$4,501.77, and gave judgment in their favor against the United States for that sum. The case is here upon a writ of error sued out by the government.

Two principal questions are here involved: First, whether the term "sample packages," as used in the contract, covered only such packages as consisted of nondutiable samples, or whether it also embraced packages consisting of dutiable samples; second, whether the claim of the petitioners was barred by the statutory limitation.

The defendant below submitted to the court the following proposition:

"That as the plaintiffs and petitioners made a binding agreement with the defendant to cart all sample packages of merchandise for the sum of one (1) cent per package, that no other or greater amount than the said sum of one (1) cent per package could be recovered, it being immaterial whether the sample packages so carted contained dutiable goods as samples, or samples of goods which were free from paying duty to the United States."

This proposition the court denied; and, in stating its conclusion of law, the court, upon the mere assumption that the rate of cartage for "sample packages" was fixed so low, because of the lack of revenue to the government from such packages, said:

"It seems quite clear that the true test of a 'sample' lay in the fact that it was undutiable. The mere marking of packages as 'samples' by the shipper or others could in no wise affect the rights of these plaintiffs under this contract. The criterion by which packages were to be classified is to be found in the character of goods which they contained, whether they were dutiable or nondutiable. For all packages carted the plaintiffs were to receive eighteen cents per package, excepting those which were samples, i. e. nondutiable. For these but one cent was allowed."

We are not able, however, so to read this contract. We search its provisions in vain to find any warrant for holding that the cartage of "sample packages," if they contained duty-paying merchandise, was to be at the rate of eighteen cents per package, and that only "sample packages" consisting of nondutiable merchandise were to be carted at the rate of one cent per package. No such distinction is expressed or hinted at in the contract. By their agreement the parties fixed the cartage rate of eighteen cents per package for all packages, "with the exception of sample packages"; and then followed the explicit stipulation "that said parties of the first part will cart all sample packages from all points at the rate of one (1) cent per package." The contract having thus clearly provided that "all sample packages" should be carted at the rate of one cent per package, how can the court, proceeding upon the basis of the contract itself, declare that that rate of compensation was applicable only to one particular class of sample packages? To do this would be not to construe doubtful language in order to reach the imperfectly expressed intention of the parties, but to make a material alteration in their plain stipulation. The court is not at liberty, upon a mere conjecture as to the supposed actuating motive of the parties, to introduce into their stipulation a qualifying term, and thus restrict the stipulation to dutiable sample packages, when the parties have said "all sample packages." We are of the opinion that the court below erred in holding that, under this contract, the petitioners

were entitled to recover more than one cent per package for the cartage of sample packages which contained dutiable merchandise.

The first section of the said act of March 3, 1887, contains a proviso in the words following:

"Provided, that no suit against the government of the United States shall be allowed under this act unless the same shall have been brought within six years after the right accrued for which the claim is made."

This provision, it will be perceived, is jurisdictional. To maintain a suit under the act, it must be commenced within six years after the alleged right accrued. Here the petitioners' right of action fully matured in February, 1888. This suit was not brought until more than seven years after the rights accrued for which the claim is made. In the face of the above-quoted proviso, how could this suit be entertained when it was brought?

In sustaining the action, the court below relied upon U. S. v. Lippitt, 100 U. S. 663, 669. That case, however, ruled merely that the limitation prescribed by the act of March 3, 1863, amendatory of the act establishing the court of claims, does not bar in that court a claim referred to it for determination by the head of an executive department under statutory authority, provided it was presented for settlement at the proper department within six years after it accrued. The supreme court there said:

"The cases thus transmitted for judicial determination are, in the sense of the act, commenced against the government when the claim is originally presented at the department for examination and settlement. Upon their transfer to the court of claims, they are to be 'proceeded in as other cases pending in said court.'"

There was a like ruling in the case of U. S. v. New York, 160 U. S. 598, 16 Sup. Ct. 402. The case in hand, however, is not governed by these decisions, which relate exclusively to claims transmitted by the head of an executive department to the court of claims for final adjudication. Here the bringing of suit within six years after right accrued was a condition not to be avoided by the claimants. Undoubtedly, the right of action accrued to these petitioners as soon as the money claimed by them became payable by the terms of the contract sued on. To sustain a suit therefor against the government, it was not necessary for the claimants to present their claim to an executive department before suing. Clyde v. U. S., 13 Wall. 38.

