiring the receivers to pay the same. To this application demurrers have been filed by the receivers, and the question before the court is on these demurrers. The matter for determination is the liability of this property for taxes. The question raised by the demurrers, simply stated, is that, the Western & Atlantic Railroad Company having been exempt from taxation except on its net income, and there having been no net income since the expiration of the lease and its charter, these assets are not subject to taxation at all. It is urged that the state, having invited these lessees to take its property in charge and operate it, and having granted certain immunities in connection with the contract of lease, will not now be allowed, before this fund resulting from its operation can go into the hands of the shareholders, to subject it to taxation. The same contention applies, of course, to the county and city as subordinate to the state. Applying the well-settled rule that exemptions from taxation are strictly construed against the exemption, it is clear that the immunity granted in this instance ceased with the termination of the lease and the expiration of the charter. It would not be ex-

tended beyond its necessary terms. It is said, however, that where the state undertakes to enter into a contract in reference to property it descends from its position as a sovereign, and must be treated as an individual entering into a contract. The authorities cited in support of this view refer to exemptions granted where benefits are received by the state as consideration for the exemption. The lease of the Western & Atlantic Railroad Company was for what must have been treated as a fair rental value of the property, and the exemption from taxation was the same as that granted to the Central Railroad, the Georgia Railroad & Banking Company, and the Macon & Western Railroad, and simply places it on the same footing with other railroads in the state. The legislature does not seem to have intended to do more than to treat it like other railroad corporations. The lease of the property by the state as the owner thereof, and the terms and conditions of the same, was one thing, and as to that, doubtless, the state's act and its contract would be considered as that of an individual. The exemption from taxation, however, was not the act of the state in its capacity as owner of the property, but in its capacity as a sovereign, and no good reason is perceived, under the facts of this case, why the exemption should have a different construction than that of any other tax exemption. Especially is this true when the extent of the exemption was the same as that allowed to several other railroad corporations. Construed in this way, it appears that the period for which the exemption was granted is ended. There is no net income so that the tax of one-half of 1 per cent. can be collected from that source, and no good reason is perceived why the property is not subject to taxation like any other property in the state. Certain statutes of the state, as contained in the Code of Georgia, have been cited in argument. Section 799 is as follows:

"All real and personal estate, whether owned by individuals or corporations, resident or nonresident, are liable to taxation, unless specially exempted."

Section 803 is in this language:

"Lands or other property belonging to citizens of the United States non resident of this state, can not be taxed higher than the property of residents, but all the property of such non residents, whether their property be real or personal, in this state, must pay taxes on the same herein."

This property, if it is subject to taxation at all, must be taxed as a lump sum in the hands of the receivers. It is not a question, such as has been argued, of the taxation of intangible shares in a corporation at the residence of the stockholder, but the question in issue, according to these petitions, is of the taxation of material, visible property. It is, to a large extent, actual money, as alleged, held by the receivers in the state, county, and city claiming the tax. It is not different from any other property in the hands of receivers of court, which all the authorities agree is subject to taxation in the locality where it is held by these officers of court. In my opinion, these receivers should have returned this property for taxation to the state, county, and city; and, having failed to do so, the court will require them to pay such amount as should have

been paid at the proper time. On the 26th day of May, 1893, the court passed an order with reference to the filing of claims against the Western & Atlantic Railroad Company, as follows:

"It being made to appear to the court that this cause has been pending in this court since the 20th day of December, 1890, and all parties having claims against the defendant have had since then to file the same, and it being desirable to end the litigation and distribute the assets as early as possible, it is, upon motion of complainant's solicitor, ordered, adjudged, and decreed that all persons having claims or demands against the late the Western & Atlantic Railroad Company, defendant in said cause, intervene in said cause and file a full and complete statement of their said claims or demands on or before the rules day in August, 1893, so that the same may be heard and adjudged. It is further ordered, adjudged, and decreed that all claims or demands not made as provided herein be and the same are barred from participating in any part of the assets of said the late the Western & Atlantic Railroad Company. It is further ordered, adjudged, and decreed that the receivers in said cause cause notice to be published for a period of sixty days prior to said rules day in August in some one of the daily papers published in the city of Atlanta."

It is contended that, under the terms of this order, these claims for taxes are presented too late. It may be true that the officers charged with their collection have not been as diligent as they might have been in presenting their claims for the same to the court, yet it is equally true that under the view entertained by the court these receivers should have returned the property for taxation, or at least have asked the direction of the court in respect to it. Officers charged with the collection of the state and municipal revenue must depend, to a large extent, upon those whose duty it is to make return of the same. Especially is this true as to the kind of property in the hands of these receivers. These petitions will be entertained, therefore, and the amount of tax due by the receivers on the assets in their hands determined. The court will not, however, entertain these claims for double taxation. The petitions set out that, under the law, persons failing to return their property for taxation in a certain time are subject to double taxation. If the attention of the court had been called to this matter by proper petition it would have been disposed of long ago, and there can be no possible ground, on a petition presented at this late date, to ask for a penalty against these receivers.

An answer has been filed in this case for the complainants in the bill, by their solicitor, which it is unnecessary to consider at present, as the case is now heard on demurrer filed by the receivers to the petitions. It does raise questions of fact which will be important for consideration hereafter as to the extent to which the assets can be taxed. This legal question is raised by the answer, that the funds in the hands of the receivers is net income, and that the net income has already paid its tax from year to year, and should not be subject to additional taxation. This position appears untenable. The company was subject to a tax of one-half of 1 per cent. on its net income during the lease. The lease expired in 1890, and this property has been held during these years in the hands of the receivers, as has been stated, and it seems to be true that it is net income or profit, as claimed, arising from the operation of the railroad by the company; but it comes back to the same question

at last,—that it is property in the hands of receivers of court, as to which there is no exemption if the exemption it had, strictly construed, ended with the lease. The facts of this case are so peculiar and unusual that the decisions which have been cited have been of little use in determining it. It is left after all to be controlled by the general principles stated in the beginning of this opinion. The case has been held up for some time, and doubts have been entertained as to the correct solution of the matter, but if this condition of mind still existed it would not justify the court in deciding against the right to taxation. The existence of the exemption, under all the authorities, must appear beyond a reasonable doubt, to justify its allowance. An extract from the opinion of the court in the case of Bank v. Tennessee, 104 U. S. 493, expresses the well-settled rule on this subject in this way:

"That statutes imposing restrictions upon the taxing power of the state, except so far as they tend to secure uniformity and equality of assessment, are to be strictly construed, is a familiar rule. Against the power nothing is to be taken by inference and presumption. Where a doubt arises as to the existence of the restriction, it is to be decided in favor of the state."

It certainly cannot be said that the right of this property in the hands of the receivers to be exempt from taxation is free from doubt. The conclusion is that the assets in the hands of these receivers are subject to taxation, but not to double taxation or penalty, and that the order of May 26, 1893, will not be enforced as against these claims. The demurrer will be overruled except as to the claim of double tax.

NATIONAL FOUNDRY & PIPE WORKS, Limited, v. OCONTO WATER CO. et al.

(District Court, E. D. Wisconsin. July 17, 1895.)

1. JUDGMENTS—PRIVIES—STOCKHOLDERS IN CORPORATION.
   Persons who, at the time of the commencement of a suit against a corporation and the rendition of judgment therein, hold, as collateral security, stock in such corporation, which has been transferred to them on the books of the corporation, and who participate actively in the management of such corporation, are so far stockholders as to be privies to the judgment, and estopped to attack it in a collateral proceeding.

2. FEDERAL COURTS—FOLLOWING STATE DECISIONS—CHANGE OF RULING.
   When a federal court has made a decision respecting the rights of parties before it in particular property, based on the rulings of the highest court of a state as to the interpretation of a statute of such state, and the state court afterwards reverses its ruling, it is not the duty of the federal court to reverse its decision as to the rights of the parties in the same property in proceedings subsequently arising.

3. CORPORATIONS — RATIFICATION OF UNAUTHORIZED ACTS — RIGHTS OF THIRD PARTIES.
   An instrument claimed to be a mortgage was executed on September 13th by officers of a corporation, without authority of the board of directors and without the corporate seal. It was not delivered on that day, but on September 15th was placed with a bank which, on that or the next day, made an advance of money. On September 15th a mechanic's lien accrued on the property alleged to be covered by such mortgage. On October 29th the mortgage was ratified by the directors and stockholders of the cor-

poration, and a formal instrument executed under the corporate seal, antedated to September 13th. *Held*, that such mortgage could not operate to create a lien superior to the mechanic's lien accruing before the ratification.

4. SAME—LIABILITY OF STOCKHOLDERS.

A corporation was organized in July, 1890, and its stock subscribed but not paid for. In September the corporation agreed with A. and W. that its entire stock should be transferred to them as collateral security for moneys to be advanced. On October 2d certificates of stock were issued to the subscribers, and immediately transferred by them in blank to A. and W. Soon after, upon request of A. and W., these certificates were surrendered and new ones issued to A. and W. in their own names, for which they gave receipts to the original subscribers stating that such stock was held by them as collateral for moneys to be advanced. A. and W. also subsequently caused the stubs of their certificates to be indorsed with memoranda that the shares were held as collateral. In January, 1891, the original subscribers assigned all their interest in the stock and in the company to dummies nominated by A. and W., and were thereupon released from liability as indorsers on notes given to A. and W. for advances to the corporation, which was thereafter actually managed and controlled by A. and W. *Held*, that A. and W. became by these transactions the absolute owners of the stock, and liable for the amounts unpaid thereon to the extent necessary to discharge the indebtedness of the corporation.

Miller, Noyes, Miller & Wahl, for complainant.
W. H. Webster, for defendants.

JENKINS, Circuit Judge. I have given due consideration to the evidence and the able arguments submitted at the hearing. I deem it essential only to state as briefly as may be the conclusions to which I have arrived, without stopping to elaborate the reasons compelling thereto.

First. I cannot doubt that Andrews and Whitcomb are concluded by the mechanic's lien decree rendered October 3, 1892, against the Oconto Water Company, so far as the determination of the lien is concerned, if that decree ought now to be enforced,—a question subsequently considered. A judgment is conclusive against the parties and privies, unless impeached for fraud or want of jurisdiction. A stockholder of a corporation is so far a privy to a judgment against the corporation that he cannot attack the judgment in any collateral proceeding. Sanger v. Upton, 91 U. S. 56, 59; Graham v. Railroad Co., 118 U. S. 161, 177, 6 Sup. Ct. 1009; Hawkins v. Glenn, 131 U. S. 319, 329, 9 Sup. Ct. 739; Glenn v. Liggett, 135 U. S. 533, 542, 10 Sup. Ct. 867; Chicago & A. Bridge Co. v. Anglo-American Packing & Provision Co., 46 Fed. 584, 587; Bennett v. Glenn, 8 U. S. App. 419, 5 C. C. A. 353, 55 Fed. 956. Garland and Todd, who held $99,700 of the capital stock out of a total of $100,000 of capital, transferred their stock to Andrews and Whitcomb as collateral security. This stock was surrendered to the company and, at the request of Andrews and Whitcomb, new certificates for a like amount of stock were issued to them on the 18th day of October, 1890. Such stock has since stood and now stands in their names. The mechanic's lien suit was brought on the 30th day of January, 1891. At the commencement of and during the pendency of that suit, not only were Andrews and Whitcomb the holders of the stock standing in their

names on the books of the company, but they actually controlled the business of the corporation. As appears by the letter book of the company, offered in evidence, Mr. Andrews conducted the correspondence,—sometimes in his own name, sometimes in the name of the corporation. It is true they held this stock all this time as collateral security, but it is also true that they actually participated in, and in fact controlled, the policy and operations of the company at and after the commencement of the suit. The employment of counsel to defend that suit, if not actually authorized by them, could not, under the circumstances, have been unknown to them and unapproved by them. Counsel defending that suit was at the time, and since has been, the counsel of Andrews and Whitcomb. Holding the stock, although as collateral security, coupled with the active management of the affairs of the corporation, in my judgment, constitute them stockholders, so far as to conclude them by the judgment rendered against the company. They are not in a position to attack that judgment collaterally. The case of Hassall v. Wilcox, 130 U. S. 493, 9 Sup. Ct. 590, is not in conflict. That was a case of bondholders, not of stockholders. In such case no like privity exists upon which to rest the conclusiveness of the judgment.