Now, the petitioners' right having fully accrued in February, 1888, the six-years limitation began to run then. The presentation of the claim to the treasury department in the year 1893 did not stop the running of the statute, nor was the petitioners' right of action suspended during the investigation of the claim by the executive officers. The forbearance of the claimants to sue was altogether voluntary on their part, and it is not within the power of the court to relieve them from the consequence of their failure to comply with the condition of the statute. Finn v. U. S., 123 U. S. 227, 233, 8 Sup. Ct. 82. We are of opinion that this suit was brought too late, and that the court below erred in overruling the defense on that ground, set up by the government. This conclusion accords with

the decision of the court of claims in the well-considered case of Carlisle v. U. S., 29 Ct. Cl. 414.

We have not overlooked the finding of the court below that in the year 1893, "under and by directions of the secretary of the treasury, the said claim of the petitioners was audited by the collector of customs at the said port of New York at the sum of $4,501^{77}/_{100}$, and that sum was then and there found to be due said petitioners from the defendant." It is, however, very certain that the so-called "audit" by the collector did not partake of the nature of a judicial determination. It was a mere reference of the claim by the treasury department to the collector for examination and report. The action of the collector was merely advisory. His report bound nobody. Had it been unfavorable to the petitioners, it would not have concluded them. U. S. v. Harmon, 147 U. S. 268, 13 Sup. Ct. 327. It is authoritatively settled that "the action of executive officers in matters of account and payment cannot be regarded as a conclusive determination when brought in question in a court of justice." Wisconsin Cent. R. Co. v. U. S., 164 U. S. 190, 205, 17 Sup. Ct. 45.

Nor can we accept the suggestion that the action of the collector relieved these claimants from the operation of the statutory limitation. Here we may appropriately quote the language of the supreme court in Finn v. U. S., supra:

"An individual may waive such a defense either expressly or by failing to plead the statute; but the government has not expressly or by implication conferred authority upon any of its officers to waive the limitation imposed by statute upon suits against the United States in the courts of claims."

The judgment of the circuit court is reversed, and the cause is remanded to that court, with direction to dismiss the petition.

UNITED STATES v. CARLOVITZ et al.

(Circuit Court of Appeals, Fifth Circuit. April 20, 1897.)

No. 557.

EVIDENCE—TRANSCRIPT FROM TREASURY DEPARTMENT BOOKS.

In a suit by the government on the bond of a postmaster to recover a balance due from him, a duly-certified transcript of the books of the treasury department, showing the account between such postmaster and the United States, is competent evidence, and is sufficient to establish a prima facie case, though open to rebuttal.

Error to the Circuit Court of the United States for the Northern District of Florida.

J. Emmet Wolfe, for the United States.

W. A. Blount and A. C. Blount, for defendant in error.

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

McCORMICK, Circuit Judge. It appears from the record that John Carlovitz was postmaster at Milton, Santa Rosa county, Fla., from October 1, 1885, to June 30, 1888, and had given bond as such

postmaster, with approved securities. On January 6, 1888, the postmaster general made the following order:

"Order No. 4.

"Being satisfied that John Carlovitz, P. M., Milton, Santa Rosa county, Florida, has made false returns of business at the post office at said place during the period from January 1, 1881, to March 31, 1887, in order to increase his compensation beyond the amount he would justly have been entitled to have by law: Now, in the exercise of the discretion conferred by the act of congress entitled 'An act making appropriations for the service of the post-office department for the fiscal year ending June 30, 1879, and for other purposes,' approved June 17, 1878 (section 1, chapter 259, Supplement to Revised Statutes), I hereby withhold commissions on the returns aforesaid, and allow as compensation (in place of such commissions and in addition to box rents and commissions on sales of waste paper, twine, etc.), deemed by me under the circumstances to be reasonable, during the period aforesaid, as follows: From January 1st, 1881, to March 31, 1883, the rate of $127.50 per quarter, and from April 1, 1883, to March 31, 1887, the rate of $152.50 per quarter, and the auditor is requested to adjust his accounts accordingly.

"[Signed] Wm. F. Vilas, Postmaster General."

In accordance with the request in the foregoing order, the auditor for the post-office department made up the account of the postmaster from October 1, 1885, to the end of the second quarter, June 30, 1888, showing a balance due the government by the postmaster of $339.29, which balance was thereafter duly demanded of the postmaster, and of the several sureties on his bond. The demand not being complied with either by the postmaster or his sureties, the government instituted this suit to recover the balance due.