Second. In National Foundry & Pipe Works v. Oconto Water Co., 52 Fed 43, affirmed, upon appeal, 7 C. C. A. 603, 59 Fed. 19, involving the mechanic's lien claim here asserted, this court held that under the law of Wisconsin a mechanic's lien existed for the materials furnished the Oconto Water Company in the construction of its plant. Since the affirmance of that decree by the circuit court of appeals, the supreme court of Wisconsin, in the case of Chapman Valve Manuf'g Co. v. Oconto Water Co., 60 N. W. 1004, with respect to the construction of the plant in question, has held that no mechanic's lien exists under the laws of Wisconsin for labor and supplies furnished a quasi public corporation furnishing water supply to the public. This decision reverses the former holdings of that court referred to in the opinion of this court reported in 52 Fed. 43, and in conformity to which holdings that decision was made, and changes the public policy of the state in respect to the application of the mechanic's lien law to a quasi public corporation. The question is therefore sharply presented whether this court should, in regard to this particular property, in respect to which it has determined that a lien exists, recede from its position in deference to the changed position of the supreme court of Wisconsin, and should follow its latest holdings. It is without question the duty of the federal court to avoid conflict with the well-settled decisions of the state courts, and they will lean towards an agreement of views if the question is balanced with doubt; but where, at the time of a decision by a federal court, there has been no settled construction by the supreme court of a state of a statute of that state, the duty is devolved upon the federal court to determine that question independently, and a federal court is not called upon in such a case to reverse its judgment in that case because the supreme court of the state has subsequently reached a different conclusion. It is much more the duty of a federal court to stand by its judgment when, as here, the decision of this court was

founded upon the construction placed by the supreme court of the state upon this very statute, applying it to public corporations by a series of decisions covering a period of nearly 30 years, declaring it to be the public policy of the state that the mechanic's lien law should extend to and include the property whether of public or private corporations, except property owned by a municipal subdivision of the state. Hill v. Railroad Co., 11 Wis. 215; Purtell v. Forge & Bolt Co., 74 Wis. 132, 42 N. W. 265. It cannot be doubted that these cases are in fact, although not in terms, overruled by the decisions referred to and by the principles asserted in Chicago, M. & St. P. Ry. Co. v. City of Milwaukee (Wis.) 62 N. W. 417, 419, 420. It is, of course, competent for the supreme court of the state to recede from its former rulings, and to establish a different policy for the state. It will doubtless be proper for this court, in any case hereafter arising, where rights have accrued subsequent to the last decision of the supreme court of the state upon the question, to give due consideration to the later rulings of that tribunal. But, with respect to the rights here involved, which had accrued before and had been determined by this court prior to these later decisions, I can only say in the language of the supreme court of the United States, that:

"It can hardly be contended that the federal court was to wait for the state courts to decide the merits of the controversy, and then simply register their decision, or that the judgment of the circuit court should be reversed merely because the state court has since adopted a different view. If we could see fair and reasonable ground to acquiesce in that view we should gladly do so, but in the exercise of that independent judgment which it is our duty to apply to the case, we are forced to a different conclusion." Burgess v. Seligman, 107 U. S. 20, 35, 2 Sup. Ct. 10.

I am therefore constrained to the conclusion that it is my duty in this case to adhere to my former decision, to the effect that the complainant and R. D. Wood & Co. were entitled to mechanics' liens upon this property.

Third. The instrument claimed to be a mortgage, under which Andrews and Whitcomb assert their right, is dated September 13, 1890, signed by Garland as president and Todd as secretary of the Oconto Water Company. Its execution was not authorized by the board of directors, nor was the instrument sealed with the seal of the company. It was not delivered on that day, but was placed with the bank on the 15th, on which or on the subsequent day an advance of money was made by the bank on a draft of Andrews and Whitcomb on Maine, which was paid by the latter some few days thereafter. The 15th of September was the date that the mechanic's lien accrued upon the property, as decreed in favor of the complainant and R. D. Wood & Co., although it appears from the stipulation filed that the first delivery of material to the Oconto Water Company was on the 8th of September. This instrument of mortgage, executed by Garland, was formally ratified at a meeting of the stockholders of the company on the 29th of October, 1890, and by the board of directors of the company on the same day, and at that time the formal contract or mortgage was executed by the officers of and under the seal of the company, but antedated to September 13th. Assuming this instrument to cover all the property of the company, it could not oper-

ate to create a superior lien as against creditors whose rights accrued prior to such ratification. It is said in Cook v. Tullis, 18 Wall. 332, 338:

"The general rule as to the effect of a ratification by one of the unauthorized act of another, respecting the property of the former, is well settled. The ratification operates upon the act ratified precisely as though authority to do the act had been previously given, except where the rights of third parties have intervened between the act and the ratification. The retroactive efficacy of the ratification is subject to this qualification: The intervening rights of third persons cannot be defeated by the ratification. In other words, it is essential that the party ratifying should be able, not merely to do the act ratified at the time the act was done, but also at the time the ratification was made."

See, also, Galloway v. Hamilton, 68 Wis. 651, 32 N. W. 636.

I therefore conclude that the liens of the complainant and of R. D. Wood & Co. are superior and paramount to any rights of Andrews and Whitcomb in the property, that their judgments are valid and effectual, and should be enforced.

Fourth. An interesting question to be determined is whether, under the circumstances disclosed by the evidence, Andrews and Whitcomb are liable to the creditors of the corporation as stockholders of the company. It is essential that the facts should be precisely stated, with a view to a correct application of the law to the case in hand. At the organization of the company in July, 1890, its entire capital stock was subscribed for as follows: By C. C. Garland, 990 shares; by F. H. Todd, 7 shares; by F. B. Barnes, J. W. McCabe and W. E. Krippene, 1 share each. Certificates of stock were issued to these parties, respectively, on the 1st and 2d days of October, 1890. It may be fairly said that none of this stock was actually paid for by parties subscribing, and that they were severally liable to the company and its creditors for the amount of their respective subscriptions. By the memorandum contract of the 13th day of September it was agreed by the company that the entire $100,000 of stock should be transferred to Andrews and Whitcomb as collateral security for the money to be advanced. On the 2d day of October, 1890, Garland sent to Andrews and Whitcomb the certificates issued to himself and to Todd, transferred in blank, and promised to remit the three certificates for one share each within a few days, unless Andrews and Whitcomb should prefer that they should be retained by Garland. On the 7th day of October Andrews and Whitcomb returned the certificates, requiring that the stock should be transferred to themselves upon the books of the company. On the 18th day of October, 1890, Garland surrendered those certificates, and the company issued certificates for 97 shares to Andrews and Whitcomb, and Garland forwarded the certificates to them. On the 22d day of October, 1890, Andrews and Whitcomb executed to Garland a receipt therefor, acknowledging the receipt from Garland individually of certificates representing 997 shares of the capital stock of the company, and stating that such stock was held as collateral to secure the payment of all moneys which may be advanced under contract, Exhibit A thereto attached, which contract was like the memorandum agreement of September 13th. On the 20th day of December, 1890, at the request of Andrews and