Issue was joined on the defendants' plea of payment. The government offered in evidence a duly-certified copy of Order No. 4, given above, a statement of account between the government and the postmaster from the office of the auditor for the post-office department showing the balance claimed, and made the proper proof of notice to and demand on the postmaster and the sureties on his bond. To the reading of the duly-certified transcript of the books of the United States treasury department showing the post-office account between the United States and the said John Carlovitz, postmaster, upon which account the suit was based, the defendants, by their attorneys, objected, because said transcript showed on the face thereof that the balance therein stated as due by said Carlovitz to the United States was the result of an arbitrary readjustment of the account of the said Carlovitz as postmaster by the auditor for the post-office department in pursuance of an order issued by the postmaster general, and that said transcript, in connection with the foregoing order of the postmaster general, could not make out a prima facie showing of the indebtedness of the said postmaster, Carlovitz, to the United States; which objection was sustained by the trial judge, and the transcript of the said statement of account showing the balance sued for was excluded from the jury. The plaintiff rested its case, and the court directed the jury to find a verdict in favor of the defendants, which was done, and judgment rendered thereon. The action of the court in excluding the evidence offered is assigned as error, and we are of opinion that the assignment is well taken. Substantially the identical question involved

in this assignment was presented to the supreme court in the case of U. S. v. Dumas, 149 U. S. 278, 13 Sup. Ct. 872, in which that court say:

"As to the competency, merely, of this evidence, there can be no question, for it is provided by section 889, Rev. St., that 'in any civil suit in case of delinquency of any postmaster or contractor, a statement of the account, certified as aforesaid, shall be admitted in evidence, and the court shall be authorized thereupon to give judgment and award execution, subject to the provisions of law as to proceedings in such civil suits.'"

It is unnecessary for us to review the authorities, which are fully cited and sufficiently reviewed by the supreme court in the case just cited. As said by Mr. Justice Jackson in the opinion in that case, there can be no question as to the competency merely of this evidence. There is just as little room to question that this evidence, standing alone, constitutes a prima facie case that would sustain and require a judgment in favor of the government. It is equally clear, however, that it constitutes only a prima facie case, and is subject to be met by other competent proof. It follows that the judgment of the court below should be reversed, and the cause remanded for further proceedings therein according to law, and it is so ordered.

RICHARDSON v. McLEAN et al.

(Circuit Court of Appeals, Fifth Circuit. May 4, 1897.)

No. 551

JOINT ADVENTURES—CONVEYANCE TO SECURE ADVANCES—REDEMPTION.

Where one party has advanced money to another to be used in the purchase of property for their joint benefit, and the latter has taken title to such property in his own name, and conveyed it to strangers, as security for further advances for his own use, the original lender is entitled to redeem such property from the persons to whom it has been conveyed, and to obtain a reconveyance from them on payment of their advances.

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

George W. Radford and J. C. Cooper, for appellant.

J. N. Stripling, for appellees.

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

McCORMICK, Circuit Judge. In 1890, Albert L. Rice was president of a projected railroad in Florida, called the "Gainesville, Tallahassee & Western Railroad." He and others interested with him saw in the New York World a notice stating that Christopher W. McLean, of Toledo, Ohio, had just met with great success, and made a large amount of money, in building the first electric railroad in that city. Mr. Rice thereupon opened correspondence with Mr. McLean, which resulted in the latter visiting Florida in the month of March, 1890, and entering into business arrangements with the projectors of the above-named railroad. Soon thereafter Mr. McLean had

negotiations with Mrs. E. J. H. Richardson, of Detroit, Mich., which ripened into an agreement evidenced by this memorandum in writing, duly executed by them, respectively:

"This memorandum of agreement, made and entered into between Mrs. E. J. H. Richardson, of Detroit, Michigan, and C. W. McLean, of Toledo, Ohio, this 30th day of April, 1890, viz.: Whereas, C. W. McLean is about to enter into a contract to build a land-grant railroad in the state of Florida, from Gainesville to Tallahassee, and to such other points as he may think best, or to purchase any railroad now constructed or under construction, and one hundred thousand dollars is needed for such purchases, survey, and construction before the railroad can be bonded to continue construction, the said Mrs. E. J. H. Richardson has this day paid C. W. McLean the sum of thirty thousand dollars on account of this agreement, and hereby authorizes C. W. McLean to use this first thirty thousand dollars to buy phosphate, timber, and other lands, lots, town sites, or to obtain option on same, and to use this money, using his own discretion in investing this money as he may desire, hoping thereby to receive some portion of the hundred thousand dollars needed to prepare railroad for bonding. C. W. McLean does hereby agree to obtain life insurance on his life for the benefit of Mrs. E. J. H. Richardson, to cover whatever amount is paid by her to him, in order that, in case of his death, she will be able promptly to secure amount of money or moneys so advanced by her, as much depends on the life of C. W. McLean to bring this matter to its fullness. It is further understood and agreed that the net profits made in all and each transaction mentioned in this agreement are to be divided equally, share and share alike, between Mrs. E. J. H. Richardson and C. W. McLean, Mrs. Richardson furnishing the money mentioned in this agreement, C. W. McLean being responsible for one-half the amount advanced by Mrs. E. J. H. Richardson."