Whitcomb, the secretary of the company indorsed upon the appropriate stubs of the stock book memoranda that the shares of stock represented were owned by Garland, and issued to Andrews and Whitcomb merely as collateral. On January 12, 1891, Andrews and Whitcomb being dissatisfied with Garland's management of the company declined to arrange for the advance of any further funds unless his connection was severed, and it was arranged that Garland should resign as president and as director of the company and assign all of his interest in the stock and all his interest of every kind in the company to one George W. Sturtevant, in consideration of which Andrews and Whitcomb released Garland from liability as indorser upon the notes given them by the Oconto Water Company to the amount of $40,000 for so much money loaned the company. At the same time Wheeler, Elkins, and Todd, who had on October 15, 1890, respectively, become the transferees of the shares of stock issued to Barnes, McCabe, and Krippene of one share each, assigned their respective shares of stock as follows: Wheeler assigned to the defendant Whitcomb, Elkins assigned to S. W. Ford, and Todd assigned to the defendant Andrews. Neither Sturtevant nor Ford paid any consideration for the stock. They were mere dummies in the enterprise, acting in the interest of Andrews and Whitcomb, and the transfer was made to give the latter full control of the management of the corporation, which they thereafter exercised. By this transaction Andrews and Whitcomb became the absolute owners of the stock. The transfer to Sturtevant was not recorded upon the books of the company, although he appears by the minutes to have acted at the meetings as the holder of the 990 shares of stock, but in fact acted as the dummy and agent of Andrews and Whitcomb.

It has been repeatedly held that the transferee of stock who causes the transfer to be made to himself on the books of a corporation, although he holds it merely as collateral security for a debt of his transferer, is liable for unpaid balances thereon due to the company or to the creditors of the company. Pullman v. Upton, 96 U. S. 328; Bank v. Case, 99 U. S. 631; Sleeper v. Goodwin, 67 Wis. 592, 31 N. W. 335. But it is said here that the company itself pledged this stock to Andrews and Whitcomb for a debt by the company to them. It is true that by the agreement dated September 13th, the company undertook to make immediate transfer in trust to Andrews and Whitcomb of its entire capital stock as collateral. The true reading of that agreement, judged in the light of the subsequent conduct of the parties, is that the company agreed to procure the subscribers to transfer to Andrews and Whitcomb all the stock of the company. Andrews and Whitcomb took the stock, not from the company, but from the stock subscribers holding it. They required for their protection against the creditors of the stockholders an absolute transfer of the stock on the stock book of the company, but they were careful afterwards to have it recognized that they held that stock merely as collateral, and that Garland and Todd owned the stock subject to the debt for which it was pledged.

If the case rested here, there might be reason to uphold the con-

tention that the authorities cited, holding liability of the pledgee of the stock, are distinguishable from the case in hand. In those cases the pledgees received their stock directly from the stockholders, and as collateral to the debt due by the stockholders. Here the stock was caused to be transferred by the company as collateral to a liability of the company, the stockholders acquiescing to enable the company to keep its obligation. Creditors stand in the right of the corporation, and they can only enforce the obligation of the stockholder where the corporation could do so. This I think is the extent to which the case of Burgess v. Seligman, 107 U. S. 20, 2 Sup. Ct. 10, has gone. The whole discussion there was whether persons to whom a corporation pledges its stock as collateral were within the exemption of the statute of Missouri which provided that:

"No person holding stock in any such company as executor, administrator, guardian, or trustee, and no person holding such stock as collateral security, shall be personally subject to any liability as a stockholder of such company; but the person pledging such stock shall be considered as holding the same, and shall be liable as a stockholder accordingly, and the estate and funds in the hands of the executor, administrator, guardian, or trustee shall be liable, in like manner and to the same extent, as the testator or intestate, or the ward or person interested in such funds, would have been if he had been living and competent to act, and held the stock in his own name." 1 Wag. St. c. 37, art. 2, § 9.

The court held that the case was within the exemption of the statute, notwithstanding the supreme court of Missouri, after the decision of the case in the court below, had taken a contrary view. It will be observed that the statute there under consideration carefully provided that the liability to creditors should remain somewhere, and that the holder of the stock merely as collateral should not be held. There the corporation pledged its unissued and unsubscribed stock; here the company caused to be pledged stock issued to subscribers. There the corporation had no recourse to subscribers; here it had. One of the reasons assigned for holding the transferee of stock liable is "that the creditors of the bankrupt company are entitled to the whole capital of the bankrupt as a fund for the payment of the debts due them. This they cannot have if the transferee of the shares is not responsible for whatever remains unpaid upon his share, for by the transfer on the books of the corporation the former owner is discharged." Pullman v. Upton, supra. Here Garland and the other original owners of the stock had simply consented to the transfer of their stock as collateral. Under the Missouri statute they would be, in law, the owners of it, subject only to the equities of Andrews and Whitcomb, and would remain liable to the company for whatever was unpaid upon that stock, notwithstanding its transfer. By the transaction of January 12, 1891, Garland and the others conveyed their equitable interest in that stock in fact to Andrews and Whitcomb, although nominally to Sturtevant and others. The use of the names of Sturtevant and Todd was a mere makeshift, the whole purpose of the transaction being, in consideration of the release of Garland from his indorsement and of his resignation as president and director, to put absolutely in Andrews and Whitcomb the ownership of that stock. The transfer

was impressed with a secret trust in favor of Andrews and Whitcomb. A stockholder cannot escape liability by the use of the name of a dummy. Aultman's Appeal, 98 Pa. St. 505; Roman v. Fry, 5 J. J. Marsh. 634. That such was the transaction is manifest from the fact that Andrews and Whitcomb thereafter took actual management and control of the corporation. I think, therefore, that by that transaction they became the absolute owners of the stock, and with it took upon themselves the liability which the law imposes upon such owners, even if, as is not the case, a statute like that of the state of Missouri obtained in the state of Wisconsin.

In Pullman v. Upton, supra, it was asserted that, by the transfer upon the books of the corporation "the former owner is discharged." If this be correct, in the absence of any statute like that of Missouri, Garland and his co-subscribers were discharged from liability to stockholders upon transfer of their stock to Andrews and Whitcomb, and unless the latter be liable the recourse of creditors would be gone,—a result which the law would not favor. But, when Garland and Todd subsequently dispossessed themselves of all interest in the stock and property of the company, nominally to Sturtevant but actually to Andrews and Whitcomb, the latter became the absolute owners of the stock standing in their names upon the books of the company, and with such absolute ownership assumed the liability to creditors which the law imposes upon such ownership, if they were not primarily liable as holders of the stock as collateral security. I conclude, therefore, that Andrews and Whitcomb are liable for all unpaid amounts upon the stock standing in their name, so far as may be necessary to discharge the indebtedness of the company.

Fifth. I am of opinion that the instruments executed by the company to Andrews and Whitcomb were made in good faith and for a valuable consideration,—that they were not withheld from record by their procurement, nor with their consent, nor in fraud of creditors. I need not enter into discussion of the vexed question of what passed to Andrews and Whitcomb under these instruments, because the conclusions heretofore suggested furnish the complainant and the intervening creditors an adequate remedy, and render any decision of that subject unnecessary and perhaps unprofitable. I shall assume for the purposes of the decree that the instrument conveying the franchise also conveyed the plant.

Sixth. The bonds issued are, in accordance with the previous ruling upon a motion for injunction, and in accordance with the decision of the supreme court of the state, held to be void, and they should be delivered up to be canceled.

Seventh. I need not decide the question whether Andrews and Whitcomb are entitled in equity to any priority over the lien of the complainant and R. D. Wood & Co. by reason of their subsequent advances for the completion of the plant. That question passes out of the case upon the holding of their personal responsibility, and under the decree that must necessarily be entered upon the conclusions which I have reached.

THE SEGURANCA.

GUIMARAES et al. v. PROCEEDS OF THE SEGURANCA.

(District Court, S. D. New York. May 2, 1895.)

NONDELIVERY OF OIL CARGO—LEAKAGE—LIGHTERAGE—SHIPPER'S RISK — GOVERNMENT CUSTODY—CONSIGNEE'S LACHES — CUSTOM HOUSE REPORT NOT EVIDENCE.

Five thousand cases of oil were deliverable at Rio in lighters at shipper's risk; the local regulations required it to be put in the custody of customs officers till the duties were paid. The consignees, though duly notified of the ship's delivery in lighters to the customs authorities, delayed for nine weeks to pay the duties and take the oil ashore, and then claimed nondelivery of 1,132 cases, and loss and damage to other cases. The ship proved delivery into lighters and to the government officers of all the oil save 102 cases broken: *Held*, that the delivery to the officers in lighters was a good delivery, and that the ship was responsible only for loss by breakage and from leakage for a reasonable time in which to pay the duties and land the goods; that the custom house report of missing cases nine weeks after, was not competent evidence of nondelivery; and that upon the whole evidence a loss of 250 cases only was chargeable against the ship.

This was a libel by Zelmira de Castro Guimaraes, and others, against the proceeds of the steamship Seguranca, to recover for alleged loss and damage upon a consignment of oil in cases.

Cary & Whitridge and W. P. Butler, for petitioners.
Carter & Ledyard and E. L. Baylies, for mortgagee of steamer.

BROWN, District Judge. The above libel was filed against the proceeds of the steamer Seguranca deposited in the registry of this court, for the recovery of an alleged loss and damage of part of a consignment of 5,000 cases of oil shipped from New York to Rio on board the Seguranca in January, 1893. The claim is contested by the Atlantic Trust Company, a mortgagee of the vessel, which claims the proceeds in the registry.

The petition alleges the nondelivery of 1,132 cases out of the 5,000; that 1,005 other cases were damaged, so that a part of contents was lost; and that 209 cans were delivered without the wooden cases which should have inclosed them.

The steamer arrived at Rio in February, and owing to her draft of water, her cargo had to be discharged by lighters. The cases of oil being inflammable, were required, under the local authority, to be delivered at the government warehouses, unless at once removed and the duties paid. The twelfth clause of the bill of lading for the oil in question provided, that it should be "lightered ashore at shipper's risk, but at company's expense, provided it did not lie in lighters or hulks for longer than 48 hours after it is discharged into said lighters, and for demurrage thereafter." The oil was all discharged from the ship into lighters by the 24th of February; and there is general testimony on behalf of the ship from those who took part in the delivery, and superintended it, that all the oil was delivered into the lighters in accordance with the manifest, and that

only 102 cases were broken, and that some were so injured that the tin cans were sent without being inclosed in wooden cases.

The lighters were small boats, about 35 feet in length, which were towed by tugs procured by the steamer, and put in charge of the government customs officers at the Registro or Trepeche, as required by the local regulations for such cargo. No men were on board the lighters, either during transportation, or when left at the Registro or Trepeche; but the boats remained in sole charge and control of the government officers until the duties were paid and the goods landed. Before the discharge of the cargo, the petitioners, as well as other consignees of the cargo, had been notified by the officers of the vessel of the arrival of the ship, with the request that they should receive the goods at once. On February 28, a letter was sent by Mr. Burt, the ship's agent, to the petitioners, calling attention to the fact that the lighters were already on demurrage for their failure to unload. The oil was allowed to remain by the petitioners in the care of the customs authorities for about nine weeks until the 29th of April, when it was discharged from the lighters; and at that time, as is alleged by the petitioners, the loss and damage were as above stated.

1. I am of the opinion that the evidence in favor of the petitioners is not sufficient to show nondelivery of the 1,132 cases. Under the peculiar circumstances of this cargo, and the regulations and customs of the port of Rio, and the provisions of the bill of lading, I think the ship is responsible only for a good delivery into the lighters, and to the customs authorities. But aside from this consideration, and saying nothing of the interval of nine weeks which elapsed between the discharge of the cargo by the ship into the lighters, and the discharge on shore under the customs authorities, there is no competent legal evidence showing that there was any shortage in the number of cases finally delivered on shore, except the 102 cases above referred to. No witness for the petitioners is produced who tallied or counted the cases received. The testimony of Mr. Carregal rests entirely on an alleged account rendered by the customs authorities of the amount discharged on shore; while that account is not produced, and the customs officers, whose testimony was sought to be taken by commission, refused to testify. The testimony of Mr. Carregal, upon cross-examination, shows that his previous statements were hearsay only. The only count which the petitioners' clerk Doerzapff testified to, is a count of 209 empty tins, placed in a lot by themselves. As against the general testimony for the ship of a discharge, in good order, in accordance with the manifest, except 102 cases, the burden of proof to show shortage was on the petitioners.