Some difficulty arose with the minority stockholders in the Florida railroad project, attended with litigation and delay, pending which McLean directed his attention to dealing in phosphate lands, of which then and later he acquired considerable quantities, taking title in his own name, generally without alluding to any other beneficial ownership, but in a few instances taking the title to himself as trustee, without any further declaration of the trust. When matters had progressed for something more than a year, further negotiations between McLean and Richardson ripened into a second agreement, evidenced by a written memorandum duly executed by them, as follows:

"Whereas, in the month of April, 1890, C. W. McLean, of Toledo, Ohio, and Mrs. E. J. H. Richardson, of Detroit, Michigan, entered into an agreement or partnership, wherein Mrs. E. J. H. Richardson was to furnish money for buying phosphate, timber, and other lands, town and city lots; buy, sell, or lease railroads, or build them in or out of the state of Florida; sell or operate railroads, or mine phosphate, or to form phosphate companies, one or more; buy and sell real estate and other properties in Ohio, Florida, or other states: It is understood and agreed that both are to share, and share alike, in all profits, whether in money, stocks, or bonds, land, city and town lots (whether they may prove to be phosphate or mineral lands or not), railroad lands or terminals, or interests in harbors or seaports; also the Red Sulphur Spring near Old Town, on the Suwannee river, in the county of Lafayette, state of Florida; in fact, to share, and share alike, in the net proceeds of all business by C. W. McLean for five years from the date of this instrument. The said Mrs. E. J. H. Richardson having contributed fifty thousand dollars in cash at various times, for which C. W. McLean has given his receipts, and has loaned to the company or co-partnership, at various times, stock in the Diamond Match Company, of Chicago, which stock is to be returned to the said Mrs. Richardson as soon as it can be safely done, and will not cripple the operations of said McLean, said C. W. McLean has placed in the hands

of Lobdell, Farwell & Co., of Chicago, Illinois, sixty thousand dollars, par value, for which receipts have been given, on which he has borrowed sixty thousand dollars, and has also received fifty-four thousand dollars, par value, and this day, 8th of July, forty-two thousand more of said stock, viz.:

$60,000 in Lobdell, Farwell & Co., Chicago, Ill.
54,000
42,000

$156,000, par value,

—C. W. McLean still having fifty-four thousand on hand, and forty-two this day delivered to him; C. W. McLean having obtained a temporary loan on eighteen thousand dollars of said fifty-four thousand, of ten thousand five hundred dollars, which said Mrs. Richardson received this 8th day of July, 1891, the receipt of which is hereby acknowledged. The said C. W. McLean is to obtain a loan as soon as possible for twelve thousand dollars, which, when done, Mrs. Richardson is to deliver said C. W. McLean the further sum of fifty-six thousand (par value) of Diamond Match stock, and said McLean to remit said Mrs. Richardson the further sum of thirty thousand dollars. The remainder of the stock to be used by said McLean as he thinks best, for the mutual advantage of both parties, and to be returned when it can be done without injury to the enterprises on hand by C. W. McLean. It is further agreed by C. W. McLean that, as soon as the certificate of stock is issued in the Gulf Stream Phosphate Company, of Florida, the company will send or deliver to said Mrs. Richardson four hundred thousand dollars of said stock, and also same out of Construction Company stock; also eight hundred thousand dollars of the stock of the Florida, Georgia & Western Railroad. All the above stocks are full paid and nonassessable. The above stocks all to be delivered to said Mrs. Richardson as soon as engraved, signed, and sealed. It is further agreed by C. W. McLean that in case of the death of said C. W. McLean, and any loss should be sustained by Mrs. Richardson in consequence of death or otherwise, that the interest of said C. W. McLean in the above properties and stocks shall be sold as soon as possible, without sacrifice, to pay said E. J. H. Richardson in full, with interest. It is further agreed that, when Mrs. E. J. H. Richardson desires to sell the Diamond Match stock pledged for our mutual interests, she is empowered to take up said stock at any time she thinks best to do so. It is further agreed that, in case of death of either party, the business is to be carried on for the benefit of whom it may concern for the full term of five years. C. W. McLean.
"Detroit, Mich., July 8th, '91. E. J. H. Richardson."