2. As respects the 1,005 alleged to be damaged, Doerzapff testifies that "a count of them by weight by the customs authorities made of that lot 287 cases empty." Allowing this statement as evidence, it would show that the loss on the 1,005 cases was equivalent to a loss of 287 cases of oil, besides the 209 empty cans before referred to. These two items spoken of by Doerzapff would embrace the 102 cases (204 cans) referred to by the ship's officers.

If the ship, therefore, was responsible for the condition of the oil at the time when it was discharged from the custom house, the petitioners would be entitled to recover for 287 cases and 209 cans. But as the bill of lading expressly provided that the lighterage should be "at shipper's risk," and evidently contemplated the removal of the cases within two days after they were placed on the lighters, and as they were nevertheless suffered by the consignees to remain upon the lighters for upwards of nine weeks in open boats, some of the cases in a leaking condition, wholly exposed to the weather and to the corrosion of salt water and rain water, which Mr. Burt's testimony proves must have injuriously affected them, any loss or damage that may have been suffered through these causes during this extraordinary, and apparently inexcusable, delay by the consignees, cannot be charged upon the ship, since the latter had no control over the custody or delivery, and the exception of "lighterage at shipper's risk" must include all damage or loss while on the lighters without the ship's fault. As I have already said, so far as the direct testimony goes, there is no evidence that the cargo was delivered upon the lighters in a bad condition beyond the 102 cases, as testified to by the ship's officers; and beyond this, no fault on the ship's part is shown. Supposing that some of the cans were leaking at the time when put upon the lighters, still the extraordinary delay by the consignees in subsequently entering and receiving their goods was at their risk; and no continuance of leakage could be charged upon the ship after the lapse of a reasonable time for the petitioners to get the goods from the lighters through the custom house authorities. The evidence, as I understand it, shows that the ship had no power whatsoever over the final delivery; and under the terms of the bill of lading, therefore, the ship was not responsible for what happened upon the lighters from such delay, whether caused by the custom house authorities, or purely by the confessed inactivity of the petitioners themselves.

There are no definite data in the evidence for determining with precision how much of the loss of 287 cases of oil in quantity, should be charged to the ship, and how much to the petitioners' delay. Whatever damage was done on board of the steamer, or during the discharge into the lighters by the stevedore employed by the ship, must be charged against the steamer, as well also as such additional loss of oil as would arise after the discharge upon the lighters by leakage, through the previous damage to the cases until the lapse of a reasonable time for the receipt of the goods by the consignees from the custom house authorities. Upon the whole testimony, the best estimate and allowance I can make for the leakage and loss chargeable to the ship, is for 500 cans, i. e., 250 cases, the value of which was $1.25 per case, for which, with interest from April 29, 1893, the petitioners may enter a decree, with costs.

THE ROBERT HADDEN.

THE MATTIE NEWMAN.

MAYOR, ETC., OF CITY OF NEW YORK v. THE ROBERT HADDEN et al.

(District Court, S. D. New York. April 26, 1895.)

DAMAGES BY COLLISION—CITY VESSEL—ADVERTISED BIDS.

The city's vessel being damaged by collision, bids for the repairs were advertised for, as required by the state law, and the city accepted the one bid offered, and claimed that amount as the measure of damages. Upon a hearing before a commissioner, he found the actual damage to be much less than the amount paid under the accepted bid. *Held*, that the reasonable cost of the repairs was the rule of damages, and not the amount paid; especially, as there appeared to be negligence in the city officers in not procuring surveys on notice, as usual, nor ascertaining the probable damages before accepting the bid.

This was a libel by the mayor, etc., of the city of New York, against the steam tug Robert Hadden and the schooner Mattie Newman to recover damages resulting from a collision.

William H. Clark, Corp. Counsel, and James M. Ward, Asst. Corp. Counsel, for libelant.

Wing, Shoudy & Putnam and C. M. Hough, for the Robert Hadden.

Alexander & Ash, for the Mattie Newman.

BROWN, District Judge. The libelant's vessel, Havemeyer, having been damaged through the fault of the respondent's tug, the damages have been assessed by the commissioner, to whom it was referred, at the sum of $1,785, with interest. Exceptions have been taken to the report, because the commissioner allowed for the repairs of the Havemeyer a less sum than was paid by the city upon the contract awarded by it to the lowest bidder for doing the repairs, according to the law governing the city upon expenditures in excess of $1,000; and also because certain wages of the men on board the Havemeyer while she was laid up for repairs, were not allowed, nor any demurrage.

The commissioner, in his opinion, has carefully treated each of these claims, and I concur in the result at which he arrives. As respects the last two items, the evidence shows that the city has not sustained any pecuniary loss in these respects through the accident. As to the first item, the cost of repairs, the court, on the trial of the cause, admitted proof of the advertisement and award of the contract for doing the repairs pursuant to the law governing the corporation, and held them sufficient as prima facie evidence of the libelant's damage. Upon the reference before the commissioner various witnesses have been examined on this subject, and the weight of proof seems to me to sustain the commissioner's report, that the Havemeyer was damaged to the extent of $1,785 only, and not in the sum of $2,864, the amount of the single bid offered for doing the repairs, and which bid the city accepted, and paid. Assuming the actual damage to the Havemeyer to be the former sum only as the reasonable cost of doing the repairs, if in consequence of the law

governing the corporation the city was obliged to accept the single bid offered, although I do not understand that the city is ever bound to accept an excessive bid, still the additional amount paid, over a fair award for the damage actually inflicted, is not a loss occasioned by the act of the respondents, but a loss arising incidentally to the city through the contract system imposed on it by law. If that mode of securing work to be done for the city is deemed best for the city's interests in the long run, it cannot change the rule of law in admiralty causes, nor impose a rule of damages different from that which applies as regards all other suitors. In this case, moreover, there would seem to have been neglect in the city officers, in not procuring surveys on notice to the defendant as usual, and in not making the customary efforts to ascertain the probable actual damage before accepting the bid.

Exceptions overruled and report confirmed.

THE DORIAN.

MONTVET et al. v. THE DORIAN.

(District Court, S. D. New York. March 28, 1895.)

COLLISION—STEAM AND SAIL—OPPOSITE COURSES—CONTRADICTION AS TO LIGHTS—NEITHER STORY CREDIBLE—INATTENTION—BAD LOOKOUT—CHANGE OF COURSE—CLOSE SHAVING.

The schooner S. going west, and the steamer D. going east, in a clear night came in collision in Long Island Sound, N. W. from Eaton's Point light. Their proper courses were opposite, and the S. had a fair wind. Each charged the other with sheering to the south just before collision, when on courses to clear by 500 to 1,000 feet. The testimony as to the lights seen, and those exhibited to the other, was irreconcilable. The D. claimed that she turned to the south sufficiently to avoid collision when at a reasonable distance from the S. The master of the S. made a certain mistake in one particular as to his change of course, upon which fabrication of testimony was charged. Upon an analysis of the evidence as to the navigation, *held*: (1) That for some minutes before collision the vessels' courses were within one-half point of opposite, and nearly head and head; (2) that no attention was given to the schooner by the D. until less than a minute before collision, when she changed 1½ points more to the southward; (3) that the master of the schooner incorrectly located the S. on his starboard bow, from viewing her from the starboard side of his own vessel, and changed his course to the south at about the same time the D. changed; (4) that the S. was in fault for the latter change, and the D. in fault for inattention and bad lookout, and for not taking timely measures to avoid the S. by a reasonable margin; and the damages were divided.

This was a libel by John C. Montvet and others, owners of the schooner Clara E. Simpson, against the steamship Dorian, to recover damages resulting from a collision.

Carver & Blodgett and J. Langdon Ward, for libelants.
Wing, Putnam & Burlingham, for claimant.

BROWN, District Judge. At about 11 o'clock on the night of December 4, 1894, the libelants' schooner Clara E. Simpson, bound west through Long Island Sound, was sunk with all on board, in a

collision with the steamship Dorian, bound east. The collision occurred at a point about 2½ miles N. by W. from Eaton's Point light. The stem of the steamer struck the schooner's starboard side near the mizzen rigging, at an angle of from two to four points. The master and two others were rescued; the rest of the crew were drowned. The above libel was filed to recover damages for the loss of schooner, cargo, and personal effects.

Each vessel charges that the collision was caused by the fault of the other, through a sheer made to the southward shortly before collision. Each admits that a change of course was made to the southward; but each avers that her own change was so long prior to the collision as to be in no degree the cause of it.

The steamer's witnesses say that the schooner's red light was seen about two miles distant, a half point on their starboard bow; that the steamer's heading was then at once changed from E. ½ N., to E. by S. ¼ S., so as to bring the schooner's red light one point on the steamer's port bow; that the schooner at no time showed her green light, but only her red light, until a few moments before collision, when being only about 700 feet distant and two or three points on the steamer's port bow, she suddenly showed both lights and ran under the steamer's stem. The master of the schooner, on the contrary, who was in charge of her navigation, says, that at no time did the schooner show her red light to the steamer, but only her green light; that when the steamer was two or three miles distant, upon being reported by the lookout, he went to the forecastle head, and with his glasses made out both colored lights of the steamer a little on his starboard bow; that he remained there until the steamer shut in her red light, and showed her green light only, about a mile distant and considerably upon his starboard bow; that he then went aft, and that the steamer, when her green light bore about two or three points on his starboard bow, and being 400 or 500 yards distant, as he estimated, suddenly turned to the southward, showed both lights, and ran down upon him, as before stated.

Not only are these statements utterly irreconcilable, but each ascribes to the other an extremely improbable course of navigation. Each practically alleges that when all danger of collision was past, and the vessels were heading away from each other so as to pass at a distance of from 500 to 1,000 feet apart, the other, without the least reason, turned to the southward and ran into collision.

An undoubted error in the statement of the master of the schooner as to the time and place when he put his vessel on a west course is pointed out by the respondent's counsel. Early in the evening the schooner had come to anchor about three miles eastward of Eaton's Point light. At about 10 o'clock p. m., the wind springing up from N. by E., she again got under way, closehauled on the starboard tack. Soon afterwards the captain gave the wheel to the wheelman, and she was put upon a course N. W. by W., one point free, and making about 4½ knots per hour. The captain says that the change to west was afterwards made when Eaton's Point light bore S. W. by W., which would be at a point three miles east of the place of collision, a point which was nearly dead to windward of the

place where the schooner was anchored, and which it was impossible she could reach on her starboard tack.

The respondent argues from this error, and from some other minor considerations, that the story of the master, supported to some extent by the wheelman, is a fabrication, designed to conceal a change of course from N. W. by W. to W. just before collision, which the respondent urges was the change alleged by the steamer, and a change made heedlessly without previous observation of the steamer's near presence. The master's evident mistake, and the other circumstances cited, seem to me insufficient to support this charge. The severe experience of the master in the collision might naturally cause some confusion in his recollection on a matter of such secondary importance as the bearing of Eaton's Point light when he changed his course; and the correction in the stenographer's notes as to this bearing indicates some apparent uncertainty in his recollection. The bearing was probably about S. by W., instead of S. W. by W. The general narrative of the master is in itself reasonable and probable. It accords to a considerable extent with the undoubted movements of the steamer; although her bearing of two or three points on his starboard bow, when her two colored lights were shown the second time, cannot be taken as correct, unless the schooner changed a second time to the southward, shortly before collision, which, from all the circumstances, and the conversation between the master and wheelman after the collision, I think she did.

The story of the steamer, however, is quite as unsatisfactory as that of the schooner. It is not consistent with the theory that the schooner's red light was seen while the latter was on a course of N. W. by W. For the steamer's evidence leaves no doubt that the change of which she complains was only about 30 or 40 seconds before the collision. This appears from three circumstances: (1) The testimony that the vessels were then only about 700 feet apart: (2) The mate, who was in charge of the steamer, says that as soon as the schooner's two lights were seen, he ordered the engines reversed; the engineer says they were reversed full speed within 10 seconds, and that there were but 12 or 15 revolutions backward before collision, full speed being 60 revolutions: (3) The wheelman put the wheel hard a-starboard as soon as the lights were seen, and only just got it hard over as the collision occurred. Had the schooner been previously going N. W. by W., she must have changed three points to show her two lights to the steamer, and three or four points more before collision; and with the steamer, heading E. by S. $\frac{1}{4}$ S., and the schooner two or three points on her port bow, the schooner could not, from that position, have got across the steamer's bow within 30 or 40 seconds or reached the place of collision; and it is, moreover, so improbable as to be inconceivable, that with the bright lights of the steamer within 200 or 300 yards, the schooner should have turned six points towards the steamer and run under her stem, even if it was possible to reach her.