About December 1, 1891, the enterprises as conducted by McLean began to need urgently further funds than he had in hand. Mrs. Richardson had advanced all the capital she conveniently could, or, at least, was willing to put into the enterprises, and McLean had to look to other sources for raising money to save from forfeiture and from seizure of creditors the property already acquired. About December 12, 1891, he began getting money from Nathan C. Pond. Mrs. Richardson began to be restless under her disappointment in not getting the promised and expected returns from her investments with McLean, and still further negotiations were had between the partners, the result of which is expressed in a third written memorandum, in the following terms:

"It is understood by and between Mrs. E. J. H. Richardson and C. W. McLean that Mrs. Richardson redeed to him property purchased of him in November last, he returning the mortgages canceled, in what is known as the 'Glassboro Addition,' in Toledo, Ohio, and to free her in the purchase of the Windsor Hotel of Mary Wolf Van Hamm, provided she (Mrs. Richardson) sign release herself. C. W. McLean is to go on with the construction of the Florida, Georgia & Western Railroad, laying ten miles of track, grading and tieing forty miles, in order to secure the first land grant, and to do this as

soon as possible on or before four months. Said McLean to renew notes with Lobdell, Farwell & Co., on Diamond Match stock, par value of stock being $212,000, until it is returned to her. It is further understood and agreed that Mrs. Richardson is to have one-half of the stock in the Florida, Georgia & Western Railroad, half the stock in the Interstate Land Construction Company, and one-half the stock in the Gulf Stream Phosphate Company,—all of the state of Florida. She already having two-fifths of the stock of the railroad and two-fifths of the stock of the Interstate Land Construction Company, she therefore is to receive one-tenth more in each of these companies. In the Gulf Stream Phosphate Company she has not received any, but is to receive one-half. These stocks are to be issued to her just as soon as the companies can be reorganized, and no delay beyond the necessary delay of doing this. It is further understood and agreed that said Mrs. Richardson is in no way to interfere with my operations, or this contract is null and void. It is further agreed that I, C. W. McLean, agree to deed the phosphate lands that stand in my name at this date to the Gulf Stream Phosphate Company as soon as organized, without any unnecessary delay."

McLean continued from time to time to get money from Nathan C. Pond, to whom he transferred, December 14, 1891, two policies of insurance on McLean's life; and on April 2, 1892, he deeded to Louis K. Pond, the son of Nathan C. Pond, a considerable amount of the Florida lands theretofore acquired. The policies of insurance and the lands deeded to Louis K. Pond were subsequently conveyed to Sarah E. Pond, who was the wife of Nathan C. Pond, and the mother of Louis K. Pond. In connection with the Florida enterprises, McLean had dealings with James M. Mayo, Sidney I. Wailes, and John C. Daves.

On March 27, 1893, the complainant, E. Jennie H. Richardson, exhibited her bill against Christopher W. McLean, Nathan C. Pond, Louis K. Pond, Sarah E. Pond, James M. Mayo, Sidney I. Wailes, and John C. Daves. To this bill, only Nathan C. Pond, Sarah E. Pond, and Louis K. Pond answered. They filed a joint and several answer. The issues as to all the other defendants were found in favor of the complainant by the decree of the circuit court, and there is no complaint of so much of that decree. In reference to the defendants who answered, the bill charges as follows:

"That the said defendant McLean, in violation of said agreements with your said oratrix, and in violation of his said trust, has purported to convey or mortgage to the defendants Louis K. Pond or Sarah E. Pond certain portions of said trust lands above mentioned, purchased as aforesaid with the funds of your oratrix, or with funds procured by said McLean upon her stocks as collateral, as aforesaid. Said portions of said lands so conveyed or mortgaged to said defendants Louis K. Pond or Sarah E. Pond, or one of them, are described as follows, to wit: * * *. That your oratrix charges and alleges that the said transaction between the said McLean and the said Ponds was a loan from the said Ponds, or one of them, or from one Nathan C. Pond to the said McLean, the exact amount of which your oratrix cannot state without discovery from the said defendants; but she charges and alleges that the same was not more than the sum of twenty thousand dollars, and the defendants should be required to make discovery of the true amount so paid by the said Ponds, or either of them, to said McLean. Your oratrix further charges and alleges that any deed or deeds executed by the said defendant McLean to the said Louis K. Pond, or to the said Sarah E. Pond, were intended to secure the repayment of a loan of money made by the said Ponds, or one of them, or Nathan C. Pond, to the said McLean; and any such deed or deeds are, in law and equity, mortgages subject to redemption, and do not convey to the said Ponds, or either of them, the complete title in fee in and to said lands described in said deed or deeds. That at the same time that