But even this, if true, would not have excused the steamer from blame. For by her own further testimony it appears that from the

time when the schooner's red light was first seen, viz., about a half point on the steamer's starboard bow, until the two lights were seen, about 30 seconds before collision, there was only time to turn the steamer's head a point and three-quarters more to the southward, viz., to E. by S. ¼ S. (which of itself would bring the schooner's light 1¼ points on the port bow), and to go ahead enough to broaden the light off about one point more; that is, from 300 to 700 feet, occupying from 20 to 45 seconds, according as the schooner was heading W. or N. W. by W.; so that the schooner could not have been seen by the steamer, according to the latter's testimony of what occurred, nor any efforts made by the latter to avoid the schooner, until from 45 to 90 seconds before collision. This was a gross fault in the steamer, which was bound to keep away from the schooner by a good margin, and by seasonable maneuvers. That the interval was short between the time when the schooner was first seen and the appearance of her two lights, is confirmed by the explicit statement of Martin, the mate, who on cross-examination says, "It was a very short time"; and though he calls it "three or four minutes, likely," what was done, viz. to broaden off only a point, shows the interval to be about one-half or three-quarters of a minute only.

From the circumstances of the collision, and the probabilities of the case, I am quite satisfied that the collision did not take place in the manner indicated by the witnesses on either side, but that the vessels for several minutes previous to the collision were approaching very nearly head and head, not varying more than half a point from directly opposite; that the master of the schooner placed the steamer more upon his starboard bow than she really was, from the fact that he viewed her from the starboard side. This is confirmed by the fact that the wheelman did not see the steamer's lights until very shortly before collision. I am persuaded that the steamer paid no attention to the schooner, and took no steps to avoid her until very near her, and after the steamer had shut in her red light and showed only her green light to the schooner, which appeared to the master to be somewhat on his starboard side, though I doubt if at that time it really was so; that the steamer within a minute and a half of collision, or less, and when both the schooner's lights were probably visible, ported her wheel to go to the southward of the schooner; and that the schooner about the same time starboarded her wheel to go to the southward, either because it seemed safe to do so while the steamer's green light only was visible, or because after seeing both lights through the steamer's swing, starboarding seemed the safer course. This swing to the southward by the schooner would account for the bearing of the steamer's two lights two or three points or more on the schooner's starboard bow, as testified to by the captain and the wheelman, when the latter first saw them. The schooner is, therefore, to blame for making a wrong change of course; and the steamer for neglecting to take timely measures to avoid the schooner by a safe margin so as to avoid creating the alarm to which the steamer's change of course must be ascribed.

The case is very closely similar in all important respects to that of The Farnley, 8 Fed. 629, in which the late Chief Justice Waite,

sitting on appeal in the Fourth circuit, held both the steamer and the sailing vessel in fault for almost exactly similar errors. In this case, as in that, the duty and responsibility of keeping out of the way of the schooner rested upon the steamer, and there was nothing to prevent her doing so seasonably. They were approaching nearly end on, and in this case, as in that, the steamer took no means to avoid the schooner until about 400 yards from her.

"Under these circumstances," says Chief Justice Waite (page 637), "it seems clear to me that the steamer held her course too long without making calculations to get by. It is undoubtedly true that if the schooner had ported her helm, instead of starboarding, the collision would have been avoided; but that, in my opinion, does not excuse the steamer from her original fault in getting so close as to make it possible to bring the vessels together in such a way. When there is plenty of sea room, and nothing to prevent, it is wrong for a steamer, in passing a sailing vessel at night, to go so near as to permit a collision in consequence of a mistake of this character on the part of the schooner. It is her duty to give a passing vessel a wide berth when it can be done, and to run no risk of errors or miscalculations."

Decree for libelants for one-half the damages, and the costs to be divided.

THE WHITEHALL.

BRIGGS v. THE WHITEHALL.

(District Court, S. D. New York. June 11, 1895.)

COLLISION—FERRYBOAT AND LIGHTER—FOG—SIGNALS NOT HEARD.

The sail lighter B. left her wharf near the Hamilton Avenue Ferry, Brooklyn, in the morning, in a light wind to go down the East river against the flood tide; soon afterwards she was enveloped in a thick fog when abreast of Governor's Island, and in the usual track of the ferryboats. She blew horns which were not heard on the ferryboat W. as she approached at a moderate speed, and collision ensued. *Held*, upon the evidence, that there was no fault in the ferryboat; that the W. was justified in starting in fog, and that prudence required the lighter, in that situation, to haul nearer the Governor's Island shore, and the libel was dismissed without costs.

This was a libel by Marvin Briggs, owner of the lighter M. S. Bernite, against the ferryboat Whitehall, to recover damages for a collision.

Alexander & Ash, for libelant.

Hyland & Zabriskie (Chas. M. Hough, of counsel), for respondents.

BROWN, District Judge. At about 7:40 o'clock of October 20, 1894, as the ferryboat Whitehall was making her trip from Hamilton avenue, Brooklyn, to her slip at the Battery, in a dense fog, she came in collision with the libelant's lighter M. S. Bernite, which was under sail, in a light breeze, in the first of the flood tide when abreast of Governor's Island and probably about one-third of the distance across the stream. The lighter had left the wharf at the Union Stores, about three blocks above the Hamilton Avenue Ferry, at a

little after 7 a. m. At that time the weather was clear. She was overtaken by dense fog some 10 or 15 minutes before collision.

The coming of a dense fog was perceived a few minutes before the lighter was enveloped in it. She was right in the path of ferryboats, and was proceeding very slowly. In that situation I think it was the duty of the lighter to remove herself from the necessary track of ferryboats, and towards the Governor's Island shore, and there come to anchor, as she might easily have done. This was a plain and simple means of avoiding certain danger to herself and to the ferryboats, which were under a public necessity of crossing from Brooklyn to New York.

The witnesses from the schooner testify that their fog horns were properly blown. It is certain that they were not heard upon the ferryboat, and that the ferryboat was also proceeding slowly. These facts are proved not only by the ferryboat's men, but by other trustworthy and expert witnesses, who were carefully listening for fog signals. Considering the eccentricities of sound in fog (The Lepanto, 21 Fed. 651, 656-658), I cannot, therefore, find the ferryboat in fault for not hearing the schooner's fog signals, if they were given; nor does the evidence show any excess of speed. The ferryboat was not obliged to stop navigation during the fog; no rule of navigation requires this. The public necessities require that traffic shall not be wholly discontinued, and I cannot find, upon the testimony, that the ferryboat was not going at as moderate speed as was practicable; so that if the collision is not to be deemed due to any remissness of the schooner, as to the sounding of fog signals, or in not putting herself out of the way of the known track of the ferryboats, it must be set down to unavoidable casualties of navigation.

Libel dismissed, without costs.

END OF CASES IN VOL. 68.